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# IMPACTS ON TRIBAL FISH AND WILDLIFE MANAGEMENT PROGRAMS IN THE PACIFIC NORTHWEST

## HEARING

BEFORE THE

## COMMITTEE ON INDIAN AFFAIRS
## UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

CHALLENGES CONFRONTING TRIBAL FISH AND WILDLIFE LAND MANAGEMENT PROGRAMS IN THE PACIFIC NORTHWEST

JUNE 4, 2003
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# IMPACTS ON TRIBAL FISH AND WILDLIFE MANAGEMENT PROGRAMS IN THE PACIFIC NORTHWEST

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**WEDNESDAY, JUNE 4, 2003**

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
*Washington, DC.*

The committee met, pursuant to notice, at 2:09 p.m. in room 485, Senate Russell Building, Hon. Daniel K. Inouye (vice chairman of the committee) presiding.

Present: Senators Inouye, Cantwell, and Smith.

## STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. The committee meets this afternoon to receive testimony on the challenges confronting tribal fish and wildlife land management programs in the Pacific Northwest. Yesterday the committee received testimony on the good work that is being conducted by tribal fish and wildlife management programs across Indian country.

We learned from the written testimony that was submitted that in the Pacific Northwest, that there are a series of complex relationships with a myriad of Federal agencies in which tribal resource managers engage. Or put another way, there are an array of Federal agencies whose responsibilities have an impact upon the health and habitat of fish and wildlife resources. Some of those agencies join the Committee today, including the U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration Fisheries Service, the Federal Energy Regulatory Commission and the Bonneville Power Administration.

There are other agencies, including the U.S. Forest Service, of the Department of Agriculture, the Army Corps of Engineers and the Northwest Electric Power Conservation Planning Council, the Environmental Protection Agency, the military services of DOD and the Department of Energy, whose activities have an impact on the natural resources for which tribal governments serve as stewards. And of course, there are also important relationships with the respective States in which tribal lands are located, as well as international bodies that have been established to oversee the implementation of provisions of international treaties, such as the United States–Canada Pacific Salmon Treaty.

Just as there must be a careful balance between the forces of nature and the impacts of human activities on precious natural resources, there must also be well coordinated and cooperative relationships amongst all of these entities to assure the preservation and protection of fish and wildlife.

We know that some of the Federal agencies have suffered severe cuts in their operating budgets and that more and more tribal governments engage in supplementing Federal responsibilities under the various Federal laws with their own resources. And we know that at some point, tribal governments will no longer be able to maintain their current level of effort in the absence of enhanced Federal support. So it may be that we have to look to other sources of funding or establish new authority for the funding of activities that some of these agencies are no longer able to fully sustain.

Because we know that there has been some confusion generated about this hearing, I want to be clear that we are not here to scold or chastise any agency. Rather, we want to develop an accurate understanding of what the present capabilities are and where we may need to address some gaps. We want to know what is working and what may need to be adjusted or fixed.

With that, I would like to advise the witnesses today that in response to a request from one of my colleagues in the Senate, we have departed from the Senate's customary protocol today so that the Federal agencies who are represented here today will have the opportunity to hear the tribal testimony before they testify. Accordingly, our last panel will be composed of the instrumentalities of the U.S. Government that have such an important role to play in assuring the long life and well-being of fish and wildlife resources and in carrying out the United States trust responsibility for Federal lands and resources.

So I am pleased to welcome an old friend of the committee, one of the prominent scholars of Federal Indian law and a well-known author of many books and law review articles, Professor Charles Wilkinson. I also want to welcome back our esteemed tribal leader, Billy Frank, Jr., chairman of the Northwest Indian Fisheries Commission.

Senator Cantwell.

## STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman, and thank you for holding this hearing today on the issue of critical important to the Pacific Northwest and to many tribes in my home State. Your work to highlight the Federal obligations to any tribe in the Pacific Northwest is greatly appreciated and those that are here in the audience I'm sure appreciate this opportunity as well.

I'd like to welcome Billy Frank of the Northwest Indian Fisheries Commission, Olney Patt, executive director of the Columbia River Inter-Tribal Fish Commission, Jim Anderson, the executive director of the Northwest Indian Fisheries Commission, and many representatives from Washington State tribes here today, and to thank them for their great leadership and great progress that's been made by working together on natural resources management capabilities.

Mr. Chairman, I think it is a vitally important issue that we address the Federal agencies and how they work and the greatest possible efforts with tribes on a government to government basis, and to make sure we meet Federal treaty obligations to fully preserve tribal fishing, hunting and gathering rights. Meeting these trust responsibilities is essential to ensuring tribal self-sufficiency. In Washington State, Indian tribes are making significant contributions to improve management of fish and wildlife resources and to help protect and recover Pacific salmon stock.

Tribal fish and wildlife professionals in Washington State have really become national leaders in this area. They have worked very hard to recover and manage salmon and other sensitive species on both tribal and non-tribal land. Many of these tribal contributions have been made in close partnership with Federal and State agencies responsible for salmon recovery and natural resource management. And Congress recognizes that tribes are full partners with Federal agencies and States in the salmon recovery process. We need to provide the tribes, though, with adequate resources and ensure that government to government relations can happen so they can fully participate in this process.

In addition, this hearing reflects the fact that the Northwest does have a unique challenge and requirements relating to off-reservation tribal fish and wildlife activities that deserve additional resources. Washington State utilities are also working to relicense privately owned hydropower facilities through the Federal Energy Regulatory Commission and tribes need to have the opportunity and resources to participate in these relicensing processes, many of which will have a direct bearing on their tribal resources.

Providing additional resources to tribes is especially important in light of a recent Federal district court ruling on the biological opinion of the Federal Columbia River Power system. While this litigation is ongoing, it's clear that tribes have an important role to play in implementing the biological opinion, particularly in the area of sub-basin planning.

Mr. Chairman, I look forward to working with you and the committee on these matters of importance concerning legislative proposals for greater Federal assistance to help tribes fulfill our century old obligations in Northwest Tribes in managing resources. And again, I thank the chairman for this hearing today, and for all those who traveled from the Northwest to participate in it.

Senator INOUYE. Thank you very much.

And now may I recognize the gentleman from Oregon, Senator Smith.

Senator SMITH. Thank you, Mr. Chairman, and thank you for holding this very important hearing. I want to ask that my full statement be entered into the record.

Senator INOUYE. Without objection, so ordered.

[Prepared statement of Senator Smith appears in appendix.]

## STATEMENT OF HON. GORDON SMITH, U.S. SENATOR FROM OREGON

Senator SMITH. I'll not give it in the interest of hearing from our witnesses, but I would like to say, I have been and will continue to be a supporter of the tribal efforts to restore naturally spawning

salmon populations in the Columbia River Basin. I hold up the Umatilla Tribes near my home town of Pendleton, OR as a great example of effective salmon restoration programs.

I also know that the need for more resources is great. And in the scales of prioritizing needs, Senator Cantwell's State and mine are in the midst of a very severe economic downturn, in part driven by drought, extraordinarily high electrical rates, now high unemployment rates. And tremendous pressure has been put on the BPA and I think the officials there, Steve Wright and others, are doing their level best to keep prices down, after a 40 percent increase, try not to have any more increases, because we have a lot of people that are hurting.

So in trying to meet our obligation to the tribes, trying to meet the mandates of the Endangered Species Act and trying to meet the needs of the entire population of the Pacific Northwest, we need the wisdom of Solomon, and it's not easy to find. But we need to keep trying to do that. But there are many interests at play here, and I will look forward to the testimony and trying to find new ways to better meet our obligations to our Native American brothers and sisters and to all the residents of the Pacific Northwest and our fish and wildlife habitats.

Thank you, sir.

Senator INOUYE. Thank you very much.

And may I now recognize Chairman Frank.

**STATEMENT OF BILL FRANK, JR., CHAIRMAN, NORTHWEST INDIAN FISHERIES COMMISSION, OLYMPIA, WA**

Mr. FRANK. Thank you, Mr. Chairman, for the second day of testimony. I'm only going to take a few minutes I thank my Senator, Senator Cantwell, for her statement. I appreciate that. And I'd like to remind Senator Smith that I used to swim in the Cayuse River where he lives. When I was 14 years old, my relatives are all over there at Umatilla. There was no water in that river then. There's water there today. And, as the Senator says, the Umatilla Tribe and the agriculture people all got together and there's in-stream flows and salmon in that river today. So these are things we can do together when we work together.

I appreciate coming back for the second day and talking about specific things. I remember this hearing room when you opened it. And Mr. Chairman, I remember when that rug was put up there by Peterson Zah. That Navajo rug was made by hand, something that tells us who we are. You said we'd have our own room to come into and talk about our culture and our way of life and how we want to have the responsibility of finding our own way in life.

And here we are today testifying about our salmon, about this very important Indian fish and wildlife bill that we support and hopefully everyone in this room supports. As my Senator, Senator Cantwell is saying don't be scared of us Indian people. We've come a long way. We've been managing for 1,000 years, but we've come a long way in 30 years. We are very capable of sitting down with anyone and everyone on the watersheds or throughout the ocean, throughout our Pacific Northwest, Columbia River Snake River, wherever we might be. We have professional people within the infrastructure of the tribes. We have our science people, we have our

policy people, we have our legal people. We're capable of sitting down and talking about anything and everything there is on the watershed.

Tribes are working the watersheds 24 hours a day. And we're taking care of all our medicines, all our animals, all of our birds. We even brought back the bluebird, the bluebird that was just about gone. We brought that back to life and it's healthy throughout the Northwest and in Puget Sound right now. It lives up on the prairies. That bluebird was at the impact area of Fort Lewis, the military reservation. We all, all of us brought that bluebird back to life. And it's there and it's healthy.

In Puget Sound, we work together hand in hand on everything that's happening within our area. As Senator Cantwell said, U.S. Army, the U.S. Navy. We work with the utilities people. We have in-stream flows on some of our rivers and we're working for more of them. We are taking dikes out. Dikes are now being breached and water is coming into the dikes so the salmon will have a big feeding ground there, for all salmon that are traveling north to south through Puget Sound and the Pacific.

So these are some of the things that we're doing. We're taking care of our medicines up there. We're working with the timber industry, we're working with agriculture, we're working with whoever wants to work with us to take care of all of our Indian medicines, our berries up in the mountain and all of our campgrounds along the areas, and all of our cedar trees, and all the things that make a healthy watershed for our Indian people and our way of life. These things we are doing. We're going to hold the United States responsible for protecting our treaty rights and our way of life and culture that's what we stand for.

We also stand for working with these agencies behind us. Sometimes we have to do their job. That's how capable we are today. But that's all right. The job has to get done. If we put our resources together, we can get that job done and make that comprehensive plan come true. We can implement U.S. versus Washington. We can do anything we want to do if we're all together, working together.

Thank you.

[Prepared statement of Mr. Frank appears in appendix.]

Senator INOUYE. I thank you very much, Chairman Frank. And now may I call upon Professor Wilkinson.

## STATEMENT OF CHARLES WILKINSON, UNIVERSITY OF COLORADO SCHOOL OF LAW

Mr. WILKINSON. Thank you very much, Mr. Chairman and the committee, for the honor of appearing before you today. I hope that this testimony will be of use to you.

My name is Charles Wilkinson. I'm the Moses Lasky Professor of Law at the University of Colorado. My primary specialties are Indian law and natural resources law in the American West. My books include the standard law texts on Indian law and Federal public land law.

When I entered law teaching at the University of Oregon in 1975, the state of the Pacific salmon fishery captivated me. And my research and writing over the years has regularly addressed the

law, history and social and economic context of the salmon controversy. Today, if the committee please, I'll give a brief overview of the historic effort to recover the Northwest's magnificent salmon runs and the central role that modern tribal governments play in that effort.

The far-flung and complex campaign to salvage the salmon runs of the Pacific Northwest is in all probability the most extensive environmental restoration effort ever undertaken, whether in this Nation or any other. Ultimately, a commitment of this magnitude has been anchored in the fierce determination of the people of the region, and across the country as well, to preserve this precious resource. From the Klamath, Columbia, and Snake rivers, up through Puget Sound and the Olympic Peninsula, our Nation has been blessed with a bounty of flashing silver runs that brings us untold economic, recreational, and spiritual benefits.

The salmon stocks began to diminish during the 1870's with the new canning technology, and the decline accelerated in the 20th century with the widely documented efforts of over-harvesting dams and various other development activities that degraded the rivers and the upland old growth forest and plains habitats that feed the water courses. Over the years, especially after World War II, the States and Congress responded in many ways. In 1976, with the runs in freefall, Congress passed the Magnuson Act, since expanded by Senator Stevens, to apply modern management principles to the fishery. The Northwest Power Act of 1980 addressed the declines on the Columbia. In 1985, this body ratified the United States-Canada Treaty. In the late 1980's and 1990's, the Endangered Species Act came front and center.

Today, salmon recovery in the Pacific Northwest is a patchwork quilt of many dozens of Federal and State statutes, tribal and international treaties, and county and city land use plans and regulations. Once in writing an article about the Columbia River, I found that a Chinook salmon born in the Lochsa River in Idaho would have to pass in its life's journey 8 dams on the Columbia, 16 passages in all out and back. And that the Chinook, in its return journey as an adult harvestable fish, would pass through no fewer than 17 separate Federal tribal, State and international jurisdictions.

Thankfully, Sammy, as I affectionately came to call my imaginary salmon, did not need a separate passport for each jurisdiction. The Northwest salmon runs have long been considered a front line matter of national importance. Federal interests and activities include the commercial and recreational values, the Indian and international treaties, the many Federal dams and crucial public lands habitat. As a result, this national legislature has given special attention to Pacific salmon through both substantive law and continuing appropriations.

Although many others are involved, lead Federal agencies include the Interior Department through the Fish and Wildlife Service and the Bureau of Indian Affairs, the Commerce Department through the National Marine Fisheries Service, the Federal Energy Regulatory Commission and the Bonneville Power Administration, which supplies one-half of the Pacific Northwest's electricity through its power sales. The Indian tribes of the region have be-

come an integral part of the contemporary management regime through their treaties, the Congress' trust relationship to the tribes, and the diverse and mightily constructive role of tribal wildlife agencies and scientists in modern times.

The treaties were enacted in one of history's most explosive bursts. Isaac Stevens, known for his aggressive and bullying tactics [his biography is entitled Young Man in a Hurry] negotiated 11 major treaties with nearly 3 dozen Northwest Indian Nations between late 1854 and early 1856. He thus obtained from the tribes, who under American law had an ownership interest in their aboriginal lands, most of the Northwest and paved the way for Oregon, Washington, Idaho, and Montana Statehood.

Stevens knew, however, that he could never obtain tribal consent to the treaties and the land sessions he craved unless the treaties guaranteed the tribes the right to fish on their ceded lands. Pacific Northwest Indian leaders said it at treaty time, and they say it today, "We are salmon people." Indian fishers continued to take salmon after the treaties but as new arrivals began to fill up the region, the States cracked down on Indian fishing. Indian people, now under the thumb of the BIA and unfamiliar with the United States legal system, had no effective way to respond. After World War II, as settlement accelerated, State enforcement intensified. Still the tribes, poverty-wracked and overtly suppressed by the BIA and the churches, lacked the ability to protect their rights.

By the early 1950's, tribalism on this continent had reached its all time low point. At that moment, tribal leaders somehow rose to the occasion and began a movement to regain control of their reservations and to assert their rights. It was nothing short of a crisis. As Vine Deloria, Jr. put it, "we'd better win this one, because if we don't, there won't be another."

Yet, implausibly, almost impossibly, given the dire circumstances in Indian country in the post World War II years, the modern sovereignty movement has remade Indian country and achieved most of its goals. Over the course of the past two generations, Indian tribes have among many other things eliminated the stranglehold of the BIA, improved their economic situation, greatly increased the numbers of college and high school graduates, created their own tribal colleges, achieved much improved health care, added large amounts of land to their reservations, and made all manner of advances in tribal governance, so that they have now established a serious working sovereignty in Indian country.

The tribes still have much work ahead of them. They have not achieved all of their goals. Movements never do. Nonetheless, the modern Indian tribal sovereignty movement deserves to be spoken of in the same breath as the civil rights, women's, and environmental movements.

The tribes of the Pacific Northwest in modern times have placed heavy emphasis on fishing rights and fisheries management. In the late 1960's, Indians across the country finally found the wherewithal to retain excellent lawyers to defend their treaty rights. The resulting litigation in the Northwest surely ranks among the region's most important court cases ever. Judge George Boldt and Judge Robert Belloni, two eminent, conservative, and courageous Federal judges, construed the treaties as the trial negotiators in-

tended, finding that they still remain fully in force over the passage of time, and that the right to fish at traditional off-reservation sites "in common with the citizens of the territory," guaranteed the tribes the right to take one-half of the harvestable runs. The U.S. Supreme Court affirmed those rulings.

Tribal salmon management has proved every bit as critical as tribal salmon rights. Judge Boldt's ruling squarely affirmed the sovereign, that is, governmental authority of tribes to regulate harvesting by their members. Thus tribal Indian fishers have the right to fish outside of State law, just as fishers in Idaho have the right to fish outside of Oregon law. But treaty fishers must obey tribal law. Judge Boldt's reasoning was consistent with historical research showing that tribes had elaborate fishing laws long before non-Indians arrived. In a broader sense, Judge Boldt's decision embodied opinions from Chief Justice John Marshall up through today's Supreme Court, acknowledging that tribal sovereignty, along with the sovereignty of the Federal Government and the States, is one of the three sources of governmental authority within our borders and within our constitutional system.

The *Boldt* and *Belloni* decisions unleashed a torrent of pent-up energy and creativity in Indian country. In the 1970's, more than 20 tribes in Northwest Washington formed the Northwest Indian Fisheries Commission, located in Olympia. Today the Commission, whose programs now encompass ocean ground fish and shellfish as well as salmon and other species, has some 50 fisheries scientists on staff, and a state of the art laboratory specializing in fish genetics and fish health. The four Columbia River tribes, the Nez Perce, Umatilla, Warm Springs, and Yakama, joined together and established the Columbia River Inter-Tribal Fish Commission, with offices in Portland. CRITFC, which has about the same staffing level as the Northwest Commission, also has a strong scientific capability and extensive enforcement division, and is about to open a laboratory in Hagerman, Idaho, that will conduct research on fish genetics and water quality.

In addition to the inter-tribal organizations, every tribe in the Pacific Northwest now has its own on-reservation fisheries operation. This is part of the dramatic revival of tribal governance generally. Indian tribes, which had essentially no full time employees in the 1960s, are now full service governments. As one gentleman at Nez Perce told me, "back in the 1970's, we were a mom and pop store. Now we're a supermarket." Tribal governments in the Northwest range from 100 employees to 1,000 or more in the larger tribes.

The tribal natural resources agencies in the Northwest, which are a priority for every tribe, employ from 10 up to 100 on-reservation fisheries scientists. Several Northwest tribes operate modern hatcheries to complement the depleted native runs. It's worth mentioning that these developments far preceded tribal gaming. The rise of modern tribal governments and the creation of first-rate salmon management capabilities in the inter-tribal commissions and on the reservations took place before there was a single tribal casino in the Pacific Northwest.

Tribes are now accepted as co-managers of the salmon resource along with the Federal and State governments. This means that

hundreds of tribal fisheries scientists, the total numbers are approximately equal to the numbers of Federal and State scientists, are, as you deliberate today out in the watersheds taking water quality samples, tagging fish, measuring water flows and temperatures, identifying insect life, counting smolts and returning fish, analyzing ocean conditions, assessing fish health, planting native vegetation in riparian areas, and interviewing elders to document the traditional knowledge that is so enriching tribal resource management.

Other tribal scientists are in the laboratories or in meeting rooms or on conference calls to set, in collaboration with their Federal and State colleagues, the flow regimes from the dams in order to give some aid to the migrating fish. These and many other chores are the stuff of the sacred campaign to save and restore the Pacific salmon runs. The tribes are respected and valuable professional participants, right in the middle of it.

As I've mentioned, because salmon restoration is accepted as an overriding national obligation, this Congress has consistently supported tribal salmon management just as it has supported the Federal and State operations. In the case of the tribes, an additional kind of obligation is at work. Chief Justice John Marshall articulated the high and special duty that the United States has assumed toward Indian tribes, and in every era since, the legislative, executive, and judicial branches have reaffirmed the trust relationship. The trust, which has always had particular force and broad applicability to tribal natural resources in general, and salmon in particular, remains a guiding star and a primary responsibility for this Congress.

In the treaties, where the tribes relinquished nearly all the land they had, this Nation promised them salmon. That promise of salmon was the essential guarantee that caused them to sign the documents that opened the Northwest.

If the committee please, I'll take the liberty of outlining a course that the committee might consider in addressing the continuing resource needs of the Northwest tribes. The overarching concept would be for the Congress to acknowledge, institutionalize and regularize tribal fish and wildlife management. This involves both substantive legislation and appropriations.

Substantively, legislation should acknowledge, in the area of fish and wildlife management, the tribes' status as governments, the existence of the trust relationship, and the government-to-government relationship and the tribes' role as comanager when Federal, State and tribal laws all apply. This would be done for clarification and to enhance continuity so that State and Federal managers new to Indian issues will have a single statute to go to for clarity on these broad issues.

These principles are not new. They already exist on the pages of Federal statutes and court decisions and importantly, they are manifested in the ongoing, on the ground work in the field among tribal, State and Federal colleagues. But these foundational structural principles need to be ratified and articulated in one place.

As for appropriations, Congress should aim to bring stability and regularity to this field. Resource managers need to be able to plan ahead. In the case of Pacific salmon, a scientist gets data on a sin-

gle run only after three to seven years when the adult fish return. Gaps in this data weaken or destroy potentially valuable bodies of knowledge.

By way of example, without speaking to the right or wrong of the underlying dispute, let me refer to the current issues involving the Bonneville Power Administration. A major funding stream to the mid-Columbia tribes for salmon management has come from the revenues of the BPA, which markets the electricity from the dams built and operated on the Columbia by the Army Corps of Engineers and Bureau of Reclamation.

Now, the BPA is facing reduced revenues. The BPA, which is itself charged with the trust duty to tribes, has been directed by this Congress to follow the fish and wildlife plan developed for the Columbia by the Northwest Power Planning Council. Designating a portion of the BPA power revenues to tribal salmon management was a wise decision as a matter of policy: Congress knew that the low cost power that Northwesterners value came at the expense of the salmon they value.

Given all the circumstances, it would seem appropriate that Congress, in its oversight capacity, ensure that tribes are receiving the fair share of BPA revenues to which they are entitled. If BPA is doing all that Congress has charged it to do, and if sufficient power revenues are not available, then it seems most appropriate that Congress would in one way or another replace the reduced BPA funds.

A somewhat similar situation exists in Northwest Washington, where the new and emerging need to manage ocean ground fish has been left mostly unfunded by the Federal Government with the result that the Northwest Indian Fisheries Commission is doing some management, but at a much lower level than is needed. Leaving aside the specifics of BPA, or the ocean ground fish situation, and recognizing the many difficulties that Congress faces in making consistent funding decisions from year to year, the larger point is that Congress should have in mind the clear objective of regularizing tribal annual funding for Pacific salmon and other fisheries management.

There are two kinds of reasons for this. The United States as a trustee made solemn pledges and treaties in laws to salmon peoples. Further, the tribes are doing good and significant work on one of the great enterprises of our time, the restoration of the Pacific salmon. We as a Nation need the professionalism and dedication that tribal fisheries managers bring to a noble cause.

I'll finish off by saying this. The tribes offer us something beyond professional salmon management. The members of this Committee, as opinion leaders, know well how a distinctive voice can articulate a cause and generate action in the name of that cause. We are blessed to have the Indian voice, ecological, spiritual and authentic, to give life to the cause of salmon restoration. Don Sampson, Umatilla and former executive director of the Columbia River Inter–Tribal Fish Commission, has written:

> Tribal peoples have lived side-by-side with the salmon for thousands of years. We know them. We honor them. Today we must speak for them and act for them.

Billy Frank, Jr., with whom I am so privileged to sit next to today, and who, like Don, and thousands of other Northwest Indian

people, has the flow of the deep rivers running in his blood, has said these words to me:

> I don't believe in magic. I believe in the sun and the stars, the water, the tides, the floods, the owls, the hawks flying, the river running, the wind talking. They are measurements. They tell us how healthy things are, how healthy we are. Because we and them are the same. That's what I believe in.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Wilkinson appears in appendix.]

Senator INOUYE. Professor, I thank you very much for your very comprehensive background information on what we are discussing today. The committee had intended not to ask any questions of witnesses in order to provide sufficient time for our Government witnesses. But I have one question I would like to ask.

In your presentation, you spoke of the rights of Native Americans based upon treaties, upon laws and our constitution and the United States trust relationship to harvest salmon. Today we will be considering the Energy Bill. There is a section in the Energy Bill, section 511. That section relates to the conditions imposed on the operation of hydroelectric dams and facilities. As currently formulated, States and Native Americans have been left out of the relicensing process. They are completely left out.

When one considers that hydroelectric generating plants, if operated improperly, could have a devastating impact upon the salmon stock, do you think that this section is in line with the policy of the United States as it relates to Indian treaty fishing rights?

Mr. WILKINSON. Well, what I would hope, Mr. Chairman, is that this issue is really considered carefully by in committee and by Senators as a whole. It's a very important provision. I would suggest that if such a provision were to be added it would almost unique in administrative law of Federal agencies. It would be far outside the scope of what we normally provide for in administrative agencies, which is to allow all affected groups to participate. And certainly in the case of tribes, the idea that somehow their rights would be diminished and made largely ineffective, which that provision would do, seems to me to run directly in the face of the treaties and the trust relationship.

Senator INOUYE. I thank you very much. On behalf of the committee, Chairman Frank, Professor Wilkinson, thank you.

Senator SMITH. Mr. Chairman, I wonder if I might ask the gentleman, isn't it true that States, tribes and non-governmental organizations have intervenor status in FERC hydro relicensing proceedings, and that this status is unaffected by section 511 of the pending Energy Bill?

Mr. WILKINSON. No; I don't agree with that. I think that their status is substantially reduced, if that were to pass, that it would be substantially reduced from the position it is in existing law.

Senator SMITH. Isn't it true that intervenors can under section 10(a) of the Federal Power Act, which requires FERC to do what is in the public interest, ask that the mandatory condition be made more stringent?

Mr. WILKINSON. They would have the right to ask that. But the procedures in the proposal give a heavy weight toward the project proponent, as compared with the tribes or any other members of the public.

Senator SMITH. It's my understanding that a FERC issued license in a Federal court, that States, tribes, Federal resources agencies and environmental groups all have standing to challenge a license in court. And certainly this is something we ought to explore, Mr. Chairman. It's an important issue.

Senator INOUYE. Thank you very much.

We have a vote scheduled at this moment, but I would like to call up the next panel. The chairman of the Shoshone Paiute Tribes of Duck Valley Reservation of Nevada, Terry Gibson; the executive director of Columbia River Inter-Tribal Fish Commission of Portland, OR, Olney Patt, Jr.; the executive director of the Northwest Indian Fisheries Commission of Olympia, WA, Jim Anderson; the chairman of the Kootenai Tribe of Idaho representing the Upper Columbia United Tribes as vice chairman, Gary Aitken.

May I first call upon Chairman Gibson.

**STATEMENT OF TERRY GIBSON, CHAIRMAN, SHOSHONE PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION**

Mr. GIBSON. Good afternoon, Mr. Chairman, honorable members of the committee. My name is Terry Gibson. I'm chairman of the Shoshone Paiute Tribes of Duck Valley. We're a federally recognized tribe and our reservation straddles the Nevada and Idaho borders. We have 1,800 enrolled members. Our reservation consists of 280,000 acres and is geographically located next to several non-Federal and one Federal hydroelectric project.

Speaking to how we became to exist in Duck Valley, through the 1863 Treaty of Ruby Valley, our western Shoshone tribal people came from the great basin area and were moved by executive order, established the Duck Valley Indian Reservation. Because of the inexhaustible supply of salmon, there were two other executive orders that extended our reservation into the State of Idaho, and that was for a specific group called the Paticat Band of Paiutes, who had been caught up in the Bannock war and were held as prisoners of war for 5 years in Fort Simco, WA.

Upon their release, they were sent to the reservation in Duck Valley. The two executive orders that expanded the reservation into Idaho, one of them was for salmon for that group of people and for the people who existed in Duck Valley. And keep in mind that the Duck Valley Reservation was established for its inexhaustible supply of salmon.

Well, 50 years ago, when these hydropower plants were put in the Snake River and the Hells Canyon area, the BIA was supposed to be watching out for my tribe's best interests. Well, lo and behold, they didn't do that. They dropped the ball. I am now a tribe in the Northwest that does not get any salmon because of what the Bureau of Reclamation has done with the Oihee Dam and stopped the total salmon run to our reservation on the Oihee River, and because of what the hydropower companies were allowed to do on the Snake River in the State of Idaho, they eliminated the rest of our salmon run that came to the east side of our reservation.

Now I sit here before you as a tribe that has no salmon. And I hear these things that are going on throughout the country and it disturbs me. Because I'm sitting here trying to obtain or trying to preserve a right to participate in a process that allows for us to

help the hydropower industry and help the States and help all the Federal agencies determine a way to find passage, fish passage.

Now, our fear is that if this new energy language that is being proposed, if this is honored and it goes through, I think that is going to take my tribe's ability away to participate at this point in time. And that disturbs me because my people wanted and tried to participate 50 years ago when the BIA was supposed to watch out for our interests. And they didn't allow my leaders of my tribe to participate.

So now I sit before this honorable committee and ask that we all get together and we all come together and try to maintain our ability to be part of the process that the power companies are now undertaking. I'm involved in the process in the Hells Canyon area and the C.J. Strike area of the Snake River. And in those areas, we are having a very difficult time being part of it, because the power company, a private entity, does not have to consult with Indian tribes. They don't have to consult on a government-to-government basis.

So all our study plans and all studies that are essential to the protection of cultural resources, of burials, of sacred sites, the Indian Religious Freedom Act, all these things, Executive Order 13007, all these things are not being addressed in this process that the power company is utilizing at this point. They tell us that once the license application, pre-application is sent to FERC, then the process to consult will start. Well, at that point, everything is compiled and it's submitted.

The tribes haven't been allowed to participate to develop any of the criteria that satisfies Section 106 of the National Historic Preservation Act as it pertains to Bulletin 38, which is very important for us. Because we are a very traditional group of people. We were put 100 miles out in the middle of nowhere hoping that we would go away or die. Well, we didn't do that. And our sacredness is very important to us and our people. Our ancestors' remains are very important to us, and we'd like to keep them in the ground. But we find at this point in time, in this, throughout this process, that our dead people do not even have rights to stay in the mother earth where they were put.

So I ask and I plead with the members of Congress that they consider what I'm saying here. Because if in fact the rest of the tribes in the Northwest are taken out of this process, such as my tribe has been, then all of those resources are going to go away. This is what we're faced with. I think it's a very sad time in the lives of Indian people that something like this would come about and the Congress would consider legislation that changes trust status and responsibility and all of this thing is swept off the table, all of these provisions are swept off the table in my mind.

So it's very important that we come together as tribes.

Senator INOUYE. May I call for a recess at this moment, because I have exactly two minutes to report to the Senate to vote?

Mr. GIBSON. Yes; Mr. Chairman.

Senator INOUYE. I'll be right back.

[Recess.]

Senator INOUYE. Chairman Gibson, are you finished?

Mr. GIBSON. No; Mr. Chairman.

Senator INOUYE. Please proceed.

Mr. GIBSON. Thank you.

As I was stating, you know, I don't want to see the other tribes lose any of the resources that they have there. I know the testimony today is geared more toward the fish and wildlife programs, but I think it is so important while we have the other tribes here to hit on the provision in the energy bill that I didn't want to lose that opportunity.

I also have a statement here from my sister tribe, the Shoshone Bannock Tribes, that they would like entered into the record pertaining to the fish and wildlife programs, and that is the Shoshone Bannock and the Shoshone Paiute Tribes have been sponsors of several fish and wildlife project proposals that ranked high in the comanagers and independent peer review of scientific validity, only to get bumped out of the process by lower ranked proposals due to recommendations made by Governor-appointed Northwest Power and Conservation Council members.

These are politically driven funding decisions that are not beneficial for fish and wildlife recovery and that resemble fraudulent waste of Federal funds.

Senator INOUYE. Without objection, those statements will be made part of the record.

Mr. GIBSON. Thank you, sir.

[Information appears in appendix.]

Mr. GIBSON. Also, you know, during this bicentennial celebration of Lewis and Clark and the core discovery, I think it's pretty sad that we may lose our right to participate in the process within hydropower relicensing at this point in time, and lose the right to participate in bringing back resources and protecting resources that are out there for all of us. I think that's very important that that be stated here.

And also, that the programs that are out there with the Bonneville Power Administration, my tribe is experiencing problems at this point in time with funding attempting to be cut because they tell us that we are in a blocked area, meaning we're above the Hells Canyon hydropower complex. And so the funding that is out there that has been allocated by the Congress and through the Bonneville Power Administration is drying up on our end of things. So we no longer get the salmon and we no longer get the funding that's available.

Thank you, Mr. Chairman, members of the Committee.

[Prepared statement of Mr. Gibson appears in appendix.]

Senator INOUYE. Thank you very much, sir.

And now may I recognize Chairman Aitken.

## STATEMENT OF GARY AITKEN, SR., VICE CHAIRMAN, UPPER COLUMBIA UNITED TRIBES

Mr. AITKEN. Mr. Chairman, members of the committee, my name is Gary Aitken, Sr. I'm a tribal chairman of the Kootenai Tribe of Idaho and vice chairman of the Upper Columbia United Tribes [UCUT]. On behalf of the Coeur d'Alene Tribe of Idaho, Colville Confederated Tribe, Kalispel Tribe of Indians, Kootenai Tribe of Idaho and the Spokane Tribe of Indians, thank you for the attention you are devoting to this matter.

I want to share with you some of the impacts on tribal fish and wildlife management programs, as well as some of our suggested solutions to the problems we have faced. The UCUT appreciate the funding from Bonneville Power Administration, another source of our tribal fish and wildlife programs. We put those dollars to productive use and would be pleased to have members of the committee visit to see how we use limited funds to accomplish a great deal of resource restoration and protection.

Here's what you'll see. In the Coeur d'Alene and Kalispel tribal communities, you will see tribes working with the Kootenai tribe and our Washington and Idaho State coal managers to protect over 4,000 acres of wildlife habitat acquired in mitigation for the impacts of Albany Falls Dam. In my community in Bonners Ferry, you would see the Kootenai Valley resource initiative, which the tribe created with the city of Bonners Ferry and Bounty County to restore the resources of the Kootenai Valley. Kootenai Valley KBRI includes the tribe, private citizens and landowners, local governments, Federal and State agencies and environmental advocacy groups and representatives of business and industry all working together to ensure stakeholders have a voice in management activities.

The KBRI is working hard for recovery of the Endangered Species Act, listed in the Kootenai River white sturgeon, and to avoid the listing of burbet, a native freshwater cod, commonly referred to as ling. Burbet historically were abundant and provided an important subsidy for the fisheries for members of the tribe. We were an important social sport and commercial fishery for the people of Idaho. Habitat changes caused by the Libby Dam have imperiled the species and available literature does not predict a recovery without a planned, coordinated intervention.

In the communities of the Spokane Tribe and the Colville Confederated Tribes, you will find a Lake Roosevelt forum, which allows everyone to develop a management plan with 150 miles of reservoir behind Grand Coulee Dam. The Grand Coulee Dam generates the largest percentage of electricity of all Federal dams, serves as a check valve on flood control and irrigation and is responsible for greatly wiping out the anadramous fish runs above it. These are fish runs that historically shaped the tribe's culture and spirituality and provided 80 percent of their nutrition. There are still unresolved issues concerning the impacts of the Grand Coulee Dam and the failure of the regional process to fairly address comprehensive problems in the basin.

The written testimony of the Spokane Tribe describes in detail how we got into this problem, what we've learned and how we can avoid continuing this situation in the future. You would see the UCUT members working hard with communities to resolve important issues and to implement obligations of BPA and the Federal agencies under treaties, Northwest Power Act, Endangered Species Act, Natural Historic Preservation Act, Clean Water Act and other legal responsibilities.

What you will not see, however, is trust among the tribes and Federal trustees. You will not see accountability of Federal agencies. You will not see certainty for the tribes and the communities they work with. And you will not see an adequate voice for the

tribes and regional governments. The reasons for these problems are set forth in the written testimony provided by the UCUT and its member tribes. The frustration will be evident in these statements and documents. The frustration underscores the importance of these issues to the tribes.

Please take these statements seriously. Here are some suggestions for solving these problems. Create trust. Ensure BPA continues to build on small first steps it has taken to respect tribal sovereignty and to improve its government to government relationships. BPA must keep its word. Ensure Federal agencies engage in meaningful dialog to address management and trust responsibilities.

No. 2, force accountability. Review the GAO audit and ensure that BPA is complying with its responsibilities. More audits and oversight of BPA. Direct BPA to disclose fully how it came to be in this financial condition, including, among other things, where the carryover funds from 1996 through 2001 MOA have been used and the amount of income BPA realized from the emergency power operation during the summer of 2001.

No. 3, create certainty. Support Congressional appropriations for other regional agencies to make their own financial contributions to fish and wildlife and habitat in the Columbia Basin which such costs should not be charged to BPA. Give BPA a deadline to get back on track with habitat acquisitions, and to use its Federal borrowing authority for this purpose. Give BPA a deadline to execute a written commitment to clear well defined funding programs for fish and wildlife and cultural resources, and include tribes in developing the funding agreement. This commitment must be for the period up to 2006. The tribes cannot accept uncertainty until 2006, as BPA would like.

Support the comprehensive Indian Fish and Wildlife Management Legislation and funding for the tribal fish and wildlife managers, the UCUT and other tribal entities. Ensure a voice for the tribe. Direct BPA and other Federal agencies to proceed quickly to negotiate a formal and comprehensive role for the tribes in decisionmaking process.

Please review the written testimony provided by UCUT and its individual member tribes for additional information. Thank you again for your time on these matters.

[Prepared statement of Mr. Aitken appears in appendix.]

Senator INOUYE. I thank you very much, Mr. Chairman.

And now may I call upon the executive director of the Columbia River Inter-Tribal Fish Commission, Olney Patt.

## STATEMENT OF OLNEY PATT, JR., EXECUTIVE DIRECTOR, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

Mr. PATT. Good afternoon, Mr. Chairman, members of the committee. My name is Olney Patt, Jr. I'm a member of the Confederated Tribes of the Warm Springs Reservation of Oregon and the executive director of the Columbia River Inter-Tribal Fish Commission, whose members are the Confederated Tribes of Umatilla Indian Reservation, Yakama Nation of Washington, Nez Perce Tribe of Idaho and the Confederated Tribes of Warm Springs.

While I am providing oral testimony to the committee on behalf of the Commission, I would like to direct your attention to the written testimony provided by the member tribes of the Commission. I will reference some of the points and issues made there.

Two years ago, a former member of this committee, the distinguished Senator from Oregon, Mark Hatfield, addressed a broad group of Columbia Basin stakeholders and governments concerning the governance of the Columbia River. His message simply and eloquently recounted the history of the Bonneville Power Administration and its goal of rural electrification and employment in the Pacific Northwest during the great depression.

He further stated that this mission had been accomplished, but that Bonneville needed to redefine its societal goals, to take into account new realities in the Pacific Northwest or risk losing the benefits of the Federal Columbia River power system to the Pacific Northwest. He believed that the redefinition of the Bonneville mission could be found at the core of its history, high social purposes that could improve lives.

With his permission, I have included Senator Hatfield's remarks as part of this testimony and request that it be included in the record.

Senator INOUYE. Without objection.

Mr. PATT. Senator Hatfield was correct in stating that the original goals of the Bonneville Project Act of 1937 were accomplished. However, they were achieved while leaving both the tribes of the Basin and the ecosystems and salmon upon which tribes depended in Bonneville's wake.

The passage of the Northwest Power Planning and Conservation Act in 1980, under the leadership of Senator Hatfield and the early work of the act's council, under the chairmanship of Senator Dan Evans, were important attempts to remedy the damages caused by the system. The regional act's mandate was for the project operators to protect, mitigate and enhance fish and wildlife resources affected by the hydrosystem through a planning process that included rigorous consultation with the tribes in terms of a statutory trust responsibility and the use of the Bonneville revenue stream, consistent with the fish and wildlife program.

As our written testimony yesterday and today points out, during the first 20 years that the Act was in place, we made great progress in our efforts to rebuild our ecosystems and salmon populations, while providing significant economic benefits to our own and surrounding communities. These included the multiplier effects of capital expenditure and the stream of benefits in terms of fishing opportunities that are helping to buoy up our sagging rural economies that suffer from high unemployment and hunger rates.

However, during the last 2 years, Bonneville, and for that matter the council, which has the responsibility to develop an effective fish and wildlife program, has failed to fulfill the mandates of the regional act. The Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation and the Nez Perce Tribe are providing written testimony to the committee. In each testimony they provide a detailed account of the problems they have encountered since the year 2000.

They include failure to implement the fish and wildlife program and the hydrosystem biological opinion that was recently held invalid by a Federal district court; placing the risk of energy related financial mismanagement on fish and wildlife funding; failure to consult and coordinate with tribes over the funding of fish and wildlife programs; failure to honor numerous commitments to the tribes made in their 1996 MOA and its rate case; failure to employ efficient contracting procedures and prompt expense reimbursement resulting in missed opportunities and unnecessary cost to the tribe; providing an increase of $4 million to its $8 million fish and wildlife division budget, resulting in new impediments to efficient fish and wildlife funding; emphasizing certain Federal agency needs in the name of ESA at the expense of successful tribal fish and wildlife programs that address both watershed and system-wide needs.

I would also direct your attention to a memo attached to this testimony from the Nez Perce Tribal Department of Fisheries Resource Management, detailing the contracting problems that are wreaking havoc on the time and resources of our tribal programs. Bonneville continues to provide the cheapest electricity in the United States, in part because it has not internalized the full cost of its fish and wildlife responsibilities that are normally borne by power plant operators. As noted in the Yakama testimony, our analysis shows that BPA could meet funding levels for high priority fish and wildlife projects and still be 6 to 14 percent below market prices for electricity. This additional funding would add only about $1.90 per month to the average consumer.

In order to provide the impetus for BPA to recognize and fund its obligations, our tribe believes that greater oversight at the national level is essential. In this regard, we greatly appreciate this committee's effort and call on you to ensure that BPA's trust responsibilities are implemented. BPA must also honor its commitments by providing adequate funding to pay for high priority fish and wildlife projects, and not use fish and wildlife funding as a shock absorber for bad water years or bad management.

Most important, though, echoing Senator Hatfield's words, BPA needs to redefine its commitment to societal values, including environmental justice. This Federal agency needs to assist in honoring the obligation of the United States when Congress ratified our treaties, securing our right to take fish at all usual and accustomed fishing places. Tribes are partners to the States and Federal Governments and exercise jurisdiction over the waters and the fish and wildlife of the Columbia Basin. As partners under the supreme laws of the United States, we must be treated as true partners at the same table, not as supplicants whose needs can be arbitrarily and capriciously ignored.

I would also like to enter into the record unanimous resolutions of both the Affiliated Tribes of Northwest Indians and the National Congress of American Indians that detail our grievances and call upon the Congress and the Administration to remedy them.

Senator INOUYE. So ordered.

Mr. PATT. Along with the Yakama testimony, these resolutions call for specific remedies for the problems that tribes have identified in their relationship with Bonneville Power Administration.

These remedies include: Providing strong oversight, including GAO review and regular reports to this committee; improving implementation by streamlining contracting or transferring implementation to another Federal entity; providing assured and adequate long term funding for Bonneville's fish and wildlife obligations; providing a coordination mechanism among the Federal, State and tribal governments consistent with Sections 4(h)(11)(b) of the regional act; improve BPA tribal policy and set measurable objectives; require BPA to document compliance with the substantive standards of the regional act, especially the equitable treatment standard.

Thank you for this opportunity to testify. If you have any questions about our testimony or our programs, other members of the commission or myself would be happy to answer them.

[Prepared statement of Mr. Patt appears in appendix.]

Senator INOUYE. I thank you very much, sir.

And now the Chair recognizes Mr. Anderson, the executive director of the Northwest Indian Fisheries Commission, accompanied by Dave Hererra, of the Skokomish Tribe, and Mel Moon, of the Quileute Tribe.

**STATEMENT OF JIM ANDERSON, EXECUTIVE DIRECTOR, NORTHWEST INDIAN FISHERIES COMMISSION, ACCOMPANIED BY DAVE HERERRA, NATURAL RESOURCES DIRECTOR, SKOKOMISH TRIBE AND MEL MOON, NATURAL RESOURCES DIRECTOR, QUILEUTE TRIBE**

Mr. ANDERSON. Thank you, Mr. Chairman and Senator Smith. We appreciate the opportunity to be here and provide testimony.

On behalf of the Commission and our member tribes from western Washington, we feel it is a great honor to talk about issues that are important to us, and we hope that we have a lot to say and that you will agree with that on the completion of this hearing. I'll try to do my best to shorten the talk and try to get us back as much on time as possible for the benefit of the others.

As Charles Wilkinson mentioned, the Northwest Indian Fisheries Commission was formed in 1974. The Commission is really a support entity for the 20 tribes. We provide technical assistance, information sharing, and policy coordination for the 20 individual tribal programs who have the management and enforcement responsibilities for the salmon runs. It's the tribes that have the comanagement authority. The Fish Commission is an entity that supports them.

The model that we have chosen to develop as I mentioned, tribes as primary managers, commission as support, really allows for the unique tribal perspectives and vision, the local watershed geography and circumstances and allows for the flexibility to really get in and do the things that are needed in these watersheds. I think that's something that's rather unique and very much a big part of our success.

Charles Wilkinson also did a very good job describing the comanagement situation. I'd like to pick up on that just briefly in saying that what Judge Boldt did when he made his findings in *United States* v. *Washington* was to create this comanagement framework where the tribes are responsible for managing their portion of the resource and the State is responsible for managing their

portion of the resource. While that may seem like an awkwardness, I think what has happened over the past three decades is that we've really been able to institutionalize how we do business and we've been able to develop a coordinated mechanism for allocating and managing Puget Sound and coastal salmon and steelhead populations.

Comanagement, like I've described, has effectively linked different cultures, tribes and the States, different watersheds, different ways of managing, and thereby, I think, has provided a connection between the rather diverse scales of the human and natural systems. It's important to understand that serious impacts do occur to the salmon and habitat from side effects of other activities, such as logging, farming, urban development and hydropower.

That raises the questions of how well these management institutions effectively deal with things perhaps outside their purview. I think one of the duties of the comanagement effort and the effort of the tribes, of which others have already spoken about, is the ability to bring things together. Tribes don't have the same limitations on them that other agencies do, the Federal Government has, State governments, local governments. Tribes have a bridging ability.

So in effect they're what I would call the glue for making things work. Certainly they are in western Washington. Co-management can be seen as an integrator, and strategic systems thinking that really allows us to have more effective real time resource management. I think we really get things done because we don't have those borders.

Let me be a little more specific. We spend hours and days and weeks and even months in many, many different processes that range from the Pacific Salmon Treaty to the Pacific Council to the Shared Salmon Strategy in western Washington to a wide range of habitat issues. When the tribes are included as full governmental partners, we have success. Where the tribes are not included as full partners, we don't have as much success. And I think the record bears that out elsewhere.

To give you a good example of where it could be better, the Pacific Fishery Management Council right now has one seat. It's an at-large tribal seat. That really should be a governmental seat. There ought to be a couple of seats, at least, for the tribes in the Pacific Council. If, I believe, that seat were a governmental seat, we could do a better job representing and participating in the Pacific Council process, because we would be allowed to have an alternate to our representative, who does a very good job, but he may not be particularly attuned to the needs of northern California tribes.

So that's just one example of where if the tribes could be factored in a little bit better, it would help. Tribes, as I mentioned, want to be involved in all aspects of salmon and other resource management. I think the tribes have the capability and the technical capacity. They certainly have the vision, perspective and leadership and are real players.

But while our message is generally positive, I wanted to hit upon a few items that are bumps along the road, and I think whenever you have institutions coming together you will have those bumps.

So this is not meant to be directed negatively, but rather call attention to some of the issues that are out there.

Without a doubt, one of the most difficult things that we have facing us is the Endangered Species Act. The ESA is a pit bull. It can be your best friend at one time and it can bite you the next time. I think pretty much anybody that's ever dealt with that knows what I'm talking about. Right now we have three species of salmon listed in the Puget Sound and coastal areas. By far the most difficult one is Chinook, the Puget Sound Chinook, because there are millions of people who live on the spawning grounds.

Tribes often resent the fact that NOAA fisheries will have much more interest in constraining harvest and hatchery activities of the tribes and the other managers, the State, than they do in terms of being tougher in habitat area. Those are the sectors of ESA. We call that, it's been called sector equity, but I would call it sector inequity. It's inappropriate emphasis on a couple of portions of salmon management and not an overall balance.

NOAA obviously would try to make a case that the ESA habitat protections are overrated, but we believe that they have authorities under consultation, section 9, to be a persuasive force, in a good fashion, in a commonsense fashion, to bring about change. We need to have that change. Certainly in Puget Sound, we need to get with some of the landowners. If we do not get that, we will not have local plans developed and we won't have a comprehensive recovery plan ever developed.

We have other concerns around the application of the National Environmental Policy Act, NEPA. The tribes feel extremely vulnerable to third party lawsuits associated with ESA listings. One of the biggest areas where we've had difficulties in the past has been procedural matters, flaws, if you will, in how the Federal agencies have developed their NEPA process. So they've been sued on process, not always on substance. We have had to jump in from a tribal perspective and find the resources through the Bureau of Indian Affairs. We've gotten some from NOAA and we've gotten some from the State of Washington after some effort.

But we have been a cooperative agency with the Bureau of Indian Affairs and NOAA in terms of developing NEPA documents for both our hatchery resource management plans and our harvest resource management plans, extremely costly endeavor and very time consuming. This is something that we feel, frankly, that it's not our responsibility to do, but to do it right, we had to jump in.

We also have some concerns around Section 10 and habitat conservation plans. Basically, these plans give up to 50 years or more certainty to landowners and entities to develop conservation plans. While it sounds good in principle, what we've seen is that these negotiations at times are done behind closed doors, and tribes are not involved and not able to provide the expertise and science that we have. So when the results come back, we end up having real differences of opinion, because certain data was not provided, certain information was not provided.

I believe that NOAA fisheries and Fish and Wildlife Service must make more diligent efforts to involve the tribes in the development of these HCPs. And at the same time, when they sign off on these HCPs, realize that they have a 50 year commitment to stay with

them, they cannot walk away because we've already seen in the case of the Washington State Department of Natural Resources HCP for their 1.5 million acres of forest land a propensity to walk away from some of the commitments in writing that they made. So those agencies need to stay focused on this.

Another area is in case of whaling. You might ask what does whaling have to do with all this. But clearly what has happened is the Ninth Circuit court found in favor of plaintiffs and basically had halted the Makah whaling treaty rights. We have asked and NOAA has been wonderful in this, has supported a rehearing, en banc rehearing at the Ninth. Justice has likewise.

But the Fish and Wildlife Service did not. And we have real questions about why the Fish and Wildlife Service would walk away from their trust obligations to the tribes. They chose basically to turn, or take the position that 200 years of treaty law should not prevail. And I think that has a big potential to undermine a lot of our co-management activities.

Finally, we have some funding concerns with regard to tribal funding. I'm not speaking about BPA, I am speaking about principally the Department of Interior monies. We have seen the Bureau of Indian Affairs not request base moneys year after year. We spend a lot of time trying to work with Congress and others to get that money put back in, working to restore the base rather than to meet new obligations like shellfish and ground fish that were spoken about yesterday and earlier today.

We believe that Fish and Wildlife Service has also opportunities to provide resources to the tribes, but they do not want to address some of the funding mechanisms that they have, like Wallop-Breaux-Dingell-Johnson moneys. They hide behind the fact that the States may object. Some of these moneys are tax monies that come from sales of equipment, et cetera, moneys that go to the States for recreational management purposes. Well, the tribes have a lot of recreational management, too. We grow a lot of fish, we do a lot of management to ensure that fish are out there for recreational people to use. Why can't that law be changed?

And one final issue with regard to Fish and Wildlife Service. They've spent 20 months trying to get tribal wildlife grant regulations out of the system, since the 2002 appropriation, and have yet to do that. They are not prioritizing funding for the tribes through that program. I think they ought to make some changes.

That concludes my remarks, and I'll pass the microphone over to David Herrera.

[Prepared statement of Mr. Anderson appears in appendix.]

Senator INOUYE. Mr. Herrera.

**STATEMENT OF DAVID HERRERA, FISHERIES DIRECTOR, SKOKOMISH TRIBE**

Mr. HERRERA. Good afternoon. My name is David Herrera. I'm a member of the Skokomish Tribe and I am the fisheries director for the tribe.

The Skokomish Tribe is a party of the treaty of Point-No-Point. We're located in Mason County, WA. Our reservation is bordered on the north by Hood Canal and by the Skokomish River. The Skokomish River is the largest river in Hood Canal and historically

produced the largest runs of Chinook salmon in the Hood Canal region, as well as large runs of all the Pacific salmon. These salmon, along with the shellfish and game, were the major source of food for our people.

In 1924, the city of Tacoma received a license from the Federal Power Commission to construct a dam on the north fork of the Skokomish River. Without any further license or authority, the city of Tacoma proceeded to build two dams, two reservoirs that flooded over 4,000 acres, two power houses, diversion works and power lines on the north fork of the Skokomish River. The project, which is known as the Cushman project, is located upstream of the reservation. It diverted all the water out of the north fork and passed the water through pipes down to the western shore of Hood Canal where the power plant number two is located. It completely dewatered portions of the north fork of the river. The dams completely blocked the passage of anadramous fish to areas above the lakes where there is spawning and rearing area that they cannot reach today. The lakes destroyed traditional tribal fishing sites as well as cultural sites.

Tacoma also constructed part of this project on tribal trust land which they had had condemned illegally by the Mason County Superior Court in 1920. Those facilities still occupy tribal lands.

In 1930, tribal legal efforts to stop the dewatering of the north fork were unsuccessful because the Federal Government refused to represent the tribe in Federal district court, and the district court ruled that the tribe could not represent itself. This allowed then the city of Tacoma to operate these facilities without any requirement for the protection of tribal reservation lands or treaty resources or cultural resources. The dewatering of the north fork has contributed significantly now to the buildup of gravel in the main stem of the Skokomish River. This has caused the water table to rise, which has increased the amount and severity of flooding on the Skokomish reservation. It has also rendered the remaining tribal land unbuildable for tribal housing, because we are not able to put septic systems in.

The change in hydrology in the river caused by the Cushman project has contributed to the decline of all species of salmon in the river. It has also degraded the habitat in the river and in the estuary, and has contributed to the listing of Hood Canal summer chum and Chinook salmon which were listed as threatened under the Endangered Species Act in 1999.

In 1974, the original license was issued to the city of Tacoma expired, FERC continued to issue licenses to Tacoma on an annual basis until they could issue a new long term license. The Skokomish Tribe, along with the joint resource parties, who consisted of the National Marine Fisheries Service, the Department of Interior, the U.S. Fish and Wildlife Service, and the Bureau of Indian Affairs, all intervened in the licensing process, seeking restoration of flows and other mitigative measures to restore the health and productivity of the Skokomish River.

This new licensing process went on for 24 years, during which time the Skokomish Tribe and the joint resource agencies appealed to FERC for interim relief, which included a minimum flow of water to be returned to the north fork of the river. The Skokomish

Tribe also sought compensation for the damages that we have suffered for 50 years by the operation of these facilities. All of these appeals were either denied or ignored by Tacoma, FERC and the Federal Government.

In 1998, FERC was issued a new 25 year operating license for the Cushman dams. This license included 13 conditions under Section 4(e) of the Federal Power Act that Tacoma must meet in order to receive the new license. These include returning a minimum flow of water to the north fork, constructing a facility to allow passage of fish above the dams and releasing flushing flows to help push the gravel that's built up in the river out into the estuary where it should be.

The tribe and the joint resource parties had sought higher minimum flows and greater mitigative measures than those required by FERC in the 4(e) conditions. Tacoma has stated that if they have to meet the 4(e) conditions that the Cushman projects would become unprofitable and that they would refuse to accept the new license and would simply walk away from the projects. Tacoma then appealed to FERC for a stay of the requirements to implement the 4(e) conditions while they appealed the license requirements. FERC granted the stay to the city of Tacoma, which allowed them to continue to operate the dam as they have for the last 70 plus years while the appeal process went forward.

A case was filed by Tacoma in district court to have the 4(e) conditions dismissed from the license. In hearing the case, the court determined that the——

Senator INOUYE. May I interrupt? How much longer will your presentation be?

Mr. HERRERA. I'm almost done.

The biological opinion needed to be conducted on the license and the conditions because of the listing of salmon stocks, which had occurred in 1999, prior to the issuance of the license. So the court remanded the issue to the National Marine Fisheries Service in 2000 to conduct a biological opinion. It has now been three years and the NMFS has not even begun to do the biological opinion. This is again causing harm to the tribe.

In closing, the Skokomish Tribe is requesting this committee and Congress to use its authority to direct FERC, National Marine Fisheries Service and all the Federal resources agencies to have a meaningful consultation with the Skokomish Tribe on the Cushman project licensing, and to meet their trust obligations in protecting the tribe and its treaty-guaranteed natural resources. Thank you.

Senator INOUYE. I thank you very much. I have been advised that Stephen Wright, the administrator of the Bonneville Power Administration, has to catch a plane. So if I may at this time recognize him. Mr. Moon, if you wish to make a statement, will you stay around, please.

May I also call up Hannibal Bolton, the chief of the Division of Fish and Wildlife Management and Habitat Restoration of the U.S. Fish and Wildlife Service.

Mr. Wright, please proceed, sir.

**STATEMENT OF STEPHEN J. WRIGHT, ADMINISTRATOR, BONNEVILLE POWER ADMINISTRATION**

Mr. WRIGHT. Mr. Chairman, thank you very much for this opportunity to appear, and I especially thank you for the opportunity to appear now. My 10-, 6-, and 3-year-olds will be abandoned if I don't catch the last plane. And I would also offer my thanks to you for moving it forward here today.

The Bonneville Power Administration is a self-financed Federal agency, as you well know. I believe we do not receive appropriations. We are a separate fund of the U.S. Treasury that is funded through the sale of power and transmission revenues. We are expected to cover all of our expenses.

We provide 75 percent of the high voltage transmission services in the Pacific Northwest, 45 percent of the region's electric power supply. And we are directed by law to provide that power supply at the lowest possible rates, consistent with sound business principles, and to repay the Federal investment of some $7 billion that has been invested in the Northwest electric power system.

We also have a very important fish and wildlife responsibility. It is a mitigation responsibility to assure that damage done to the fish and wildlife resources of the Pacific Northwest by the Federal hydroelectric resources are mitigated. The Northwest Power Act requires also that we provide equitable treatment to fish and wildlife resources as equitable compared our operation of the Federal power system. And we take these responsibilities extremely seriously.

The GAO has descried our fish and wildlife responsibilities and power responsibilities as inherently in conflict. There is a great deal of truth in that statement, but I don't think that one should conclude that they are necessarily mutually exclusive, either. When one operates a hydroelectric power system, there is a goal of both providing lowest cost power as possible, while also assuring that we meet our fish and wildlife responsibilities. And we seek to accomplish both. Fish and wildlife mitigation responsibilities are in fact a cost of operating a hydropower system.

Our goal is to meet all of our responsibilities, to taxpayers, to ratepayers, to the fish and wildlife interests in the Pacific Northwest, as efficiently as possible. When the Northwest Power Act was passed, the Bonneville Power Administration fish program, this was back in 1979, was less than $1 million annually. Today our cash expenditures total more than $300 million annually. And when one considers the modifications to hydrosystem operations for fish and wildlife benefits, our annual costs exceed $600 million a year.

This increase in funding has created tremendous opportunities for partnerships with the region's Native Americans. Of the $300 million in annual expenditures for on the ground activities, a great deal of that goes toward what's called off-site mitigation. In fact, $139 million is off-site mitigation. This is primarily habitat improvements, investments in hatcheries, and other sorts of things.

There are two critical points I want to make about this effort, and they're made in these charts I brought with me. Funding for these efforts has increased steadily for the last 20 years since the Northwest Power Act provided us this responsibility. And as one can see, we have steadily increased funding to the point where we

are now in excess, if you include both the capital and the expenses and excess, of $140 million a year.

I'd also like to make the point that our funding has increased in the last three years as well. We have not reduced funding. When compared against the actual levels in fact, our actual levels continue to increase.

If we move to the second chart, you'll also see that funding provided to the region's tribes has been a substantial component of our overall funding. The red bars here are the amount of funding being provided to the region's tribes as compared against the yellow being to the States, the blue being Federal entities and the purple being other. A substantial amount of our funding is going to tribal entities within the Pacific Northwest.

These funding efforts have produced substantial results, from my perspective. In the last three years, in 2001, we had the highest number of returning salmon in the Columbia Basin since the Bonneville Dam was built in 1938. And 2002 was the second highest number of returning salmon, and it appears that 2003 will be the third highest. Certainly ocean conditions are a significant contributor to the number of returning salmon. But we have had good ocean conditions in the last 60 years. I believe that the investments being made, not just on the part of the hydropower system, but investments across the region, by the region's tribes, by State agencies and others, are beginning to show substantial benefits.

Now, as you may have heard, the Bonneville Power Administration is suffering a financial hangover from the 2001 west coast energy crisis and this year's drought. This has created a substantial challenge for us. In fact, in 2001, we put in place a 46 percent rate increase, and earlier this year, we forecast the need for further rate increases for fiscal year 2004, and in fact are in the midst of a rate case to make those decisions. But it is not a foregone conclusion that in fact we will have rate increases, particularly the magnitude that we propose, which is in the 15 percent range. The decision with respect to rates is still dependent upon the management actions that we take between now and then.

As one wise person said to me recently, the financial challenges have also created opportunities for us to be able to challenge our organization to improve our operations and to find more cost effective ways of accomplishing our mission. The current financial crisis has created just such an opportunity for us. We have been revisiting our budgets across the board, not just in the fish and wildlife area, but in every single program that we operated, and challenging all our management practices. This review has led us to conclude that we can do better in terms of managing our fish and wildlife efforts.

First, we have concluded that we should not spend more than the budgeted amounts for this year and for future years, $139 million, and that we have the opportunity to carry out our obligations within that budgeted level. We're also in the process of reforming our contract management processes to assure that we're accomplishing our fish and wildlife responsibilities in the most cost effective manner.

This reform process has five key elements. First, to simplify our current contracting processes and contracts for both our contractors

and for BPA. We believe this will address some of the issues that you've heard here today from some of the region's tribes.

Second, to implement standard business practices and provide a more consistent approach to our contracting. Again, this should help to address some of the issues that you've heard from tribes here today.

Third, to provide clear accountability for achieving measurable performance based results.

Fourth, to provide improved financial information in order to assure that we can manage this program to budget.

Fifth, to reduce Bonneville's administrative overheads.

Mr. Chairman, we are working with the regional parties to assure funding is in budget and that our contract perform elements will be implemented within the next year. Just to be clear, as we've gone through this effort, Bonneville has not terminated, breached or abrogated any contracts, and we do not intend to do so.

I would also say though that our financial problems have created some real challenges for us. And we had to make a number of decisions earlier this year that were rather abrupt. I regret the fact that we had to make those decisions in that manner, and one of our goals is greater outreach to the region's tribes to improve consultations, et cetera. We needed to take those actions because our financial situation as quite severe. In fact, we had a significant concern about maintaining liquidity throughout the course of the year, just to be able to pay all of our bills. But having said that, it is not our goal that the actions we took earlier this year would become standard business practice for us. We can and will do better with respect to working with the region's tribes.

Mr. Chairman, frequently we get requests for increased funding and/or more predictable funding for the wide variety of programs that we support. We also get requests for more stability with respect to our rates. Our goal when these requests come in is to return to our statutory roots to determine what are our obligations and are we achieving them in the most cost effective manner. With respect to fish and wildlife funding, we have recently expressed a willingness to create a more predictable funding stream for fish and wildlife activities, again in response to tribes and other agencies that we work with in our region.

But first, we believe we need to define our obligations so we can understand where the goal line is, and to create assurances that we're seeking the most cost effective approach to crossing that goal line.

In conclusion, let me make four points. BPA funding for fish and wildlife activities is steadily increasing, despite the financial difficulties that we have incurred in the last year. Tribes are a significant partner in this effort.

Second, we are instituting reforms in contract management which should simplify and clarify our contractual policies, while enabling us to carry out our fiducial responsibilities to the region's ratepayers and to the Nation's taxpayers.

Third, we're anxious to better define our ultimate statutory and treaty obligations in order to find a path to meeting those obligations that creates more predictable funding from BPA.

And one final point if I could, with respect to a point that was raised earlier. The issue was raised as to whether Bonneville's initial mission was to electrify rural America. There were a number of issues that led to the formation of Bonneville Power Administration. Electrifying rural America was among those. But another critical point was to create a yardstick for competition, to provide power at a cost basis to the region's ratepayers that would lead to the lowest cost possible, not just for those who received the benefits from the Bonneville system, but by creating competition in the marketplace with lower rates for those who didn't directly receive the benefit from that. We take that mission extremely seriously as well, and believe that our goal is not to drive our costs up as close to market as we can get, but to keep our costs as low as we possibly can while meeting all of our obligations.

With that, Mr. Chairman, again, I am greatly appreciative of your allowing me to move up in the order here, and I'm open to any questions that you or the members of the panel may have.

[Prepared statement of Mr. Wright appears in appendix.]

Senator INOUYE. Senator Smith.

Senator SMITH. Thank you, Mr. Chairman.

Steve, thank you for your testimony. I wonder if there aren't different expectations about how much money is supposed to increase every year. And I wonder if for BPA the memorandum of agreement between Federal agencies, does it require a certain amount or do you think people have different expectations about what you ought to be doing?

Mr. WRIGHT. Senator, there are in fact very different expectations that are out there. The memorandum of understanding that was entered into in 1996 expired in 2001. There are two issues with respect to that. First of all, there are some expectations with respect to carryover funds, funds that were not spent in that period. And we have had disagreements with the region's tribes about what the specific language says in those agreements. Our view is that we have completely complied with that agreement and provided all the funding that was required by that agreement.

Beyond that, there are expectations now in the post-2001 period with respect to the level of funding that we are providing. Under the old MOA, we provided $100 million a year to the direct program, the program that I've described here. Under our new rates, we are providing $139 million a year, a 40-percent increase in funding. Despite that, the Northwest Power Planning Council created a lengthy process to look at potential projects that could be funded, and had approved a number of projects which, when we added them up, added up to a lot more than $140 million a year.

So expectations were created in that process that we would provide more money. Given our current financial circumstances, we are not able to provide more than the budgeted amounts. So yes, there has been a problem with respect to these different expectations. And we have some who say we've reduced funding, when our view is, we've actually increased funding compared to the budgets.

Senator SMITH. And your point in your charts I think are telling us that every year you have increased funding. Is that accurate?

Mr. WRIGHT. With respect to the direct program, the program that the tribes use, yes, that is accurate.

Senator SMITH. You noted that we've had the first, second and third largest salmon returns in recent history since 1938.

Mr. WRIGHT. Yes.

Senator SMITH. What percentage of those returns are from hatchery fish and which are from wild fish?

Mr. WRIGHT. That's a question that's probably better directed to Mr. Lohn. But I understand a substantial portion are hatchery fish, the great majority.

Senator SMITH. The great majority.

Mr. WRIGHT. Yes.

Senator SMITH. And you have ongoing consultations with the treaty tribes, and I think clearly from what I'm hearing from different testimony, we could maybe boost those up and get rid of some of the different expectations so people have a little clearer understanding of what they can reasonably expect?

Mr. WRIGHT. I think that's right. I think that clearly a challenge for us is to improve the consultation process with the region's tribes. If I could, though, I'd like to use this as an opportunity to make a plea in that regard. There are 13 Columbia Basin tribes within the Columbia River basin, for which we have relationships over fish and wildlife issues. But there are 54 tribes within the service territory that we operate within.

One of the difficulties is that there are a lot of things that folks want to talk with us about. Attempting to do all of that through formal consultation processes is extremely difficult, especially when we're talking about a river that continues to flow downstream, no matter what we might try to do to stop it. So there are ongoing decisions every day that people want to be involved in. And finding a way to be able to manage and have a reasonable dialog with the region's tribes in a timely manner has proven to be a great challenge for us.

I recently spoke to the AT&I regional conference up at Bellingham, and at that, I made a plea to them and said, we need to find a way to develop more informal mechanisms, to be able to talk with each other. Because if we count on formal consultations only to be able to work through this, my guess is we're not going to be successful. It just is not adequate time.

Senator SMITH. You may not be able to put a percentage on this, but you've indicated that much of the money that goes through and to the tribes for different projects, I assume many of those are hatchery projects. And yet you've also noted that improved ocean conditions are perhaps accounting for these large returns of salmon. Can you quantify? What's giving us the best results that we're enjoying right now? Is it hatcheries? Is it improved riparian areas? Is it ocean areas? Do you have any sense of that, so we can say to the taxpayer, the ratepayer, this is money well spent?

Mr. WRIGHT. I would turn to Mr. Lohn for specifics with respect to the biology on this. There is no doubt in my mind, though, that there is a substantial contribution both made by the man-made investments in this system, as well as ocean conditions. Again, just looking at the history of the runs here, the largest returns in 60 years would suggest that, we've had good ocean conditions the last 60 years. Something that we're doing now is making a difference.

Unfortunately, I'm not able to quantify to what extent we're making a difference. But I'm a believer that in fact this is not a mission we should shrink from. We should in fact be making investments in fish and wildlife resources. We have a responsibility to mitigate for damage done by the Federal hydroelectric resources. Our challenge is to do it in the most cost-effective way possible.

Senator SMITH. I believe we need to keep making those investments, also, and obviously a lot of us who are ratepayer and taxpayers in the Bonneville region, we hope it's all being spent well and it's resulting in this. So we're looking to you to assure us that it is money well spent and that it is making a difference and that we can in some ways quantify it for the people that are very interested in this.

Mr. WRIGHT. One thought on that, Senator. Our research, monitoring and evaluation efforts are now funded at an excess of $30 million a year. We are putting a substantial amount of money into RM&E. I want to compliment Bob Lohn and NOAA fisheries. We've been able to take advantage of the new research that's out there to begin to modify some hydrosystem operations, to try to assure that when we do spill and flow and those sorts of things, we're targeting the things that create the greatest benefit. We're also creating some opportunities to be able to reduce costs for ratepayer while increasing benefits for fish through using that research data. NOAA Fisheries really deserves a compliment for the work they've done in that area.

Senator SMITH. Thank you, Mr. Chairman.

Senator INOUYE. Thank you very much.

Mr. Wright, the committee, together with Senator McCain, will be sending you written questions. We look forward to your responses.

Mr. WRIGHT. Thank you very much.

Senator INOUYE. Thank you very much, and I hope you make the flight.

And now may I recognize Mr. Bolton.

**STATEMENT OF HANNIBAL BOLTON, CHIEF, DIVISION OF FISH AND WILDLIFE MANAGEMENT AND HABITAT RESTORATION, FISHERIES AND HABITAT CONSERVATION, UNITED STATES FISH AND WILDLIFE SERVICE**

Mr. BOLTON. Thank you, Mr. Chairman and members of the committee. I too wish to express my sense of appreciation for allowing me to move up on the witness list.

About 33 years ago, I was happy to state that I was the captain of my ship, and my wife quickly followed behind me that she was an admiral. So if she gave me a direct order to be home at a reasonable hour this afternoon, I really am especially appreciative at being allowed to move forward.

I would also like to thank you for the opportunity to provide testimony from the Fish and Wildlife Service regarding the tribal fish and wildlife management program in the Pacific Northwest. I'm Hannibal Bolton, chief of the Division of Fish and Wildlife Management and Habitat Restoration, Fisheries and Habitat Conservation, U.S. Fish and Wildlife Service. My written testimony has been submitted for inclusion in the record.

We greatly appreciate the committee's interest in our Native American programs. The Service has a long history of working with Native American governments to manage fish and wildlife resources. In fact, in 1872, the McCloud Wintu Tribe, at the northern end of Sacramento Valley, played a key role in establishing the Nation's first salmon hatchery along the McCloud River in the Pacific Northwest.

Since that time, the relationship between the Service and the tribes has expanded through many of our programs. In 1994, the Service's fisheries program took a major step forward by developing and adopting a Native American policy. The goal of this policy is to help us accomplish our mission, while concurrently participating in fulfilling the Federal Government's responsibilities to assist Native Americans in protecting, conserving and utilizing their reserved, treaty guaranteed, statutorily identified trust assets.

Through this policy, the Service is committed to providing timely and adequate communication and cooperation to tribes to provide fish and wildlife management expertise, training and assistance, and to respecting and utilizing the traditional knowledge, experience and perspective of Native Americans in managing fish and wildlife resources. The Service takes its responsibility seriously and works closely with our Native American partners to further the well-being of tribes and the long term health of our shared resources.

This afternoon, I'm going to outline some of the programs and initiatives the Service utilizes to achieve these goals. First, I'll speak about the tribal grants program. Two of our newest grant programs that will directly benefit the tribes are our tribal wildlife grants and landowner incentive programs. The Service is eager to begin implementing these two new grant programs, because they will significantly increase the funding for Federal wildlife grants on tribal lands.

The final guidelines for both the programs emphasize sustainability of fish and wildlife populations, habitat conservation, partnership, and enhancing capacity. These programs will not only enhance conservation of fish and wildlife species and their habitats, but will also strengthen Service-tribal relationships as we work together to address conservation concerns on and around tribal lands in the Pacific region and the rest of the Nation.

The Service and Indian tribes share a common goal of conserving sensitive species, including threatened and endangered species, migratory birds and the ecosystem on which they depend. Through government-to-government protocols the Service strives to significantly include affected tribes Endangered Species Act, dam licensing and relicensing provisions of the Federal Power Act, and Migratory Bird Treaty Act processes. The Service solicits tribal input on not only the species in question, but also relevant tribal cultural and religious values, hunting, fishing and gathering rights, treaty obligations and potential impact on tribal economies. The Service has also had a collaborative process in place for establishing tribal migratory bird hunting seasons.

Through its habitat conservation programs, the Service investigates, evaluates and makes recommendations on Federal water resource development projects, primarily those constructed and

funded or licensed by the U.S. Army Corps of Engineers, Bureau of Reclamation, Natural Resource Conservation Service, and Federal Energy Regulatory Commission.

Our partners for Fish and Wildlife Program place a high priority on working in partnership with tribes to restore fish and wildlife habitats. We implement restoration projects both on and off tribal land in concert with various tribes in the Northwest. Projects include wetland, riparian, in-stream and grassland restoration. We recently established a Fish and Wildlife Program agreement with the Kootenai Tribe of Indians in northern Idaho. The focus of the restoration activities will be on bull trout aquatic and riparian habitat restoration. The Partners program is also working actively with other Pacific Northwest tribes.

Some other examples of habitat based programs in our fisheries program are the Fisheries Restoration and Irrigation Mitigation Act and our National Fish Passage program, which provides cost-shared funding for fish screen and fish passage improvements on tribal land, State, Federal and private lands.

The Service works closely with tribal partners to further the well-being of the tribes and the long term health of our shared fisheries resources. For example, our fisheries resources offices work closely with tribes to assess fish stocks and assure fair and equitable sharing of fish harvests, as well as providing assistance on many important habitat and species restoration efforts.

The Service implements or administers a number of national fish hatcheries mitigation programs to support tribal fisheries both on and off reservation lands. It is important to highlight that tribes are consulted on the management of national fish hatcheries. Our fisheries resources offices work cooperatively with tribes and other partners to gather information for management decisions at national fish hatcheries, to minimize the risk to wild and listed fish species.

The Service also provides funding and technical assistance to accomplish hatchery reform of tribal and non- tribal hatcheries in western Washington. The hatchery reform project is systematic, science driven redesign of hatcheries to meet two goals: To help recover and conserve naturally spawning salmonid populations; and to support sustainable salmon fisheries through hatchery production without negative effects on wild salmon. The Service provides funding to the Northwest Indian Fisheries Commission and its member tribes in western Washington to improve hatchery practices, and to make structural improvements at tribal hatcheries to meet the goals of hatchery reform.

Tribes are considered co-managers of both listed and unlisted salmon resources. The Service works to ensure tribal harvest rights are upheld. For example, we work closely with tribes to implement fish management plans on the Columbia River in order to provide a management framework within which parties of the *United States* v. *Oregon* may exercise their sovereign powers in a coordinated and systematic manner, in order to protect, rebuild, and enhance Columbia River fish runs above Bonneville Dam, while providing harvests for both treaty Indian and non-Indian fisheries. The primary goals of the parties are to rebuild weak fish runs to full productivity and fairly share the harvest of upper river runs

between treaty Indian and non-Indian fisheries in the ocean and Columbia River Basin.

Mr. Chairman, in closing, I would like to restate that the Service is committed to providing timely and adequate communication and cooperation to tribes to providing fish and wildlife management expertise, training and assistance, and to respecting and utilizing traditional knowledge, experience and perspective of Native Americans in managing fish and wildlife resources. In order to accomplish this, we are committed to developing good working long lasting relationships and mutual partnerships with Native American governments.

Mr. Chairman, this concludes my remarks. I would be pleased to answer any questions.

[Prepared statement of Mr. Bolton appears in appendix.]

Senator INOUYE. I thank you very much, Mr. Bolton. The committee will be submitting questions in writing, and we look forward to your response. Thank you, sir. Hope you make it.

Mr. BOLTON. Thank you, sir.

Senator INOUYE. And now may I call upon Mr. Moon.

**STATEMENT OF MEL MOON, NATURAL RESOURCES DIRECTOR, QUILEUTE TRIBE**

Mr. MOON. Thank you, Senator.

For the record, my name is Mel Moon. I'm the Natural Resources Director for the Quileute Indian Tribe in Washington State. I'm also a commissioner with the Northwest Indian Fisheries Commission. I serve on several panels, one of which is the Marine Fisheries Advisory Committee, which deals with national fisheries and NOAA fisheries. Also, I've recently been appointed to the Protected Areas National Committee, which is going to hold its first meeting here in about 2 weeks.

I also am the president of the American Fisheries Society's Native Peoples section, an opportunity that I've had for 2 years and actually, Hannibal was the previous chairman before me.

I wanted to talk about the Indian Fish and Wildlife bill in particular, and reference our support for the bill that would have an association with some caveats that we feel very strongly about. First of all, we would be supportive of an Indian fish and wildlife bill that addressed government-to-government roles of Federal agencies and affected tribes, as well as developing a standard of consultation and a process for achieving co-management cooperation in natural resources.

We recently had an experience with the Northwest Forest Plan in the Pacific Northwest, dealing with issues of the spotted owl and Federal lands policies. At that time we were engaged in a process known as watershed analysis. We were able to have a pilot watershed analysis project in the Quileute watershed, brought all the parties together, had scientists brought together and did a multiple modules list.

In the end, our experience was that we were able to build partnerships, to build trust. We had a lot of suspicions about what was causing these issues. Some people thought that the logging was a matter of erosion and high temperatures, some people thought it was high fishing rates, some people didn't know what to think

about tribes. They were a mystery to them. We were able to dispel all these myths and come to an understanding of trust. And we have been able to utilize that plan for many years thereafter.

This was our first experience with what I would call ecosystem based management approaches. We believe that that particular kind of approach is a good one and should be applied in a number of natural resources forums. In particular, we see more emphasis now on looking at the ocean in terms of how we're going to protect the resources within that and the functions within that to maintain sustainability.

We have several cases I wanted to bring to your attention in regard to ground fish. We made mention of it in earlier testimony. Essentially, for the Quileutes, we have a fishery that takes place within a localized area. We're not necessarily able to move around very far. The species that we have a concern about, in particular, there's 82 that are managing to coast, there's 9 species that are listed as over-fished.

We're engaged in council process in trying to advocate for our fisheries as well. What we're finding out is that there are a lot of unanswered questions which will require us to interact with Federal agencies and State agencies as well. In particular, we have three particular issues, one dealing with a species known as yellow eye, which is a very long-lived rockfish species. This particular species produces a high abundance of fish when it's larger, when it's older, as opposed to the smaller fish. One of the key elements of management is that we need to have selective types of fisheries, we can't have just take-all fisheries.

We have a tremendous bi-catch issue happening on the west coast. It's a major concern that we need to interact with. We have for example a halibut fishery that is targeted at 1.6 million pounds of halibut for three States, Washington, Oregon and California, as well as the 11 tribes, which have a 50 percent treaty right. Yet we are faced with a harvest of 2 million pounds of bi-catch by other industries such as the trawl fishery. This is totally unacceptable.

We have a sable fish fishery, black cod fishery as well, as 460 to 750 metric ton each year. In discussions with the NOAA fisheries, we learned that as much as the 750 metric tons or greater is caught in bi-catch. These are examples of issues that we must wrestle with as tribes to maintain sustainability in our areas.

In conclusion, we would support an Indian fish and wildlife bill that would address government-to-government consultation and define roles. We would also support standards and communications and a process for achieving co-management cooperation in natural resources. And lastly, we are firm believers that ecosystem based approaches is a unique way to approach management that brings the parties together. We would advocate to have that implemented in marine fisheries.

That would conclude my remarks. Thank you.

Senator INOUYE. I thank you very much, Mr. Moon.

May I call upon the Director of Natural Resources and Environment of the U.S. General Accounting Office, Jim Wells, accompanied by Frank Rusco. Mr. Wells.

**STATEMENT OF JIM WELLS, DIRECTOR, NATURAL RESOURCE AND ENVIRONMENT, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY FRANK RUSCO, ASSISTANT DIRECTOR, APPLIED RESEARCH AND METHODS**

Mr. WELLS. Thank you, Mr. Chairman and members of the committee. We too are pleased to be here today to discuss Bonneville's role in these important issues. Accompanying me today is Frank Rusco, who's leading our current work.

Within the last several months, GAO has received two requests from a chairman in the House and from your committee, Mr. Chairman, to examine circumstances involving the operations of Bonneville. Is Bonneville having financial difficulties? Yes. Are decisions being made that may reduce expenditures on fish and wildlife? Yes.

We just started our work. So much of what we have to say today is a he said, she said type scenario. But we are continuing to work. My full statement addresses five areas, and I'll just quickly touch on each of those five areas right now. Bonneville is required by statute and by dozens of treaties, court cases and presidential directives to protect and enhance fish and wildlife. Equally important, Bonneville must ensure economic and reliable power supply. Unfortunately, these two goals are inherently in conflict at times, and they are going to require not only tradeoffs in the past, but maybe more tradeoffs in the future.

Second, Bonneville calculates that it's spent over $1.1 billion in support of fish and wildlife programs from 1997–2001. In addition, another $2.2 billion is estimated by Bonneville in foregone revenues, because it was able to spill water over the dams to augment the flows, enhance fish survival, instead of using it to generate power. To date we've not audited those figures, but we'll be glad to take a look at those.

Third, is the financial crisis. Cash reserves have clearly fallen from $800 million to $188 million since the year 2000. Bonneville is estimating that its costs for the current 2002–2006 rate period will be about $5.3 billion higher than the previous 5-year rate period that they were operating, and revenues will be about $1.4 billion less than what they even projected as late as 2001. To avoid defaulting on Treasury debt and to cover the costs which is required by law, Bonneville has increased its power rates by over 40 percent since 2001, and they are considering further increases.

Mr. Chairman, Bonneville has plans to reduce costs and it hopes for favorable water conditions. It hopes for favorable price conditions that will enable it to increase its revenues from power sales in the future to help them out of this financial crisis. I have to stop a moment, Steve Wright just a few moments ago correctly pointed out the causes for the financial crisis they're in, and he mentioned were a result of the drought, some tough years, and the west coast high energy prices that they were dealing with.

But as auditors, we also must point out that they did some of this to themselves. Clearly, they signed contracts to deliver electricity, more electricity than what they had. They bought high, they sold low. They guessed wrong on prices at times. Their internal costs are escalating and they're attempting to look hard at what it's going to take to lower their internal costs. Mr. Chairman, the bot-

tom line is the financial crisis, they took some risks and they lost. And now they're working their way out.

Fourth, some recent management actions by Bonneville appear to have adversely affected funding. That's true. For example, a change in Bonneville's approach for budgeting fish and wildlife expenditures recently resulted in the loss of about $40 million, some of which the tribes talked to today. Bonneville officials, and you heard Steve Wright mention this today, they agree this is happening and perhaps it was an abrupt change that could have been managed better and they're going to look toward better consultation in the future and help to prevent that from happening again.

We are aware that Bonneville has plans to put on hold its acquiring land to be used as habitat for fish and wildlife. To be fair to Bonneville, they are reaching out to the power planning councils and they're reaching out to their constituents, trying to discuss in this era of financial crisis, where do we go from here, where do they go from here, and how to prioritize these purchases in the future.

Fifth, for all the reasons that I just talked about, Bonneville and its constituents face challenges ahead. Bonneville markets power and it uses part of that revenue that it gains from consumers for the benefit of fish and wildlife. Unfortunately, the hydro system that they operate in is not dependable, in terms of it has unpredictable water supply and that in turn makes it difficult to match supply and demand, especially in times of drought.

What is predictable and what is unchanged is that Bonneville does have a responsibility to pay back its debt and it must recover its costs. And to meet these dual roles, Bonneville has signed many contracts to provide power, it's made agreements regarding fish and wildlife obligations. These actions are affecting taxpayers, the consumers, the Indian tribes and the fish and wildlife that literally will have life and death consequences.

Mr. Chairman, there is a risk of oversimplifying this as we continue to look at our work at your request. Bonneville may be overcommitted and faces many additional difficult challenges as its needs for fish and wildlife compete with increasing power demands for a finite supply of water. In closing, Mr. Chairman, clearly the future is uncertain. But one thing is very clear: Bonneville and its numerous stakeholders are going to be faced with some pretty potentially painful decisions in the coming year. Senator Smith, as you mentioned in your earlier remarks, the wisdom of Solomon may be required.

The outcomes of these decisions that are being made clearly are going to affect the health, the viability of not only the fish and wildlife populations, but the way of life of Northwest residents who have benefitted and need to continue to benefit from Bonneville's electric power. Given the competing priorities that involve making these tradeoffs, this is where GAO is today as we continue our work. We continue to support good public oversight of decisions that are being made, and we will continue to pursue the work that you've asked us to do, and we will report back to you.

We as auditors also care about making sure that when Bonneville makes these commitments and signs the treaties and gives the

agreements, that the future checks that they write, they do not bounce. No one wants a bad check.

Mr. Chairman, that concludes my brief remarks.

[Prepared statement of Mr. Wells appears in appendix.]

Senator INOUYE. Thank you very much, Mr. Wells. When do you think that analysis and study will be available to the committee?

Mr. WELLS. Mr. Chairman, we are in receipt of the request. We are currently in the process of pulling together a team. We have a team that's already in place in Bonneville that we're doing work on the financial crisis. Our goal is to tap into the existing team to get that work done. We'll be consulting with your staff in terms of the design of that work and how long it may take. But it may take several months, yes, sir.

Senator INOUYE. I have just one question, I'd like to submit the rest to you for your consideration. Does Bonneville have the discretion not to fund "reasonable and prudent alternatives" recommended by NOAA to avoid jeopardy to an endangered species?

Mr. WELLS. I think Mr. Steve Wright testified about the importance of honoring existing contracts. They have every intent to honor what they have signed. If the inference of the question, are these something that have not been signed to date? Because I think they are in a situation where they are very carefully looking at what future obligations they may take on.

Senator INOUYE. I believe this is a statutory obligation. It's not a contract. I just wanted to know if Bonneville has the right, discretion not to fund reasonable and prudent alternatives that NOAA may recommend.

Mr. WELLS. Mr. Chairman, I would love to consult with my legal staff and attorneys and make sure we have a correct answer to that question. We'll be glad to supply it for the record.

Senator INOUYE. And we'll submit the rest of the questions.

Mr. WELLS. Thank you, sir. We'll be glad to answer those.

Senator INOUYE. I thank you, sir.

Mr. WELLS. Thank you.

Senator INOUYE. And now I'd like to call the Regional Administrator of the National Fisheries Service of NOAA, Bob Lohn; and Director of the Office of Energy Projects, Federal Energy Regulatory Commission of Washington, Mark Robinson. I thank both of you for waiting this long. Thank you very much.

## STATEMENT OF BOB LOHN, REGIONAL ADMINISTRATOR, NATIONAL FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. LOHN. Thank you, Mr. Chairman and the honorable members of the committee for inviting us.

In the interest of time, with the permission of the chair and the committee, I'd like to file written comments and simply touch upon a few headlines and stand open for questions.

Senator INOUYE. I can assure you that the written statement will be made part of the record.

Mr. LOHN. Thank you, sir.

Good afternoon, Mr. Chairman, members of the committee. We were asked to comment, Mr. Chairman, on the types of interactions

we have with the Indian tribes in the Pacific Northwest, and I'll focus on that. There are approximately 30 tribes in the Northwest that have trust and treaty rights that include fishing opportunities. It is with those 30 tribes that we have our most frequent contact.

We recognize and take very seriously the fact that we have a trust and treaty obligation to them. We try to reflect that obligation not only in dealing with tribes but in dealing with others, and making it clear that as part of the U.S. Government, we need to reflect and take into consideration tribal viewpoints in our dealings throughout our activities.

We attempt to maintain ready communication and coordination with the tribes in our region. We do that daily. There are probably every day a series of issues that my staff will be dealing with with the Northwest tribes. We expect that the tribal viewpoints and tribal interests will be treated respectfully and responsibly in all of our dealings. We maintain not as a sole point of contact but rather as a policy level assurance that if contact does not work well at the staff level or if there's need for a new type of input, a tribal liaison and have done so since the year of 2000. That's an additional, not a primary but a supplementary way of making sure that we address our tribal issues.

We deal with tribes daily on issues such as research, fisheries, not only salmon fisheries, but also groundfish management, hydropower and hatcheries. With the two major tribal groups, the Northwest Indian Fisheries Commission and Columbia River Inter-Tribal Fisheries Commission, we have semi-annual policy level meetings in which I and my senior staff meet with our counterparts on the commissions. We've found those to be not just courtesy visits but serious discussions of the major issues we are facing. We cannot always get to agreement, but we at least attempt to understand where one another is coming from, what's trying to be achieved, and to the greatest extent possible, we try and include that view point and reach resolution within what we do.

In implementing the large biological opinion that governs the operations of the Federal Columbia River power system, there is a lengthy and complicated oversight group. At each stage, there is tribal involvement. In particular, while there is a series of technical committees that provide advice, this is overseen by the implementation committee, which also has participation by State, Federal, local utility, and tribal interests. Just as an example, not only do we take this participation seriously, but last year there was a request that this committee spend some time in the field, not just in Portland where the Federal agencies may be headquartered. So there was a meeting scheduled in Boise to better bring the committee close to the issues associated with the Shoshone Bannock and Shoshone Paiute tribes and Nez Perce Tribe. And similarly, the committee met near Grand Coulee to bring the committee more closely in contact with the issues of the Upper Columbia United Tribes.

We routinely share documents and incorporate informal comments from the tribes in all that we do. In fact, I can't think of an instance where we would be making a major decision affecting fish in the northwest and we would not be consulting in advance and sharing documents with the tribes. Their advice is important and

we do this not just as a courtesy, but because they are valued co-managers.

We are also able to provide a certain amount of funding to the tribes and to the Pacific Coast Salmon Recovery Fund. In the year 2003, in fiscal year 2003, Congress appropriated $90 million for that fund. It's shared among four States. And also among tribes, the Pacific Coast tribes will receive this year $8.9 million, the Columbia River tribes will receive $3 million. That will cover a variety of areas, including habitat protection and restoration and watershed planning.

There's also in place, Mr. Chairman, a secretarial order from 1997. While the order was adopted with much fanfare, and then seemed to disappear from view perhaps at the Washington, DC level, for me it is a reality that I try to take into account in our daily work. It's an order that covers American Indian tribal rights, Federal tribal trust responsibilities and the Endangered Species Act. We implement it on a regular basis in each of our consultations.

We've also attempted to take that order further and develop on a pilot basis some sort of implementation agreement. So all the parties that we deal with are familiar with exactly what the expectations are on each side, and we do our best to meet them. That's in a pilot stage in western Washington. It's been that way for approximately 6 months. It looks like we've got about the right framework and assuming that that framework is successful, we'll expand that to all of our tribal relations.

Finally, Mr. Chairman, we've been talking a lot about our side of the partnership. But I wanted the committee to hear and to know that this is a real partnership, and the tribes are full partners who bring real contributions on which we rely in conducting our business. We benefit from them, we meaning not just NOAA fisheries but I believe the U.S. Government generally.

I'd like to highlight just a few of those contributions before we close. First of all, the tribes, as mentioned by Professor Wilkinson, over the years have developed a very substantial technical capability. They bring important, sometimes unique technical expertise and we often rely on this expertise. Sometimes it's the sole source for this kind of expertise.

For example, on the role of hatcheries, a contentious scientific issue, some of the most thoroughly documented, most important scientific work being done is being done within tribal hatcheries as part of tribal programs. And it's without peer in the world.

Second, the tribes bring a deep knowledge of local habitat and opportunities. Often there is a successful and longstanding working relationship with other local stakeholders. And as we move out from protection into restoration, it's out of this relationship that we can lay firm sub-basin plans and a good understanding for what we need to do to achieve recovery.

Third, the tribes bring a long term perspective that embraces comprehensive restoration and not just a quick fix. That's important, because at times we will be focused on the crisis of the moment and having a longer perspective is invaluable.

And finally, as the Committee no doubt has heard before, Mr. Chairman, the tribes bring a wealth of traditional knowledge,

which can give good guidance even in those places where science has nothing to say. And I am grateful for that guidance.

So Mr. Chairman, that concludes my prepared testimony. Thank you again for this opportunity to appear.

[Prepared statement of Mr. Lohn appears in appendix.]

Senator INOUYE. I thank you very much, Mr. Lohn. Now may I recognize Mr. Robinson.

**STATEMENT OF MARK ROBINSON, DIRECTOR, OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION**

Mr. ROBINSON. My name is Mark Robinson, Mr. Chairman, and I'm the director of the Office of Energy Projects at the Federal Energy Regulatory Commission. Our office certificates interstate natural gas pipelines, authorizes liquid natural gas facilities, and more importantly to this committee, it licenses hydroelectric projects. Specifically, we're responsible for about 1,600 hydroelectric projects across the country, not only the licensing but also their administration and safety.

Personally, I've been involved with licensing hydroelectric projects and their administration for over 25 years now. I've watched the licensing process change through the years to become more and more open, more and more collaborative. We continue that process now.

I think what I'd like to do, as briefly as possible, given I think I may be the last person to testify today, is to touch on the licensing process and then spend just a couple of minutes talking about section 511 of S. 14. First of all, the tribal involvement in licensing is integral. We have it from the very moment that a license is contemplated until the time the license is issued. I'd like to just briefly run through how the tribes are involved.

We start with pre-filing. That's prior to the application being filed with the Commission. One of the first things that happens is an information package is prepared and provided to any tribe that would be affected by the licensing of that project. This occurs in many instances around, I'd say about five years prior to the license expiring if it's a relicense, and about three years prior to an application being filed with the Commission. Once that application package is available to the tribes, the tribes can comment on it, give us any impression of any concerns that they may have with that project.

Then there's a meeting held with the tribe. Again, this is all before an application comes into the Commission. That meeting is to further explain what the project is about and what relicensing is going on.

Then there's an opportunity for the tribes to request studies that they would like to see performed to support the license application, and reasonable studies that the tribes request are in fact required by our regulations to be performed. After that, we have a draft application that's provided to the tribes. Then finally, comments on that draft application, if they discern any type of disagreement between the tribes and our applicant, there is a requirement that our applicant try to resolve those issues with negotiations with the tribes.

That all occurs prior to the application being filed, pre-filing. Once the application is filed, tribal involvement continues. We notice the tribe that the application has been filed with us and we accept comments again, and we request further requests for studies from the tribes if they see a need for them. We continue that with an opportunity for the tribes to be involved in the negotiations that occur pursuant to section 10(j) of the Federal Power Act, where we try to resolve issues concerning fish and wildlife mitigation. And the tribes are welcome to participate in that as well.

Finally, we issue a draft environmental impact statement, and the tribes are requested to comment on that, and their comments are treated, then ultimately, hopefully the Commission is in a position to issue a license.

All of those steps in that process occur in what we consider our traditional licensing process. We have a second process beyond that called the alternative licensing process, which has all of those steps plus a requirement that the tribes and everybody else approach licensing in a collaborative fashion, so that there are multiple interactions among all parties throughout the licensing process.

That's not good enough. We're coming up with a new process now, in fact, in February the Commission issued a notice of proposed rulemaking that would define a new process which has been called the integrated licensing process. We are conducting development of that rule in a very open forum, and in fact had, I think, six forums across the country specifically with the tribes to take their input on how this new licensing process should be designed to best satisfy their needs.

We also identified a tribal liaison to assist them in working through this NOPR. The NOPR is out, the notice of proposed rulemaking—the final rule will be out some time this summer. But the NOPR proposes that we institutionalize the tribal liaison so that not only are all those steps laid out that the tribes can involve themselves and do involve themselves in our process, but there would be a person at FERC whose sole responsibility is to guide and help and assist those tribes in taking advantage of that process.

So we're still trying to improve how we do our government-to-government interactions with the tribes. But we've come a long way over those 25 years, and I don't think anybody can say at this point that there's not ample opportunity for the tribes to be involved and through outreach be sought to participate in the licensing process.

Moving quickly to S. 14, section 511, two things that that language, that legislation does for us to improve the licensing process. And I believe that particular legislation would improve the licensing process. First, it provides consistency. Of all the people who have the ability to dictate conditions in a license, and that includes the Department of Commerce, Agriculture, Interior, the State, and in some instances even the tribes, where they have 401 responsibilities. But for those first three agencies, Interior, Commerce and Ag, it provides a Congress-mandated criteria similar to the congressionally mandated criteria that exists for FERC in issuing licenses and including conditions. That will give us consistency of criteria

across all Federal agencies for conditions included in license, and that's important.

The second thing that that piece of legislation does is it provides accountability. Currently those mandatory conditions that come from those agencies, there is no recourse other than their inclusion in the license by the Commission. This legislation would allow for the agencies themselves, the Secretary, to review those conditions should the license applicant ask that that occur. Currently there is no accountability for those in terms of them internally being looked at in a formal process. This legislation would provide that. Nothing sharpens the pencil of one of us folks who works for the Federal Government more than knowing that somebody is going to be looking at what we do. And that legislation does that, just like it already occurs at the Commission.

Some of the things I heard today, I want to make sure people are clear that do not occur because of that language in the legislation. It does not in any way, shape or form limit the ability of the tribes to participate in the licensing process. All it does is to go to the process that develops mandatory conditions from those Federal agencies. And in fact, specifies that anyone, including tribes, can propose mitigative measures in that language. So actually there's a little additional step there for the tribes that does not currently exist.

But all those things that we talked about, I talked about earlier, would still be present, post-legislation with section 511. It doesn't in any way reduce the authorities of the secretaries. The secretaries maintain the posture of deciding which conditions go in. They have the ultimate say, nobody changes that, and that's the way it exists today.

So in conclusion, I would just like to say that we have a process that identifies at least 10 places for the tribes to be involved in licensing. I don't believe that section 511 of S. 14 would affect that. Thank you.

[Prepared statement of Mr. Robinson appears in appendix.]

Senator INOUYE. I thank you very much, Mr. Robinson. I have just a couple of questions for both of you, and I would like to submit the rest if I may.

Mr. Lohn, earlier this month, the District Court for the District of Oregon declared the 2000 biological opinion to be invalid. Assuming that this decision is not overturned, how do you anticipate that the rejection of this opinion will protect the fish stocks in the Columbia River basin?

Mr. LOHN. Senator, there is an important intermediate step, which is whether or not, the protection and restoration measures of the current opinion will stay in place or are in place during this interregnum, if you will, between the current biological opinion, which the court has indicated it will remand for further action, and the future biological opinion which will replace it. I believe, Senator, that if we continue to keep the current biological opinion in place, as a set of operating guidelines, I think that would offer the most successful protection for fish during the meantime.

The court did not throw out the opinion on the grounds that it was failing to deliver the benefits necessary to protect the fish. The court's ruling was based upon determination that the mitigation re-

lied upon, future mitigation, did not fit certain categories within a rule adopted under the Endangered Species Act. The challenge that the court laid at our door step was to see how that, if we are more specific, how that rule would apply or would we want to write a different biological opinion that would rely on different mitigation.

I think that question is open. But meantime, much of the work that's ongoing I think is important to protect fish. I'm hoping it will continue.

Senator INOUYE. How is NOAA fisheries going about the review of Chinook management plans of both State and tribes, including habitat assessment and restoration, to determine whether they comply with the 1999 habitat agreement under the Unites States–Canada treaty?

Mr. LOHN. Senator, that habitat agreement and its implementation provisions are really an open question on which we will be seeking guidance from the commission members as to what steps the commission members from the United States, what steps they feel are appropriate. I was not a party to that, I was not at NOAA fisheries when that agreement was negotiated. We'll follow the advice of the American members of the commission as to what the understanding would be.

My sense is, my understanding is, that within the next several months, that issue will be before the commission and they will give us some guidance as to the extent to which there needs to be a review. We'll conduct it according to those guidelines.

Senator INOUYE. Mr. Robinson, on section 511 of the Senate Energy Bill, I gather you do not agree with Professor Wilkinson's assessment.

Mr. ROBINSON. No, sir; I do not.

Senator INOUYE. Now, under section 511, do State and tribes have the right to participate in an on the record hearing for alternative conditions proposed by the licensee?

Mr. ROBINSON. I think that would depend upon the regulations that Interior, Ag, and Commerce may propose to run those hearings. But I can't imagine, given the licensing processes that exist, that they would do other than that. Currently, there are no abilities for the tribes to participate in the development of those conditions as it sits today. They are strictly out of those agencies directly to the commission, and there is no process for their discussion other than the licensing process which would continue, as I said.

Senator INOUYE. How do you go about assuring that the licensees are complying with mandatory conditions?

Mr. ROBINSON. We, by statute, are required to inspect the projects and ensure their compliance with all terms and conditions, mandatory or otherwise. We have five regional offices that are staffed with inspectors that go out. We also rely on the good offices of the National Marine Fisheries Service, Fish and Wildlife Service and others, and tribes, to report any instances of non-compliance, in which case we investigate and have the ability to fine, which we have done.

Senator INOUYE. So it is your opinion that section 511 does not in any way do jeopardy to the trust relationship that exists between Indian nations and the United States Government?

Mr. ROBINSON. No, sir; I don't believe it does.

Senator INOUYE. Senator Smith.

Senator SMITH. Thank you, Mr. Chairman.

Mr. Robinson, thank you for your clarification on the section 511 issue on relicensing. I think it's very important that we know what the facts are and what rights are still in place.

Bob Lohn, you heard me ask Steve Wright about the percentage of returning salmon. I'm not sure it matters as to species and what rivers and what-not, but do you have a rough number?

Mr. LOHN. Senator, a rough number for the Columbia River basin would be on the order of 70 to 80 percent, depending on the year.

Senator SMITH. And the 70 to 80 percent are?

Mr. LOHN. Hatchery fish.

Senator SMITH. And is it the policy of the Administration to support the tribal hatcheries?

Mr. LOHN. Senator Smith, it is very much the policy of the Administration, or certainly of NOAA fisheries, to support both the hatchery experiments, provided and run by the tribes, and in general, the hatchery activities of the tribes.

Senator SMITH. Are the hatchery fish being allowed to spawn or are they being killed?

Mr. LOHN. Senator, it depends on which group of hatchery fish. Where the science seems to be emerging, sir, is that hatcheries that are using native brood stock are probably producing fish that can spawn and inter-mix very successfully with the stock in that river.

Senator SMITH. Isn't it a fact that in every year when the tribes take the brood stock they get it from last year's wild fish?

Mr. LOHN. Senator, in the best run hatcheries, and that includes many of the tribal hatcheries, that would be the case.

Senator SMITH. It's hard to understand when the proximity, the nexus between the wild and the hatchery is that close, that immediate, that somehow they're genetically inferior.

Mr. LOHN. Yes, sir; in fact, the definitive work came out within the month from the Hood River project in which there was careful track kept of not only who the parents were but what the success of the next generation was. Interesting numbers, sir. The out of basin fish, mainly hatchery fish, had a success rate that was 17 to 54 percent that of the in-basin fish. But the hatchery fish from within basin, from the native brood stock, had a success rate that varied from 84 to 109 percent of the naturally spawning stock. In other words, they were functionally identical.

Senator SMITH. This is really good news, to have this many fish coming back, and if you call them hatchery, they're one generation or literally one year removed from wild fish.

Mr. LOHN. That's correct.

Senator SMITH. My concern is to Senator Inouye's question about Judge Redden's opinion, is that it will affect tribal harvests. What does that mean for ocean harvests and in-river harvests? What's the prospect on that?

Mr. LOHN. Senator, if the judge chooses to leave the opinion in place on an interim basis while a new opinion is being prepared to respond to his concerns, then I think the effect will be little or none. If the current opinion is removed, then the outcome would be

speculative, sir, it really would be speculative. The effects are very broad ranging on all of our mitigation activities, as well as on the operation of the hydro system. We're just now reviewing them.

Senator SMITH. Well, it's a great concern for a lot of different interests. Obviously, whether you're a ratepayer or a tribal fisherman, this is an enormously consequential decision, particularly in light of the economic distress of our region and the enormous return of salmon to our rivers now. It's hard to make sense of the decision.

But I wonder if you can't give me some assurance that if it is, this opinion's thrown out or the biological opinion, does it give the Bush administration an opportunity that does not exist under the past Administration's biological opinion?

Mr. LOHN. Senator, that's correct. Our thought at this point, sir, within the time the court has allowed us, which is one year, to do as thorough a look at all of the science, all of the improvement in the runs, and complete a biological opinion that reflects that new information.

Senator SMITH. Thank you, Senator. I know we only have 5 minutes on this vote and I apologize for taking so much time.

Senator INOUYE. I would like to thank all of the witnesses for their patience and good humor. This concludes our hearing today and I thank all of you for your testimony. I will be submitting written questions, if I may, and look forward to your response.

[Whereupon, at 5:20 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

# APPENDIX

## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

### PREPARED STATEMENT OF HON. GORDON SMITH, U.S. SENATOR FROM OREGON

Mr. Chairman, I appreciate your convening this hearing to examine the challenges facing tribal fish and wildlife management programs in the Pacific Northwest.

I have long been a supporter of tribal efforts to restore naturally spawning salmon populations in the Columbia River Basin. Close to my home town of Pendleton, OR, the Confederated Tribes of the Umatilla Reservation have conducted an extremely effective salmon restoration program in the Umatilla basin.

Many of the treaty tribes have advocated the use of supplementation, which is the selective use of hatchery fish to reestablish naturally spawning runs, and I have always supported these efforts. In addition, I have sought and will continue to advocate for funds to be made available to tribes through the coastal salmon recovery program.

The last several years have been challenging in the Columbia River basin, where there are numerous salmon runs listed as threatened or endangered under the Endangered Species Act.

In 2001, we had a severe drought that affected both flows in the basin and BPA's revenues. For example, in April of 2001, the flow of the Columbia River at The Dalles was 40 percent of the historic average, taking storage into account.

In addition, in late 2000 and 2001 , we experienced extreme price volatility for electricity on the West Coast. Prices in the Northwest for spot power in April 2001 were 10 to 12 times their historic levels. While prices have now stabilized, the effects are still being felt in the Northwest.

BPA had to raise its rates over 40 percent last October, and has proposed a further rate increase for next October. Meanwhile, Oregon continues to suffer one of the highest unemployment rates in the Nation.

Last year, in the face of a projected revenue shortfall of between $800 and $900 million through 2006, BPA began to examine ways to cut costs. This included cuts in its fish and wildlife program. During this process, BPA sought input from the Northwest Power Planning Council on how to proceed on making these cuts.

This has been a difficult time for BPA, and for all of the stakeholders in the basin. Some weaknesses in the administration of the fish and wildlife program were revealed, and Steve Wright, the BPA Administrator, is working to address these issues.

I look forward to hearing from the witnesses today about the best way that the region can move forward together to ensure that salmon runs are recovered, and that treaty obligations to Northwest tribes are fulfilled.

We face a number of challenges, but I am committed to working with the tribes, the Northwest delegation and Governors, and the other stakeholders in the basin to ensure that our economy and our salmon runs can both recover.

PREPARED STATEMENT OF JIM ANDERSON, EXECUTIVE DIRECTOR, NORTHWEST INDIAN FISHERIES COMMISSION

Mr. Chairman and members of the committee, my name is Jim Anderson, and I am the executive director of the Northwest Indian Fisheries Commission. With me today are Dave Herrera, Natural Resource Manager for the Skokomish Tribe and Mel Moon, Natural Resource Manager for the Quileute Tribe. I will provide some opening comments, and Dave and Mel will follow with their perspectives. For the record, we have submitted additional written testimony to the committee.

On behalf of the Commission and our 20 member tribes from western Washington, I want to thank you for the opportunity to testify today on t6e Impacts on Tribal Fish and Wildlife Management Programs in the Pacific Northwest. I believe that the tribes have a lot to say about the subject, and I think that you will soon agree.

**Tribes and NWIFC**

The Northwest Indian Fisheries Commission was formed in 1974 by our member tribes immediately after the *United States* v. *Washington (Boldt* Decision*)* case was decided in favor of the United States and the intervening tribes. Each member Tribal Government has it's own Natural Resource Program. Typical Tribal Programs have natural resource policy managers, management biologists, enhancement professionals, enforcement personnel, technical and administrative support staff. Tribes have law codes, promulgate regulations and manage the fishery based on solid science and tribal values. And each tribal program is supported by the tribal court system. These professional programs are primarily funded by Public Law 93–638 contracts and/or Self-Governance compacts, and individual tribes often find complementary funding from other grant sources, foundations or from their own limited resources.

Today, the Commission employs over 70 individuals, over three-fourths of whom are professional resource managers. One-half of our staff have advanced college degrees, and 6 have their doctorates in such specialized fields as genetics, fish pathology, ecology, statistics and silviculture. The Commission's role is to support our Member Tribes with their efforts. We do that through technical assistance, information sharing and policy coordination. The model the Tribes have chosen to follow-tribes as primary managers, and the NWIFC in a support role-works well because it allows for the individual tribal uniqueness and particular vision, local geography and circumstances, and is flexible. There is much more to say about how we are structured, but what is particularly unique about the tribes is not our ability to organize, but rather our ability to make things happen.

Co-Management

For thousands of years, Tribes have taken Pacific Salmon from the rivers and coastal areas of the Pacific Northwest for subsistence, ceremonial and commercial purposes. Great tribal cultures flourished in our area, built substantially on and around the bounty of the salmon.

This changed in the latter one-half of the 1800's with the influx of settlers and the growing involvement of non-Indian commercial fisheries. These fishers moved off shore with increasingly sophisticated technology, and Indian fishers found themselves at the end of the line, allowed to harvest the few salmon that remained after passing though the great wall of commercial fisheries. Increasingly, after statehood in 1889, state managers curtailed and closed Indian fisheries in apparent concern over the conservation of salmon runs. In turn, tribes turned to the courts to uphold their rights to harvest, and as I mentioned earlier, the court affirmed these rights in Western Washington in the landmark *Boldt* Decision.

What Judge Boldt did, in effect, was to create a co-management framework, where the tribes were responsible for managing their one-half of the resource, and the state was responsible for managing it's one-half of the resource. Over the course of the past three decades, we have fine tuned this framework pretty well, and it serves as the institutional basis for coordinating and allocating and managing the salmon in Puget Sound and the Coast. Co-management has linked different cultures, different watersheds, different ways of managing and thereby provides a connection between the diverse scales of human and natural systems.

The salmon ecosystem encompasses both terrestrial and aquatic habitats, and extends from inland watersheds to ocean basins. Salmon know no boundaries and jurisdictions. They pass through many different property and governance regimes during their migrations.

It is important to understand that some impacts to the salmon and habitat occur as side effects of other activities, such as logging, farming, urban development and hydropower. This raises questions of how well management institutions can deal

with issues outside their purview. An effective salmon management regime must consider the full extent of the migratory ran, as well as the full suite of impacts to the resource, not merely fishing mortality.

Tribes and the state have taken steps to address this clash between the needs of the ecosystem, and the prevailing management jurisdictions by refining and institutionalizing our co-management relationship. This institutional change, supported by the treaties and affirmed by the courts, and even sometimes written into state and Federal law, has greatly improved resource management.

In effect, the tribes and the co-management authorities and process, has become the glue for making things work in the Northwest. Co-management is the integrator and the strategic systems thinking that must be in place for effective resource management.

We spend many hours and days, weeks on end, in too numerous to mention processes and efforts, all with the intent to better manage the salmon resource. From the Pacific Salmon Treaty, to the Pacific Fisheries Management Council to the Shared Salmon Strategy in Western Washington, it should be fully understood that the Tribes are not merely involved-they often times have equal places at the table. When this occurs, like the PST or the Shared Salmon Strategy, Tribes' views must be taken into account. Where Tribes are only marginally accorded respect, such as the PFMC, the process does not work as well.

We try to make co-management work for species other than salmon too, including shellfish and groundfish. For all, we bring leadership and a vision to the table, something that is often lacking in the non-Indian world. Sure there are exceptions, but as a rule, people in the know will tell you that "but for the tribes" nothing would have happened.

Tribes want to be part and parcel to all the efforts that affect salmon. and other species for which they have rights. Tribes? want to be full governmental partners-not stakeholders or afterthoughts. Tribes have the capability and technical capacity, and when combined with their policy perspective, vision and leadership, they are formidable players.

But, while our message is generally positive, not all is warm and fuzzy. In any situation where authorities are shared-in this case with the State, Canada, Federal entities (NOAA-Fisheries and Fish and Wildlife Service) and through the International Pacific Salmon Treaty, we find that there are bumps along the way.

We feel compelled to discuss these to highlight some of our concerns and to suggest some improvements.

ESA Sector Equity/Biological Opinion/Recovery

Without a doubt, one of the most awkward situations is with the Endangered Species Act. The ESA has been described as a **"pit bull"**—you never know if it is going to be your best friend, or turn around and bite you. Right now, three species of salmon are listed in our area—Puget Sound Chinook, Hood Canal/Strait of Juan de Fuca Chum and Lake Ozette Sockeye. By far, the most difficult one for us is the Chinook. This listing in 1999, has placed new and onerous requirements on the tribal harvest and hatchery programs.

Tribes often resent how NOAA-Fisheries will come down hard on tribal and State harvest and hatchery programs, while not being tough enough in the habitat arena. We call this Sector Equity, or better, Inequity.

NOAA Fisheries will say that the ESA is overrated as a habitat protection tool, but there are methods they can use to ensure that the playing field is more level. They should be required to do necessary consultations on key habitat actions, and they can carefully use the Section 9 enforcement provision as a tool to help persuade reluctant landowners to come to the table we have set for recovery planning. Without an aggressive strategy to help lead the salmon recovery process, we will not see the key landowners deal in good faith. This situation is very apparent in the Skagit Rivers basin, where all people acknowledge that recovery will only occur if the Skagit River stocks are healthy.

NOAA-Fisheries has also issued an ESA Biological Opinion on the 1999 PST Agreement, but what we are finding is that NOAA-Fisheries has independently defined exploitation rates for several of the systems (Nooksack, Skagit, Stillaguamish) after the negotiated agreement was reached, and as Canadian and Alaskan harvests have increased, they have attempted to use these rates to manage the tribal fisheries down to ensure "conservation", despite written agreements to the contrary. In most cases, Tribes have not had a directed fishery on these populations for over 20 years, yet NOAA-Fisheries wants farther reductions to other tribal fisheries to further reduced impacts. This smacks of the same kind of restrictions placed on tribes prior to the *Boldt* Decision, trying to manage conservation at the end of the run, rather than where the impact occurs. This was wrong then, and it is wrong now!

**NEPA**

Another area related to the ESA listing and recovery issue is the application of NEPA. Tribes feel extremely vulnerable to third party lawsuits, a fact supported by recent litigation from an organization called Washington Trout. In a series of lawsuits against NOAA-Fisheries and the State of Washington on harvest and hatchery resource plans, Washington Trout's action, if successful, could entirely shut down the state and tribal fisheries and hatchery operations.

If not for the tribes, we believe that NOAA-Fisheries and the State of Washington would not have adequately addressed NEPA responsibilities, which would have undermined tribal treaty rights. With the help of the BIA funding, tribes have been leaders in developing necessary NEPA processes and documents, serving as a co-lead agency with NOAA-Fisheries to help guide our way through the ESA-NEPA quagmire.

**Section 10/HCP**

We also are very concerned about how the Federal agencies choose to implement Section 10 of the ESA. This is the provision that allows entities to develop conservation plans and upon approval, receive long term ESA protection (up to 50 years). We have seen these negotiations conducted behind closed doors with tribes excluded. This places the tribes in the difficult position, where they were not involved and don't believe the science that was used to justify decisions. NOAA-Fisheries and the FWS must make more diligent efforts to involve the tribes in the process. Moreover, they must stay with the HCP's and make sure that their agreements are being followed. Without this monitoring, they are being used! A good case in point is the state of Washington Department of Natural Resources HCP for 1.5 million acres of forestland. Tribes were talked out of litigation by Federal entities (Congress and the Administration) saying that this HCP was so good, how could we object. Now DNR is undermining their plan without the tribes and without NOAA-Fisheries and FWS oversight. What gives?

**Whaling**

Another area where we have grave concerns centers on the recent 9th Circuit Court case on Makah Whaling. Whatever you may think about whale hunting, it is absolutely clear in the treaties that Makah has a legally reserved right to hunt for whales. NOAA-Fisheries has been a strong partner with the tribe, and has shown great resolve in supporting the tribal right. They recommended, and Justice supported an en banc hearing at the 9th Circuit. Unfortunately, the same cannot be said for the Fish and Wildlife Service, which choose not to support the rehearing. The court ruling fails the tribe in that it said the Marine Mammal Protection Act effectively trumped treaty rights. This case reverses almost 200 years of Supreme Court precedence, and threatens all tribal treaty rights. It could undermine all of our co-management efforts. The committee should be aware of precedent setting court cases like this, and work to ensure that treaty rights are affirmed through legislative action.

**Funding**

Finally, we are very concerned about the continuity of tribal funding. I speak generally about the DOI budget, and am not addressing BPA. Our *Member Tribes* and the Commission are not associated with BPA funding. Having said that, tribes have been the beneficiary of Federal funding, but every year, the BIA fails to request some of our base moneys—such as Unresolved Hunting and Fishing Rights, Shellfish and Forest and Fish. They have justified this as saying their limited moneys would be better placed in other areas, like trust reform. I ask you, what better trust use is there than natural resource management. If we spend all of our effort just trying to get out of the hole, how can new, unfounded mandates like shellfish and groundfish ever be successful?

This concludes my testimony. I will be happy to answer any questions at the end of the panel.

# UPPER COLUMBIA UNITED TRIBES

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Colville * Coeur d'Alene * Kalispel * Kootenai * Spokane

**Statement of Vice-Chairman Gary Aitken, Sr.**
**on behalf of the**
**Upper Columbia United Tribes**
**before the**
**Senate Indian Affairs Committee**
**June 4, 2003**
**Regarding**
**Impacts on Tribal Fish and Wildlife Management Programs**
**in the Pacific Northwest**

Mr. Chairman, Members of the Committee:

My name is Gary Aitken, Sr. I am Tribal Chairman of the Kootenai Tribe of Idaho and Vice-Chairman of the Upper Columbia United Tribes (UCUT). On behalf of the Coeur d'Alene Tribe of Idaho, Colville Confederated Tribes, Kalispel Tribe of Indians, Kootenai Tribe of Idaho and Spokane Tribe of Indians, thank you for the attention you are devoting to this matter. I want to share with you some of the impacts on Tribal fish and wildlife management programs, as well as some of our suggested solutions to the problems we have faced.

UCUT Tribes appreciate the funding from the Bonneville Power Administration and other sources for our Tribal fish and wildlife programs. We put those dollars to productive use and would be pleased to have members of the Committee visit to see how we use limited funds to accomplish a great deal of resource restoration and protection. Here's what you'll see:

In the Coeur d'Alene and Kalispel Tribal communities you will see the Tribes working with the Kootenai Tribe and their Washington and Idaho State co-managers to

protect approximately 4,000 acres of wildlife habitat acquired in mitigation for the impacts of the Albeni Falls dam.

In my community, in Bonners Ferry, Idaho, you would see the Kootenai Valley Resource Initiative, which the Tribe created with the City of Bonners Ferry and Boundary County to restore the resources of the Kootenai Valley. KVRI includes the Tribe, private citizens and landowners, local governments, federal and state agencies, an environmental advocacy group and representatives of business and industry all working together to ensure stakeholders have a voice in management activities. The KVRI is working hard for recovery of the Endangered Species Act listed Kootenai River white sturgeon and to avoid the listing of burbot, a native freshwater cod commonly referred to as ling. Burbot historically were abundant and provided an important subsistence fishery for members of the Tribe and were an important social, sport and commercial fishery for the people of Idaho. Habitat changes caused by Libby Dam have imperiled the species and available literature does not predict their recovery without planned, coordinated intervention.

In the communities of the Spokane Tribe and the Colville Confederated Tribes, you will find the Lake Roosevelt Forum, which enables everyone to develop management plans for the 160 miles of reservoir behind Grand Coulee Dam. The Grand Coulee Dam generates the largest percentage of electricity of all the federal dams, serves as a check valve on flood control and irrigation, and is responsible for completely wiping out anadromous fish runs above it. These are fish runs that historically shaped the Tribes' culture and spirituality and provided 80% of their nutrition. There are still unresolved and uncompensated issues concerning the impacts of the Grand Coulee Dam and the failure of the regional process to fairly address comprehensive problems in the Basin. The written testimony of the Spokane Tribe describes in detail how we got into this problem, what we've learned, and how we can avoid continuing this situation in the future.

You would see the UCUT members working hard with their communities to resolve important issues and to implement obligations of BPA and the federal agencies under the Northwest Power Act, Endangered Species Act, National Historic Preservation Act, Clean Water Act and other legal responsibilities.

What you will not see, however, is trust among the tribes and federal trustees. You will not see accountability of federal agencies. You will not see certainty for the

Tribes and the communities they work with. And you will not see an adequate voice for the Tribes in regional governance.

The reasons for these problems are set forth in the written testimony provided by UCUT and its member Tribes. The frustration will be evident in these statements and documents. That frustration underscores the importance of these issues to the Tribes. Please take these statements seriously. Here are some suggestions for solving these problems.

**1. Create Trust**

- Ensure BPA continues to build on small first steps it has taken to respect Tribal sovereignty and improve its government-to-government relationships.
- Ensure federal agencies engage in meaningful dialogue to address management and trust responsibilities.

**2. Force Accountability**

- Review the GAO audits and ensure that BPA is complying with its responsibilities.
- Direct BPA to disclose fully how it came to be in this financial condition, including among other things where the carry-over funds from the 1996-2001 MOA have been used and the amount of income BPA realized from "emergency" power operations during the summer of 2001.

**3. Create Certainty**

- Support Congressional appropriations for other regional agencies to make their own financial contributions to fish and wildlife and habitat in the Columbia Basin, where such costs should not be charged to BPA.
- Give BPA a deadline to get back on track with habitat acquisitions, and to use its federal borrowing authority for this purpose.
- Give BPA a deadline to execute a written commitment to a clear, well-defined funding program for Fish and Wildlife and Cultural Resources, and to include Tribes in developing the funding agreement.
- Support comprehensive Indian Fish and Wildlife Management legislation and funding for Tribal Fish and Wildlife Managers, the Upper Columbia United Tribes and other regional Tribal entities.

**4. Ensure a Voice for the Tribes**

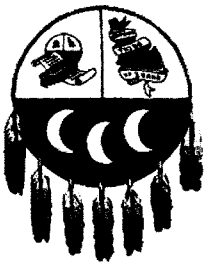
- Direct BPA and the other federal agencies to proceed quickly to negotiate a formal and comprehensive role for the Tribes in decision-making processes.

Please review the written testimony provided by UCUT and its individual member tribes for additional information.

Thank you again for your time and attention to these matters.

Sincerely yours,

Gary Aitken, Sr., Vice-Chairman
Upper Columbia United Tribes




# Kootenai Tribe of Idaho

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June 4, 2003

The Hon. Ben Nighthorse Campbell, Chairman
The Hon. Daniel K. Inouye, Vice Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

**RE: Written Testimony of the Kootenai Tribe of Idaho before the Senate Indian Affairs Committee regarding Impacts on Tribal Fish and Wildlife Management Programs in the Pacific Northwest**

Mr. Chairman, Members of the Committee:

The Kootenai Tribe of Idaho is honored to present testimony on impacts on tribal fish and wildlife management programs in the Pacific Northwest.

As we all know, the Federal Columbia River Power System (FCRPS) has caused untold losses to resident fish, wildlife and anadromous fish throughout the Columbia River Basin. The Kootenai River white sturgeon and bull trout have been listed under the Endangered Species Act (ESA), as have several anadromous fish species. These ESA species are subject to biological opinions issued by the United States Fish and Wildlife Service and National Marine Fisheries Service. The Bonneville Power Administration (BPA), Army Corps of Engineers and the Bureau of Reclamation, along with other federal agencies, states, local stakeholders and the tribes have the responsibility to ensure recovery of the listed species through proper implementation of the biological opinions and to prevent future listings of additional species.

Under the Northwest Power Act, the Bonneville Power Administration also has the responsibility to protect and enhance fish and wildlife populations in the Columbia

River Basin impacted by the FCRPS through proper implementation of the Northwest Power Planning and Conservation Council's (NWPPC) Fish and Wildlife Program. The NWPPC representatives are appointed by the governors of Idaho, Montana, Washington and Oregon. The Northwest Power Act delegates to the NWPPC responsibility to develop a Fish and Wildlife Program and recommending projects to BPA for funding, giving deference to the region's Tribal, state and federal fish and wildlife managers. We all recognize these programs have mixed success.

The Kootenai Tribe of Idaho, however, is not presenting this testimony just to point out the deficiencies in implementation of the Northwest Power Act and the ESA. Other individuals and groups presenting testimony likely will point out these deficiencies and note the resources distributed outside the Columbia River Basin at the expense of the Basin's fish and wildlife. Moreover, I will not dwell on the losses of the Tribe's treaty resources guaranteed to it by the Treaty of Hell Gate of 1855 or that the Tribe's full exercise of its treaty rights have been denied by these shortcomings. We would like to bring your attention to some positives, while noting, only in passing, an agreement with other witnesses that the system could be, and should be, much better.

The Kootenai Tribe has been fortunate to implement some appropriate measures in the biological opinion associated with the listing of the Kootenai River white sturgeon. The Tribe also has received support on other species of concern. The relationship between the Tribe and the Bonneville Power Administration, other federal agencies, its sister Tribes, the NWPPC and the states and other stakeholders has generally been one of mutual respect and cooperation. The fish have greatly benefited.

The Tribe believes that restoration of any species cannot occur without collaboration among all stakeholders in the Columbia River Basin. The Tribe works closely with its sister Tribes in the Basin to foster such collaboration. One forum for this collaboration is the Upper Columbia United Tribes (UCUT). UCUT consists of the Colville, Spokane, Kalispel and Coeur d'Alene Tribes and Kootenai Tribes. The UCUT recognizes the interconnectedness of the Columbia River Basin and coordinate management activities to ensure that the actions of one do not harm the goals of another.

The Tribe's commitment to collaboration also occurs at the community level. The Tribe was instrumental in working with local governing bodies to form the Kootenai

Valley Resource Initiative (KVRI) to restore and enhance the resources of the Kootenai Valley. The KVRI is empowered under a Joint Powers Agreement among the Tribe, the City of Bonners Ferry and Boundary County. The Initiative membership is comprised of the Tribe, private citizens and landowners, local governments, federal and state agencies, an environmental advocacy group and representatives of business and industry.

The mission of KVRI is to improve coordination of local, state, federal and tribal programs to restore and maintain social, cultural, economic and natural resources. It utilizes a number of subcommittees to work with the group as appropriate to accomplish the tasks at hand. We are excited about the possibilities this sort of collaboration can achieve. This type of cooperation among all stakeholders is the only way to ensure proper implementation of the biological opinions and restoration of the Basin.

The Tribe would like to offer some positive suggestions for improving implementation of the Endangered Species Act, Northwest Power Act and the Fish and Wildlife Program in the Columbia River Basin. These suggestions will make Tribal programs better at achieving positive results.

First, let us remember what is at stake and what could be lost if improvements for the future are not implemented. Failure to achieve recovery of the Kootenai River white sturgeon, bull trout and anadromous fish will result in the extinction of species the tribes have relied upon for subsistence and cultural purposes. The United States gave its solemn word to protect the tribes' interests in these resources in the treaties. In addition to Tribal subsistence fishing, sport and commercial fishing for these species has supported Indian and non-Indian families. If the Basin were to lose these species, it would mean an end to special ways of life for Indian and non-Indian alike.

Danger also exists for the destruction of relationships that have been built among the Indian and non-Indian communities. Historically, the relationships were marked by hostility. Through hard work, an unprecedented level of trust between the Indian and non-Indian communities has been achieved. Through the KVRI, for example, all stakeholders in Boundary County are involved in fish and wildlife management from sturgeon and burbot recovery to subbasin planning.

Having noted what is at stake, let us examine what is doable to achieve positive improvement in the impacts Tribal fish and wildlife programs can make to the health of

the region. First, we note that National Congress of American Indians Resolution # EWS-02-001 and Affiliated Tribes of Northwest Indians Resolution #03-31 contain specific requests to BPA from Indian Tribes throughout the United States and specifically from the Northwest Tribes. We concur with these requests. The following are additional suggestions consistent with the resolutions:

**Respect for Tribal Sovereignty**

The BPA and the other federal agencies must be made to fully embrace their responsibility to respect Tribal sovereignty and the government-to-government relationship that must exist. BPA has acknowledged that it has done poorly in this respect and has committed to doing better in the future. But lip service is not enough. The Tribes are not utility companies and aluminum companies. The Tribes have specific rights guaranteed by treaties, other agreements with the United States and protections under various laws and court cases. These set the Tribes apart from other stakeholders.

Had BPA honored the government-to-government relationship and approached the Tribes when its financial crisis became apparent, the Tribes and the federal agencies might have worked collaboratively to minimize the impacts. BPA and the federal agencies refused this opportunity to work as a team. We ask that the Committee help ensure that the opportunity is not missed in the future.

**Accountability**

The Tribe often hears that the BPA budget crisis is due to escalating fish and wildlife costs. Everyone must be made to understand that fish and wildlife payments to the Tribes are an account payable. These payments are on the federal books for the loss of fish and wildlife that are part of the legacy of the Tribes. These treaty obligations must not be subject to BPA's budget woes. This is not a difficult concept and the Tribes remain perplexed at the stubborn reluctance of some to embrace it.

The Tribe is pleased to see the Government Accounting Office (GAO) audit concerning the federal agencies' recovery responsibilities, expenditures and actions with respect to Columbia River Basin salmon and steelhead. The Tribe also appreciates the request from the Committee for an additional GAO audit to review BPA's treaty and trust obligation implementation. These efforts will help ensure the complete story of BPA's problem is told.

BPA must be made to acknowledge to the Basin the nature and scope of foregone revenues due to irrigation, navigation, aluminum companies and others. BPA has been quick to point out what it sees as the rising costs of fish and wildlife management. The agency has not, however, been so forthcoming in explaining to the residents of the Columbia River Basin the incredible benefits irrigators, barging companies, aluminum companies, investor-owned utilities and others have received at the expense of fish and wildlife.

BPA must also be forthright in revealing how it came to be in this financial position. BPA must honestly disclose where the carry-over funds remaining from the 1996-2001 Memorandum of Agreement on fish and wildlife funding have been used and under what authority. Additionally, BPA must account for income from "emergency" power operations during the summer of 2001.

**Appropriate Cost Allocation**

The Northwest Power Act requires the Columbia River Basin ratepayers to fund implementation of the Fish and Wildlife Program as partial repayment for the benefits they receive from the construction and operation of the FCRPS. BPA is responsible for collecting and distributing the ratepayer money in fulfillment of treaty and trust obligations the Fish and Wildlife Program. The Tribe looks forward to reviewing the GAO audits to ensure that BPA is distributing ratepayer money in accordance with these obligations.

BPA must be honest about its use of resources. Here is an example of a failure in this regard. BPA requested additional borrowing authority to be used for all authorized purposes. BPA led the Tribes to believe that some of the funds would be used to proceed with Tribal habitat acquisitions and, therefore, supported BPA's request to Congress. BPA was granted additional borrowing authority of $700 million. At its May 20, 2003 meeting, the Affiliated Tribes of Northwest Indians (ATNI) requested specifics on how BPA was to fulfill Tribal expectations. Despite admitting it had set aside some of the borrowing authority for power transmission purposes, BPA informed ATNI that the borrowing authority could not be specifically allocated to fish and wildlife at this time. This was not the Tribes' understanding when it supported the increase. The Columbia River Basin Tribes need a firm commitment that the borrowing authority will be used for

fish and wildlife management. Moreover, they need BPA to keep its word.

The federal agencies must develop, through collaboration with the tribes and the states, a process to establish permanent and appropriate funding levels to meet Treaty and trust obligations and the mandates of the Northwest Power Act, the Endangered Species Act, the National Historic Preservation Act and the Clean Water Act. The costs for fulfilling these responsibilities should be allocated among federal agencies and funding sources for paying these costs clarified in accordance with the law.

The Tribe suggests to the Committee that the concerns for reliable and certain funding could be partially alleviated through the development of a Memorandum of Agreement that sets forth a process to determine the amount necessary to fully fund fish and wildlife and allocate the costs among the federal agencies according to legal responsibility. Similar efforts have been attempted in the past with varying degrees of success. The Tribe is confident, however, that through sincere collaboration better results can be achieved.

The Tribe also suggests to the Committee that more certainty for the fish and wildlife managers can be achieved by entering into multi-year contracts with BPA for funding of projects. The Basin recently switched from an annual review process to a three-year rolling review process for project recommendation and approval. The rolling review process was intended to allow fish and wildlife managers to spend more time restoring the Basin and less time stranded in processes. The next logical step would be to provide three years of funding for a project that has been approved for three years. Unfortunately, BPA refuses to enter into multiple year contracts with fish and wildlife managers, limiting contracts to one-year periods. As a result, fish and wildlife managers continue to spend more time in processes and less time restoring the Basin.

**National Fairness**

Many in the Basin feel that the Northwest ratepayers are paying more than their fair share for implementation of the Endangered Species Act, Clean Water Act, National Historic Preservation Act and other legal responsibilities. Throughout the rest of the United States, fulfillment of these national responsibilities are funded by the federal government under federal authority and by state governments under state authority. In the Columbia River Basin, however, the other federal agencies and the states look primarily

to BPA for funding. Thus, ratepayers are required to bear the entire burden for the Columbia River Basin as well as their share of the national burden.

**Tribal Participation in the Decision-Making Process**

Greater intergovernmental cooperation can and should be fostered. Many attempts in the past have been made to form a regional governance group that would include representation from the Tribes, federal agencies and the states. The Tribe urges the Committee to encourage the federal action agencies operating the FCRPS to negotiate a formal and comprehensive role for the Tribes in some form of regional governance group. Such a regional governance group would further Basin restoration and move the region toward a more collaborative effort.

The Tribe thanks the Chairman and Committee for the opportunity to address the impacts on the Tribe's fish and wildlife management programs. The Tribe looks forward to working with the Committee, BPA and other federal agencies, the states and our sister Tribes in addressing fish and wildlife needs in the Columbia River Basin.

Sincerely yours,

Gary Aitken, Sr., Chairman
Kootenai Tribe of Idaho

# TESTIMONY
# BY THE NORTHWEST INDIAN FISHERIES COMMISSION

## REGARDING THE IMPACTS ON TRIBAL FISH AND WILDLIFE MANAGEMENT PROGRAMS IN THE PACIFIC NORTHWEST

## TO THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

## JUNE 4, 2003

Mr. Chairman and members of the Committee, the Northwest Indian Fisheries Commission and Commission member tribes welcome this opportunity to provide testimony to you on the impacts of proposed Indian Fish and Wildlife Management legislation on the tribes in the Pacific Northwest. There are many reasons why this legislation is needed, and why we hope you and your colleagues throughout Congress will support its development and passage.

**WHY INDIAN FISH AND WILDLIFE MANAGEMENT LEGISLATION IS NEEDED**
The tribes of the Northwest have been on the receiving end of some good decisions by the U.S. Supreme Court, e.g., the U.S. v. Passenger Vessel Decision of 1979 reaffirmed by the U.S. v. Washington (Boldt) Decision of 1974, confirming the tribal right to harvest half of the salmon resource. More recently, the Supreme Court chose not to hear an appeal of the 1994 Rafeedie Decision in 1999 (also U.S. v. Washington), reaffirming tribal shellfish rights. However, the overall tendency of the court of the past two decades has been anything but fair with respect to tribal rights. The Supreme Court issued five decisions affecting the rights of Indian tribes in 2001, for example. The Court decided against the tribes in four out of five instances. In particular, the decisions in Nevada v. Hicks and Atkinkson Trading Co. v. Shirley raise strong concerns that the court is on an accelerating trend toward assaulting tribal sovereignty. Even as tribal governments have made significant strides in reasserting their rights to govern, over the last twenty years Supreme Court decisions, such as Montana v. U.S., Brendale v. Yakama Nation, Oliphant vs. Suquamish Indian Tribe, and Strate v. A-1 Contractors have significantly limited the civil and criminal jurisdiction of tribal governments over events that occur within their territorial boundaries. The most recent Supreme Court cases make it clear that tribal governments are in an increasingly defensive posture in the federal courts, and it is likely that the upcoming years will prove to be even more damaging if this defensive posture is maintained. In the long term, this erosion of jurisdiction threatens to make tribal governments ineffective in protecting the cultural identities of their communities. It also impacts the ability of tribes to manage natural resources.

Clearly, the tribes have to do whatever they can to counter these tendencies.

Similarly, there have been good decisions regarding tribal rights made by the Executive Branch—such decisions as the set aside of hundreds of thousands of acres of forestland and the Secretarial Order regarding federal implementation of the Endangered Species Act. More recently, however, it has become apparent that forestlands set aside by the prior Administration to provide meaningful protection of natural resources are to be re-opened by the current Administration to accommodate the timber industry. And it

has become apparent that the federal agencies responsible for implementation of ESA are intent on focusing implementation on harvest and hatcheries rather than hydropower and habitat. These determinations by the current Supreme Court and Administration are ill-advised in terms of public health and the economy, and adverse to the implementation of the federal trust responsibility to the tribes.

Again, it is clear that the tribes must press for more favorable acknowledgement of their rights. In part, the responsibility for acknowledgement of historic fairness falls into the lap of the U.S. Congress.

As made evident in Section 8, Clause 3 of the United States Constitution, the Congress is the branch of the federal government most directly invested with the authority to work with the tribes in the implementation of our sacred trust relationship. As made evident by Article 6, Clause 2, treaties made under the authority of the United States are the supreme law of the land.

It is the assertion of the tribes of the Pacific Northwest that the resource harvest rights retained by the tribes in the treaties that exist between us are, in effect, the law of the land, and that protection of these rights is a special and official responsibility of the United States Congress. Therefore, it is our assertion that Congress has a responsibility to assure that the tribes have a harvest opportunity, and to assure that the natural resources that sustain the tribes (as well as other citizens) are protected from harm caused by whatever impacts might encroach on those rights. Congress must protect the resources that sustain the tribes. It must protect these resources from development, pollution and damaging impacts of any kind.

Thus, it is important for Congress to assert itself, ideally through clear and definitive legislation, as the body of government most responsible for these things. Properly developed and implemented, such legislation will do much to help achieve the objectives inherent in your trust responsibility to the tribes. It only follows that such legislation would help remedy problems that exist in principle, funding, and diversion from other branches of the federal government, states or private entities.

We anticipate that there will be those entities that make an effort to detract from the development and implementation of such legislation. Generally speaking, such distractions are reflective of vested financial interests, rather than the sacred legal and moral bond that exists between Congress and the tribes. We tribal representatives appear before you as the authorized representatives of our governments, here in the interest of helping our citizens acquire only those things they have been promised by Congress through binding contract. We ask only for what is already ours. We ask you, one and all, to stand fast against distraction from the proposed legislation, and stand tall in the fulfillment of your trust obligations to the tribes.

Yesterday, our testimony addressed the principles of co-management and the needs and opportunities associated with groundfish and shellfish. In today's testimony, we will endeavor to briefly explain some of the challenges, and opportunities, we face in achieving protection of the salmon resource and salmon habitat through meaningful implementation of the Endangered Species Act, as well as the Clean Water Act and other federal law. We will also speak about problems associated with the Federal Energy Regulatory Commission, and we will address wildlife management and salmon marketing.

**ENDANGERED SPECIES ACT/SALMON RECOVERY**

The past two decades have witnessed the steady decline of many wild salmon stocks originating from Puget Sound and the Washington coast. A huge population influx in Washington state during the past 25 years –and the accompanying development, pollution and increased demand for water, among other factors – has resulted in a dramatic and well-documented loss of critical wild salmon habitat.

Despite efforts by tribes, state agencies and the federal government to protect freshwater habitat, the long term decline in both the quantity and quality of available wild salmon spawning and rearing habitat

continues. The result is wild salmon populations that are smaller and less productive – so much so that the National Marine Fisheries Service (NMFS) in 1999 listed Puget Sound chinook salmon, Lake Ozette sockeye and Hood Canal summer chum stocks as "threatened" under the federal Endangered Species Act (ESA).

Natural forces, probably instigated by man, have also contributed to the decline of wild salmon stocks in the region. Pacific Ocean warming and cooling phenomena known as El Nino and La Nina, respectively, have caused wide-ranging climatic conditions in the last decade that have brought droughts and flooding to western Washington watersheds. Such conditions can lead to poor freshwater salmon survival, and are also blamed for poor ocean survival and growth of young salmon. Fisheries managers have responded to salmon declines with historic cutbacks in fisheries – 80 to 90 percent in the last decade. But depleted stocks cannot be rebuilt by fishery restrictions alone. The habitat on which these stocks depend must also be restored.

***TRIBES AND THE ESA/PACIFIC COASTAL SALMON RECOVERY***

New federal funding under the Pacific Coastal Salmon Recovery initiative enabled tribes to begin new efforts or continue existing projects in four important areas of wild salmon recovery: habitat restoration; stock enhancement; salmon research; and implementation of the Pacific Salmon Treaty. With the aid of this new federal funding, tribes have conducted comprehensive projects in each of these four areas that contribute significantly to the effort to restore wild salmon populations.

Tribes have completed management and recovery plans for a number of basins and several species, in response to ESA listings. These efforts, combined with the setting of extremely limited harvest levels and progressive efforts in hatchery reform should have proved to the world that the tribes are consistently good managers, intent on achieving salmon recovery. The consultation process preceding adoption of 4(d) rules by the National Marine Fisheries Service (NMFS), the agency charged with implementing the ESA, also required large amounts of tribal and NWIFC staff time. The rules essentially allow actions, such as harvest and hatchery operations, taken pursuant to an acceptable recovery plan to be exempt from ESA take prohibitions.

***SASSI AND SSHIAP***

Ten years ago, a statewide inventory of all salmon stocks and their status was completed (the Salmon and Steelhead Stock Inventory, or SASSI). It became apparent to the tribes and WDFW at that time that it would be impossible to adequately assess salmon habitat within the scope of the stock inventory. Because freshwater habitat is a basic limiting factor for the production of some salmon species, it was clear that an inventory of salmon habitat must also be compiled. Work on the Salmon and Steelhead Habitat Inventory and Assessment Project (SSHIAP) – began in 1995. Its purposes have been to develop a blueprint for joint tribal/state action, define a cooperative process to implement habitat and restoration strategies by documenting past and current habitat conditions, assess the role of habitat loss and degradation on the condition of salmon and steelhead stocks and develop stock- or watershed-specific strategies for habitat protection and restoration. State salmon recovery legislation has mentioned SSHIAP as the basis for prioritizing salmon recovery projects and as the repository and analysis tool for habitat monitoring information. To this end, SSHIAP has received funding from the state Salmon Recovery Board to help complete the habitat database and GIS tools for Water Resource Inventory Areas that encompass most of western Washington. Among other things, SSHIAP products describe the location, amount and current condition of habitats used at various stages in the life of salmon and steelhead, historic habitat loss, and the natural and man-made factors contributing to habitat loss and degradation. This SSHIAP database provides graphical depictions of types and amounts of habitat lost and degraded, effects on salmon stocks of concern and critical habitats used by each stock in each stage of its life. A habitat protection and restoration strategy is developed for each stock and/or watershed, as is a funding strategy to obtain resources necessary to implement habitat protection/restoration strategies and conduct necessary research. SSHIAP has been working closely with and providing information for use in a number of processes, including comprehensive species planning, statewide Limiting Factors Analysis, a State Department of Ecology Watershed Characterization Project, Timber/Fish/Wildlife Watershed Analysis, the Interagency Committee for Outdoor Recreation salmon recovery database and the Washington Department of Fish and Wildlife/ Washington Department of Transportation salmonid passage database. SSHIAP will continue to evolve and grow to meet the needs of salmon restoration in the State of Washington, if funded. Both SASSI and SSHIAP must be viewed as ongoing processes, and continued funding is necessary.

***COMPREHENSIVE COHO/CHINOOK***

Work has progressed on Comprehensive Species Planning, which is aimed at ensuring the health, maintenance and restoration of salmon. This effort recognizes that the management of habitat, harvest and hatcheries cannot be addressed in isolation. For example, harvest management has responded – and must continue to respond – to wild stock declines. However, when long-term problems are rooted primarily in habitat degradation—rather than overfishing—further restrictions in fisheries will not restore depressed stocks to their full productive potential. The answer lies in a comprehensive approach of addressing all impacts to weak stocks, including protecting productive habitat and restoring degraded habitat.

***SHARED STRATEGY***

Fishery closures and reductions have resulted in severe economic hardship for tribal fishermen on reservations, where unemployment runs as high as 80 percent. Tribes have continued implementation of a comprehensive approach to wild salmon stock recovery. While continuing to address ESA listings of several western Washington salmon stocks, tribes have participated in processes such as the "Shared Strategy" in an effort to support salmon recovery.

The Shared Strategy has been an effort to save declining wild salmon stocks in the Puget Sound region by combining the efforts of tribal, state, federal and local governments and others. The proposed strategy has been aimed at developing a recovery plan that meets the broad interests for salmon in Puget Sound. It has also been intended to establish a framework to link recovery efforts, complete a recovery plan, and guide its implementation and identify and support important current efforts to protect Puget Sound salmon. The

success of the effort is yet to be seen. But, at the very least, it demonstrates the fact that the tribes are enthusiastically seeking solutions to the salmon diminishment problems.

***HATCHERY REFORM***

Like harvest, (but unlike hydro and habitat) a great amount of meaningful work has been done to respond to ESA listings with the fourth "H," hatchery reform.

With new federal funding in FY 00, tribes began a Hatchery Reform initiative, a systematic, science-driven redesign of how hatcheries will be used to achieve new purposes by helping to recover and conserve naturally spawning populations and supporting sustainable fisheries. As co-managers, the tribes and State of Washington are seeking to go beyond merely complying with ESA directives that hatcheries be operated to minimize risks to endangered salmon.

The Hatchery Scientific Review Group (HSRG) released a report in March that lays the groundwork for implementing a comprehensive, systematic and scientific redesign of salmon hatcheries in Puget Sound and coastal Washington. By focusing on watershed conservation and fisheries goals, scientific defensibility and adaptive management, the recommendations redefine how hatchery programs will be designed, operated and evaluated. In announcing the report, members of the HSRG were joined by Washington Governor Gary Locke, U.S. Representative Norm Dicks (D-Wash.), Northwest Indian Fisheries Commission Chair Billy Frank, Jr., NOAA Fisheries Regional Administrator Bob Lohn and Washington State Department of Fish and Wildlife Director Jeff Koenings. At the announcement event, HSRG Chair Lars Mobrand, Ph.D., said hatcheries should be viewed as only one of several tools available for recovering depressed populations and providing fisheries and that they should be used for these purposes only when the benefits outweigh the risks. He added that the keys to successful hatchery reform include operating hatchery programs based on clear regional goals and institutionalizing a process of continued monitoring and assessment that informs decision-making.

The state, tribal and federal fish management agencies have asked the HSRG to remain empanelled beyond the recommendations phase to help design the mechanisms necessary to implement the recommendations and establish adaptive management techniques. Washington Department of Fish and Wildlife Director Jeff Koenings, Ph.D. said hatcheries play a critical role in both conserving wild salmon and supporting sustainable fisheries, and that the HSRG is providing the scientific framework for those operations.

The tribes believe that with vision, hatcheries can be managed more effectively in the future, and that with a comprehensive strategic plan based on solid science, the benefits of hatchery reform in western Washington will be far reaching.

The HSRG divided Puget Sound and the coast into 10 regions, providing an unprecedented opportunity to make region-by-region recommendations based on regional management goals for conservation and harvest, and on stock and habitat health.

The three regions included in the March report are the Skagit River Basin, Nooksack/Samish Rivers and Central Puget Sound. The HSRG released its recommendations for the Eastern Straits of Juan de Fuca, South Puget Sound and the Stillaguamish/Snohomish Rivers in February 2002. The final four regions — Hood Canal, Willapa Bay, North Coast and Grays Harbor — will be reviewed by the end of 2003. The reviews were conducted via in-region meetings and supported by a collaborative information gathering process among management agencies and the scientists. The reviews included a consideration of each hatchery program's effects on all hatchery and naturally spawning salmon stocks in the region.

U.S. Representative Norm Dicks and Washington Governor Gary Locke have taken the lead to secure funding for both the recommendations and implementation phases of the Hatchery Reform Project. Congressman Dicks points out that salmon fishing provides $1 billion annually to Washington State's economy. And he said that one of the things he admires most about this effort is that it seeks to make fisheries sustainable while protecting and helping to recover wild salmon.

Clearly, the collaborative effort involved in hatchery reform and in harvest management are exemplary, and should point the way in dealing with the other "H's." And, clearly, success in all of these arenas is dependent on adequate funding by both the federal and state governments. Indian Fish and Wildlife Management legislation should encourage such equity, and support funding to enable it.

***CHALLENGES TO ESA***

***State***

From the outset of the ESA response effort, the Governor of Washington's "Extinction Is Not An Option," plan has been on the wrong track because it has relied on deregulation of state environmental laws, accommodation to out-of-stream uses and voluntary efforts by the business and agriculture communities, etc. to do the right thing. The state has established a process for watershed planning that has omitted the tribes.

Watershed initiatives have been at the heart of tribal comprehensive species planning, with specific recovery plans being developed for each watershed to guide how fisheries, habitat and hatcheries will be managed. Getting in the way of these efforts, however, is a push by the state to modify water law in a way that removes the incentive for watershed planning (by providing broadly defined "municipalities" and the agriculture industry new access to water resources at the expense of instream resources).

One serious problem that has been ongoing, and continues to worsen is the lack of funding commitment by the state to salmon recovery.

Although tribes try to encourage the State of Washington to invest more adequately in natural resource management, the fact is that it is cutting its overall natural resource investment—even though its current rate of investment is already slightly over one percent of its overall budget. The tribes and NWIFC have worked diligently to encourage the state's legislators and Governor to place greater priority on natural resource funding because we realize that having healthy natural resources is critical to the health, quality of life and economic strength of everyone. But the cuts continue. We would hope that the state would have the foresight to place more emphasis in this area, by creating new state revenues, if necessary. We fear that the failure of the state to do so will impact the leverage it has in acquiring federal support. Also, tribes are forced to fill in where the state fails. As a result, we now find cooperative programs, ranging from hatcheries to ESA response, in jeopardy. This situation is only made worse by the failure of federal agencies to follow through, forcefully, on comprehensive implementation of ESA.

***Federal Agencies***

One of the greatest challenges to the achievement of the objective of salmon recovery is an apparent lack of resolve by federal agencies to implement the Endangered Species Act on an equitable basis. ESA is neither the beginning, nor the end point, of salmon recovery in western Washington. But it was to be the filter through which all salmon recovery plans in western Washington must pass. To date, NMFS has shown little or no interest in holding the habitat and hydro ends of the equation accountable, focusing exclusively on harvest and hatcheries.

Just this past week, the Bush Administration said critical habitat has little value and asked Congress to amend the ESA's language on critical habitat, saying that it offers little conservation benefit compared to

the tremendous cost. The Department of Interior said the Fish and Wildlife Service needs an additional $2 million this year to comply with court-ordered deadlines to designate critical habitat for 32 species, deadlines generated by ESA lawsuits from environmental groups. Clarifying language is one thing, but we fear that these statements lose sight of the big picture. If we continue to lose our natural resources, the cost to the nation will far exceed a few million dollars. It will cost us our natural heritage, and it will have very major implications on the future economy.

***Congress***

We are concerned about efforts in Congress to weaken ESA for what appear to be self-centered reasons. The most recent anti-ESA effort has been by Rep. Richard Pombo of California, who now chairs the House Resources Committee. He has moved legislation to weaken the law in the guise of a military exemptions called for by the military. The legislation goes far beyond such an exemption, throwing into question whether the federal government should designate critical habitat for endangered species. Restrictions on industries that might run afoul of the marine mammals protection act could also be eased in this legislation. The changes proposed to ESA would be the most significant in 25 years. In response to a request from the military for sweeping exemptions to environmental laws, Rep. Pombo and others have insisted that any endangered species exemptions come through the Resources Committee, which he chairs. The military's complaints were broad, but objections were apparently initiated by the Marine Mammal Protection Act in part because a new Navy sonar system designed to detect nearly silent submarines has been hampered because of its potential effect on whales. Other branches of the military have also complained about the need to protect endangered species habitat. These complaints are bothersome in themselves. But in proposing relief, Resource Committee members have not confined themselves to those complaints, but are looking at legislation to diminish the effect of ESA overall. The tribes, which have made more sacrifices than anyone in American foreign wars, believe the natural heritage of this land is one of the primary purposes of defense in the first place.

The Senate is not invulnerable to assaults on ESA either, of course, e.g., the Endangered Species Listing and Delisting Process Reform Act of 2003 (S 369). Among other things, this legislation, proposed by Sen. Thomas Craig (R-ID) amends ESA by requiring the Secretary of the Interior to "promulgate regulations that establish criteria that must be met for scientific and commercial data to be used as the basis for a determination that a species is an endangered or threatened species."

***The White House***

Rep. Ellen Tauscher, whose district adjoins Rep. Pombo's, has referred to his anti-ESA actions as "appalling" and she has credited his ascension to the Resources Committee chairmanship to the Bush administration's support of his tough opposition to ESA.

This is, unfortunately, all too typical of the President's approach to natural resource management. The tribal preference is to find ways to work with the Administration. But there must be an understanding that whether natural resources are protected and restored through response to the ESA, or whatever other means, they are protected by tribal treaties, and the federal government has a trust responsibility to assure that they are protected. This issue goes to the heart of prospective Indian Fish and Wildlife legislation.

**CLEAN WATER ACT**

Tribes are very concerned about clean water problems in Washington State. One of the mainstay programs they have engaged with over the past 13 years is the Coordinated Tribal Water Quality Program (CTWQP), developed by the 26 federally recognized tribes in the State of Washington in 1990. Tribes have worked with the U.S. Environmental Protection Agency (EPA) to implement the CTWQP. EPA funds have enabled the tribes to conduct water quality programs critical to the management of their treaty-protected resources, and to provide for the health of their members and the environment. Federal funding of the CTWQP is necessary under the trust responsibility of the United States to implement the Stevens Treaties.

The base level funding requirement for the Coordinated Tribal Water Quality Program has been $3.1 million per year. This provides $110,000 to each of the 26 tribes for their individual programs and $240,000 for statewide program coordination. This funding structure provides for extremely low overhead with 94.5 percent of the funds going to on-the-ground activities and just 5.5 percent for coordination.

The CTWQP is designed to provide base-level staff infrastructure for tribes to organize and begin addressing the water quality concerns that are threatening their reservations and treaty-protected resources. Water pollution in Washington threatens the health of tribal members and their treaty resources without respect to political boundaries. Tribal jurisdictions interlock with many other jurisdictions, including some of the most densely populated and industrial areas in the state.

Three commonalities guide program design and implementation:
• All tribes are confronted by serious water quality issues:
• All tribes require necessary infrastructure to adequately address these issues; and
• A watershed/ecosystem approach is the best approach to solving these issues because of their multi-jurisdictional nature.

The tribes in Washington developed and adopted the CTWQP as a watershed protection strategy to safeguard the resources on which they depend for their economic, spiritual and cultural survival. This strategy provides for the development of infrastructure, program implementation and statewide coordination.

The tribes know that the battle against water pollution cannot be fought alone. To succeed, it will require cooperative, coordinated efforts with other governments. To make every funding dollar work to its fullest, the tribes are building partnerships with other governments to implement coordinated, cooperative programs that address water quality issues. For the past 30 years the tribes in Washington have been successfully developing comprehensive, cooperative agreements with state and local governments and private interest groups to protect and manage natural resources essential to the survival of fish and shellfish. These processes, unique in the nation, have brought previously contending parties together in efforts to address difficult issues.

Each of the 26 tribes participating in CTWQP has professional staff to accomplish program activities. Utilizing the program, tribes have developed, implemented and worked on watershed management plans, monitored water quality trends, mapped problem areas, cleaned up shellfish beds, established wellhead protection programs, and developed water quality standards. As sovereign governments and partners in water quality management, many tribes also began participating in cooperative watershed-based, inter-governmental water quality protection activities.

Tribal accomplishments in this area have been many and diverse, ranging from the certification of water standards to planting of indigenous fauna and building fences along streams. There have been many statewide achievements, as well, all intended to monitor and safeguard water quality throughout the state. Related coordinated projects have been conducted with both state and federal agencies. A model EPA/Tribal Partnership program has been conducted, for example, which has helped develop tribal management capacity, delegated environmental protection programs to the tribes and encouraged cooperation between governments at all levels to resolve environmental problems of mutual concern.

Through the Coordinated Tribal Water Quality Program, the tribes have the same goal for Washington waters as the federal Clean Water Act: To restore and maintain the chemical, physical and biological integrity of the nation's waters.

The tribes are concerned about the current jeopardy facting the EPA's Pollution Tracking System. The EPA's computerized database for tracking water pollution is plagued with problems which may cause the system to become useless unless the agency dramatically improves efforts to fix it. The agency's 20-year-old Permit Compliance System (PCS), which tracks pollution data from more than 64,000 facilities across the nation is hindered by missing and faulty data, as well as the absence of information about thousands of lesser pollutants that are not reported to the system. Such challenges come at a time when it appears that there are efforts to de-prioritize water quality programs and efforts on the national scene.

The tribes are also concerned about the current effort being forwarded by Governor Locke and a number of legislators in Washington State. One of several ill-advised water bills being promoted is SB 5028, which would diminish state authority in protecting water quality.

Again, the tribes assert that the protection of water quality is a treaty-protected right and part of the federal trust responsibility. Moreover, it is extremely important for all members of Congress, the Administration and the public to fully realize the very real importance of taking care of our water resource, and all related natural resources. Without these resources, this generation is in the process of handing very serious problems off to the generations to come.

**FERC**

The dam re-licensing process overseen by the Federal Energy Regulatory Commission (FERC) is another issue of deep concern to the tribes, in large measure due to a tendency to skip over treaty-protected rights. It is clear to us that this agency should be reminded that it is, in fact, part of the federal government and thus accountable to the federal trust responsibility to the tribes.

We oppose the hydroelectric licensing provisions in the Energy Bill (S 14). As written, this bill's provisions for re-licensing require agencies to consider the private economic interests of dam owners above those of the tribes, states and federal agencies. They diminish environmental standards of review and provide for only the license applicant to challenge final FERC recommendations. The provisions prevent tribes from challenging the final FERC recommendations, which thus fail to even acknowledge tribal rights and the federal trust responsibility to the tribes. The hydroelectric industry's need for streamlined licensing procedures received due congressional deliberation last year. Industry reached a compromise with entities concerned about resource management issues. This compromise was adopted by the House (HR 4, Secs. 401 and 402) and was included in the bill sent to the Senate last year. We urge support for this compromise.

This year's proposed give-away of precious and scarce resources for the limited benefit of private hydroelectric licensees is very bad policy. The track record in hydroelectric licensing is dismal.

A case in point is the Cushman Dam, owned by the City of Tacoma. As has been the case with cities, as well as other local governments and entities, there is a lack of will to acknowledge tribal rights, or even to acknowledge the needs of critical natural resources, e.g, salmon. FERC issued a 25 year license to Tacoma to keep operating the Cushman Dam in 1998. In so doing, 13 conditions were laid out, some of which would help protect the fish resource depended on by the Skokomish Tribe in western Washington. However, the city has failed to meet these requirements, and has stated that doing so would render the dam unprofitable. It filed a lawsuit in Federal District Court against FERC, which is still pending. A twist in this situation is that there were no ESA listings on salmon in 1998. There are now. Subsequent to those listings, the court indicated that it could not make a ruling until the National Marine Fisheries Service does a biological opinion on the terms of the re-licensing—something that has not even commenced in the past three years. The Tribe has met with the agency several times, demanding action. There has been none. Tacoma has filed for a stay. FERC is doing nothing. NMFS is doing nothing, except focusing on harvest—which has already been severely curtailed by the Tribe. The dam continues to operate. Fish continue to die as a result. Treaty rights continue to be violated.

It would be appropriate for Indian Fish and Wildlife Management legislation to address this type of situation, and for Congress to take action to correct these violations of the federal trust responsibility.

Beyond the legislative approach, we urge support for the ongoing cooperative rulemaking process, in which FERC has worked with a broad spectrum of interest groups to improve hydroelectric re-licensing processes without gutting protections for the environment, fish and wildlife, and tribal and state governmental intervention. The negotiated final rule, due soon, will no doubt provide for more fair and equitable licensing processes.

**WILDLIFE**

Wildlife resources have always been central to the cultures of the treaty Indian tribes in western Washington. Elk, deer, waterfowl and other wildlife have long provided a source of food and clothing for Indian people. As with salmon and shellfish, the tribes reserved the right to harvest wildlife in treaties with the U.S. government:

Little has changed over the centuries. The ancient link between the tribes and wildlife remains strong. Wildlife still provides important nutrition to Indian families on reservations where unemployment can run as high as 80 percent. As traditional foods, deer, elk and other wildlife remain important elements of feasts for funerals, naming ceremonies and potlatches. Hides, hooves, antlers, feathers and other wildlife parts are still used for traditional ceremonial items and regalia.

Unfortunately, the quality and quantity of the habitat upon which the wildlife resources in western Washington depend for their survival are declining rapidly. Where virgin forests once stood there is now urban sprawl. Deer and elk herds have been squeezed into smaller and smaller areas of degraded and fragmented habitat. Concurrently, the ability of tribes to exercise their treaty-reserved right to hunt on open and unclaimed lands has also been dramatically impacted. Tribal members have been forced to hunt farther and farther from home to harvest their treaty-reserved share of wildlife resources. Too often, this results in empty freezers and hungry people. Overlaid on this background has been a series of legal skirmishes resulting in court rulings mostly favorable to the tribes.

State and federal courts have consistently upheld the right of treaty tribes to hunt on open and unclaimed land free of state regulation. The courts have generally ruled that lands such as National Forests, which have not been set aside for uses incompatible with hunting, are open and unclaimed. Further, the courts have ruled that in order to apply a state regulation to a tribal member with a treaty hunting right, the state must prove that the regulation is both reasonable and necessary for conservation purposes. In 1999 the U.S. Supreme Court upheld the tribal treaty right to hunt on state lands free of state regulation in

Minnesota v. Mille Lacs Band of Chippewa Indians. The ruling stemmed from hunting, fishing and gathering rights reserved by the tribe in an 1837 treaty with the U.S. government. The Washington State Supreme Court made a similar ruling in 1999 in State v. Buchanan. Donald Buchanan, a Nooksack tribal member, was charged in 1995 with harvesting two elk during a closed season at the state-owned Oak Creek Wildlife Area. Two lower courts ruled Buchanan was simply exercising his treaty-reserved right to hunt on open and unclaimed land when he harvested the two elk. The state Supreme Court ruled that treaty tribes may hunt within original tribal lands and traditional areas and also ruled that the state-owned Oak Creek Wildlife Area was open and unclaimed land within the meaning of the treaties. The court also threw out the state's argument that the treaty hunting right was eliminated when Washington became a state. As in the Mille Lacs case, the court said that only the U.S. government may abrogate a treaty right.

While tribes prefer to cooperate with the State of Washington in the implementation of their treaty hunting rights and responsibilities as co-managers of the wildlife resources, they realize that they may be forced to seek a clarification of their treaty hunting rights through the federal courts.

The treaty Indian tribes in western Washington have a long history of co-managing natural resources with the State of Washington. The tribes and state have had numerous successes in implementing cooperative natural resource management efforts to protect, restore and enhance the productivity of natural resources in Washington. In a recent policy decision, the Washington Fish and Wildlife Commission recognized that "the preservation of healthy, robust and diverse fish and wildlife populations is largely dependent on the state and tribes working in a cooperative and collaborative manner."

It is important to understand that tribal hunters do not hunt for sport. Hunting is a spiritual and personal undertaking for each hunter. All tribes prohibit hunting for commercial purposes. Western Washington treaty tribal hunters account for only about 1 percent of the total combined deer and elk harvest in the state. According to state and tribal statistics for 2001—a typical year—non-Indians harvested 40,977 deer, while tribal members harvested 508. For the same period, non-Indians took 8,278 elk; tribal hunters harvested only 215. Most tribal hunters do not hunt only for themselves. The culture of tribes in western Washington is based on extended family relationships of parents, grandparents, aunts, uncles, cousins and other relatives. A tribal hunter usually shares his game with several families. In some cases, tribes may designate a hunter to harvest one or more animals for elders or families who cannot provide for themselves.

As a sovereign government, each treaty tribe develops its own hunting regulations and ordinances governing tribal members. Each tribe also maintains an enforcement program to ensure compliance with tribal regulations. As responsible managers, tribes know the value of enforcement as a management tool. Tribes have limited hunting opportunity for tribal members when, because of budgetary constraints, they have lacked resources to adequately enforce their regulations. The ratio of tribal enforcement officers to treaty hunters is higher than the ratio of state enforcement officers to non-Indian hunters. Like the State of Washington, tribes set seasons based on sound biological information about the ability of the resource to support harvest. In the northern Puget Sound region, for example, tribes have for the past six years prohibited hunting on the Nooksack elk herd because the herd's population is too low. Loss and degradation of habitat are the primary causes of the herd's decline.

Collectively, the tribes have created the Inter-tribal Wildlife Committee of the Northwest Indian Fisheries Commission (NWIFC) to provide a forum for addressing inter-tribal issues. The committee also provides a unified voice in discussions with state and federal wildlife managers. Tribes have created a technical working group through the NWIFC to share findings from research projects and address wildlife management issues common to all of the tribes. An NWIFC wildlife biologist assists tribes in many aspects of natural resource management

The tribes are committed to doing the work that must be done to protect, restore and maintain the health of goats, elk and other animals that help feed their families and retain their culture. They want to do this work in a coordinated, cooperative way with state and federal agencies, and anyone else who chooses to work with them. Hopefully, Indian Fish and Wildlife legislation will acknowledge such efforts, by directing support for such programs and by supporting the funding needed to finance such efforts.

**MARKETING**

Fishing is a long established way of life for the tribes of the Pacific Northwest. The fact that the tribes have cut back on their fisheries 80-90 percent over the past decade should never be taken lightly. It hurts, deeply. In fact, many tribal members struggle to find their way in life when they are not able to fish. This is a financial impact, to be sure. Tribal people who have depended on fish for their sustenance through their entire lives, as their ancestors did before them, are all-too-often unable to support their families. This is a bad situation made even worse when they try to sell their catch when fishing does occur, only to be offered by pittance by buyers.

This is a "Catch 22" situation for the Northwest tribes, which have voluntarily cut back fishing over the past decade in order to sustain the salmon species in times of diminishment. Doing this is a matter of respect—deep, abiding respect for the lessons of the ages. But not being able to fish also has a major cultural impact. It cuts a lifeline to self-esteem and the spiritual identity of being Indian. It is a true dilemma for the Indian people.

But the tribes are not taking it sitting down. In addition to working hard to restore the fish resource—to harvestable levels—the tribes are also working hard to capture a fair share of the market. Competitors in the fish industry, particularly fish farms, are highly subsidized by their countries of origin. Norwegian, Canadian and Chilean fish farmers are not on their own—as the tribes have been. Their governments back them substantially, providing an inequitable advantage.

Wild caught salmon from the Northwest is very high quality salmon, and re-establishing markets for it will provide a meaningful incentive to salmon restoration. Doing so will also require support from the federal government. It will serve good purpose for Congress to take a strong interest in this, and provide economic incentives to the support of this industry. Such investment will serve the dual purpose of supporting a clean environment in the Northwest, and even support the economic revitalization of the area (tribal and non-tribal) through the support of the fishing industry and the lucrative tourism trade. It will help put salmon back in the waters of our region—something that serves both tourism and the environment well. It will also support the attraction of clean industry to the area, since such industry highly values a good life style in selecting its location.

A tribal marketing committee has been established to help explore new markets for Northwest wild caught fish, and progress has been made in doing so. The federal government has provided historically high subsidies to the agriculture industry, and yet has done nothing of the sort for the fishing industry. Congress would do well to remember that fish are food, too.

**TESTIMONY OF HANNIBAL BOLTON, CHIEF, DIVISION OF FISH AND WILDLIFE MANAGEMENT AND HABITAT RESTORATION, FISHERIES AND HABITAT CONSERVATION, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS, REGARDING THE IMPACTS ON TRIBAL FISH AND WILDLIFE MANAGEMENT PROGRAMS IN THE PACIFIC NORTHWEST**

June 4, 2003

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Mr. Chairman and Members of the Committee, I am Hannibal Bolton, Chief, Division of Fish and Wildlife Management and Habitat Restoration, Fisheries and Habitat Conservation, U.S. Fish and Wildlife Service. I thank you for the opportunity to provide the testimony of the U.S. Fish and Wildlife Service regarding tribal fish and wildlife management programs in the Pacific Northwest. We greatly appreciate the Committee's interest in our Native American programs.

The U.S. Fish and Wildlife Service (Service) has a long history of working with Native American governments to manage fish and wildlife resources. In fact, in 1872, the McCloud Wintu Tribe, at the northern end of the Sacramento Valley, played a key role in establishing the Nation's first salmon hatchery, along the McCloud River in the Pacific Northwest. Since that time, the relationships between the Service and tribes have expanded through many of the programs outlined below, and with the help of our Native American liaison program.

In 1994, the Service developed and adopted its Native American Policy to help accomplish its mission and to concurrently participate in fulfilling the federal government's and the Department of the Interior's (Department) responsibilities to assist Native Americans in protecting, conserving, and utilizing their reserved, treaty guaranteed, or statutorily identified trust assets. Through this policy, the Service is committed to providing timely and adequate communication and cooperation to tribes, to providing fish and wildlife management expertise, training and assistance, and to respecting and utilizing the traditional knowledge, experience, and perspectives of Native Americans in managing fish and wildlife resources.

Indian tribes, states, and federal agencies share the responsibility to protect and enhance fish and wildlife. The federal government and its implementing agencies owe an affirmative duty to use their expertise and authority in meaningful consultation with tribes to safeguard natural resources that are of crucial importance to tribal self-government and prosperity.

The Service has pledged to respect, promote, and protect tribal self-government, self-determination, and the sovereignty of federally recognized tribes. Nearly all of our programs incorporate tribal involvement at some level.

The Service takes its responsibilities seriously and works closely with our Native American partners to further the well-being of tribes and the long-term health of our shared natural resources.

**Tribal Grants**

The Service is eager to begin implementing two new tribal grant programs that will emphasize sustainability of fish and wildlife populations; habitat conservation; partnerships; and enhancing capacity.

- The Tribal Landowner Incentive Program will provide matching funds of up to 75 percent for projects carried out by federally recognized tribes that benefit at-risk species. $4 million will be available under this program annually.

- Tribal Wildlife Grants will be awarded competitively to enhance wildlife and their habitats on tribal lands. This program will put nearly $10 million on the ground this year, and $5 million annually.

These programs will not only enhance conservation of fish and wildlife species and their habitat, but will also strengthen Service/Tribal relationships as we work together to address conservation concerns on and around tribal lands in the Pacific Region. Our Regional Native American Liaisons have been working closely with tribes and Service staff to ensure that information on these grants, and other programs, is made available and that the process for applying is clear and easily understood.

**Conserving Sensitive Species and Migratory Birds**

The Service and Indian tribes share a common goal of conserving sensitive species, including threatened and endangered species, migratory birds, and the ecosystems on which they depend. Tribal lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws. Historically, Indian reservation lands have not had the same opportunities to participate in federal assistance programs that states and private landowners have had. Consequently, many tribal lands have remained untouched by conventional land use practices and function as islands of high quality ecosystems, attracting many sensitive species and migratory birds.

Through government-to-government protocols, the Service strives to significantly include affected tribes in Endangered Species Act, dam licensing and relicensing provisions of the Federal Power Act, and Migratory Bird Treaty Act processes. The Service solicits tribal input on not only the species in question, but also relevant tribal cultural values; hunting, fishing, and gathering rights; treaty obligations; and potential impacts to tribal economies. The Service also has a collaborative process in place for establishing tribal migratory bird hunting seasons.

Caspian tern management is an example of tribal involvement in managing sensitive species and migratory birds. Tribes are represented on the Caspian Tern Working Group (CTWG), which was formed in 1998 to assist the U.S. Army Corps of Engineers in developing a plan to reduce smolt predation by Caspian terns nesting on Rice Island in the Columbia River. The CTWG has

been meeting on a regular basis to address this and related issues and serves as a forum to discuss and plan actions, and resolve interagency, state, and tribal concerns. Tribes are represented by the Columbia River Inter-Tribal Fish Commission.

**Habitat**

Through its Habitat Conservation Program, the Service investigates, evaluates, and makes recommendations on federal water resource development projects, primarily those constructed, funded, or licensed by the U.S. Army Corps of Engineers, Bureau of Reclamation, Natural Resources Conservation Service, and Federal Energy Regulatory Commission. The Service assists these agencies in the project planning process by providing fish and wildlife resource information, evaluating the anticipated impacts of alternatives on those resources, recommending a preferred alternative from a fish and wildlife perspective, and developing measures to mitigate (avoid, reduce and compensate for) project impacts and enhance fish and wildlife. As a recent example, we are working closely with the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWSRO) to develop prescriptions and recommendations for the proposed relicensing of the Pelton-Round Butte Hydroelectric Project. The Service will prescribe upstream and downstream fishways and has recommended measures to protect instream flows and restoration and improvement of aquatic and terrestrial habitats that will benefit tribal resources.

Our Partners for Fish and Wildlife Program places a high priority on working in partnership with tribes to restore fish and wildlife habitats. We implement restoration projects both on and off tribal lands in concert with various tribes in the Northwest. Projects include wetland, riparian, in stream, and grassland restoration. Many projects focus on removing fish barriers. We recently established a "Partners" Cooperative Agreement with the Kootenai Tribe of Indians in northern Idaho (Boundary County). The focus of the restoration activities will be on bull trout aquatic and riparian habitat. The Partners Program is also working actively with other Pacific Northwest Tribes.

Some other examples of habitat-based programs are the Fisheries Restoration and Irrigation Mitigation Act (FRIMA) program, which provides grant funding for fish screen and fish passage improvements to irrigation projects in Oregon, Washington, Idaho, and western Montana, and the Chehalis River Fisheries Restoration Program, which has provided funding to the Quinault and Chehalis Tribes to restore fish habitat and conduct spawner surveys in the Chehalis Basin.

**Law Enforcement**

Each year, the Service's Law Enforcement program office and the Native American Fish and Wildlife Society sponsor a law enforcement training program. Since 1999, Service special agents have trained more than 450 Native American conservation officers to enforce wildlife laws. These conservation officers represent more than 120 tribes throughout the United States. Specialized instruction runs the gamut from developing tribal game and fish codes, to identifying waterfowl, to safely handling firearms.

We encourage the use of cooperative law enforcement as an integral component of Native American, federal and state agreements relating to fish and wildlife resources. Service and Native American law enforcement agents work together in operations on or adjacent to tribal lands throughout the country. In addition, we assist tribal governments in the coordination of appropriate fish and wildlife law enforcement investigations that require the use of the federal court system. If requested, the Service also provides assistance as a liaison between tribal governments and the U.S. Department of the Interior's Solicitor's Office on fish and wildlife law enforcement matters.

**National Wildlife Refuge System**

The Pacific Region manages over 100 refuges located throughout Washington, Oregon, Idaho, Nevada, California, and the Pacific Islands. Over 2,800 archaeological sites have been recorded on these refuges. Recognizing that many of these sites are sacred to Native Americans, the Service works hard to collaboratively manage them with tribes.

The Service also seeks the involvement of tribal governments as we develop Comprehensive Conservation Plans (CCPs) for our refuges that are adjacent to tribal lands, or which contain cultural resources or trust species of interest to tribes. CCPs describe the desired future conditions of a refuge and provide long-range guidance and management direction to: achieve refuge purposes; help fulfill the National Wildlife Refuge System mission; maintain and, where appropriate, restore the ecological integrity of the refuge; help achieve the goals of the National Wilderness Preservation System; and meet other mandates.

**Fisheries Resources**

The Service works closely with tribal partners to further the well-being of the tribes and the long-term health of our shared fishery resources. For example, salmon from National Fish Hatcheries (NFHs) are provided to the tribes for subsistence and ceremonial use; Fish Health Centers provide advice and technical assistance to the tribes; and Fishery Resource Offices work closely with tribes to assess fish stocks and assure fair and equitable sharing of fish harvests, as well as provide assistance on many important habitat restoration efforts.

A specific example of the Service's assistance to tribes is our working relationship with the Columbia Basin Fish and Wildlife Authority (CBFWA). CBFWA was established as an association of state and federal fish and wildlife agencies and Indian tribes to serve as a forum for exchange of information and to assure comprehensive and effective planning and implementation of fish and wildlife programs in the Columbia River Basin in order to improve the quality of fish and wildlife decision-making and influence other regional decision-makers, consistent with requirements of applicable law. Through CBFWA, the Service works cooperatively with tribes on a variety of issues and to address concerns they may have. Examples include recent efforts to develop a Research, Monitoring and Evaluation protocol for salmonids in the Columbia Basin and establishing collaborative funding needs for fish and wildlife mitigation.

The Service, working with its tribal, state, and federal partners, is also engaged in sub-basin planning efforts to develop harvest, production, and habitat management goals, and strategies to achieve those goals, in order to rebuild Columbia River stocks important to tribal and non-tribal fisheries.

Similar working relationships are provided through the Northwest Indian Fisheries Commission and the Columbia River Intertribal Fish Commission. All of these organizations are to be commended for their important efforts and achievements.

**Hatcheries**

The Service implements or administers a number of hatchery mitigation programs including the Mitchell Act program, Lower Snake River Compensation Program (LSRCP), Bureau of Reclamation Grand Coulee Dam program, and Corps of Engineers Dworshak Dam and John Day Dam mitigation programs, that support tribal fisheries both on and off-reservation lands. LSRCP facilities consist of 26 production, acclimation, and trapping facilities, as well as several fish health and monitoring and evaluation offices in Washington, Oregon, and Idaho. The facilities are operated and evaluated by the fisheries agencies of Oregon, Washington, and Idaho, the Service, and the Nez Perce and Umatilla Tribes. The Service supports treaty fishing through the programs at Quilcene, Quinault, and Makah NFHs. Quilcene NFH supports the Point no Point Tribes (particularly Skokomish and Port Gamble Tribes), and Quinault and Makah NFHs support the Quinault and Makah Tribes, respectively. Quinault and Makah NFHs are located on reservations, and all hatchery production is coordinated closely with these tribes through cooperative agreements with the Service. Tribal members work at Service hatcheries in fish production, fish marking, and fish sampling.

The Warm Springs NFH provides a good example of Service and tribal support for the National Fish Hatchery program in the Pacific Northwest. In 1959, the CTWSRO requested that the Service investigate the possibilities of salmon and steelhead enhancement on the Reservation, and in 1963, the CTWSRO requested that the Service initiate hatchery feasibility studies on the Reservation. Construction of Warm Springs NFH was authorized by an Act of Congress on May 31, 1966 to stock the waters of the Warm Springs Reservation of Oregon. It was expected that the hatchery would produce about one million salmon and trout annually, providing economic benefits to the CTWSRO through the sale of fishing permits and related enterprises, as well as employment and training opportunities. The continuing goal of the CTWSRO and Service is to cooperatively manage Warm Springs NFH in a manner that will protect remaining wild fish populations and preserve their genetic integrity, maintain the existing physical characteristics of Warm Springs anadromous fish stocks and their production above the hatchery, and not impact fish populations below the hatchery while abiding by the goals and objectives of the Deschutes River Subbasin Salmon and Steelhead Plan and the Integrated Resource Management Plan I for Forested Areas of the Reservation.

It is also important to highlight that tribes are consulted on the management of National Fish Hatcheries. We work cooperatively with tribes and other partners to gather information for

management decisions at National Fish Hatcheries to minimize the risk to wild and listed salmonid species. For example, the Service has established a cooperative agreement with the CTWSRO and an interagency agreement with U.S. Geological Survey. With our partners we use state-of-the-art technology such as underwater videography and radio telemetry to evaluate hatchery-wild salmonid interactions in streams on tribal lands.

The Service also participates on the Pacific Northwest Fish Health Protection Committee which provides a forum for the development of research priorities, technical, diagnostic, prophylactic and therapeutic procedures, fish cultural practices, and practical fishery management policies to prevent the introduction and spread of diseased fish and pathogens, to minimize the impact of diseases that do occur, and to promote the production of healthy fish. Membership includes the Columbia River Inter-Tribal Fish Commission, the Northwest Indian Fisheries Commission, Alaska Department of Fish and Game, California Department of Fish and Game, Idaho Department of Fish and Game, Washington Department of Fish and Wildlife, Oregon Department of Fish and Wildlife, U.S. Fish and Wildlife Service, NOAA-Fisheries, the Montana Department of Fish Wildlife and Parks, and Clear Springs Foods, Inc. Several other entities participate as contributors and observers.

Finally, the Service provides funding and technical assistance to accomplish hatchery reform of tribal and non-tribal hatcheries in western Washington. The Hatchery Reform Project is a systematic, science-driven redesign of hatcheries to meet two goals: to help recover and conserve naturally spawning salmonid populations, and to support sustainable salmon fisheries through hatchery production without negative effects to wild salmon. The Service provides funding to the Northwest Indian Fisheries Commission and its member tribes in western Washington to improve hatchery practices and to make structural improvements at tribal hatcheries to meet the goals of hatchery reform.

**Harvest**

Tribes are considered co-managers of both listed and unlisted salmon resources. The Service works to ensure tribal harvest rights are upheld. For example, we work closely with tribes to implement fish management plans on the Columbia River in order to provide a management framework within which the parties to *U.S. v. Oregon* may exercise their sovereign powers in a coordinated and systematic manner in order to protect, rebuild, and enhance Columbia River fish runs above Bonneville Dam while providing harvests for both treaty Indian and non-Indian fisheries. The primary goals of the parties are to rebuild weak fish runs to full productivity and fairly share the harvest of upper river runs between treaty Indian and non-Indian fisheries in the ocean and Columbia River basin.

Another important example is the Service's work with the Northwest tribes in Pacific Salmon Commission fishery management activities to implement the U.S./Canada Pacific Salmon Treaty. The Treaty provides the United States and Canada with salmon harvests commensurate with each country's total salmon production, and also seeks to conserve the salmon resource of each country (to prevent over-fishing). The Service works with the affected tribes, other U.S.

agencies, and Canada, on several technical committees that address international fishery management of salmon stocks in western Washington, the Columbia River Basin, and the Oregon coast. Tribal involvement includes Puget Sound Tribes, the Northwest Indian Fisheries Commission, and the Columbia River Intertribal Fish Commission. In particular, the Service works with the tribes and other agencies on the Selective Fisheries Evaluation Committee, which evaluates impacts of mass marking hatchery production to provide selective harvest of hatchery salmon stocks. Tribal members serve on the evaluation teams to ensure their needs are being met.

**Conclusion**

Mr. Chairman, in closing, I would like to state that the Service is committed to providing timely and adequate communication and cooperation to tribes, to providing fish and wildlife management expertise, training and assistance, and to respecting and utilizing the traditional knowledge, experience, and perspectives of Native Americans in managing fish and wildlife resources. In order to accomplish this, we are committed to developing good working relationships and mutual partnerships with Native American governments.

Mr. Chairman, this concludes my remarks. I would be happy to answer any questions.

**Hannibal Bolton**

Hannibal Bolton, a native of Crawfordsville, Arkansas, is a graduate of the University of Arkansas/AM&N, class of 1971. He is a 30 year career veteran of the Fish and Wildlife Service. He began his career with the Service in 1971 as a staff fisheries biologist near Princeton, Indiana, where he worked on large river and warm water fisheries management and ecology. He was Assistant Project Leader of the Ashland Fishery Resources Office in Ashland, WI. In 1981, he established the Winona Fishery Resources Office at Winona, MN, where he served as its project leader until 1991. In 1991 he was selected as the Fisheries Associate Manager for the Great Lakes big Rivers Region in Minneapolis, MN, and his tour of duty included program implementation and development for the region's fishery management program. He later worked as the Deputy Assistant Regional Director for the Fisheries Program, where he developed regional fishery policy and implemented guidelines encompassing eight states (MN, IL, IN, NS, OH, WU, IA) and seventeen field stations.

Mr. Bolton is currently the Chief, Division of Fish and Wildlife Management Assistance and Habitat Restoration, in Washington, DC. There he maintains oversight of the development of the Service's Fisheries program's budget, policy and legislative activities, as well as the Fish and Wildlife Management, Anadromous Fish Management, and Marine Mammal Program issues. In addition to his career with the Service, Mr. Bolton is very active in a wide array of professional and scientific organizations, as well as serving as a member of the Board of Trustees at Northland College in Ashland, Wisconsin. He is also a proud life member of Kappa Alpha Psi Fraternity, Inc.

**Written Testimony**
**of the**
**Duck Valley Shoshone Paiute Tribes of Nevada & Idaho**

**Before the**
**United States Senate**
**Committee on Indian Affairs**

**Hearing on the**
**"Status of Tribal Fish and Wildlife Management Programs"**

**Submitted by**
**The Honorable Terry Gibson, Chairman**

**June 4, 2003**

## INTRODUCTION & BACKGROUND

The Duck Valley Shoshone Paiute Tribes of Nevada & Idaho (Duck Valley) are federally recognized Tribes organized under the *Indian Reorganization Act of 1934.* The Duck Valley Indian Reservation (Reservation) straddles the Nevada and Idaho borders and has a total population of 1800 members. The Reservation consists of 280,000 acres and is geographically proximate to several non-federal, hydroelectric projects, that impact Duck Valley's natural, economic, cultural, and historic resources. The Reservation was established by executive orders dating from April 16, 1877, May 4, 1886, and July 1, 1910, within a region whose salmon supply was deemed to be inexhaustible for our people's benefit. On our Reservation, Duck Valley exercises certain rights of home rule and is responsible for the promotion of the economic and social welfare of its tribal membership. Duck Valley's interests are also based on the Bruneau and Boise Treaties (Treaties). Our ancestors signed these treaties with the United States. However, they were later left un-ratified.

The Treaties created a permanent homeland for Duck Valley with the condition that we are to continue our off Reservation activities, including established fishing patterns from the Reservation's Mary's Creek that flows to the Bruneau, Snake and Malad Rivers. Duck Valley has specific rights to utilize its off-reservation resources and we have an interest in the operation of the various hydroelectric projects surrounding our Reservation. These interests also arise under such statutes as the *National Historic Preservation Act,* the *Native American Graves Protection & Repatriation Act,* and the *American Indian Religious Freedom Act.*

## IMPACT OF HYDROELECTRIC PROJECTS ON DUCK VALLEY

The central part of the Reservation is made up of wide, open valleys of Blue Creek and the Owyhee River(s). The Owyhee River, located in the Snake River

corridor, traverses the Reservation flowing southeast to northwest and is the primary drainage in Duck Valley. A small portion of the Reservation's northeast corner is drained by the Bruneau River. These rivers are critical to the livelihood of Duck Valley. Agriculture and ranching have been longstanding central components of the Reservation economy. We also operate three fishery reservoirs for public use along the Owyhee River, as well as miles of recreational fishing along the River. Most important, the Snake River-Owyhee River systems contain many sites that have religious, cultural, and archeological significance to us, that are impacted by the off Reservation hydroelectric projects. Specifically, the C. J. Strike, Malad, and Hells Canyon projects (Project Area) are of particular concern to us as they affect our resources both on and off the Reservation.

The Duck Valley people, historically, have used the Project Area before the establishment of American settlers. The Project Area served as a gathering and fishing location for the Duck Valley people, providing us with the opportunity to take fish and gather plants and animals in the area. The historical record indicates that large numbers of salmon which returned to the Project Area and which played such an important part in the lives of our people. Because of the abundance of the anadromous fish at the project area, this area became an important gathering place for our people and resulted in numerous camps in the area. In addition, the Project Area was important in the trade activities of the Duck Valley people with other Tribes and with the American settlers.

Idaho Power is currently in the process of applying to the Federal Energy Regulatory Commission's (FERC) for the relicensing of the C. J. Strike, Malad, and Hells Canyon and various smaller projects. As stated before, these projects impact Duck Valley's homeland and various interests as guaranteed under by Executive Orders and Treaties. Unfortunately, these impacts have not been fully recognized within the FERC licensing process. The current process does not fully and adequately address our concerns. Therefore, we believe that any "reform" of the relicensing process and, in particular, any proposed legislation which intends to shorten or expedite the licensing process must taken into account our interests.

**S. 14, *THE ENERGY POLICY ACT OF 2003***

As noted above, there are substantial impacts by hydroelectric projects impacting our interests that have not been fully recognized within the FERC relicensing process. In particular, we have concerns with the hydroelectric relicensing reform provision in **S. 14**, *The Energy Policy Act of 2003.* We do not take issue with purpose of streamlining the relicensing process, making it less complex and lengthy, and thereby less costly. However, we believe that these goals must not outweigh our ability to protect our interests on being consulted and participating in the licensing process.

Current Law
The Federal Power Act, 16 U.S.C. § 797(e), authorizes FERC to issue or reissue a license to private parties, corporations, or any State or municipality for the operation of a hydroelectric project within any federal reservation after first determining that:

- the license will not interfere, or is not inconsistent with the purpose for which such reservation was created or acquired, and;
- the license contains conditions that the respective Secretary, under whose supervision such reservation falls, shall deem necessary for the *adequate protection and utilization of such reservation* (emphasis added).

The Federal Power Act defines a federal "reservation" to include tribal lands within Indian reservations. See 16 U.S.C. § 796(2). The Secretary of the Interior has the authority to establish the statutory baseline conditions for projects within an Indian reservation. For projects not within an Indian reservation but which affect tribal resources, operation of applicable federal law provides an avenue for Indian tribes to participate in the license approval process.

Recommendation
Because the hydroelectric provision in **S. 14** proposes changes federal law, Duck Valley is concerned that the new relicensing regime will result in unknown impacts on the Tribes' ability to meaningfully participate in relicensing and licensing proceedings. Alternatively, we support an approach that would statutorily require the affected federal agencies to consult with the Tribes in a manner that meaningfully addresses the Tribes' particular concerns. This inclusive and deliberate approach to this complex matter would provide a sound basis for Congress to change the law in a manner that accords proper respect for the unique legal and political relationship between Indian tribes and the United States.

**CURRENT FERC REGULATORY REFORM EFFORTS**
On February 20, 2003, FERC issued a Notice of Proposed Rulemaking (Proposed Regulations). To protect our rights and resources, we submitted comments to FERC and we continue to be actively involved with the on-going rulemaking process.

Under the current relicensing procedure, the interest and rights of Tribes are, at a minimum, protected. As we understand the initial motivation behind the Proposed Regulations was the desire by certain parties to expedite the handling of relicensing proceedings through the consolidation of certain portions of the existing procedure. While we believe that this is a positive goal and do not wish to obstruct progress in this regard, we note that this effort can only

succeed if the rights of all parties – including Tribes – are protected in the regulatory process.

In our view, the Proposed Regulations do not streamline the current process, rather, they allow duplication of the process by not including all affected parties from the very beginning stages of the process. Moreover, the Proposed Regulations are also problematic in that they fail to adequately address important issues relating to the rights and interest of Tribes. We believe it is necessary for FERC to recognize these discrete tribal issues and resolve them before the Proposed Regulations can be successfully adopted. Thus far, this has not occurred, however, we will continue to be engaged in the process and work toward an acceptable resolution of these issues.

Listed below are the general comments and concerns we have submitted to FERC for consideration:

- The Regulations Must Recognize The United States' Trust Responsibilities to Indian Tribes, And Provide For Those Responsibilities To Be Properly Discharged In Licensing Proceedings.
- The Regulations Must Expressly Provide For Government-To-Government Consultation.
- The Regulations Must Expressly Provide For The Recognition Of Treaty Rights.
- The Tribe's Concerns Must Be Resolved In The Regulations (Not Referenced In The Preamble).
- The Tribe's Right To Provide Comments Relating To Studies Must Be Specifically Recognized In The Regulations.
- The Tribe Supports Establishment Of A Tribal Liaison.

For the Committee's review, we are also attaching to this testimony our full comments submitted to FERC. *See* Attachment A. We understand the Committee will be drafting legislation to address the issues raised in during this hearing. We strongly urge the Committee to consider incorporating these recommendations into the legislation as well as supporting our Tribe's comments.

**FUNDING FOR TRIBAL PARTICIPATION IN FERC PROCEEDINGS**

Clearly, hydroelectric projects have had a substantial impact upon our Reservation. In particular, they have dramatically impacted our subsistence, cultural resources, environment, and fisheries. Unfortunately, these impacts have not been recognized within the FERC licensing process. All too often (and with little notice) we are provided with limited periods to respond to massive filings and <u>are given no resources by the applicant or FERC to do so.</u>

As the Committee is aware, Federal agencies have a trust obligation to protect important tribal resources. Specifically, as noted in Executive Orders, Treaties, the Federal government assumed the obligation to protect on and off reservation resources for use by Duck Valley. This obligation was a material factor in Duck Valley's willingness to locate onto the Reservation. Despite the importance of the resources within Project Areas to Duck Valley, and despite the Federal government's obligation to protect these tribal resources, no meaningful attempt was undertaken to consult with Duck Valley on a government-to-government basis prior to the initial licensing of these projects some 50 years ago nor for their relicensing. In particular, our trustee, the Bureau of Indian Affairs (BIA), represented our interests half a century ago and now provides no support for these critical relicensing issues.

With that said, the BIA has a line item in its budget for FERC activities on Indian reservations. However, this source of funding is very small and is limited to administrative costs of tracking FERC activity on reservations. No funding is provided directly to Tribes to participate in FERC proceedings. The cost burden of participating in FERC proceedings should not fall on the Tribes! We urge the Committee to address this issue so that we are equipped to adequately participate in FERC proceedings.

**CONCLUSION**

The Duck Valley Shoshone Paiute Tribes of Nevada and Idaho cannot stress enough the importance of protecting our natural and cultural resources. We urge Congress, FERC, the Department of the Interior and other federal departments and agencies to take our concerns seriously. We look forward to working with Congress and the Executive Branch in addressing our concerns. Thank you for the opportunity to present our written testimony regarding this important matter.

**TESTIMONY OF**
**D. ROBERT LOHN, REGIONAL ADMINISTRATOR**
**NORTHWEST REGION, NATIONAL MARINE FISHERIES SERVICE**
**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**
**U.S. DEPARTMENT OF COMMERCE**

**BEFORE THE**
**COMMITTEE ON INDIAN AFFAIRS**
**UNITED STATES SENATE**

**ON**
**TRIBAL FISH AND WILDLIFE MANAGEMENT PROGRAMS IN THE PACIFIC NORTHWEST**

**JUNE 4, 2003**

Good afternoon, Mr. Chairman, and honorable members of the Committee. Thank you very much for inviting me to share some comments about NOAA Fisheries relations and cooperation with tribal governments in the Pacific Northwest on fisheries issues. There are 43 tribes in the Pacific Northwest, 30 of which have federally recognized fishing rights. It is with the 30 tribes possessing trust and/or treaty fishing rights that we have our most frequent contact. We have repeatedly stressed to the region's leaders, tribal and non-tribal, the importance of our co-management and trust relationship to the tribes. NOAA Fisheries enjoys a positive working relationship with our Pacific Northwest tribal partners. We view that relationship as crucial to the region's future success in recovery of listed salmon.

I would now like to give the Committee an overview of the types of interactions we routinely have with the tribes of the Northwest Region.

## Tribal Communication and Coordination

### Northwest Region (NWR) Tribal Liaison

To improve our coordination and communication with Northwest tribes, the NWR established a regional tribal liaison position in 2000. That position provides a point of contact for tribal officials and staff members uncertain about NOAA Fisheries program contacts. Coordination includes answering specific questions to clarify uncertainty and resolving more general questions about the consultation process and procedures. In these ways we have been able to address such specific issues as: FERC relicensing consultations (White River and Cowlitz Projects), resource management actions (Confederated Tribes of the Warm Springs Reservation of Oregon (grazing and forestry) Coquille (forestry) and Confederated Tribes of the Grand Ronde (forestry, including a multi-year consultation on forest management plan). Additionally, the NOAA Fisheries

divisions and branches within our region have virtually daily contact with tribal programs in such areas as research, fisheries, hydropower, and hatcheries.

**NWR-Tribal Commissions Semi-Annual Meetings**
We have semi-annual policy-level discussions with the two regional fisheries commissions (Columbia River Inter-Tribal Fish Commission (CRITFC) and the Northwest Indian Fisheries Commission (NWIFC)). We use these meetings to keep our respective organizations informed of programmatic developments and to share issues of concern. The meetings involve the tribal commissioners and key policy staff (from a total of 24 tribes), along with my senior policy staff and me. We believe these meetings are mutually beneficial and greatly improve our communication and coordination.

We have stressed that our government-to-government relationship and trust responsibility is to tribal governments, not intertribal organizations (a point often emphasized by tribal governments themselves). To reinforce our appreciation of this unique relationship, last year my senior staff and I met with all six tribal governments in the Columbia Basin, representing tribes with fishing and co-management authorities.

**FCRPS Implementation**
The Federal Columbia River Power System is operated in accordance with a NOAA Fisheries biological opinion pursuant to the Endangered Species Act (ESA). The opinion places substantial requirements on the Bonneville Power Administration, the US Army Corps of Engineers, and the Bureau of Reclamation to operate the system to protect listed salmon and steelhead and to conduct off-site mitigation to improve the habitat and productivity of the listed fish. Many of the steps taken under this biological opinion also benefit non-listed stocks of these fish, including those important to the tribal governments in the Columbia River Basin.

The requirements of the ESA lead us to concentrate resources on opportunities to conserve listed species. For the habitat, research, monitoring, and evaluation projects, this can, in some cases, cause us to prioritize toward projects that focus on listed species. While we also seek to coordinate ESA obligations with ongoing projects that benefit non-listed stocks, we recognize that the increases in BPA funding have been focused on FCRPS actions that are necessary to avoid jeopardizing the continued existence of threatened and endangered salmon. Inevitably, the tribes, as well as state and local interests, have a capacity for projects that extend beyond BPA's capacity and authority. Therefore, we seek to coordinate and partner resources to maintain support for tribal projects that are directed toward long-term restoration and protection of watersheds by the kinds of actions that help assure that additional stocks of salmon will not require ESA protection in the future.

In overseeing the hydro system operations under the biological opinion, we have tried to assure full opportunity for tribal participation. These operations are overseen, to a significant degree, by a committee called the Implementation Team (IT) and various work groups reporting to the IT. The IT and its work groups are composed of federal, state, local utility, and tribal

representatives. Last year, in response to tribal requests to hold some meetings outside the Portland area, at sites nearer the reservations, we held our first "off-site" meetings. The IT met in Boise, Idaho to be more conveniently located for the Shoshone-Bannock, Shoshone-Paiute, and Burns Paiute Tribes. Another meeting was held at Grand Coulee (sponsored by the Spokane Tribe of Indians and the Confederated Colville Tribes). It was held over two days to include a tour of Lake Roosevelt by the tribes to illustrate concerns associated with lake management decisions made by the IT.

**Regulation Coordination**
We routinely share draft documents and incorporate informal comments and suggestions from NWIFC, CRITFC and interested tribes when we are developing regulations and implementing ESA 4(d) rules that provide for tribal management plans. Further, we coordinate with the commission and interested tribes when engaging in stock assessments, species status reviews, and so forth.

**Pacific Coastal Salmon Recovery Fund**
The Pacific Coastal Salmon Recovery Fund (PCSRF) was established in FY2000 to provide grants to the States and Tribes to assist state, local and tribal salmon conservation and recovery efforts. The PCSRF was requested by the Governors of the States of Washington, Oregon, California and Alaska to help restore Endangered Species Act listings of west coast salmon and steelhead populations as well as in response to the harvest restrictions placed on Southeast Alaskan fishers through the 1999 Pacific Salmon Treaty. Each year, PCSRF funding is earmarked for Pacific Coastal and Columbia River tribes.

There are 35 tribes involved in the PCSRF program. There are five major program areas: (1) Salmon Habitat Protection and Restoration; (2)Watershed and Sub-Basin Planning and Assessments; (3) Salmon Stock Enhancement; (4) Salmon Research, Monitoring and Evaluation; and (5) Public Outreach and Education. The tribal funding for each year has been identified for Pacific Coastal Tribes and Columbia River Tribes, as follows:

| | |
|---|---|
| FY 2000 | $6M - Pacific Coastal Tribes |
| | $2M - Columbia River Tribes |
| FY 2001 | $7.4M - Pacific Coastal Tribes |
| | $2.5M - Columbia River Tribes |
| FY 2002 | $11.0M - Pacific Coastal Tribes |
| | $4.0M - Columbia River Tribes |
| FY 2003 | $8.9M - Pacific Coastal Tribes |
| | $3.0M - Columbia River Tribes |

NOAA Fisheries has developed Memoranda of Understanding (MOUs) with the three Intertribal Commissions on the use of PCSRF funds by member tribes (CRITFC, NWIFC, and Klamath River Inter-Tribal Fish and Water Commission). Under the MOUs, the commissions have developed project identification and selection processes in order to select proposed projects that meet the requirements of the PCSRF. The commissions provide grant administration services, including grant reporting on behalf of the member tribes.

In addition to the tribal commissions, funds are made available to seven individual tribes that are not members of either fish commission: The Confederated Colville Tribes; Shoshone-Bannock Tribes; the Confederated Tribes of the Grand Rhonde; the Coquille Tribe; The Confederated Tribes of the Siletz Reservation; the Chehalis Tribe; and, the Round Valley Tribe. The PCSRF program has provided a unique opportunity to form partnerships with the tribes in order to benefit salmonid populations.

**Initiatives with Tribes**

**Secretarial Order**
In 1997, the secretaries of Commerce and the Interior signed a joint Secretarial Order (SO), *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.* After years of informal application of the order, the NWR with NWIFC developed guidance for applying SO principles to habitat-related (ESA) Section 7 consultations with federal action agencies in which a tribe, tribes, and/or NWIFC may have an interest. This small, but significant, step is being tested as a pilot program in western Washington. If it proves successful, we will work on other sections of the SO, to be jointly identified by NWR and the tribes, as well as with other tribes in the region for adaptation to their particular situations.

**Groundfish**
At tribal request we met to discuss concerns surrounding groundfish fisheries. Recently, severe cutbacks were required in the groundfish fisheries all along the west coast. As a result of tribal concerns and to take advantage of opportunities to share management, research, and monitoring expertise with tribal and state co-managers, we have formed a groundfish committee, including state representation, to address concerns about Washington Coastal Groundfish areas, to coordinate information for presentation to the Pacific Fishery Management Council.

**Tribal Advisory Boards/Committees**
The NWR Tribal Liaison serves on the advisory committees to the Northwest Indian College's Tribal and University Program and Haskell Indian University's Environmental and Natural Resources Program. These activities provide invaluable opportunities to not only assist the professional development of the Indian students but also to help increase tribal student awareness and interest in NOAA Fisheries.

As stated earlier, Mr. Chairman, all of us in the NWR take our trust responsibilities to the tribes very seriously. We are proud of the advances in our relationships with regional tribes that have been made in the last few years and look forward to even greater advances in the years to come.

Mr. Chairman, that concludes my prepared testimony. Again, thank you for this opportunity to appear before you today. I would be pleased to answer any questions you or members of the Committee may have.

**Testimony of Mr. Olney Patt, Jr.**
**Executive Director**
**Columbia River Inter-Tribal Fish Commission**
**Before the**
**United States Senate Committee on Indian Affairs**
**On June 4, 2003**

Mr. Chairman, Mr. Vice-Chairman, members of the committee. My name is Olney Patt, Jr. I am the new executive director of the Columbia River Inter-Tribal Fish Commission as well as the immediate past chairman of the Tribal Council of the Confederated Tribes of the Warm Springs Reservation of Oregon. While I am providing oral testimony to the committee on behalf of the commission, I would like to direct your attention to the written testimony provided by the member tribes of the Commission and I will reference some of the points and issues made there.

Two years ago, a former member of this committee, the distinguished Senator from Oregon, Mark Hatfield, addressed a broad group of Columbia Basin stakeholders and governments concerning the governance of the Columbia River. His message simply and eloquently recounted the history of the Bonneville Power Administration and it's goal of rural electrification and employment in the Pacific Northwest during the Great Depression. He further stated that this mission had been accomplished but that Bonneville needed to redefine its societal goals to take into account new realities in the Pacific Northwest . . . or risk losing the benefits of the Federal Columbia River Power System to the Pacific Northwest. He believed that the redefinition of the Bonneville mission could be found at the core of its history . . "high social purposes that could improve lives." With his permission, I have included Senator Hatfield's remarks as part of this testimony and request that it be included in the record.

Senator Hatfield was correct in stating that the original goals of the Bonneville Project Act of 1937 were accomplished. However, they were achieved while leaving both the tribes of the basin and the ecosystems and salmon upon which tribes depended in Bonneville's wake.

The passage of the Northwest Power Planning and Conservation Act in 1980 (the Regional Act) under the leadership of Senator Hatfield and the early work of the Act's Council under the chairmanship of Senator Dan Evans were important attempts to remedy the damages caused by the system. The Regional Act's mandate was for the project operators "to protect, mitigate and enhance" fish and wildlife resources affected by the hydro system through a planning process that included rigorous consultation with the tribes in terms of a statutory trust responsibility and the use of the Bonneville revenue stream consistent with a fish and wildlife program. As our written testimony yesterday and today points out, during the first twenty years that the Act was in place, we made great progress in our efforts to rebuild our ecosystems and salmon populations while providing significant economic benefits to our own and surrounding communities. These included the multiplier effects of capital expenditure and the stream of benefits in terms of fishing opportunities that are helping to buoy up our sagging rural economies that suffer from high unemployment and hunger rates.

However, during the last two years, Bonneville and, for that matter, the Council, which has the responsibility to develop an effective fish and wildlife program, have failed

to fulfill the mandates of the Regional Act. The Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe are providing written testimony to the Committee. In each testimony they provide a detailed account of the problems they have encountered since the year 2000. They include:

- Failure to implement the Fish and Wildlife Program and the hydrosystem Biological Opinion that was recently held invalid by a federal district court.
- Placing the risk of energy-related financial mismanagement on fish and wildlife funding.
- Failure to consult and coordinate with tribes over the funding of the Fish and Wildlife Program.
- Failure to honor numerous commitments to the tribes made in their 1996 MOA, and in its rate case.
- Failure to employ efficient contracting procedures and prompt expense reimbursement resulting in missed opportunities and unnecessary costs to the tribes.
- Providing an increase of $4 million to its $8 million Fish and Wildlife Division budget resulting in new impediments to efficient fish and wildlife funding.
- Emphasizing certain federal agency funding needs in the name of the ESA at the expense of successful tribal fish and wildlife programs that address both watershed and systemwide needs.

I would also direct your attention to a memo attached to this testimony from the Nez Perce Tribal Department of Fisheries Resource Management detailing the contracting problems that are wreaking havoc on the time and resources of our tribal programs.

Bonneville continues to provide the cheapest electricity in the United States in part because it has not internalized the full cost of its fish and wildlife responsibilities that are normally borne by power plant operators. As noted in the Yakama testimony, our analysis shows that BPA could meet funding levels for high priority fish and wildlife projects and still be six to 14 percent below market prices for electricity. This additional funding would add only about $1.90 per month for the average consumer.

In order to provide the impetus for BPA to recognize and fund its obligations, our tribes believe that greater oversight at the national level is essential. In this regard, we greatly appreciate this committee's effort and call on you to ensure that BPA's trust responsibilities are implemented. BPA must also honor its commitments by providing adequate funding to pay for high priority fish and wildlife projects and not use fish and wildlife funding as a shock absorber for bad water years or bad management.

Most importantly though, echoing Senator Hatfield's words, BPA needs to redefine its commitment to societal values including environmental justice. This federal agency needs to assist in honoring the obligations of the United States when the Congress ratified our treaties securing our right to take fish at all usual and accustomed fishing places. Tribes are partners to the states and federal government and exercise jurisdiction over the waters and the fish and wildlife of the Columbia Basin. As partners

under the supreme -laws of the United States, we must be treated as true partners at the same table, not as supplicants whose needs can be arbitrarily and capriciously ignored.

I would also like to enter in the record the unanimous resolutions of both the Affiliated Tribes of Northwest Indians and the National Congress of American Indians that detail our grievances and call upon the Congress and the Administration to remedy them. Along with the Yakama testimony, these resolutions call for specific remedies for the problems that tribes have identified in their relationship with the Bonneville Power Administration. These remedies include:

- Providing strong oversight including GAO review and regular reports to this committee.
- Improving implementation by streamlining contracting or transferring implementation to another federal entity.
- Providing assured and adequate long-term funding for Bonneville's fish and wildlife obligations.
- Providing a coordination mechanism among the federal, state and tribal governments consistent with section 4(h)(11)(b) of the Regional Act.
- Improve BPA Tribal Policy and set measurable objectives.
- Require BPA to document compliance with the substantive standards of the Regional Act especially the equitable treatment standard.

Thank you for this opportunity to testify. If you have any questions about our testimony or our programs, other members of the Commission or myself would be happy to attempt to answer them.

**SENATOR MARK O. HATFIELD**
**REMARKS ON PRESERVING THE BENEFITS**
**OF THE COLUMBIA RIVER**
**MARCH 12, 2001**

When we initially planned this event we didn't realize we'd be in the midst of an energy crisis. Good timing for discussing the most important public policy issue of the year.

It's impossible to read newspapers or watch television news without hearing about power prices, power supply, or fears that the Northwest will be a California energy farm.

- Although the general public is still confused, some people are waking up to importance of the Federal hydro system.
- For those who do understand, preserving the benefits of the power system is becoming an urgent policy issue.

Energy conservation -- all but forgotten during the 1990s when we were seduced by the unfulfilled promises of competition -- now is promoted as the best near-term tool for dealing with the crisis.

- Newspaper ads, public service announcements, declarations of emergencies all provide conservation suggestions:
    - Turn out lights, turn down thermostats, use fluorescent bulbs, insulate your homes, run appliances during off-peak times, etc., etc.
- Surprisingly, there has been no mention of a highly effective conservation practice devised by an obscure energy expert:
- Betsy Bloomingdale -- friend, confidante and sometime energy advisor to President and Mrs. Reagan –proudly stated during an earlier crisis that she did her part to conserve energy by prohibiting her servants from using the self-cleaning oven before 11:00 in the morning.
- Now, ladies and gentlemen, heroic insight like that comes along only once or twice a generation, and I have to wonder how many megawatts we would have saved this year if we'd been quick to give this direction to all household servants in the Northwest.

But let's forget about the crisis for a while and think about the future. Getting through the current mess will take tremendous effort. But, we'll get through it and realize it was just a distraction on the road to long-term energy security.

- But the question is how? How should we preserve the benefits of the system for the people of the Northwest?

I think I know the answer to that question, but before I go further, I want to warn you that it will be viewed by many of you as highly unorthodox. I'm going to explain it by making 3 primary points:

- First, I want to offer the radical idea that the Northwest's energy system, although almost 70 years old, is still in its infancy.
- Second, I want to inject some new ideas on how we can render the system invulnerable to outside attack, and
- Third, I will talk about the ultimate purpose for which we should be willing to go to great lengths to protect and preserve the benefits of the system.

As I've observed the public discourse over the last couple of years -- mostly surrounding the salmon and dam breaching debate -- I've concluded that many in the region see the power system as a perfect machine, almost as if planned by the All-Mighty himself and handed down on stone tablets from Mt. Sinai.

- So complete, so flawless that every ounce of our strength should go toward protecting it from its enemies -- both within and outside the region.
- My friends, I agree that it is a brilliant power system, but it's a mistake to view it as a finished product that needs only to be protected.

The remarkable thing about the current system was that it was built over a 50-year period by a string of effective leaders.

- The "torch of development" was passed from generation to generation.
- The common thread that ran through their separate agendas was the concept that the system could always be improved – made bigger and better.
- It was bipartisan -- Republicans and Democrats alternated leading.
- Herbert Hoover, Franklin Roosevelt, Charles McNary, Warren Magnuson, and Scoop Jackson, among others, all had important roles.

Although they were of different political persuasions, and lived in different times, they shared the vision that the Federal system was always a work in progress; the river's full potential to create wealth <u>and</u> improve lives never fully realized.

- And they were willing to pay in political blood, if necessary, for their shared vision to build the physical infrastructure of the energy system we have today.
- But what makes their achievement even more remarkable is they weren't rolling the pork barrel into the region just for economic development, but they understood that the system was a vehicle for profound social change.
- What enabled their ultimate success was that the building of the hydrosystem had at its core, high social purposes that would improve lives.

Unfortunately, over the years we've gotten too comfortable and lost the concepts that the system is in continual need of improvement <u>and</u> it is capable of effecting social change.

- We've been so busy enjoying the fruits of our predecessors' labors that we have let the fire in their torch burn out.
- While the system today is a mighty monument to past ingenuity and determination, it lacks the strong imprint of the current generation.

Let's first look at the need to physically expand the system. We must reinvigorate the notion that it is a young system, still in a state of infancy. It can be improved – in modern ways that will make it:

- More efficient,
- Easier on the environment, and
- Serve more people with low cost power.

How can we do this? What will it look like when we do?

- We're already seeing the transformation.
- The need for large, thermal power plants is diminishing.
- In their place, we likely will see a "distributed" system of combustion turbines, fuel cells, micro turbines, solar cells, and other small-scale technologies that can be installed in individual homes and businesses, and also provide additional energy for the grid. They are:
    - Less expensive to build,
    - Cheaper to operate,
    - More reliable,
    - Higher in quality of power produced,
    - Insulated from future cost increases, and
    - Have fewer environmental impacts.

Recent increases in electricity prices are making conservation and renewable energy more attractive. We must capitalize on this.

- This means conservation is more cost-effective than ever before -- perhaps as much as 2,400 megawatts over the next 20 years -- providing we make the investment.
- This represents about $6 billion in long-term savings for the region, or about $300 million annually.
- Just think how better off we would be today if we had invested in that much conservation already.

There is a similar story for renewables:

- Between 1991 and 1998, about 420 megawatts of various renewable energy resources were developed in the region.
- But recent technology advances and increases in the cost of traditional energy are combining to create a virtual renewables "explosion:"
    - 300 megawatts of new wind capacity is being developed along the N.E. Oregon and S.E. Washington border.
    - Just a couple weeks ago, Bonneville issued a solicitation for 1,000 megawatts of new wind power.
    - Put in an historic context, this is nothing short of revolutionary.

Fuel cells are probably the most exciting, rapidly advancing technology today.

- They create electricity through a chemical reaction, not combustion.

- They are 85% efficient, almost twice that of today's large-scale combustion turbines.
- One unit, the size of a clothes washer, is able to power an entire home.
- There are prototypes being tested right now in the region.
- In the future, if 10% of the households in the Northwest installed fuel cells, they would produce about 2,200 megawatts of power -- equivalent to about ten standard-size gas turbines.

What it all adds up to is an energy revolution built on recent technological advances.

- The Northwest is in a better position to capitalize on this opportunity because we have the hydrosystem as our base generating resource.
    - And we can use it as a solid financial base to make these investments.

The hydrosystem has been the envy of the Nation for years. That's not surprising because it's just plain human nature to covet what you can't have.

- But, by modernizing and expanding the system using new technologies, we'll build an efficient, progressive energy system that others can begin to emulate.
- Instead of being the envy of others for all the wrong reasons, we will be the envy of others for the right reasons -- by providing the model for modern energy technologies that we can export to others.
- A model that will lead us away from the technologies of the past to the technologies of the future.

In doing so, we will both expand and protect the system -- just like earlier generations taught us.

- But, we must recognize the opportunity, and not circle the wagons in fear.
- It's time for a new generation of politicians, engineers and builders to develop a new, unified vision for realizing the full potential of the system –
    - A system that ensures continued clean air and water,
    - A system that ensures broadly distributed cost-based rates,
    - A system that works to recover fish and wildlife harmed by the hydrosystem, and
    - A system that again has at its core, profound social purposes that benefit those in the region most in need.

It is on this last point that I want to spend the remainder of my time this morning.

I firmly believe that the primary key to ensuring the preservation of the system lies in yet another example set by our predecessors.

- The modern development of the Columbia Basin has its roots deeply planted in high social ideals.
    - The original, primary goal was to electrify rural areas and provide irrigation water, with the greatest benefit directed to poor people.

- Also, it was the culmination of Franklin Roosevelt's dream of relocating Dust Bowl refugees in the Northwest and providing jobs and renewed economic opportunity.
- Today, looking in the rear-view mirror at Depression-era politics, we can see that the development had more to do with societal benefits than electricity and water.
- They were, in effect, deeply felt social values embodied in concrete, falling water and wire.

Today, it's difficult to appreciate the excitement accompanying the construction of the dams and the stringing of wire. But think about this:

- In the 1930s, only 54% of farms in Washington had electricity. In Oregon and Idaho, about 31%. In Montana, just 8% had power.

- Imagine the anticipation if affordable electricity would soon be available: Power to help cook, wash clothes, pump water, heat and light your house -- a monumental improvement in the quality of life for rural residents.

For nearly 50 years, these and other social benefits fueled the expansion of the Federal system.

- But 20 years ago, the skepticism began.
- Although the advantages of economic development persisted, the original social purposes were fulfilled.
- The rural West was electrified -- the job was done -- so why should the Northwest continue to benefit from low-cost Federal power?
- For the last 2 decades we've staved off attacks to privatize the system and dramatically increase Bonneville's electric rates.
- But our job was made more difficult because we had accomplished the underlying social purposes critical to the system's original success.
- We were put in the position of defending inexpensive power, primarily, and that makes us look greedy.

Think about it. Other than Bonneville's commitment to fund fish and wildlife and other environmental programs, what social purposes are we fighting for today?

- Not rural electrification -- we did that.
- Not further expansion of federal irrigation and farming -- that's unlikely.
- In other words, not the social purposes of 60 years ago.

To guarantee the long-term viability of the system, we must discover new societal benefits and pursue their fulfillment as fervently as earlier generations pursued theirs. This requires fresh thinking.

- Just as obvious as the hardships stemming from the Depression are the staggering array of problems we face today.
- We only need to open our eyes and see them:

    - Hunger, education, affordable health care, and inadequate science and medical research funding, just to name a few.
    - By tackling these with the revenues generated by Bonneville, we find the ultimate purpose for which we seek to protect the system.

- Many of you may be shocked by this suggestion. But using the benefits of this great energy machine to attack today's most serious problems in society is the single most effective way to preserve the benefits of the system.
- By tackling these social ills we will forge new and vital links with a broad range of interests – inside and outside the region -- who will work with us to protect and enhance the system.
    - Social services advocates, teachers unions, school boards, and the medical community to name a few.
- And, as always with this self-financing power system, the benefits we enjoy are the benefits we pay for when we buy power from Bonneville.

The severity of the problems we face may surprise you. How many in this room today are aware that in 1999 the U.S. Department of Agriculture ranked Oregon the worst state in the nation for hunger?

- 515,000 people received emergency food boxes from the Oregon Food Bank Network last year, an increase of 30% since 1996!
    - That's the equivalent of one in seven people in Oregon and Clark County, Washington.
- Even more alarming – 41% of all hungry people in Oregon are children.

How many here know that 10,000 students -- a full 6.6% -- dropped out of Oregon high schools in 1999?

- That means that 1 in 5 students entering high school fail to graduate.
- On the local level it's even worse. There are 2 high schools in Portland where fewer than one-third of the students who entered as freshmen graduated on time.
- In fact, Oregon has the worst drop-out rate in the Northwest, and one of the worst in the nation.

These statistics are nothing less than shameful for a wealthy society. And for those who say, "Yes, but we are so financially stretched that we couldn't possibly do this," I say: "Yes we can. Maybe not immediately, but with patience and planning, we can do it!"

- The current energy crisis and resulting high electricity rates do prevent immediate action. But the crisis is expected to be short in duration, maybe 2 or 3 years. Once supply and demand are in balance, the region should again enjoy lower rates.
- When this occurs, we should be in a position to create a modest regional fund from Bonneville revenues that could be allocated to the states and tribes to address a small set of select social programs.
- But the real power and large-scale funding behind this idea would derive eventually from Bonneville's long-standing, overwhelming nuclear debt.

- Ironically, this debt that has plagued us for nearly 20 years, is our "ace in the hole." For the next several years, Bonneville will continue to pay about $500 million annually on debt service for these plants.
- But in about a decade, those payments should start to drop. When they do, the region should be in a position to recapture and redirect that stream of money to the states and tribes for social programs to benefit those most in need.
- If there is a silver lining to the WPPSS nuclear debacle, this is it:
    - The hundreds of millions of dollars spent every year on debt service should not be halted once it is repaid, but diverted to programs that will actually have a positive, lasting impact on human lives.

There are no good excuses for not pursuing a new social agenda in the region. In fact, fulfilling a social agenda was part of the reason for building the system in the first place.

- Although our communities face a plethora of difficult problems, today's political realities prevent the creation of the constituency necessary to raise the money needed to attack them.
- This proposal overcomes that obstacle.

This will not be easy to accomplish.

- It will require statutory changes.
- It will require Bonneville's customers to agree to not roll back rates once the nuclear debt is paid.
- It will require the support and assistance of the region's leaders.
- It will not occur overnight, but now is the time to begin.

If we are serious about protecting the benefits of the power system for future generations, we must once again require the system to serve the people -- all the people.

- It's the right thing to do both morally and politically.
- It will make it difficult for others to divert the benefits of the system beyond our borders.
- If we do not take these steps, our arguments for fending off attacks will be as hollow as a de-watered turbine penstock.

Opportunities to make large-scale, meaningful improvements in the lives of disadvantaged people come seldom during a lifetime. This is one of those times.

- I urge you to seize the opportunity before you.
- By doing so, you will protect the Northwest's greatest, most precious human and man-made treasures, today and for generations to come.

**Testimony of J. Mark Robinson**
**Director, Office of Energy Projects,**
**Federal Energy Regulatory Commission**
**Before the Committee on Indian Affairs**
**United States Senate**

**June 4, 2003**

Mr. Chairman and Members of the Committee:

My name is Mark Robinson, and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission. I appreciate the opportunity to appear before you to discuss the Commission's regulation of non-federal hydropower projects and how the Commission considers Tribal issues, including Tribal Fish and Wildlife programs, as well as to address the hydroelectric relicensing provisions of the pending Senate energy bill, S. 14. As a member of the Commission's staff, the views I express in this testimony are my own, and not necessarily those of the Commission or of any individual Commissioner.

The Commission currently regulates over 1,600 hydroelectric projects at over 2,000 dams pursuant to Part I of the Federal Power Act (FPA). Together, these projects represent 57 gigawatts of hydroelectric capacity, more than half of all hydropower in the United States, and over five percent of the electric generating capacity. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable energy source.

The Commission's hydropower activities generally fall into three categories. First, the Commission licenses and relicenses hydroelectric projects. Relicensing involves projects that were last licensed 30 to 50 years ago. The Commission's second

role is to manage hydropower projects during their license term. This post-licensing workload has grown in significance as new licenses are issued and as environmental standards become more demanding. Finally, the Commission oversees the safety of licensed hydropower dams. This program is widely recognized for its leadership in dam safety.

My testimony today will provide brief overviews of the current hydroelectric licensing activity and the licensing process. I will then focus on how the Commission's licensing process ensures consideration of the concerns of Indian Tribes, and on Title V, Section 511 of S. 14.

## I. Current Hydroelectric Licensing Activity

The Commission will process 218 relicense applications this decade. These projects include many large-capacity and complex projects, and have a combined capacity of about 22 gigawatts, or 20 percent of the Nation's installed hydroelectric capacity. Of these projects, the 39 located in the northwest represent approximately 20 percent of the projected proceedings, but involve approximately 8,500 megawatts of capacity, or more than one-third of the capacity at issue.

### New opportunities to balance competing resources

Relicensing projects upon expiration of the current license is of particular significance because it involves projects that were last licensed up to 50 years ago. In the intervening years, enactment of numerous environmental, land use, and other laws, as well as judicial interpretation of those laws, have greatly affected the Commission's

ability to control the timing and conditions of the licensing process. Under the standards of Section 10(a)(1) and 4(e) of the FPA, projects can be authorized if, in the Commission's judgment, they are "best adapted to a comprehensive plan" for improving or developing a waterway for beneficial public purposes. This standard is very broad, but typically involves power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation. The Commission is required to give "equal consideration" to developmental and non-developmental values.

**Balancing need for power and stakeholder concerns**

While the Commission's responsibility under the FPA is to strike an appropriate balance among the many competing developmental and environmental interests, various statutory requirements give other agencies a significant role in licensing cases. Several entities have mandatory authorities that limit the Commission's control of the cost and time investments for licensing. For example, Section 4(e) of the FPA authorizes federal land-administering agencies to provide mandatory conditions for projects located on federal reservations under their jurisdiction. Further, Section 18 of the FPA gives authority to the Secretaries of the Departments of the Interior and Commerce to "prescribe" fishways. And, Section 401(a)(1) of the Clean Water Act precludes the Commission from licensing a hydroelectric project unless the project has first obtained state water quality certification, or a waiver thereof. These certificates typically contain their own set of conditions.

In addition, the Commission must ensure that licenses it issues are consistent with the terms of any applicable treaties between the United States and Indian Tribes, and must consider the impacts of projects on Tribal interests. The Commission also must ensure compliance with other federal statutes, including the Coastal Zone Management Act, Endangered Species Act (ESA), Federal Land Policy and Management Act, Wild and Scenic Rivers Act, National Historic Preservation Act, and Pacific Northwest Electric Power Planning and Conservation Act, each with its own procedural and substantive requirements. Compliance with all these requirements involves a multitude of different processes ancillary to licensing, which has lengthened the time required to obtain a license.

**Complexities and regional variation in relicenses**

Primary issues being addressed at those 218 projects with applications for relicensing filed from 2000 and 2010 vary by region, but include power, water use, fish passage, endangered species, recreation, shoreline management, reservoir level fluctuation, and instream flows. Water quality and cultural resources are concerns in all regions. The projects are distributed about equally between the eastern and western United States, but are concentrated in the Northwest and Southeast regions.

Hydropower issues in the northwestern United States often concern federally listed threatened or endangered salmonids (salmon, trout, and char), which often are of great concern to Indian Tribes. Most relicensing proceedings in this region requires formal consultation with resource agencies under the ESA.

At the beginning of 1996, the National Marine Fisheries Service had listed four strains (geographically distinct groups of a species) of salmonids. Today, there are 33 strains of salmonids listed by NMFS and the U.S. Fish and Wildlife Service. There is a significant overlap in the range of the listed salmonid strains and the concentration of hydropower sites in the Northwest and California. For example, about 130 licensed projects in these regions are located within the geographical boundaries of listed chinook salmon and steelhead trout. Thus, these listings, often requiring formal consultation under the ESA, have added considerable complexity and delay to the processing of relicensing applications.

**Measures to efficiently process projects**

Staff at the Commission has undertaken numerous measures to efficiently process these complex projects. The Commission has held hydropower licensing status workshops to move stalled cases, held licensing workshops with state agencies on integrating state processes, introduced electronic filing, implemented a revised *ex parte* communications rule, and provided numerous guidance documents for stakeholders on our web page. Perhaps more important, the Commission has proposed a new hydropower licensing process, developed with sister agencies, in a recent rulemaking discussed below.

## II. The Commission's Licensing Process

### The traditional licensing process

A. The Traditional Process in General

The Commission currently uses two different processes in licensing: the "traditional" process and the "alternative" process. Under the traditional process, three to three and one-half years prior to filing an application, a license applicant must consult with federal and state resource agencies, affected land managing agencies, Indian tribes, and state water quality certifying agencies to provide these entities with information describing the proposed project. The applicant must also conduct studies necessary for the Commission staff to make an informed decision on the application. Under the Commission's detailed regulations concerning prefiling consultation and processing of filed applications, the formal proceeding does not begin until the license application is filed with the Commission. As a result, under the traditional process, the Commission staff does not generally participate in pre-filing consultation.

After an application is filed, two years prior to license expiration, the federal agencies with responsibilities under the FPA and other statutes, the states, Indian tribes, and other participants have opportunities to request additional studies and provide comments and recommendations. Federal agencies with mandatory conditioning authority also provide their conditions. The Commission staff may ask for additional information that it needs for its environmental analysis. All of this information is incorporated into the Commission staff's environmental review under

the National Environmental Policy Act (NEPA). The NEPA review is the basic evidentiary document on which the Commission bases its licensing decision.

Because of the sequential nature of the traditional process and the frequent need to gather further information after the application is filed, the traditional process can be lengthy. The median processing time after application filing is 47 months.

B. Consideration of Tribal Matters

At the licensing stage, Section 4(e) of the FPA provides two important substantive protections for federal reservations, including Indian reservations. First, it provides that:

> licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which the reservation was created or acquired.

Second, section 4(e) provides that licenses issued within any reservation:

> shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

In the traditional process, when an applicant files an application to license or relicense a proposed project, or to obtain an exemption from licensing, the Commission's regulations have specific provisions for notice to and participation by Indian Tribes. A potential applicant for a license or exemption must consult with any Indian Tribe that may be affected by the project prior to filing the application. During

this pre-filing consultation process, the applicant must provide affected Tribes with detailed information on the proposed project and must hold a joint meeting with pertinent Federal and state agencies and Tribes, after which the Tribes and agencies submit comments on the applicant's proposal. The applicant must gather information and conduct reasonable studies requested by an affected Tribe, and must provide the Tribe with a copy of its draft application and allow the tribe 90 days to comment on it. If these comments indicate a substantive disagreement with the applicant's conclusions regarding resource impacts or proposed mitigation and enhancement measures, the applicant must meet with the Tribe (and pertinent Federal and state resource agencies) to try to reach agreement, and must in any event describe disagreements and discussions about them in its filed application. An application for a license or exemption must identify any Tribe that may be affected by the proposed project, and the applicant must serve the Tribe with a copy of the final application.

When the application is accepted for filing, the Commission will circulate a notice of the application to affected Tribes. A Tribe may request additional scientific studies within 60 days after the filing date, and may file recommendations regarding fish and wildlife and any other matters by 60 days after the Commission issues a notice that the application is ready for environmental review. Commission staff's initial determination under Section 10(j) of the FPA of the consistency of Federal and state fish and wildlife agencies' recommendations with applicable law is served on affected Tribes, which may comment on and participate in negotiations between the staff and

Federal and state agencies. In addition, Tribes may file comments on Commission staff's draft environmental analyses and draft environmental impact statements.

In sum, Commission action on license applications is subject to procedural and substantive safeguards to ensure that the rights and interests of the Tribe, including Tribal fish and wildlife management programs, will be fully explored and carefully considered. In addition, as described above, no license for a project located on a reservation can issue without a finding that the proposed project will be consistent with the reservation's purposes, and any such license on a Indian reservation is subject to mandatory conditions proffered by the Secretary of the Interior. State resource agencies have the same opportunities as the Tribes to participate in the process, and in addition have authority under the Clean Water Act to impose license conditions and, under Section 10(j), to make fish and wildlife recommendations..

**The alternative licensing process**

In an effort to improve the efficiency and the timeliness of the licensing process without sacrificing environmental protection, the Commission embarked on a journey of administrative and regulatory licensing reform. Beginning in 1997, the Commission altered its regulations to provide for an alternative to the traditional licensing process. The alternative licensing process adds efficiency by combining the pre-filing consultation process with the environmental review process under NEPA. Using this process, participants, and in some cases Commission staff, work collaboratively prior to the filing of the application to develop, in most cases, a preliminary draft NEPA

document. Participants in the alternative licensing process generally anticipate that their efforts will culminate in a settlement agreement. The alternative process has been successful in reducing the post-filing processing time to a median of 16 months. The requirements with respect to consideration of Tribal matters that I have discussed above with respect to the traditional licensing process also apply to the alternative process. Due to the collaborative nature of the alternative process, Tribes that wish to do so may become fully engaged in the licensing process beginning at a very early stage, and thus can help shape the environmental documentation and, in many cases, the license application, to ensure that their concerns are satisfied.

**Integrated licensing process**

A. The Integrated Licensing Process in General

Even in light of successes associated with the use of the alternative licensing process, stakeholders have continued to develop additional procedural modifications to the more formal traditional process that would further improve the efficiency and timing of licensing while maintaining environmental protections. Thus, the Commission, in cooperation with the Federal resource agencies, the Tribes, the states, and other stakeholders, developed the integrated licensing process that is the subject of the Commission's current rulemaking proceeding.

The integrated licensing process will integrate an applicant's prefiling consultation with resource agencies, Indian tribes, and the public into the Commission staff's NEPA scoping process. This approach, however, would differ from the

alternative licensing process in several respects, such as ensuring Commission staff involvement at all stages, and better integrating the licensing process with the actions and processes of other federal and state agencies and Indian tribes.

The Commission is now engaged in an open rulemaking proceeding whereby the Commission is seeking public input on the new integrated process. Our proceeding has included input from Federal and state agencies, the Tribes, license applicants, non-governmental organizations, and the public, both before and after the February 2003 issuance of a Notice of Proposed Rulemaking. We are also engaged in joint drafting of rule language by Commission staff and the federal agencies with mandatory conditioning authority under the FPA.

This rulemaking proceeding was initiated in September 2002, when the Commission and the federal agencies with mandatory FPA conditioning authority issued a notice requesting comments on the need for a new licensing process. In order to obtain input from the Tribes, the states, and other key participants, the notice also established a series of regional public and Tribal forums to discuss issues and proposals.

Following the regional forums and submission of written comments in early December 2002, the Commission hosted public drafting sessions, including the Tribes, the states, and other stakeholders, in which discussion of the results of the regional forums and comments was followed by a broadly-based collaborative effort to develop consensus recommendations on an integrated licensing process and, where possible,

develop preliminary draft regulatory text. Subsequently, staff from the Commission and the federal agencies with mandatory conditioning authority worked together to develop regulatory language for a proposed rule.

Based on written and oral comments and the public drafting sessions, the Commission issued a Notice of Proposed Rulemaking on February 20, 2003, and asked for public comment. The proposed new integrated process would improve both the efficiency and timeliness of the licensing process by merging pre-filing consultation with the Commission's NEPA scoping; enhancing consultation with Indian Tribes; improving coordination of processes with federal and state agencies, especially those with mandatory conditioning authority; increasing public participation during pre-filing consultation; and developing a study plan and schedule, including mandatory, binding dispute resolution with respect to studies to be taken by the applicant. Further, unlike the more sequential traditional licensing process, an integrated process would allow for multiple Federal and state processes to take place simultaneously. The result should be the development of all information the Commission, federal agencies with mandatory conditioning authority, and state agencies or Indian Tribes with water quality certification authority need to carry out their respective statutory responsibilities by the time the application is filed.

We believe that the efficiency and timeliness of the proposed integrated licensing process will reduce costs associated with the license application process by minimizing the redundancy and waste caused by the often duplicative information

needs of the Commission, Indian Tribes, and various Federal and state agencies associated with the hydroelectric licensing process.

To obtain further public input on the proposed rule, the Commission held a series of six regional workshops. These regional workshops, co-hosted by Departments of the Interior, Commerce, and Agriculture, were geared toward members of the hydropower community, Indian Tribes, federal and state resource agencies, environmental organizations, and the general public. Each of the regional workshops, including the session held in Portland, Oregon on March 13-14, included a day reserved for the discussion of Tribal issues. Following the conclusion of the workshops, the Commission held a four-day stakeholder drafting session in Washington, D.C., from April 29 though May 2, to develop proposed final rulemaking language. The drafting meetings also included separate sessions devoted to Tribal matters.

B. Consideration of Tribal Matters in the Integrated Process

In the Notice of Proposed Rulemaking, the Commission stated that the licensing process will benefit from more direct and substantial consultation between the Commission staff and Indian Tribes, including increased direct communication with Tribal representatives in appropriate cases. The Commission also stated that it would establish the position of Tribal liaison, to provide a single, dedicated point of contact to which Native Americans can go in hydroelectric licensing proceedings.

The Notice of Proposed Rulemaking states that the Commission staff will be

contacting Indian Tribes likely to be interested in a relicense proceeding at a very early point, for the purpose of initiating discussions concerning consultation procedures. Draft regulations provide for the following points where Commission staff will seek Tribal input and/or where there will be opportunities for Tribes to comment and otherwise participate in relicensing proceedings: (1) filing comments regarding an applicant's choice of licensing process; (2) attending scoping meetings to discuss issues, resource management objectives, existing information and information that must be developed, and to develop a process plan and schedule for the proceeding; (3) filing comments and information requests; (4) providing comments on the Commission's scoping documents and the applicant's draft study plan; (5) attending a study plan meeting to attempt to resolve study issues; (6) to the extent that Tribes have been authorized by the Environmental Protection Agency to exercise certification authority under Section 401 of the Clean Water Act, initiating dispute resolution with respect to studies as to which agreement is not reached; (7) reviewing the results of the first season of field studies, attending a meeting to discuss those studies, and requesting modifications to the study plan; (8) filing comments of the draft license application; (9) following the filing of the license application, filing motions to intervene, comments on the applicants, and proposed license terms and conditions; and (10) filing comments on a draft environmental assessment or environmental impact statement (or on an environmental assessment, in those cases where no draft is prepared). In addition, if a Tribe has intervened in a proceeding, it may file a request for rehearing of

a licensing order.

While I cannot predict the exact content of the Commission's final rule, I am confident that the integrated licensing process, which is premised on the early identification of issues, collaborative agreement on information gathering, and consistent participation throughout the licensing process of all interested individuals and groups, specifically including Indian Tribes,, will build upon the participation opportunities that already exist in the traditional process, and thus provide even greater assurance that Tribal matters will be fully considered.

**III. Comments on Title V, Section 511 of S. 14**

Section 511 would amend the FPA by providing an applicant for a hydroelectric license the opportunity to propose an alternative to mandatory license conditions proffered under FPA Section 4(e) and fishways prescribed under FPA Section 18 by the Secretaries of Agriculture, Commerce, and the Interior. If the Secretary determines that the alternative would, in the case of a mandatory condition, provide for adequate protection of the reservation or, in the case of a fishway prescription, will be no less protective of the fish resources than the original prescription, and will either cost less or result in improved project generation as compared to the original condition, the Secretary shall accept the condition,. In making the decision, the Secretary must give equal consideration to power and other developmental purposes as well as preservation of environmental quality. Further, if the Secretary does not accept an alternative condition or prescription, and the Commission finds the Secretary's original condition

or prescription to be inconsistent with law, the Commission could refer the dispute to the Commission's Dispute Resolution Service for an advisory opinion.

As discussed previously, the FPA requires that the Commission authorize only those projects that are best adapted to a comprehensive plan for improving or developing a waterway for beneficial public purposes, including power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation, giving equal consideration to developmental and non-developmental values. Aligning the criteria that the mandatory conditioning agencies must use to more closely parallel the Commission licensing criteria under the FPA should minimize conflict between those agencies' mandatory conditions and the Commission's conditions.

I support the idea of greater interaction between the resource agencies and the licensees in the development of environmental measures, which Section 511 would encourage. I believe that the proposed language with respect to mandatory conditions and fishway prescriptions would add a degree of accountability that currently does not exist. As Congress considers any legislation, however, it should be careful to ensure that any procedures that could add time or expense to the process are justified by improved outcomes.

I have reviewed the proposed legislation to see if there are any provisions that would exclude the Tribes and states from making recommendations regarding prospective hydropower applicants' proposed alternative conditions Section 511. I do not believe that anything in Section 511 precludes Tribes and states from participating

in the process by which the Secretaries would consider alternative mandatory conditions and fishway prescriptions. Also, Section 511 specifically states that nothing in that section shall prohibit other interested parties from proposing alternative conditions and prescriptions. Thus, Section 511 would not appear to adversely affect the Tribes or states.

In sum, the Commission's new integrated licensing process will provide at least 10 specific points for the Commission to obtain input from the Tribes and from the states. I am confident that this process will result in the best possible communication between the Tribes, the states, the Commission, and other stakeholders.

Thank you. I will be pleased to answer any questions you may have.

**Testimony of Mr. Allen Slickpoo, Jr.**
**Chairman, Columbia River Inter-Tribal Fish Commission**
**Before the**
**United States Senate Committee on Indian Affairs**
**On June 4, 2003**

Mr. Chairman, Mr. Vice-Chairman, members of the committee. My name is Allen Slickpoo, Jr., I am a member of the Nez Perce Tribal Executive Committee and I am the current chair of the Columbia River Inter-Tribal Fish Commission. While I am providing oral testimony to the committee on behalf of the commission, I would like to direct your attention to the written testimony provided by the member tribes of the Commission and I will reference some of the points and issues made there.

Two years ago, a former member of this committee, the distinguished Senator from Oregon, Mark Hatfield, addressed a broad group of Columbia Basin stakeholders and governments concerning the governance of the Columbia River. His message simply and eloquently recounted the history of the Bonneville Power Administration and it's goal of rural electrification and employment in the Pacific Northwest during the Great Depression. He further stated that this mission had been accomplished but that Bonneville needed to redefine its societal goals to take into account new realities in the Pacific Northwest . . . or risk losing the benefits of the Federal Columbia River Power System to the Pacific Northwest. He believed that the redefinition of the Bonneville mission could be found at the core of its history . . "high social purposes that could improve lives." With his permission, I have included Senator Hatfield's remarks as part of this testimony and request that it be included in the record.

Senator Hatfield was correct in stating that the original goals of the Bonneville Project Act of 1937 were accomplished. However, they were achieved while leaving both the tribes of the basin and the ecosystems and salmon upon which tribes depended in Bonneville's wake.

The passage of the Northwest Power Planning and Conservation Act in 1980 (the Regional Act) under the leadership of Senator Hatfield and the early work of the Act's Council under the chairmanship of Senator Dan Evans were important attempts to remedy the damages caused by the system. The Regional Act's mandate was for the project operators "to protect, mitigate and enhance" fish and wildlife resources affected by the hydro system through a planning process that included rigorous consultation with the tribes in terms of a statutory trust responsibility and the use of the Bonneville revenue stream consistent with a fish and wildlife program. As our written testimony yesterday and today points out, during the first twenty years that the Act was in place, we made great progress in our efforts to rebuild our ecosystems and salmon populations while providing significant economic benefits to our own and surrounding communities. These included the multiplier effects of capital expenditure and the stream of benefits in terms of fishing opportunities that are helping to buoy up our sagging rural economies that suffer from high unemployment and hunger rates.

However, during the last two years, Bonneville and, for that matter, the Council, which has the responsibility to develop an effective fish and wildlife program, have failed to fulfill the mandates of the Regional Act. The Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe are providing written

testimony to the Committee. In each testimony they provide a detailed account of the problems they have encountered since the year 2000. They include:

- Failure to implement the Fish and Wildlife Program and the hydrosystem Biological Opinion that was recently held invalid by a federal district court.
- Placing the risk of energy-related financial mismanagement on fish and wildlife funding.
- Failure to consult and coordinate with tribes over the funding of the Fish and Wildlife Program.
- Failure to honor numerous commitments to the tribes made in their 1996 MOA, and in its rate case.
- Failure to employ efficient contracting procedures and prompt expense reimbursement resulting in missed opportunities and unnecessary costs to the tribes.
- Providing an increase of $4 million to its $8 million Fish and Wildlife Division budget resulting in new impediments to efficient fish and wildlife funding.
- Emphasizing certain federal agency funding needs in the name of the ESA at the expense of successful tribal fish and wildlife programs that address both watershed and systemwide needs.

I would also direct your attention to a memo attached to this testimony from the Nez Perce Tribal Department of Fisheries Resource Management detailing the contracting problems that are wreaking havoc on the time and resources of our tribal programs.

Bonneville continues to provide the cheapest electricity in the United States in part because it has not internalized the full cost of its fish and wildlife responsibilities that are normally borne by power plant operators. As noted in the Yakama testimony, our analysis shows that BPA could meet funding levels for high priority fish and wildlife projects and still be six to 14 percent below market prices for electricity. This additional funding would add only about $1.90 per month for the average consumer.

In order to provide the impetus for BPA to recognize and fund its obligations, our tribes believe that greater oversight at the national level is essential. In this regard, we greatly appreciate this committee's effort and call on you to ensure that BPA's trust responsibilities are implemented. BPA must also honor its commitments by providing adequate funding to pay for high priority fish and wildlife projects and not use fish and wildlife funding as a shock absorber for bad water years or bad management.

Most importantly though, echoing Senator Hatfield's words, BPA needs to redefine its commitment to societal values including environmental justice. This federal agency needs to assist in honoring the obligations of the United States when the Congress ratified our treaties securing our right to take fish at all usual and accustomed fishing places. Tribes are partners to the states and federal government and exercise jurisdiction over the waters and the fish and wildlife of the Columbia Basin. As partners under the supreme -laws of the United States, we must be treated as true partners at the same table, not as supplicants whose needs can be arbitrarily and capriciously ignored.

I would also like to enter in the record the unanimous resolutions of both the Affiliated Tribes of Northwest Indians and the National Congress of American Indians that detail our grievances and call upon the Congress and the Administration to remedy them. Along with the Yakama testimony, these resolutions call for specific remedies for the problems that tribes have identified in their relationship with the Bonneville Power Administration. These remedies include:

- Providing strong oversight including GAO review and regular reports to this committee.
- Improving implementation by streamlining contracting or transferring implementation to another federal entity.
- Providing assured and adequate long-term funding for Bonneville's fish and wildlife obligations.
- Providing a coordination mechanism among the federal, state and tribal governments consistent with section 4(h)(11)(b) of the Regional Act.
- Improve BPA Tribal Policy and set measurable objectives.
- Require BPA to document compliance with the substantive standards of the Regional Act especially the equitable treatment standard.

Thank you for this opportunity to testify. If you have any questions about our testimony or our programs, other members of the Commission or myself would be happy to attempt to answer them.

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NATIONAL CONGRESS OF AMERICAN INDIANS

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THE NATIONAL CONGRESS OF AMERICAN INDIANS

RESOLUTION #EWS-02-001

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EXECUTIVE DIRECTOR
Jacqueline L. Johnson
Tlingit

NCAI HEADQUARTERS
1301 Connecticut Avenue, NW
Suite 200
Washington, DC 20036
202.466.7767

**Title:** **Improving the implementation and funding for the Bonneville Power Administration's Contribution to Fish and Wildlife Mitigation**

**WHEREAS,** we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS,** the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS,** The Affiliated Tribes of Northwest Indians have expressed unanimous concern that the Bonneville Power Administration has failed to administer and consistently under funded its obligations to protect, mitigate, and enhance fish and wildlife in a manner consistent with federal statutes and with its trust responsibility to the Indian tribes of the Columbia Basin; and

**WHEREAS,** tribes in the affected region have issued a resolution calling for significant reforms in BPA funding and contracting, consultation with Indian tribes, and long-term support of fish and wildlife obligations; and

**WHEREAS,** the failure to address these issues could provide an adverse precedent for other federal agencies that have a responsibility to protect trust resources of Indian tribes throughout the United States; and

**WHEREAS,** the effects of BPA budget cuts in FY03 are severe and immediate in their impact on Indian tribes in the Columbia Basin.

**NOW THEREFORE BE IT RESOLVED,** that the National Congress of American Indians supports a complete financial and management audit of BPA's implementation of the Fish and Wildlife Program to increase transparency and accountability, and

**BE IT FURTHER RESOLVED,** that the NCAI supports an increase in BPA's borrowing authority, subject to the requirement that a portion of funds obtained under that authority be devoted to fish and wildlife mitigation adequate to implement the NMFS's 2000 Biological Opinion on the Federal Columbia River Power System and the NWPPC's Fish and Wildlife Program by, among other things, triggering Cost Recovery Adjustment Clauses and using borrowing authority if necessary and appropriate, and to use its capital budget for land and water acquisitions and remove its self-imposed prohibition on carrying over funds to future years; and

**BE IT FURTHER RESOLVED,** that the NCAI calls upon BPA and all other federal agencies to immediately begin working with the cultural, fish and wildlife managers to determine what tasks are needed in Fiscal Years 2003-6 to fully implement the NMFS's 2000 Biological Opinion on the Federal Columbia River Power System and the NWPPC's Fish and Wildlife Program, and funding made available immediately for work in Fiscal Year 2003; and

**BE IT FURTHER RESOLVED,** that the NCAI supports reforming the BPA contracting process in the short term, and ultimately transferring BPA's fish and wildlife program implementation responsibilities to another agency to reduce administrative costs and delays in the longer term; and

**BE IT FINALLY RESOLVED,** that the NCAI calls upon BPA and all other federal agencies to commit to immediately addressing the problem of longer-term cultural, fish and wildlife funding to meet tribal treaty obligations and the federal trust responsibility, and the fully implement Endangered Species Act recovery and the NWPPC's Fish and Wildlife Program, and to identify how much BPA will fund for fiscal years 2006 through at least FY2011.

**CERTIFICATION**

The foregoing resolution was adopted at the 2003 Executive Council Winter Session of the National Congress of American Indians, held at the Wyndham Washington D.C. Hotel in Washington, DC, February 24-26, 2003, with a quorum present.

Tex Hall, President

ATTEST:

Juana Majel, Recording Secretary

Adopted by the Executive Committee during the 2003 Executive Council Winter Session of the National Congress of American Indians, held at the Wyndham Washington D.C. Hotel in Washington, DC, February 24-26, 2003.

BPA Contracting Issues

Nez Perce Tribe DFRM Staff Retreat
1/23/2003 and 1/24/2003

1. During the last three months of 2002, BPA Contracting suddenly prohibited line-item transfers (no-cost modifications to the contract amount). These modifications are necessary to adjust an ongoing contract, without an increase in cost; to accommodate unforeseen needs that occur between the times the contract is written and completed (typically 1 ½ years). The action was the result of BPA switching accounting methods late in 2002 to a fiscal year accrual process. Applying such unilateral decisions without a transition period prohibited the Tribe from procuring needed equipment and hampered our ability to meet 2003 project deliverables.

    1. Evaluate Salmon Supplementation Studies (Project No. 198909802).

2. BPA prohibited the ability to carry over monies on ongoing contracts. These involved dollars that BPA had already committed to contract. Because of the nature of natural resource work, projects cannot always be completed within the season planned. However, extending the period of work or increasing the amount of work to be completed in the next contract is a viable solution for some contracts. In others, work that does not get accomplished could simply be foregone. In those cases, disallowing carry over funds would make sense.

3. The disposition of NPPC approved 2002 RM&E projects that BPA did not fund yet had agreed to fund, both in their decision letter and the Biological Opinion Implementation Plan.

    1. Proposal No. 28034 - Chinook Smolt Survival and SAR, South Fork Salmon River.
    2. Proposal No. 28045 - Evaluate Stream Habitat Using the Nez Perce Tribe Watershed Monitoring and Evaluation Plan.
    3. Project 1997-030-00 - Chinook Salmon Adult Abundance Monitoring.
    4. Proposal No. 27021 - Imnaha Status Monitoring.
    5. Proposal No. 28020 - Nez Perce Harvest Monitoring Program

4. Proper roles of BPA COTR's. BPA COTR's have requested project scope changes for 2003 after the projects have already received scientific review and approval by the ISRP, CBFWA and NPPC. Such changes made unilaterally by COTR's compromise and invalidate the established project approval process and seem to be an overstep in their duties. Furthermore, it opens to question whether the scientific credentials of BPA COTRs outweighs those of the project sponsors, the basin's fish and wildlife program mangers and the ISRP.

    1. Evaluate Potential Means of Rebuilding Sturgeon Populations in the Snake River (Project No. 199700900).
    2. Evaluate Stream Habitat Using the Nez Perce Tribe Watershed Monitoring and Evaluation Plan (Proposal No. 28045)
    3. Nez Perce Harvest Monitoring Program (Proposal No. 28020).

5. BPA's internal Biological Opinion requirement process has not been effectively coordinated with co-managers.

6. BPA's direction not to fund training affects staff development, keeping current with state-of-the-art techniques in the field of fisheries, and can result in spending unnecessary funds and/or utilizing improper techniques.

7. Equity in funding cuts between BPA and the Tribe. Bonneville increased its budget while all projects will be cutting components of their budgets.

8. Equity in training between BPA and the Tribe. BPA is currently training COTR's while the tribe is no longer allowed to bill training.

9. Project contract review and approval turn-around time takes too long. The average time between submittal of contracts for approved projects and the receipt of the contract is 5 months.

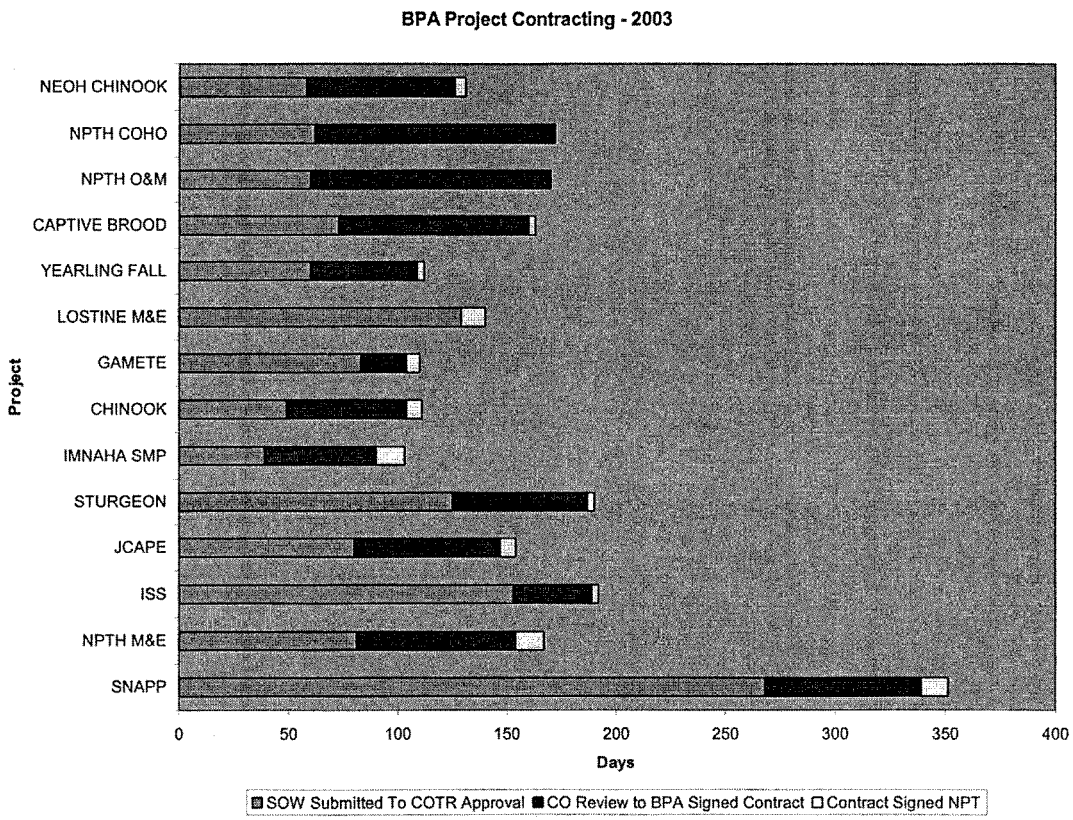
10. Communicate contract setup so that project sponsors are aware of what BPA will deem to be an appropriate expenditure. This will minimize extensive review and question on invoices by BPA COTR's. Provide the guidelines up front and we will establish the contracts and line item expenditures accordingly.

11. Communication between COTR's and their supervisors. Information does not flow downhill very well.

12. Daily changes of policy and requirements for contracting with BPA.

13. Facilitating capital expenditures in a timely manner; e.g., advance monies to NPT so purchases can be made without depleting Tribal cash reserves. For example, NPTH equipment acquisition is often delayed 3-6 months due to waiting for reimbursement from BPA. Equipment purchases range in the realm of several hundreds of thousands to millions. This same principle should apply to vendors with subcontracts to provide timely payment to them and not detract from the NPT credibility.

14. Is the "Contract Review and Modification or Termination" language sent out with the contracts a contract amendment or contractor notification?


BPA Project Contracting - 2003
Project
NEOH CHINOOK
NPTH COHO
NPTH O&M
CAPTIVE BROOD
YEARLING FALL
LOSTINE M&E
GAMETE
CHINOOK
IMNAHA SMP
STURGEON
JCAPE
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250
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Days
SOW Submitted To COTR Approval
CO Review to BPA Signed Contract
Contract Signed NPT

# 2003 Winter Conference
# Portland, Oregon

## RESOLUTION #03 - 31

## "IMPROVING THE IMPLEMENTATION AND FUNDING OF THE BONNEVILLE POWER ADMINISTRATION'S CONTRIBUTIONS TO FISH AND WILDLIFE MITIGATION"

## PREAMBLE

We, the members of the Affiliated Tribes of Northwest Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian Treaties and benefits to which we are entitled under the laws and constitution of the United States and several states, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution:

**WHEREAS,** the Affiliated Tribes of Northwest Indians (ATNI) are representatives of and advocates for national, regional, and specific Tribal concerns; and

**WHEREAS,** the Affiliated Tribes of Northwest Indians is a regional organization comprised of American Indians in the states of Washington, Idaho, Oregon, Montana, Nevada, Northern California, and Alaska; and

**WHEREAS,** the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of Affiliated Tribes of Northwest Indians; and

**WHEREAS,** since time immemorial, our tradition, culture, religion and way of life have been centered around our fishing, hunting and gathering resources, and the lands and waters on which they depend, and yet their health and well-being continue to suffer as a result of anthropogenic activities and actions to such an extent that numerous anadromous and resident fish and wildlife species are compromised for present and future generations; and

**WHEREAS,** the loss and diminishment of many of these resources has in turn caused substantial harm to tribal people and communities and has impacted our inherent tribal sovereignty, which is based in part on the free exercise of our rights to fish, hunt and gather, and the United States has a duty, based on treaties, executive orders, the federal trust responsibility and numerous statutes and court opinions, to ensure that those rights are honored; and

**WHEREAS,** in order to safeguard our rights and preserve and enhance the resources on which they are based in the Pacific Northwest, the United States is obligated to fund and implement actions that will protect cultural resources and improve habitat and other conditions necessary to sustain healthy, self-perpetuating populations of fish, wildlife, plants and other resources; and

**WHEREAS,** the Bonneville Power Administration (BPA) is the primary funding source for fish and wildlife rebuilding efforts in the Columbia River Basin, which are required by tribal treaties, the federal trust responsibility, the ESA, the National Historic Preservation Act (NHPA), the Northwest Power Planning and Conservation Act, and other mandates; and

**WHEREAS,** BPA has entered into previous MOUs since 1976 assuring tribes that efforts to protect and enhance the natural and cultural resources would have financial stability, and has failed to honor previous financial commitments to fund fish and wildlife rebuilding efforts, by underspending funds that had been promised, by failing to carry forward unexpended funds as promised, and by devoting fish recovery funds from ratepayers to non-fish recovery purposes; and

**WHEREAS,** BPA, by underfunding, is not fully implementing the National Marine Fisheries Service's (NMFS's) 2000 Biological Opinion on the Federal Columbia River Power System and the Northwest Power Planning Council's (NWPPC's) Fish and Wildlife Program, despite its commitment in its Rate Case to provide full funding, and has instead sought to cut fish and wildlife funding and cultural resource management responsibilities; and

**WHEREAS,** BPA has required culture, fish and wildlife managers to reduce their budgets drastically, while BPA has increased its own budget to pay for non-essential personnel, property and services; contrary to a stated objective in the 1976 MOU to minimize BPA staff and defer decision making to the tribes; and BPA has failed to reveal a truthful and accurate accounting of its expenditures; and

**WHEREAS,** by threatening to reduce funding for culture, fish and wildlife mitigation, BPA risks setting back recovery and restoration efforts undertaken by tribes, states, local governments and other stakeholders such as irrigation districts and private land owners for years to come; and

**WHEREAS,** rural economies will be negatively impacted by the loss of economic activity associated with implementing restoration contracts and reduced opportunities for recreational fishing, hunting and wildlife viewing; and

**WHEREAS,** tribal cultural resource's could be left vulnerable to vandalism and looting through a reduction in funding. Without adequate funding river operations could erode cultural resources without the opportunity to take preventive actions; and

**WHEREAS,** BPA is breaching contracts with Columbia Basin tribes by unilaterally abrogating contracts with tribes and by now insisting on contract language that would terminate contracts at "BPA's convenience," based on BPA's response to the actions of third parties not privy to the contracts; and

**WHEREAS,** BPA's contracting process causes unnecessary duplication, inefficiency, delay and expense, requiring BPA to do site visits, reviews, and further documentation that compromises the year-long process followed by resource managers, science review panels and the NWPPC, after which BPA may then require changes in scope of work and tasks;

**WHEREAS,** all fifty-four tribes represented in the Affiliated Tribes of Northwest Indians have sovereign and treaty rights affected by energy development projects, such as the hydroelectric generation projects operating under renewable licenses administered by the Federal Energy Regulatory Commission; now

**THEREFORE BE IT RESOLVED,** that the Affiliated Tribes of Northwest Indians calls for a complete financial and management audit of BPA's implementation of the Fish and Wildlife Program to increase transparency and accountability; and

**THEREFORE BE IT FURTHER RESOLVED,** that the Affiliated Tribes of Northwest Indians calls for full implementation and funding by BPA of the NMFS's 2000 Biological Opinion on the Federal Columbia River Power System and the

NWPPC's Fish and Wildlife Program, by, among other things, triggering Cost Recovery Adjustment Clauses if necessary and appropriate; and

**THEREFORE BE IT FURTHER RESOLVED,** that the Affiliated Tribes of Northwest Indians supports increasing BPA's borrowing authority, subject to the requirement that a portion of funds obtained under that authority be devoted to fish and wildlife mitigation adequate to implement the NMFS's 2000 Biological Opinion on the Federal Columbia River Power System and the NWPPC's Fish and Wildlife Program; and

**THEREFORE BE IT FURTHER RESOLVED,** that the Affiliated Tribes of Northwest Indians calls for BPA to use its capital budget for land and water acquisitions and remove BPA's self-imposed prohibition on carrying over funds to future years; and

**THEREFORE BE IT FURTHER RESOLVED,** that the Affiliated Tribes of Northwest Indians calls on BPA and all other federal agencies to immediately begin working with the cultural, fish and wildlife managers to determine what tasks are needed in Fiscal Years 2003-06 to fully implement the NMFS's 2000 Biological Opinion on the Federal Columbia River Power System and the NWPPC's Fish and Wildlife Program, and to determine how much these tasks will cost. These costs should then be allocated among the agencies, funding sources for paying for these costs clarified (either appropriations or BPA funds), and funding made available immediately for work in Fiscal Year 2003; and

**THEREFORE BE IT FURTHER RESOLVED,** that the Affiliated Tribes of Northwest Indians calls for BPA to immediately retract its newly-imposed contract language in culture, fish and wildlife project contracts, and allow project managers to proceed under the longstanding termination provisions of standard BPA contracts; and

**THEREFORE BE IT FURTHER RESOLVED,** that a clear, well-defined process should be developed and followed by BPA and the other federal agencies in working with the culture, fish and wildlife managers to establish adequate funding levels to meet tribal Treaty obligations and the federal trust responsibility, and the mandates of the Northwest Power Planning and Conservation Act, the ESA, the NHPA and the Clean Water Act prior to any new BPA Rate Case and the signing of new power sales contracts; and

**THEREFORE BE IT FURTHER RESOLVED,** BPA, in carrying out it's trust responsibility is obligated to assist tribes in the FERC re-licensing process to actively participate in the development of standards and guidelines which are protective of trust resources and tribal rights; and

**THEREFORE BE IT FURTHER RESOLVED,** that the Affiliated Tribes of Northwest Indians supports reforming the BPA contracting process in the short term, and ultimately transferring BPA's fish and wildlife program implementation responsibilities to another agency to reduce administrative costs and delays in the longer term; and

**THEREFORE BE IT FINALLY RESOLVED**, that the Affiliated Tribes of Northwest Indians calls on BPA and all other federal agencies to commit to immediately addressing the problem of longer-term cultural, fish and wildlife funding to meet tribal Treaty obligations and the federal trust responsibility, and to fully implement ESA recovery and the NWPPC's Fish and Wildlife Program, and to identify how much BPA will fund. Failure to address this problem (for Fiscal Years 2006 through at least Fiscal Year 2011) will result in tribal opposition to any BPA efforts to begin a new Rate Case or sign new power sales contracts.

## CERTIFICATION

The foregoing resolution was adopted at the 2003 Winter Conference of the Affiliated Tribes of Northwest Indians, held at the Embassy Suites Portland Airport Hotel in Portland, Oregon on February 13, 2003 with a quorum present.

Ernest L. Stensgar, President

Norma Jean Louie, Secretary

# Testimony of the Yakama Nation to The Senate Indian Affairs Committee Hearing on Salmon Restoration Issues in the Northwest

June 4, 2003

## Introduction

The Yakama Nation is pleased to provide testimony at this hearing. We also appreciate the focus of the Committee on these important issues. We are hopeful that this hearing will be the start of a sustained effort to increase the oversight of the Bonneville Power Administration and the Federal Energy Regulatory Commission. Both of these agencies have failed to carry out their responsibilities to the Yakama Nation under the Treaty of 1855.

The Yakama Nation has been working in a number of forums to get Bonneville to meet its treaty and tribal trust obligations. We are concerned that BPA is not fulfilling its obligations to the Yakama Nation or the requirements of the Endangered Species Act and the Northwest Power Act. Most of our comments and concerns have been ignored.

We have also appealed Bonneville's 2000 rate case decisions to the FERC. The appeal argued that Bonneville did not set its base rates at a level that was high enough to pay all of its costs and to also ensure repayment of the debt that Bonneville owes to the U.S. Treasury. The FERC has stilled not acted on our appeal over the past two years. This is clearly a case where justice delayed is justice denied.

We have participated in these processes in good faith, assuming that these agencies would meet their trust responsibilities to our tribe. Given the disappointing results of our efforts we feel like we have been playing in a shell game without a pea.

We welcome the help of the Indian Affairs Committee in providing oversight for these agencies.

## Background

The Yakama Nation is a sovereign government. The Yakama's occupied most of central Washington—about 12 million acres—for more than 600 generations. In 1855, the tribes and bands of the Yakama Nation signed a Treaty with the United States that established the Yakama Indian Reservation and reserved to the Yakama Nation their rights to hunt and fish and gather foods as they have since time immemorial. The Yakama Nation has assiduously upheld the commitments we made to the United States in the Treaty. One of the reasons we have participated in the Bonneville and FERC processes is to get the United States to honor the commitments it has made.

The Yakama Nation has have seen our culture, religion, and economy devastated by the construction and operations of the dams on the Columbia and Snake Rivers. We have seen salmon

runs plummet to a tiny fraction of historical levels. Salmon, steelhead, lamprey, and other fish and wildlife provided food and commerce for our tribe. These resources are an integral part of our culture and religion.

In 1986, the Northwest Power Planning Council conducted an extensive study of the salmon and steelhead losses that have occurred in the Columbia Basin since European development. The study concluded that all causes of development have resulted in the loss of 7 to 14 million salmon and steelhead per year. The Council also concluded that the hydroelectric system was responsible for 5 to 11 million of these lost salmon and steelhead per year. Of course, the hydroelectric dams have also caused the loss of a significant number of other fish and wildlife.

These losses have had a devastating effect on our tribe. Tribal communities have high unemployment and average incomes on reservations are about one third of the level in non-tribal communities. Over 40 percent of our people live in poverty. Unemployment ranges from 20 percent to as high as 70 percent in the winter when there is no fishing. The death rate on reservations is double the rate for non-tribal communities. The loss of fish and wildlife has had a significant effect on tribal culture, religion, and health.

Over the last few years, salmon returns have improved. We had the first commercial harvest of spring chinook since 1965. While we are happy to see more fish returning, these returns are no where near the levels that would fulfill the hydropower responsibility set by the Northwest Power Planning Council.

The Bonneville Power Administration is a significant funding source for the restoration of fish and wildlife in the Columbia River Basin; BPA is supposed to play a key role in restoring fish and wildlife damaged by federal dams. This year Bonneville will spend about $115 million on habitat restoration and new projects to rebuild fish and wildlife (the rest of its $139 million budget goes to administration, monitoring, and research). This represents about four percent to Bonneville's total annual revenue. Bonneville has legal obligations to restore salmon to our rivers and streams. These obligations arise from treaties with the United States, federal trust responsibility, and various statutes such as the Northwest Power Act.

Tribal and other fishery managers have documented a number of successes in rebuilding fish and wildlife. Even with these successes, we have a long way to go to achieve the rebuilding objectives of the Pacific Salmon Treaty, Northwest Power Act, Endangered Species Act, Clean Water Act, Wy-Kan-Ush-Mi Wa-Kish-Wit, and the United States commitments in treaties and executive orders with our tribes.

## Bonneville is not doing enough to protect and rebuild fish and wildlife

**The Biological Opinion is inadequate**. A Federal District judge recently struck down the Biological Opinion on the Federal Columbia River Power System because it relied on measures that were not certain. The Yakama Nation and other tribes were amicus for the plaintiffs.

United States District Judge James A. Redden's May 7th ruling found that NMFS's 2000 biological opinion contained salmon habitat restoration and protection measures that could not

provide protection for hydroelectric operations under the ESA unless they were "reasonably certain to occur."

BPA's refusal to commit to funding salmon restoration highlights just how uncertain NOAA's plan was. Unless BPA provides actions certain to restore salmon and funds them, the Federal government will either have to breach the Snake River dams or seek an exemption from the ESA God Squad to allow Columbia Basin salmon to go extinct.

Columbia Basin Indian tribes have implemented highly successful salmon restoration projects in the basin. Funding for these actions needs to be maintained and increased in order to avoid jeopardy. We need action, not more planning.

**BPA is not implementing the Biological Opinions and Fish and Wildlife Program**: The Biological Opinion included a number of specific standards for Bonneville, the Corps of Engineers, and the Bureau of Reclamation. The record to date is not encouraging.

BPA and other federal agencies have not provided adequate funding. We estimate that current funding covers about 60 percent of the estimates made by the Council on Environmental Quality for implementing the Biological Opinion.

The current efforts are nowhere near the budget estimates made by fish and wildlife managers during the Provincial Review. Fish and wildlife managers developed detailed projects and budgets for Bonneville to implement the Biological Opinion and the Columbia River Basin Fish and Wildlife Program. All of these projects were reviewed and approved by the Independent Science Review Panel. We have attached the *Results of the Provincial Review: Estimated Budget Needs Through FY 2006* and request that it be included in the record of this hearing. Our analysis shows that Bonneville's current funding level is at least $108 million per year below the Provincial Review budget.

Federal agencies have failed to meet the flow and spill standards in the Biological Opinions. NOAA Fisheries maintains a score card that show how many times river operations fail to meet the requirements of the Biological Opinion. That score card shows that the Federal agencies have failed to meet these standards 11 times out the 28 measurements from 1995 through 2001. We have attached a copy and request that it be included in the record.

BPA is not meeting its obligations to restore wildlife. The construction and operation of the Federal dams had a severe impact on wildlife and other resources that are important to our tribe. Bonneville has provided some funding to the Yakama Nation to acquire critical habitat for wildlife. Our program has been very successful. To date we have achieved about half of our goal for habitat acquisition and restoration. Now BPA claims that its wildlife obligation to the Yakama Nation has been fulfilled. We disagree with Bonneville's calculation on how to credits wildlife mitigation. We believe that significantly more effort is needed to restore wildlife resources that were decimated by the dams. We also know that maintenance of this habitat is an ongoing expense and therefore, Bonneville's funding should continue in perpetuity.

## BPA has shifted the risks to fish and wildlife

The Bonneville Power Administration supplies about 40 percent of the electricity in the Pacific Northwest. It markets electricity from Federal dams and one nuclear power plant in the Pacific Northwest. The revenue from these power sales goes to pay Bonneville's costs, including repaying debt associated with nuclear plant construction and debt to the U.S. Treasury associated with construction of the dams and transmission system. Bonneville is also a key funding source for fish and wildlife programs in the Columbia Basin.

Bonneville's 2000 rate case set power sales costs for Northwest utilities from October 2001 through September 2006. The process also determined the revenue available for fish and wildlife restoration through 2006 and will position BPA for long-term funding. During the 2000 rate case, the Yakama Nation, along with the Columbia River Inter-Tribal Fish Commission, provided testimony that BPA was not setting its rates high enough to address the costs and risks it was facing. We were concerned that BPA's costs would be higher than it anticipated and that BPA's only choices would be to defer payments to the U.S. Treasury or defer fish and wildlife funding. We also argued that the rate decisions should support the Federal government's obligations under Treaties and Executive Orders with Northwest Tribes to meet tribal fishing rights.

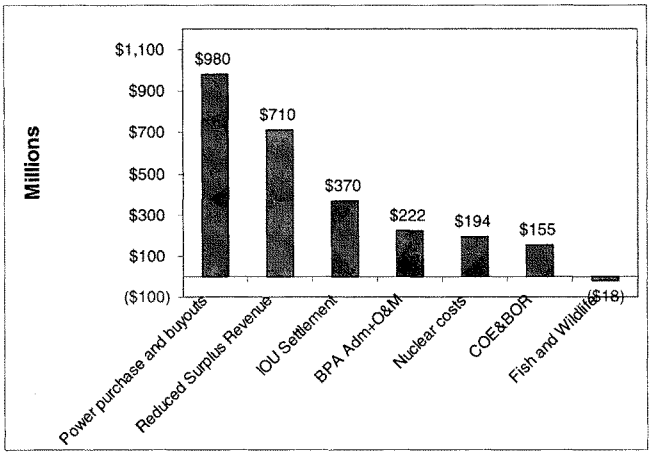
Bonneville used a number of optimistic assumptions to justify its decision to serve 3,300 megawatts of additional electricity and take on other additional responsibilities while keeping its rates at the same level that it set in 1996.

The concerns we raised in the 2000 rate case proceedings have materialized. Bonneville's costs were much higher than it assumed in the rate case. For example, Bonneville's decision to sell more electricity than it had has added about $4 billion to Bonneville's costs. Bonneville's own internal costs were $313 million higher than it assumed in the 2000 rate case. Bonneville's estimate in the 2000 rate case for the costs associated with the Bureau of Reclamation, the Corp of Engineers, and Energy Northwest were too low by $349 million. Bonneville also overestimated the revenue it would receive from selling surplus electricity by $710 million. The figure below shows the major cost categories that changed. We have attached a recent report by Bonneville that documents the many mistakes and optimistic estimates that Bonneville made that caused its current financial problem.

When Bonneville faced financial problems it cut back on fish and wildlife protection. In 2001, Bonneville was concerned that it might miss a payment to the U.S. Treasury. We note that Steve Wright, the Bonneville Administrator, told federal regional executives and tribal leaders that there would be political fallout if the region failed to meet a Treasury payment. The minutes from the March 16, 2001 Regional Executives Meeting also indicate that he said that "We want to operate without creating the view that taxpayers are subsidizing the federal Columbia River system, he said. If Congress thinks there's a subsidy, the region could lose control of the federal system, Wright indicated." As a result of this financial crisis, Bonneville eliminated river operations to protect migrating salmon and steelhead in 2001. This year, BPA is cutting fish and wildlife funding by more than $40 million because of its financial problems. It has said that it plans to make additional cuts in future years. These cuts are from a level that is not nearly adequate to

implement the Federal Columbia River Power System Biological Opinions, much less the obligations to restore the Treaty fishery.

Comparison of BPA 2000 Rate Case Assumptions and Estimate During Financial Choices




Bonneville's 2000 rate decisions were made before the Federal government decided on its plans for restoring fish and wildlife and meeting Treaty and Trust obligations to Indian tribes in the Columbia Basin. We were concerned that Bonneville's rate proposal would foreclose implementation of our tribal plans.

Bonneville promised Indian tribes and others that it would fund its salmon restoration obligations, including trust and treaty obligations and developed a number of contingencies that could be used to cover higher salmon restoration costs or other uncertainties facing Bonneville. Bonneville adopted a range of future fish and wildlife costs of $430 million to $780 million per year and also adopted cost recovery adjustment clauses that could raise rates if costs were higher than Bonneville assumed. In a letter to tribal leaders, the Bonneville Administrator said "This will give BPA about $500 million per year of contingent funding (in addition to the $520 million in the original rate base) for fish and wildlife recovery efforts during the rate period...We believe this should provide a high assurance that we can meet our share of whatever fish and wildlife plan is ultimately chosen." (BPA Administrator, September 1999)

Given these assurances, you can understand why the Yakama Nation is so upset that Bonneville decided not to honor its commitments to our tribe and eliminated fish and wildlife protections to address a financial crisis that was caused by Bonneville's over optimistic assumptions and mismanagement.

We are very concerned that Bonneville will continue to shift risks to fish and wildlife in the future. The criteria Bonneville has adopted allow it to implement emergency river operations (a dramatic way of saying reduce fish and wildlife protections) before it triggers a rate increase. This is not the appropriate way to address financial problems.

## The FERC has delayed our appeal of the 2000 rate case

During the 2000 BPA rate case the Yakama Nation and the Columbia River Inter-Tribal Fish Commission argued that Bonneville's rates are not high enough to meet its obligations. We argued that Bonneville had not adequately addressed the risks and costs that it faced. The reality is that these costs will have to be paid whether Bonneville has planned for them or not. The alternative would be failure to meet Bonneville's obligations under Treaties and Federal laws or to reduce the likelihood that Bonneville will be able to fully repay its debt to the Treasury in a timely manner.

Bonneville ignored our arguments in the 2000 rate case and set its rates significantly below the market price of electricity. In the summer of 2001 we appealed the BPA decision to the FERC.

The standard of review for Bonneville's rates in the Northwest Power Act is:

> Rates established under this section shall become effective...upon confirmation and approval by the Federal Energy Regulatory Commission upon a finding by the Commission that such rates are sufficient to assure repayment of the investment in the Federal Columbia River Power System over a reasonable number of years after first meeting the Administrator's other costs. The rates must also be based on the Administrator's total system costs. These requirements are found in 16 U.S.C. 839e(a)(2) (A)&(B).

We believe that FERC will not be able to find that BPA's rates were set high enough to meet its costs and assure repayment to the Treasury. Subsequent events confirm this conclusion. We know that FERC has not had many opportunities to make such a finding. The parties in previous rate case have tried to argue that the rates were too high and FERC has declined to second guess Bonneville.

One of the purposes of our 2000 rate case briefs was to clearly raise these issues to Bonneville. The goal of the remedies we proposed in our brief was to convince Bonneville to raise its rates and strengthen its risk mitigation measures to ensure that all of its costs, including the costs associated with its Treaty and trust obligations and other Federal laws are met while assuring repayment of its debt to the Treasury pursuant to 16 U.S.C. 839e(a)(2) (A)&(B).

We had assumed that the FERC would have ruled on our appeal prior to the next Bonneville rate case. Such a ruling could have provided important direction that Bonneville needs to set its rates sufficient to meet its costs and repay the Treasury. Unfortunately, the FERC has not ruled on our appeal during the past two years. This delay increases the chances that Bonneville will make the same mistakes again.

## Bonneville is about to make the same mistakes again

Bonneville is in the middle of a new rate case to determine the level of a Safety Net Cost Recovery Adjustment Clause to adjust rates to cover some of the higher costs we described above. The process is known as the SN CRAC. The only costs that Bonneville did not include in this adjustment were fish and wildlife costs. In fact, Bonneville has capped fish and wildlife costs and assumed river operations that provide less protection for fish and wildlife than the Biological Opinion.

Bonneville has eliminated the range of fish and wildlife costs through 2006 and capped those costs. It ignored evidence that we provided that fish and wildlife costs will be higher than it has assumed. Bonneville continues to use optimistic assumptions about its costs and revenues. Bonneville continues to ignore the uncertainties and risks that it faces. Bonneville's draft SN CRAC proposal lowers the probability of fully repaying the U.S. Treasury on time and in full to 50 percent through 2006. The proposal also does not restore Bonneville's financial health or position Bonneville to remain competitive in the future.

Our testimony on the costs and uncertainties facing Bonneville demonstrate that it is likely that Bonneville will face higher costs than it has assumed in the Proposal. These higher costs, along with the limits for the SN CRAC in the Proposal would further reduce Bonneville's chances of fully paying the Treasury. Bonneville's new Treasury payment standard in combination with the uncertainties discussed above makes it unlikely that it will be able to make all of its Treasury payments on time and in full. Therefore, Bonneville's proposal has not met the requirements of 16 U.S.C. 839e(a)(2).

To keep rates down, Bonneville sets its rates under the assumption that it may defer Treasury payments. In practice, Bonneville operates to a 100 percent Treasury Payment Probability. The result is that when Bonneville gets into financial trouble, it shifts the risk to fish and wildlife. If Bonneville has not honored its commitments in the past, it is difficult to difficult to believe that Bonneville will meet its fish and wildlife obligations in the future if faced with a low probability of fully repaying the Treasury.

## Bonneville has ignored evidence provided by the Yakama Nation

We have participated in good faith in this most recent rate case. Bonneville on the other hand, has moved to strike major portions of the evidence we provided on the weaknesses of Bonneville's proposal. Bonneville also moved to strike 48 of our attachments to our direct and rebuttal testimony. The Administrative Hearings Officer hired by Bonneville has agreed with Bonneville and has struck substantive evidence that is directly relevant to whether Bonneville's rate adjustment is sufficient to meet its costs and assure repayment to the Treasury.

**Bonneville ignored estimates for the future costs of fish and wildlife**. The stricken information would have shown that Bonneville's current efforts are several hundred million dollars per year below the estimates developed by the Council on Environmental Quality. Failure to address this uncertainty increases the chances that Bonneville's Proposal is not sufficient to meet its costs and repay Treasury.

Bonneville also successfully moved to strike our testimony regarding the budget developed by the fish and wildlife managers and the Independent Science Review Panel on the cost of implementing the Provincial Review. The document, entitled: Results of the Provincial Review: Estimated Budget Needs Through FY 2006, dated April 16, 2003 provides a detailed budget for habitat restoration on non-federal lands and other actions to implement the Biological Opinions and Council Program. This document summarizes the cost of implementing the Provincial Review that Bonneville cites in its own testimony. This document shows that the costs of implementing the Provincial Review could be approximately $108 million per year higher than Bonneville has assumed in its Proposal.

**BPA struck information on the uncertainties of future fish and wildlife costs.** We offered testimony that documented the uncertainties associated with development of recovery plans, subbasin plans, the check-ins required by the Biological Opinions, the implementation of the Clean Water Act, and changes that may result from pending litigation. Our testimony would have shown that there are significant risks that Bonneville's future costs would be higher than assumed in its Proposal.

**Bonneville claims that its proposal is based on budgets for implementing the Biological Opinion and the Council's Fish and Wildlife Program when no such budgets exist through 2006.** In stricken testimony, we provided evidence that directly rebutted Bonneville's assertion that the agency based its SN CRAC Proposal on the Biological Opinion Implementation Plan and Council Fish and Wildlife Program. We provided evidence indicating that Bonneville could not have based its Proposal on either the Implementation Plan or Program because neither document has budgets through 2006. Among the stricken material is a February 21, 2003 letter from the Council indicating that it has not developed budgets through FY 2006 and that Bonneville is jeopardizing its ability to meet legal requirements under the Biological Opinion and the Northwest Power Act.

The February 21st letter states:

> The Council cannot proceed to evaluate fish and wildlife expense program spending levels without resolving the issues identified above. At this point, the Council stands by its earlier statement to you that it is concerned that a reduction in Bonneville's spending commitment below $139 million may jeopardize its ability to meet legal requirements under the Biological Opinions and the Northwest Power Act. Critical Biological Opinion check-ins are imminent. These are the funds that are necessary to implement many of the important projects and programs that must be in place to succeed in those evaluations. The reductions precipitated by Bonneville's immediate switch to its "accrual rules" are going to have an impact on our fish and wildlife restoration efforts. We are concerned that deeper and sustained cuts in the out- years may have serious impacts that could retard the progress we have been making.

The Council letter also notes that cuts in Bonneville's fish and wildlife funding may risk it ability to meet it legal obligations:

> Bonneville's many programs are not all equal. Some, such as the fish and wildlife program, respond to legal obligations that cannot be abandoned, even temporarily. Programs with such legal requirements must be viewed differently than programs that are useful and valuable but not legally required or unquestionably essential to Bonneville's core statutory missions. Moreover, to be equitable, you must assess where various program costs are today against their planned levels. Programs operating within planned budgets are penalized for their efficiency if this is not considered. Finally, because you are considering cost reductions in the context of the SN CRAC, the significance of a possible program reduction from a rate impact perspective must be understood. It makes little sense to increase legal risks to the durability of the power system because of a cost reduction that has essentially no impact on rates.

Bonneville also moved to strike the testimony provided by CRITFC and Yakama that there is no evidence in the record to support the fish and wildlife cost assumptions Bonneville has used in its Proposal.

**Bonneville ignored evidence on river operations**. Bonneville has assumed river operations that are less protective for fish and wildlife than the Biological Opinion. CRITFC and Yakama offered testimony on the differences in revenues and other impacts of Bonneville's assumptions compared to the current implementation of the Biological Opinion and alternative operations. Bonneville moved to strike this testimony. In addition, CRITFC and Yakama also offered evidence from NOAA Fisheries that federal agencies have failed to meet the river operations standards in the Biological Opinion during 40 percent of the measurement periods since 1995.

Bonneville also moved to strike other testimony that provides detailed analysis of the adverse biological effects associated with reducing flows and spills as Bonneville has assumed. This testimony would have shown that adverse biological effects increase the uncertainty that Bonneville's assumptions regarding river operations are appropriate.

**Bonneville ignored information about higher costs to protect fish and wildlife.** Bonneville successfully moved to strike testimony that it declared emergencies allowing the agency to curtail spill for salmon, including listed species under the ESA, in order to produce more power and might do so in the future based on its financial needs. Bonneville has also successfully moved to strike testimony that it cut fish and wildlife funding.

**Bonneville moved to strike our testimony that quoted Bonneville Administrator Steve Wright on the political risks to Bonneville if it failed to make a Treasury payment**. Our evidence stated:

> In 2001, the Bonneville was facing a financial crisis and proposed elimination of spill and flows measures to protect migrating fish at all of

> the federal dams. At the time, CRITFC recommended deferring a Treasury payment so that some fish protection measures could be implemented. This recommendation was denied by Bonneville because of the political problems associated with a Treasury deferral. We note that Steve Wright, the Bonneville Administrator, told federal regional executives and tribal leaders that there would be political fallout if the region failed to meet a Treasury payment. The minutes from the March 16, 2001 Regional Executives Meeting also indicate that he said that "We want to operate without creating the view that taxpayers are subsidizing the federal Columbia River system, he said. If Congress thinks there's a subsidy, the region could lose control of the federal system, Wright indicated." *(see* attachment SN-03-E-CR/YA-02DD). Now, BPA is facing a financial crisis and the proposal of both Bonneville and the utilities is to increase the risk of Treasury deferral to minimize the rate increase. We are concerned that this strategy will shift the risk to fish and wildlife and Bonneville will face additional political risk. When Bonneville faces the possibility of a Treasury deferral, we have seen in the past that it is likely to eliminate protections for fish and wildlife, and incur risk of litigation by states, tribes, and others. *(see* BPA-CR-002 herein incorporated as attachment. (emphasis added)

**Bonneville moved to strike its own data responses**. Bonneville moved to strike information that was supplied in data responses from Bonneville on the uncertainties associated with planning and meeting future electric energy needs.

**BPA moved to strike its own study on the causes of its financial problems**. The stricken attachment rebuts Bonneville's direct testimony and demonstrates that Bonneville faces revenue uncertainties that add risk to Bonneville's ability to meet its total system costs. Bonneville's new proposal repeats many of the mistakes described in its own report because the Proposal does not address the actual uncertainties and risk facing Bonneville. Bonneville's recent history is directly relevant to Bonneville's SN CRAC Proposal. By failing to address these uncertainties Bonneville increases the risk that the Proposal will not meet its costs and repay the Treasury.

**Bonneville has moved to strike our testimony and exhibits that relate to how Bonneville should treat capitalization of land and water acquisition.** This testimony is directly relevant to Bonneville's total system costs. The testimony that Bonneville moved to strike states:

> Following Section 4(h)(10)(B) of the NW Power Act, "capital facilities" costing more than $1 million and having a useful life exceeding fifteen years must be capitalized. In the past BPA has defined capital facilities indirectly through its practices. It has:
>
> - Capitalized the planning and design costs as well as the construction costs;
> - Combined costs of several small separate facilities to meet the threshold (e.g., Yakima Phase II Screens); and,

Aggregated costs over several years (i.e., costs less than $1 million in any one year).

The Executive Budget for FY 2003 summarizes BPA's intended use of capital borrowing for fish and wildlife:

Bonneville's fish and wildlife capital program is directed at activities that increase numbers of Columbia River Basin fish and wildlife resources including projects designed to increase juvenile and adult fish passage in tributaries and at mainstem dams, increase fish production and survival through construction of hatchery and acclimation facilities, fish monitoring facilities, and fish habitat enhancement. Funding is also included for pre-engineering design and studies for new and developing projects. The priority for capital project funding will focus first on implementing the reasonable and prudent alternatives contained in the NMFS and USFWS Biological Opinions, and second on implementing the Planning Council's Fish and Wildlife Program...

In addition to a number of specific hatchery and tributary passage programs, the Executive Budget identifies the following facilities that BPA intends to capitalize in FY 2003:

- Construct habitat improvement, passage projects and small irrigation screening projects including development and enhancement of model watersheds. The design and construction is expected to continue.

- Continue implementation of high priority Endangered Species Act related projects, and activities associated with the USFWS BO and the NMFS BO.

The fish and wildlife managers have developed a definition for BPA capital facilities that is similar to those used by other public agencies, which we shared with BPA. (*See* attached February 18, 2003 letter to Therese Lamb, BPA-CR-020B.doc) It is:

***

Specifically, Bonneville may use its permanent borrowing authority to acquire land and interests in land, water or water rights, and to finance construction of capital facilities and improvements to land including, but not limited to, buildings, roads, culverts, stream bank stabilization, fences, utilities, sewage treatment and discharge, diversion screens and ladders, instream structures, fish propagation facilities, and other tangible improvements.

> We recommend that BPA specifically include this definition in the rate case to be clear that it intends to collect revenue from rates to purchase land.
>
> Based on the above requirements, we identified current BPA-funded fish and wildlife projects that could be capitalized and compared the list with those projects that BPA actually capitalized in FY 2002. The attached table indicates that, although BPA had the ability to fund $36 million in fish and wildlife capital projects, it chose to capitalize only $5.9 million (*See* BPA-CR-020A.xls).
>
> BPA has not yet identified which projects it intends to fund in FY 2003, so it is not possible to identify which facilities it is not planning to capitalize. However, the attached table lists $81 million in FY 2003 projects that meet the above requirements for capitalization.

Bonneville's failure to consider all of this information is likely to result in rates that will not meet its costs and will not assure full payment to the Treasury. In addition, we believe that Bonneville's trust responsibility requires Bonneville to fully consider all of the information provided by the Yakama Nation.

## Bonneville has done a poor job administering the fish and wildlife program

**Accountability:** Bonneville and utilities often claim that there is not enough accountability for fish and wildlife activities in the Northwest. Therefore, we want to summarize the current process.

Every year, fish and wildlife managers develop proposals to implement the Biological Opinion and Fish and Wildlife Program. The Columbia Basin Fish and Wildlife Authority prioritize these proposals. The high priority projects are reviewed by the Independent Science Review Panel and the Panel makes recommendations on which proposals meet rigorous scientific standards. The Northwest Power Planning Council then conducts a public process to review the recommendations of CBFWA and the Science Review Panel. The Council then recommends projects for funding to Bonneville. This entire process takes most of a year and costs millions of dollars of fish and wildlife agency staff time. In addition, the ISRP has a budget of almost $1 million per year and the Council's fish and wildlife budget is approximately $4 million per year.

**Bonneville duplication causes problems**. Bonneville, in spite of what we believe is clear statutory intent that requires it to fund the projects that come out of this elaborate process, then takes these recommendations and does its own review. This process often takes nine months. In the process, Bonneville changes the scope and tasks of the projects and adds significant duplication and time. These delays make it difficult to work with local partners.

**Bonneville's administrative costs are too high**. Bonneville's internal administrative costs for fish and wildlife are approximately $13 million per year. These costs are excessive and take money that could go to on-the-ground projects that could benefit fish and wildlife.

**Bonneville's contract management causes problems.** This year Bonneville unilaterally decided that it would not carry fish and wildlife funds from one year into the next. This is a significant change from Bonneville's practices over the past 23 years. In the past, Bonneville recognized that occasionally projects get delayed by weather or other complications. If some of the costs for a project occurred in the next fiscal year Bonneville would carry the obligated funds forward to pay the costs. Bonneville's new policy creates terrible problems. For example, the Yakama Nation worked for several years with local farmers and ranchers to purchase land along the Yakima River and its tributaries on a willing buyer, willing seller basis to improve fish and wildlife habitat. The negotiations with the landowners were complicated and protracted. Finally after nearly four years of negotiations, the agreements were completed and we were ready to purchase the properties. Without notice, Bonneville implemented its "no carry-overs" policy and withdrew the funding for the habitat restoration. Bonneville's action destroyed this program and made it unlikely that these landowners will ever deal with us again. Bonneville has ignored requests to remedy this injustice.

**Bonneville makes unilateral changes in contracts.** This year Bonneville decided that it wanted to add a provision to our contracts that they could be cancelled for Bonneville's convenience. We faced the prospect of losing all of our contracts with Bonneville if we did not agree to this contract amendment. The Bonneville contracts support 108 positions in the Yakama Nation Fish and Wildlife Department.

**Bonneville has a conflict of interest.** Bonneville's decision that it will not carry forward funds to the next fiscal year combined with a decision to cap funding for each year has created a conflict of interest. These are both changes from Bonneville's practices since 1981. As a result of these changes, if BPA causes a delay in starting a contract, it means a permanent loss of fish and wildlife funds. Unexpended fish and wildlife funds are returned to the BPA general budget. The delayed actions have to come out of next budget and reduce other activities in that year. We are concerned that BPA is delaying projects to reduce its costs.

## Bonneville's Tribal Policy

Bonneville adopted a tribal policy in 1995. The policy addresses the processes that Bonneville will use in consulting with Columbia Basin tribes.

In our opinion, Bonneville has not consulted in meaningful way with our tribe, especially at the government to government level. We rarely meet with the Bonneville Administrator. When we do, it is generally to discuss our concerns with actions he has already taken.

In February of 2003, the Affiliated Tribes of Northwest Indians unanimously adopted a resolution detailing our concerns with Bonneville's failure to provide adequate funding for fish and wildlife and its problems with administering the fish and wildlife program. In our opinion, BPA has still not responded in an adequate way to the ATNI Resolution.

Other federal agencies have adopted tribal policies that appear to address both substantive goals and objectives and more proactive consultation processes. We would like to work with Bonneville to update and improve its tribal policy.

## Bonneville has not adequately addressed tribal trust resources

**Federal commitment to achieve both ESA and trust responsibilities.** In July 1998, the Assistant Secretary for Oceans and Atmosphere wrote to CRITFC about meeting both ESA and trust responsibilities. The letter states that:

> It is our policy that the recovery of salmonid populations must achieve two goals: 1) the recovery and delisting of salmonids listed under the provisions of the ESA; 2) the restoration of salmonid population, over time, to a level to provide a sustainable harvest sufficient to allow for the meaningful exercise of tribal fishing rights. We see no conflict between the statutory goals of the ESA and the federal trust responsibility to Indian tribes. Rather, the two responsibilities complement each other.

Unfortunately, Bonneville has focused its funding on ESA species at the expense of other non-listed fish and wildlife. For example, Columbia River fall chinook are not listed, yet they are vital to the tribal fishery. Another example is lamprey. These fish are an important tribal resource that have been ignored. Bonneville recently reported that $107 million of the $139 million it will spend in FY 2003 is needed to meet its ESA obligations. The remainder is not sufficient to address other non-listed fish and wildlife. The likely result of failing to address these other species is that they will continue to decline and be listed under the ESA.

## Bonneville has not met its equitable treatment obligations

**Bonneville has not provided equitable treatment for fish and wildlife**: The Yakama Nation and other tribes have sued Bonneville for failure to meet its equitable treatment obligations under the Northwest Power Act. Our brief provides and extensive record of BPA favoring other river operations while placing risks on fish and wildlife.

The recent legal filings in the Ninth Circuit Court of Appeals by Columbia Basin Indian tribes and environmental groups document Bonneville's failure to provide equitable treatment for fish and wildlife as required by the Northwest Power Act. The attached brief shows that Bonneville has provided only cursory review of this issue. Its actions to date have shifted financial and hydrologic risks from utilities and industries to fish and wildlife. Bonneville's actions have had minimal effects on electricity rates, flood control, irrigation, navigation, and recreation. On the other hand, Bonneville's decisions have had devastating effects on fish and wildlife and tribal culture. Bonneville has not treated fish and wildlife on a par with the other purposes of the hydroelectric system as required by the Northwest Power Act.

As part of its equitable treatment obligations, Bonneville should have also analyzed the equity of the benefits from Bonneville's rate and power sales actions. For example, Bonneville reported that it paid its investor-owned utilities approximately $1.5 billion to reduce load on Bonneville. It also paid aluminum smelters approximately $1.3 billion to reduce load on Bonneville. In both cases, this was after a decision by Bonneville to sign power sales contracts to sell electricity to these customers at rates that were significantly below the market price for electricity. On the other hand,

Bonneville has not paid Columbia Basin Indian tribes for the loss of livelihood, or other economic and social costs for the loss of fish and wildlife resources. Bonneville should compare the relative benefits and risks that it has provided, including the effects on fish and wildlife and tribal communities in its decisions.

## Bonneville does not have a process to ensure that future energy decisions will not foreclose fish and wildlife restoration and fulfilling treaty rights.

During the 2000 rate case, we were concerned that Bonneville was setting rates through 2006 without knowing the costs of implementing the biological opinion that would guide its fish and wildlife actions during that period. Bonneville responded by developing fish and wildlife funding principles that included a range of future costs, a commitment to a high probability of repaying the Treasury, and a commitment to position Bonneville to remain financially healthy so it could meet its obligations after 2006.

Our attached rate case brief documents how Bonneville has failed to honor the Fish and Wildlife Funding Principles.

Bonneville's rates and some of its contracts expire on September 30, 2006. Bonneville will need to define its fish and wildlife costs between 2006 and 2011 prior to starting a new rate case for post 2006. Some utilities have advocated that new contracts should extend through 2026.

We are concerned that there is no published schedule for this process. We are also concerned that several important activities to determine future fish and wildlife activities may not be completed prior to Bonneville determining its post-2006 fish and wildlife budget. For example, NOAA Fisheries and the Northwest Power Planning Council are working to prepare subbasin plans that will address the needs of both the Endangered Species Act and the Northwest Power Act. It appears likely that these plans will not be completed prior to Bonneville determining its rates. NOAA Fisheries is also developing recovery plans for listed species. These may not be completed prior to Bonneville setting its rates.

We are concerned that Bonneville decisions on how much revenue it will generate to pay for fish and wildlife between 2006 and 2011 could foreclose fish and wildlife decisions and continue to limit funding below appropriate levels.

## Bonneville has not honored commitments to Indian tribes.

Bonneville has made a number of commitments to the Yakama Nation and other Columbia Basin tribes that have not been honored:

- Bonneville and other Federal agencies committed to a funding level for fish and wildlife for the Fiscal Years 1996 through 2001 in the Memorandum of Agreement on Bonneville Power Administration's Financial Commitment for Columbia River Basin Fish and Wildlife Costs. Section VIII.h. clearly states that: "Any funds remaining in these accounts after close of Fiscal Year 2001 will not be re-programmed for any non-fish and wildlife use, but will remain available for expenditure for the benefit of fish and wildlife."

By the end of Fiscal Year 2001 Bonneville and other Federal agencies had under-spent these funds guaranteed for fish and wildlife measures under the Fish and Wildlife Memorandum of Agreement by approximately $227 million. Contrary to the agreement, BPA put these funds in its general reserve and they were not available for fish and wildlife. The Yakama Nation testified repeatedly about this illegal use of MOA funds in the 2000 rate case, but Bonneville continued to include the funds in reserves for other uses. These funds have essentially disappeared as Bonneville used its reserve to purchase high cost electricity to meet its over-commitment to its utility and aluminum smelter customers.

- Bonneville has said that implementation of the spill and flow actions in river operations are a critical part of it efforts to provide equitable treatment for fish and wildlife. Yet in 2001, BPA decided to eliminate these protections to avoid raising rates or deferring payments to the Treasury. The limited mitigation Bonneville offered for the 2001 "emergency" has also been cut.

- Bonneville and the Administration made commitments in 2000 that the Federal government would aggressively implement the habitat restoration activities and other reforms in the Biological Opinion. Yet, we estimate that current funding is not nearly adequate to implement the actions that the Federal government committed to.

- In the September 1999, letter Bonneville also stated that its reserves at the end of the rate period were projected to be $1.25 billion. These ending reserves are extremely important to position Bonneville to be able to fund the higher fish and wildlife protection measures after 2006. It's SN CRAC rate proposal is expected to have an ending reserve of less than $350 million.

After all of these commitments and assurances, Bonneville is now considering reducing its future fish and wildlife funding to improve its finances. This would future shift the risk of Bonneville's mistakes to fish and wildlife and the tribal cultures that depend on them.

## Bonneville could meet its fish and wildlife obligations and provide electricity to the Northwest that is below the market cost of electricity

Bonneville and its customers have predicted dire circumstances if it raises its rates. In the SN CRAC proposal, Bonneville has reduced the chances of fully paying the Treasury and reneged on the Fish and Wildlife Funding Principles to minimize any rate increase.

No one likes to see electricity rates go up; however, it is important to note that Bonneville's proposal would result in an increase of about $4.50 per month for the average consumer served by Bonneville. This is hardly an economic disaster.

Our analysis shows that BPA could meet funding levels from Provincial Review and still be six to 14 percent below market prices for electricity. The additional funding would add about $0.0017 per kilowatt-hour—about $1.90 per month for the average consumer.

We also provided evidence to Bonneville that increasing fish and wildlife funding would have significant benefits for tribal and other rural communities. For example, increasing funding by $100 million per year for habitat restoration would result in $200 million to $300 million in increased economic activities associated with the jobs that would be created and the increased tourism and recreation from expanded fishing opportunities.

**RECOMMENDATIONS**

**1. More oversight is needed on the implementation of BPA trust responsibilities.**

**GAO Review:** We appreciate the Committee's request for a GAO review of BPA's activities. We would be happy to provide specific recommendations on issues that could be addressed. We have a significant amount of information that would be useful to GAO.

**Oversight Hearings**: Regular oversight hearings by the Indian Affairs Committee could be very helpful in improving Bonneville's efforts to meet its fish and wildlife and trust obligations. We would like to see more accountability to achieve results for Columbia Basin Tribes. The current effort is process oriented and not producing adequate results. We need clear goals and measurable objectives and an adequate budget to meet them.

**2. Improve fish and wildlife implementation**

**Streamline contracting**: We need to reduce the time and effort required to get contracts in place to rebuild fish and wildlife. The Columbia Basin has a rigorous process to review and prioritize these projects. After this extensive review it should be relatively straightforward to prepare the scopes of work and contracts.

**Consider transferring implementation to another entity**: We would like to explore a transfer of fish and wildlife implementation to another entity to reduce administrative costs and improve implementation. The new entity should meet the federal trust responsibility to tribes.

**Address conflict of interest**: Transferring implementation would address the current conflict of interest problem. In the meantime, Bonneville should reinstate its policy of carrying funds forward to the next fiscal year and it should not arbitrarily cap fish and wildlife funding.

**3. Provide adequate funding for fish and wildlife**

**Funding through 2006**: The committee should direct fish and wildlife managers and Bonneville to develop budgets to fully implement the biological opinion and fish and wildlife program. We believe that the Provincial Review is an excellent place to start. Bonneville should adjust its rates as necessary to provide adequate funding.

**Funding after 2006**: The Committee should direct Bonneville to coordinate its rate case and power sales contract processes with fish and wildlife decisions and long-term fish and wildlife budgeting. The Committee should ensure that BPA decisions do not foreclose future fish and wildlife restoration.

**4. Bonneville should capitalize land and water acquisitions.**

The fish and wildlife managers have developed a definition for BPA capital facilities that is similar to those used by other public agencies. It is:

> Bonneville may use its permanent borrowing authority to acquire land and interests in land, water or water rights, and to finance construction of capital facilities and improvements to land including, but not limited to, buildings, roads, culverts, stream bank stabilization, fences, utilities, sewage treatment and discharge, diversion screens and ladders, instream structures, fish propagation facilities, and other tangible improvements.

Adopting this definition would improve Bonneville's ability to meet its fish and wildlife costs while minimizing the associated rate increase.

**5. Improve BPA Tribal Policy**

BPA should work with tribes to incorporate the best practices from other federal agencies. We would hope that a new tribal policy would set measurable goals and objectives for meeting Bonneville's trust obligations.

## Conclusion

Again, we appreciate the Committee's efforts in holding this important hearing. We hope it will be the beginning of a sustained effort to improve the oversight of Bonneville and the FERC.

Attachments

Results of the Provincial Review: Estimated Budget Needs Through FY 2006.
What Led to the Current BPA Financial Crisis? A BPA Report to the Region
CRITFC and Yakama Nation Initial Brief to the SN CRAC BPA Rate Case

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# INITIAL BRIEF
# OF THE
# COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION
# AND
# THE YAKAMA NATION
# AND
# REQUEST FOR ADMINISTRATOR TO RECONSIDER HEARING OFFICER'S ORDER STRIKING CERTAIN TESTIMONY

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May 23, 2003 Exhibit: SN-03-B-CR/YA-01

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## INTRODUCTION

The Columbia River Inter-Tribal Fish Commission ("CRITFC") and Yakama Nation submit this brief on behalf of CRITFC's member tribes and the Yakama Nation (collectively CR/YA) pursuant to the Procedures Governing Bonneville Power Administration Rate Hearings, 51 Fed. Reg. 7,611 (1986), and the Special Rules of Practice governing these proceedings. SN-03-O-1; and SN-03-O-2. This brief describes CRITFC's and the Yakama Nation's factual, policy, and legal positions with respect to the Bonneville Power Administration's Proposals in the SN-03 rate case.

In this brief CRITFC and Yakama also request that the Administrator reconsider certain aspects of the Hearing Officer's orders to strike testimony of CRITFC and



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1 Yakama. In so doing, we have set forth portions of the stricken testimony solely for the
2 purposes of appealing the Hearing Officer's determination.
3 While CRITFC and the Yakama Nation recommend changes to the proposal, to
4 the extent not otherwise noted in this Initial Brief, wherever contrary to the
5 determinations in Bonneville's SN-03 proposals, CRITFC and the Yakama Nation
6 incorporate by reference all of our other arguments as set forth in our prior briefs, as
7 well as our direct and rebuttal testimony in this rate case in order to preserve the
8 CR/YA issues raised in testimony and in our legal briefs. To the extent Bonneville's
9 SN-03 proposal departs from the recommendations contained in the CR/YA prefiled
10 testimony or briefs in this rate case proceeding, CR/YA reserves the right to raise such
11 issues in subsequent administrative and judicial proceedings.

12 **I. STATEMENT OF THE CASE**

13 **A. Background and Summary**

14 Bonneville's SN-03 rate proposal will determine whether Bonneville has sufficient
15 funds to meet its costs and repay the United States Treasury. It will also greatly affect
16 funding for the overall federal effort to recover Columbia River salmon runs to
17 sustainable, harvestable levels. Such levels are necessary to support the treaty reserved
18 fishing rights of the Yakama Nation and the other member Tribes of the Columbia River
19 Inter-Tribal Fish Commission. The SN-03 proposal will limit financial capabilities of the
20 Bonneville Power Administration to fund the recovery of Columbia River salmon runs to
21 the extent such runs have been impacted by the development and operation of the Federal
22 Columbia River Power System.


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1 CRITFC and Yakama contend that Bonneville's rate proposal does not provide
2 sufficient financial capability for Bonneville to meet its total system costs, which include
3 its statutory and other legal duties to fund salmon recovery. Bonneville has not included
4 the appropriate costs in its analysis of Bonneville's financial obligations. Bonneville has
5 not adequately addressed the significant uncertainty it faces in future costs and revenues.
6 Bonneville's proposal greatly reduces the probability that it will make all of its Treasury
7 payments on time and in full. Bonneville's proposal does not meet the Fish and Wildlife
8 Funding Principles. Bonneville's proposed rate design will further weaken its ability to
9 meet its other costs. Because of these flaws in the proposal, Bonneville will face two
10 untenable alternatives. Bonneville will either defer needed fish and wildlife restoration
11 (which is already occurring) or it will not have sufficient funds to assure timely
12 repayment of the debt associated with the Federal Columbia River Power System
13 (FCRPS). Neither of these alternatives is acceptable public policy. Neither will further
14 the Federal government's obligations under the Treaties or Bonneville's obligations
15 under § 7(a)(2)(A) & (B) of the Northwest Power Act, and other Federal laws.
16 Our goal in this proceeding is to convince Bonneville to raise its rates to ensure
17 that all of its costs, including the costs associated with its treaty and trust obligations and
18 other Federal laws are met while assuring repayment of its debt to the Treasury pursuant
19 to 16 U.S.C. 839e(a)(2) (A)&(B).
20 We believe that Bonneville can raise its rates several mills per kWh, and still be
21 below the market cost of power and achieve these goals. This would improve
22 Bonneville's ability to fund needed fish and wildlife restoration and cultural resource


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1 protection. It would address the significant cost and revenue uncertainty facing
2 Bonneville. Moreover, it would position Bonneville to remain competitive in the next
3 rate period and significantly improve the chances that Bonneville will be able to make
4 full and timely payments on its debt to the Federal Treasury to repay the investment in
5 the FCRPS.

6 **1) The Treaty Rights of the Columbia River Tribes**

7 The Columbia River treaty tribes continue their participation in this rate
8 proceeding to protect their interests associated with their treaty-reserved rights, rights that
9 must be proactively protected by Bonneville as an agency of the federal government.
10 Bonneville's fiduciary duty to the Treaty Tribes to protect their treaty secured interests
11 dictate that a higher standard of care must be exercised in this proceeding as it affects
12 these tribal interests. For a more in-depth discussion of Bonneville's fiduciary duties,
13 please refer to WP-02-B-CR/YA-01, pages 3-6, 7-8.

14 **B. Standard of Review**

15 **1) Northwest Power Act**

16 Standards for approval of Bonneville's rates are set forth in the Northwest Power
17 Act. 16 U.S.C. 839e. Standards of review for Bonneville's rate proposal by the Federal
18 Energy Regulatory Commission (FERC) are established in Section 7(a)(2) of the
19 Northwest Power Act. 16 U.S.C. 839e(a)(2). FERC is authorized to confirm and approve
20 power rates after a finding that such rates (1) are sufficient to assure repayment in the
21 Federal Columbia River Power System (FCRPS) after first meeting the Administrator's
22 other costs and (2) that such rates are based upon the Administrator's total system costs.


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1 *See Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1110 (9th Cir.
2 1984).
3 Under the Northwest Power Act, measures to protect, mitigate, and conserve fish
4 and wildlife damaged by the hydroelectric development and operations in the Columbia
5 River Basin are to be paid by the Bonneville Power Administration. 16 U.S.C.
6 839b(h)(8), 839b(h)(10). These costs are part of Bonneville's total system costs.
7 In addition, Bonneville must generally comply with other federal law in setting
8 rates. "All purposes of the Northwest Power Act, together with the provisions of other
9 laws applicable to the Federal Columbia River Power System are all intended to be
10 construed in a consistent manner. Such purposes are also intended to be construed in a
11 manner consistent with applicable environmental laws." 16 U.S.C. 839. Section 7(a)(1)
12 of the Northwest Power Act, 16 U.S.C. 839e(a)(1), requires that rates be "established in
13 accordance with sections 9 and 10 of the Federal Columbia River Transmission System
14 Act (16 U.S.C. 838) [16 U.S.C. 838g and 838h], section 5 of the Flood Control Act of
15 1944 [16 U.S.C.825s], and the provisions of this chapter."
16 Bonneville's rates are final for purposes of review by the United States Court of
17 Appeals, Ninth Circuit after they are approved by FERC. 16 U.S.C. 839f(e)(1)(G); 16
18 U.S.C. 839f(e)(4)(D). The Ninth Circuit may at that time review rates for matters of law
19 both inside and outside of FERC's authority. *CEC v. Johnson* 767 f.2d 631, 633 (9th Cir.
20 1985). Rate determinations will be reviewed by the Ninth Circuit to determine whether
21 they are supported by substantial evidence in the rule making record. *Central Lincoln*
22 *People's Utility District v. Johnson*, 735 F. 2d at 1115.


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1 **II. BONNEVILLE'S PROPOSAL DOES NOT COVER TOTAL SYSTEM**
2 **COSTS AND DOES NOT ASSURE REPAYMENT OF TREASURY.**
3
4 Bonneville's rate proposal will determine its revenues through 2006. The Federal
5 government, Bonneville included, adopted a policy for the Conservation of Columbia
6 Basin Fish in December 2000 (All H Paper). At the same time, the National Marine
7 Fisheries Service issued a Biological Opinion regarding operation of the Federal
8 Columbia River Power System (FCRPS). By memorandum of agreement and Record of
9 Decision, Bonneville has agreed to support implementation of these plans. These plans
10 define significant actions that Bonneville and others must take to meet requirements
11 under the Endangered Species Act, Clean Water Act, and other environmental laws.
12 CRITFC and the Yakama Nation assert that Bonneville must increase its SN-
13 CRAC to recover these and other added fish costs. Instead, Bonneville's Proposal has
14 eliminated the range of fish and wildlife costs that was designed to address some of the
15 uncertainty associated with Bonneville's future obligations. Conger, et al. SN-03-E-BPA-
16 07, page 3. Irrespective of Bonneville's assumptions, the reality is that Bonneville is
17 already pushing a bow wave of unmet existing fish and wildlife obligations that pre-date
18 the All H Paper and Biological Opinion. These existing commitments will increase
19 Bonneville's cost and exposure significantly and are in addition to the All H Paper and
20 Biological Opinion obligations. And, additional fish and wildlife funding requirements
21 will fall on Bonneville because the ESA implementation and other obligations will add to
22 Bonneville's total system costs. Bonneville will have to address these costs whether it
23 has included them in its Proposal or not. By not adequately addressing these costs and
24 uncertainties in its Proposal, Bonneville has unacceptably increased the risks that it will


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not be able to cover all of its costs or assure timely repayment to the Treasury. We will demonstrate in this brief that Bonneville has significantly underestimated the risks that it faces and has not included sufficient costs in its revenue requirements and risk mitigation mechanisms to meet its future Total System Costs while assuring timely repayment to the Treasury.

**A. Bonneville's Proposal does not adequately address other federal laws and has underestimated the risk that it will not cover the Total System Costs and therefore the Proposal is unlikely to meet Bonneville's costs.**

Bonneville must adequately establish rates to recover its costs and expenses incurred by the Administrator pursuant to the Northwest Power Act and other provisions of law. 16 U.S.C. 839e(a)(1).[1] Because Bonneville's total system costs are subject to future events, inherent in these costs are risks that must be addressed in Bonneville's rates. It is Bonneville's responsibility to measure the risks involved in developing costs for which complete accuracy is not possible based on substantial evidence. Bonneville's Proposal must address the risks associated with uncertainty in its future revenue requirement. The Proposal must provide rates that are based on and will repay the Administrator's total system costs. 16 U.S.C. 839e(a)(2).

Unfortunately, Bonneville has failed to accurately account for costs in the proposal that will be required to address the fish and wildlife losses caused by the

[1] The House Committee on Interstate and Foreign Commerce stated: The third purpose [of the Act's fish and wildlife provisions] is that the BPA customers and the consumers of those customers will continue to pay all of the costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements. These costs include those related to fish and wildlife. H.R.No.Rep. 96-976, pt. I, 96th Cong., 2d Sess., at 49.



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development and operation of the federal hydropower system. Bonneville has chosen to ignore important new information contained in the 2000 Biological Opinion, the Provincial Review, and a recent court case determining the adequacy of the Biological Opinion. Attempts by Bonneville to minimize these actions or declare them outside the scope of this proceeding will not make them go away. Failure to address these issues will increase the risk that Bonneville's rates will not be sufficient to meet its costs and repay the Treasury.

**Issue: Has Bonneville's Proposal appropriately accounted for the cost of meeting federal government obligations to protect and restore Columbia Basin fish and wildlife?**

As discussed in the following subsections, Bonneville must comply with other federal laws in developing and setting rates. The Northwest Power Act provides that all laws applicable to the Federal Columbia River Power System are to be construed in a consistent manner and in a manner consistent with applicable environmental laws. 16 U.S.C. 839. Where federal and environmental laws affect the Federal Columbia River Power System, Bonneville must consider the affects of those laws on setting rates and whether those rates are based on the Administrator's total system costs. 16 U.S.C. 839e(a)(2)(B). Bonneville has erred by ignoring the 2000 Biological Opinion and Provincial Review. These and other actions place additional risk that has not been adequately addressed in the Proposal. This risk undermines Bonneville's ability to repay Treasury and fully fund fish and wildlife measures necessary to comply with federal law. Where Bonneville's Proposal does not adequately deal with these risks, the proposed rates



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are deficient and are not based on the Administrator's total system costs, 16 U.S.C. 839e(a)(2)(B), and will not assure repayment of the federal investment. 16 U.S.C. 839e(a)(2)(A).

**1) Bonneville's Proposal does not adequately address costs associated with the Endangered Species Act and Northwest Power Act.**

The Endangered Species Act, 16 U.S.C. 1531-1543, protects species listed as either endangered or threatened and imposes substantive duties on Bonneville. Bonneville must ensure that its activities, including power sales, are not likely to (1) jeopardize the continued existence of listed species or (2) adversely modify the critical habitat of such species. The ESA also prohibits Federal agencies from "taking" (e.g. harming) any endangered species. Bonneville has responsibilities in implementing the ESA to recover listed salmon and steelhead in the Columbia and Snake rivers.

The Pacific Northwest Electric Power and Conservation Council (Council) develops the Columbia River Basin Fish and Wildlife Program pursuant to the Section 4(h) of the Northwest Power Act. 16 U.S.C. § 839b(h). The scope of the Council Program addresses all fish and wildlife in the Columbia River Basin affected by the construction and operation of the hydroelectric system. As noted above, the Program's goal is to restore sustainable harvest levels of fish and wildlife to meet obligations under the Northwest Power Act, other Federal laws, and Treaties with Indian tribes and Canada. The Program is based on recommendations from the region's federal, state, and tribal fishery managers and others. The Council adopted Programs in 1982, 1984, 1987, 1992, 1994, and 2000. It also adopted amendments in 1995 specifically addressing resident fish and wildlife.



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1 The Act directs BPA to use its funds to protect, mitigate, and enhance fish and
2 wildlife in a manner consistent with the Council's Program and take the Program into
3 consideration at each relevant stage of its decision making. 16 U.S.C. § 839b(h)(10)(A).
4 The Act also directs BPA to "exercise its responsibilities consistent with the purposes of
5 this Act and other applicable laws, to adequately protect, mitigate, and enhance fish and
6 wildlife, including related spawning grounds and habitat, affected by such projects in a
7 manner that provides equitable treatment for such fish and wildlife with other purposes
8 for which such system and facilities are managed and operated." 16 U.S.C. §
9 839b(h)(11)(A). Bonneville must also coordinate its actions with tribal, state, and federal
10 fish and wildlife managers. Id. At 839b(h)(11)(B).

11 **a) Bonneville has failed to consider evidence on the costs and risks**
12 **associated with implementing the ESA and Council Fish and**
13 **Wildlife Program.**
14
15 The federal government, including Bonneville, has repeatedly stated that the 2000
16 Biological Opinion would be aggressively implemented due to the extremely degraded
17 nature of the listed salmon stocks in the Columbia and Snake Rivers. Unfortunately,
18 Bonneville and other federal agencies' actions do not correspond with their statements.
19 On the one hand, BPA and federal agencies have said that the Biological Opinion
20 on the FCRPS operations is an aggressive effort to improve habitat, reform hatcheries,
21 and reduce harvest. The federal agencies delayed breaching the Snake River dams
22 because they thought that the aggressive measures in the Biological Opinion would be
23 sufficient. Bonneville and other federal agencies urged the Columbia Basin tribes to
24 work with them on implementation rather than file suit on the inadequate Biological


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1 Opinion. The tribes were told that implementation would be very aggressive. On the
2 other hand, Bonneville's actions are very different than the Bonneville words.
3 Bonneville's testimony describes how it has addressed fish and wildlife costs.
4 *See* SN-03-E-BPA-01 page 3-5 lines 1 though 6 and page 3-7, line 24 through page 3-8,
5 line 22 and Keep, et al. SN-03-E-BPA-04 page 12 lines 8 though 16. In BPA's rebuttal
6 testimony it states "Since the completion of the ROD for the WP-02 rate proposal, the
7 NMFS and USFWS have completed biological opinions under the ESA to cover FCRPS
8 operations, the Council has largely completed it Provincial Reviews planning for 3 years
9 under the program..." *See* McNary, et al. SN-03-E-BPA-18 page 2 lines 12 though 15.
10 For accuracy we would note that the final ROD was issued June 2001 while the
11 biological opinions were issued in December 2000.
12 **Request to Reconsider Order Striking Certain Testimony**
13 Bonneville successfully moved to strike CRITFC and Yakama Nation testimony,[2]
14 regarding the funding required to meet the biological opinions. *See* SN-03-O-11.
15 (Striking Sheets et al., SN-03-E-CR/YA-01 pages 24, line 18 to page 29, line 12 and
16 pages 32 line 4 through page 37, line 4. CRITFC and Yakama hereby move the
17 Administrator to set aside the Hearing Officer's order with regard to the following
18 testimony described for purposes of this motion. The stricken testimony CRITFC and
19 Yakama would have provided detailed estimates of the likely costs of implementing the
20 Biological Opinions and Council Fish and Wildlife Program, responding to Bonneville
21 testimony. *See* SN-03-E-BPA-01, Page 3-5, lines 1-6. Our evidence would have shown

[2] PPC, NRU, and WPAG filed a nearly identical motion to strike. SN-03-O-11


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1 that Bonneville did not address the cost estimates developed by fish and wildlife
2 managers and the Independent Science Review Panel, by the Council on Environmental
3 Quality, or by the CRITFC and the Yakama Nation and that these cost estimates are
4 significantly higher than the assumptions that Bonneville has cited in this proposal. *See*
5 SN-03-E-CR/YA-01, pages 24, line 18 through page 29, line 12 and pages 32, line 4
6 through page 37, line 4.

7 The stricken information also would have shown that Bonneville's current efforts
8 are several hundred million dollars per year below the estimates we provided. Failure to
9 address this uncertainty increases the chances that Bonneville's Proposal is not sufficient
10 to meet its costs and repay Treasury. *See* SN-03-E-CR/YA-01, page 32, line 4 through
11 page 37, line 4, SN-03-E-CR-01KK, and SN-03-E-CR-01GGG. Bonneville also
12 successfully moved to strike our testimony regarding the budget developed by the fish
13 and wildlife managers and the Independent Science Review Panel on the cost of
14 implementing the Provincial Review. SN-03-O-11 (striking SN-03-E-CR/YA-01, page
15 24, line 18 to page 30, line 2; SN-03-E-CR/YA-01UU; and SN-03-E-CR&YA-02K). The
16 document, entitled: Results of the Provincial Review: Estimated Budget Needs Through
17 FY 2006, dated April 16, 2003 provides a detailed budget for habitat restoration on non-
18 federal lands and other actions to implement the Biological Opinions and Council
19 Program. This document summarizes the cost of implementing the Provincial Review
20 that Bonneville cites in its own testimony. This document shows that the costs of
21 implementing the Provincial Review could be approximately $108 million per year
22 higher than Bonneville has assumed in its Proposal. The testimony also describes


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uncertainties associated with subbasin planning, recovery planning, litigation, and the check-ins required under the Biological Opinions that could increase these costs. The final document also describes why these costs were assumed to be Bonneville's responsibility. *See* SN-03-E-CR/YA-01, page 24, line 18 through page 30, line 2; SN-03-E-CR/YA-01UU; and SN-03-E-CR&YA-02K.

It would be wrong for Bonneville to fail to consider this evidence. CRITFC and Yakama assert that Bonneville's Federal Register notices, FRN Vol. 68, No.49, March 13, 2003, page 12051, and the Hearing Officer's determinations to strike certain testimony are at odds with the express statutory requirements of the Northwest Power Act. The statute speaks directly to what material shall be included in the Administrative Record in a "7i" proceeding.

> In addition to the opportunity to submit oral and written material at the hearings, **any written views, data, questions, and arguments** submitted by person prior to or before the close of the hearings **shall be made part of the administrative record.**

16 U.S.C. 839e (i)(3)(emphasis added). In addition to the grounds stated in the CRITFC and Yakama Answers to the motions to strike, herein incorporated by reference, the statute clearly supports the CRITFC and Yakama request to restore certain portions of our direct and rebuttal testimony to the record of this proceeding. Moreover, Under Bonneville's Rules of Procedure Governing Rate Hearings ("Rules"), "parties shall be provided an adequate opportunity to offer refutation or rebuttal on **any** material submitted by any other party or by BPA." Rules § 1010.11(a)(1) (emphasis added). It is the clear



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1 policy of the Rules to allow relevant testimony in response to Bonneville's Initial
2 Proposal.
3
4 In order to comply with its statutory mandates and Congressional policy,
5 Bonneville may not ignore testimony that is reasonably related to developing a full
6 understanding of issues that may affect Bonneville's ability to cover its total system costs,
7 to repay Treasury, or its ability to pay for fish and wildlife measures. The disputed
8 testimony and attachments are proffered only to clarify the uncertainties Bonneville faces
9 in its revenue requirements so that Bonneville can address these uncertainties and cover
10 its total system costs.
11 Bonneville cannot decide it will not investigate issues that expose Bonneville to
12 financial risks just because Bonneville asserts examined similar issues at an earlier time.
13 Nor can Bonneville categorically dismiss consideration of fish and wildlife costs raised
14 by the parties (other than Bonneville) to this proceeding. Where it is demonstrated that
15 Bonneville's analysis of its costs is inadequate, it violates statutory mandate and
16 Congressional policy to ignore information that is relevant and necessary to a full
17 understanding. Bonneville has a duty in this proceeding to consider all relevant evidence.
18 The tribes request that the Administrator set aside the Hearing Officer's
19 determination in SN-03-O-11 to strike the foregoing testimony, [3] consider and respond to
20 the tribes' stricken testimony, and include the foregoing tribal testimony and attachments
21 in the record of this proceeding. The stricken tribal testimony rebuts Bonneville's direct

[3] The stricken testimony referenced here that we asked to be restored to the record is: SN-03-E-CR/YA-01, pages 24, line 18 through page 29, line 12 and pages 32, line 4 through page 37, line 4. SN-03-E-CR/YA-01, page 32, line 4 through page 37, line 4. SN-03-E-CR-01KK, and SN-03-E-CR-01GGG.


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1 testimony and demonstrates that Bonneville faces cost uncertainties that add risk to
2 Bonneville's ability to meet its total system costs. The stricken testimony is important
3 because it provides information directly relevant to issues that Bonneville claims that it
4 has considered but has not. It rebuts Bonneville's testimony and demonstrates that the
5 costs and uncertainties of meeting Bonneville's total system costs are higher than
6 assumed in the Proposal. The fact that Bonneville has ignored CR/YA information
7 without providing any analysis in the record demonstrates that Bonneville's has failed to
8 consider a relevant factor in assuring that its revenues are sufficient to meet its costs and
9 repay the Treasury. Ignoring these uncertainties does not make them go away.

10 b) **Bonneville has changed its assumptions regarding future fish and**
11 **wildlife costs and has disregarded relevant testimony.**
12

13 Bonneville has fundamentally changed its assumptions about fish and wildlife
14 costs in the SN CRAC process. At SN-03-E-BPA-01, Page 3-5, lines 1-6 Bonneville's
15 proposal states: "The assumptions on fish and wildlife recovery funding levels that
16 resulted during the development of the Fish and Wildlife Funding Principles (Principles),
17 which were included in the May 2000 Final Proposal, have been supplanted by the
18 development of the Action Agency Implementation Plan. *See* Keep, *et al.*, SN-03-E-
19 BPA-04. The fish and wildlife funding levels reflect both the Plan and recommendations
20 from the Northwest Power Planning Council's (NWPPC) Fish and Wildlife Program". In
21 cross-examination, Sarah McNary conceded that budgets for the Implementation Plan



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and Council Fish and Wildlife Program through FY 2006 were not available. Transcript of Cross-Examination, p. 118 (McNary)

**Request to Reconsider Order Striking Certain Testimony**

In stricken testimony, we provided evidence that directly rebutted Bonneville's assertion in Keep, et al. SN-03-E-BPA-04 page 11, that the agency based its Proposal on the Implementation Plan and Council Fish and Wildlife Program. We provided evidence indicating that Bonneville could not have based its Proposal on either the Implementation Plan or Program because neither document has budgets through 2006. Sheets, et al. SN-02-E-CR/YA-01, page 17, line 16 through page 19, line 23. Among the stricken material is a February 21, 2003 letter from the Council indicating that it has not developed budgets through FY 2006 and that Bonneville is jeopardizing its ability to meet legal requirements under the Biological Opinion and the Northwest Power Act.

The February 21st letter states:

> The Council cannot proceed to evaluate fish and wildlife expense program spending levels without resolving the issues identified above. At this point, the Council stands by its earlier statement to you that it is concerned that a reduction in Bonneville's spending commitment below $139 million may jeopardize its ability to meet legal requirements under the Biological Opinions and the Northwest Power Act. Critical Biological Opinion check-ins are imminent. These are the funds that are necessary to implement many of the important projects and programs that must be in place to succeed in those evaluations. The reductions precipitated by Bonneville's immediate switch to its "accrual rules" are going to have an impact on our fish and wildlife restoration efforts. We are concerned that deeper and sustained cuts in the out- years may have serious impacts that could retard the progress we have been making.



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1 The Council letter also notes that cuts in Bonneville's fish and wildlife funding may risk
2 it ability to meet it legal obligations:

> 3 Bonneville's many programs are not all equal. Some, such as the fish
> 4 and wildlife program, respond to legal obligations that cannot be
> 5 abandoned, even temporarily. Programs with such legal requirements
> 6 must be viewed differently than programs that are useful and valuable
> 7 but not legally required or unquestionably essential to Bonneville's
> 8 core statutory missions. Moreover, to be equitable, you must assess
> 9 where various program costs are today against their planned levels.
> 10 Programs operating within planned budgets are penalized for their
> 11 efficiency if this is not considered. Finally, because you are
> 12 considering cost reductions in the context of the SN CRAC, the
> 13 significance of a possible program reduction from a rate impact
> 14 perspective must be understood. It makes little sense to increase legal
> 15 risks to the durability of the power system because of a cost reduction
> 16 that has essentially no impact on rates.

17 SN-03-E-CR/YA-01LL.

18 Bonneville also moved to strike the testimony provided by CRITFC and Yakama
19 that estimates for the implementation plan and Council program are not available through
20 FY 2006 and that there is no evidence in the record to support the fish and wildlife cost
21 assumptions Bonneville has used in its Proposal. SN-03-M-5. The stricken testimony,
22 SN-02-E-CR/YA-01, page 17, line 13 through page 23, line 13, and attachment SN-02-E-
23 CR/YA-01LL rebuts Bonneville's claims regarding cost estimates.

24 In response to BPA's motion, the hearing officer struck this portion of the tribes'
25 testimony. SN-03-O-11 (order striking portions of CR/YA direct testimony). As
26 described previously, it would be wrong for Bonneville to fail to consider this evidence.
27 The tribes request that the Administrator set aside the determination in SN-03-O-11 to
28 strike the foregoing testimony, SN-02-E-CR/YA-01, page 17, line 13 through page 23,
29 line 13 and attachment SN-03-E-CR/YA01LL, consider and respond to the tribes'



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1 stricken testimony, and include the foregoing tribal testimony in the record of this
2 proceeding. The stricken tribal testimony rebuts Bonneville's direct testimony cited
3 above and demonstrates that Bonneville faces revenue uncertainties that add risk to
4 Bonneville's ability to meet its total system costs. Failure to adequate address the risks
5 and uncertainties described in the stricken testimony will increase the risk that
6 Bonneville's rates are not sufficient to meet its costs and repay the Treasury.

7 **c) Customer Opposition is not relevant to BPA's Fish and Wildlife**
8 **Funding obligations.**
9
10 Bonneville's rebuttal testimony also concedes that Bonneville based the funding
11 level on its own judgment and the need to hold down fish and wildlife funding to increase
12 liquidity. Bonneville also states that "...with BPA's customers uniformly opposing any
13 rate increase through this SN-03 process, it is politically untenable to further increase fish
14 and wildlife expenditures when other program areas are taking deep cuts. *See* SN-03-E-
15 BPA-18, page 6, lines 3 through 13. Customer opposition is not relevant to Bonneville's
16 fulfillment of its statutory duties with regard to implementation of the Northwest Power
17 Act, the ESA, or Bonneville's legal duties to the tribes.
18 In our rebuttal testimony we showed that Bonneville's utility customers have not
19 analyzed the costs of meeting Bonneville's fish and wildlife and related legal
20 responsibilities. *See* SN-03-E-CR/YA-02O. Bonneville should not rely on its customers'
21 opposition to fish and wildlife funding when the opposition is not based on factual
22 evidence.
23 Rather, Bonneville is required to coordinate its actions with the fishery managers.
24 16 USC 839b(h)(11)(B). Bonneville has failed to do so. Bonneville has failed to address


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1 the significant risk that fish and wildlife implementation costs will be substantially higher
2 than Bonneville has assumed in the rate case. Bonneville has also failed to address the
3 significant risk of failure to fully implement the ESA. In addition, by failing to
4 implement the actions needed to restore salmon and other fisheries while keeping rates
5 artificially low, Bonneville risks legislation to fundamentally change or dismantle the
6 agency. By failing to address the risks of not implementing the Biological Opinion,
7 Bonneville has understated the risks it faces. This increases the likelihood that its rates
8 are not sufficient to pay its costs and repay the Treasury.

9 **d) Bonneville has not adequately addressed funding for fish and**
10 **wildlife that are not listed under the Endangered Species Act.**
11

12 Bonneville states that it has addressed species that are not yet listed under the
13 Endangered Species Act. *See* SN-03-E-BPA-04, page 12, line 11. In response to our
14 data request, BPA provided a report to the Northwest Governors on BPA expenditures to
15 implement the Fish and Wildlife Program. *See* SN-03-E-CR-01QQ. We reviewed the
16 report and did not find any analysis of spending for non-listed species. We note that
17 Bonneville's rebuttal testimony states that its ESA commitments require $107 million of
18 $139 million funding cap for FY 2003.
19 CRITFC and the Yakama Nation provided evidence that fish and wildlife that are
20 not listed under the ESA are not getting adequate funding. This problem is likely to
21 result in additional listings and cost exposure for BPA.
22 An example of this problem is the lamprey. Pacific lamprey are a key indicator of
23 the ecological health of the Columbia Basin and appear to be a choice food for avian and


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1 fish predators over salmon smolts. Lamprey were designated as Category 2 candidate
2 species for ESA listing in 1994 by the USFWS. The Council's 1994 Fish and Wildlife
3 Program noted the decline of lamprey and requested a status report which was completed
4 (Close et al. 1995). On January 28, 2003, Pacific lamprey were petitioned for ESA
5 listing by a host of environmental organizations.
6 Although adult lamprey counting at mainstem Columbia and Snake River dams is
7 not standardized, population trends indicate precipitous declines. Based on 1997 fish
8 ladder passage estimates, there was a 65% drop in Pacific lamprey abundance between
9 Bonneville (Columbia River km 235) and The Dalles (Columbia River km 308) dams,
10 with another large drop (72%) between John Day (Columbia River km 347) and McNary
11 Dam (Columbia River km 470) counts. Passage over upriver dams in the Snake and
12 Columbia rivers in 1997 was low. Only 3% of the Pacific lamprey that crossed
13 Bonneville Dam were counted at Lower Granite Dam (Snake River km 173) and
14 approximately 6% crossed Wells Dam (Columbia River km 830). Research has pointed
15 to the difficulties encountered by lamprey in passing through the FCRPS as a cause for
16 their decline. An ESA listing of lamprey and remedial actions at the dams would
17 increase Bonneville's cost exposure.

18 **e) Bonneville's proposal is based on optimistic assumptions about**
19 **river operations that are not consistent with the Biological**
20 **Opinion.**
21
22 Bonneville's proposal assumes significant changes in the operation of the FCRPS.
23 *See* SN-03-E-BPA-04, Page 11, line 23 through page 12, line 7. Bonneville's
24 assumptions that the Corps of Engineers and Bureau of Reclamation will reduce spill and


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1 flow operations increases the risk that Bonneville's revenues will actually be lower than
2 it has assumed. This increases the risks that Bonneville's rates are not sufficient to meet
3 its costs and repay the Treasury. Our rebuttal shows that the Biological Opinion standards
4 are the at the low end of levels that are likely to avoid high mortality for listed salmon
5 and steelhead and that reducing flows, as assumed by Bonneville, will increase mortality
6 for species listed under the ESA. *See* SN-03-E-CR/YA-02, page 6, line 8 through 18 and
7 related exhibits.

8 Bonneville has also said that its assumptions rely on changes in river operations
9 that are under discussion with NOAA Fisheries and the Northwest Power Planning
10 Council and that Bonneville. *See* SN-03-E-BPA-04, page 11, line 22 through page 12,
11 line 7. We believe it is unlikely that these issues will be resolved prior to Bonneville's
12 ROD. Bonneville should be more risk averse in its approach to assessing future
13 hydrosystem operations and projected revenues.

14 **Request to Reconsider Order Striking Certain Testimony**

15 In response to Bonneville's testimony, CRITFC and Yakama offered testimony
16 on the differences in revenues and other impacts of Bonneville's assumptions compared
17 to the current implementation of the Biological Opinion and alternative operations. *See*
18 SN-03-E-CR/YA-01, page 12, line 14 through page 16, line 18. Bonneville moved to
19 strike this testimony. *See* SN-03-M-5. In addition, CRITFC and Yakama also offered
20 testimony from NOAA Fisheries that federal agencies have failed to meet the river
21 operations standards in the Biological Opinion during 40 percent of the measurement
22 periods since 1995. *See* SN-03-E-CR-01U. Bonneville also moved to strike this


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1 CRITFC and Yakama testimony. As described earlier, it would be in error for Bonneville
2 to fail to consider this evidence. [4] Bonneville also moved to strike other testimony that
3 provides detailed analysis of the adverse biological effects associated with reducing flows
4 and spills as Bonneville has assumed. This testimony would have shown that adverse
5 biological effects increase the uncertainty that Bonneville's assumptions regarding river
6 operations are appropriate. *See* SN-03-E-CR/YA-02M and -02EE.

7 The Hearing Officer orders SN-03-0-11 & 17 struck the foregoing material. The
8 tribes request that the Administrator set aside the determination in SN-03-O-11 and 17 to
9 strike the foregoing evidence[5], consider and respond to the tribes' stricken evidence, and
10 include the foregoing tribal evidence in the record of this proceeding. The stricken tribal
11 testimony rebuts Bonneville's direct testimony at SN-03-E-BPA-04, Page 11, line 23
12 through page 12, line 7. In conformance with the statute's mandate the stricken material
13 should be admitted to the administrative record.

14 **2) Fish and Wildlife are not receiving Equitable Treatment under the**
15 **Northwest Power Act.**
16
17 In 1980, Congress enacted the Northwest Power Act, 16 U.S.C. 839-839h, and in
18 so doing, acknowledged "that no longer should fish and wildlife be given a secondary
19 status. *Yakima Nation v. NPPC*, 35 F.3d 1371 at 1377, *citing* 126 Cong. Rec. H10681
20 (1980) (Rep. Dingell).

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[4] The stricken testimony referenced here that we asked to be restored to the record is: SN-03-E-CR/YA-01, pages 24, line 18 through page 29, line 12 and pages 32, line 4 through page 37, line 4. SN-03-E-CR/YA-01, page 32, line 4 through page 37, line 4, SN-03-E-CR-01KK, and SN-03-E-CR-01GGG.

[5] The stricken testimony referenced here that we asked to be restored to the record is: SN-03-E-CR/YA-01, page 12, line 14 through page 16, line 18. SN-03-E-CR-01U. SN-03-E-CR/YA-02M and -02EE. SN-03-E-CR/YA-01, page 32, line 4 through page 37, line 4, SN-03-E-CR-01KK, and SN-03-E-CR-01GGG



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> The [Act] marked an important shift in federal policy. Continually declining fish runs had revealed the failures of previous legislative efforts requiring that "equal consideration" be given to fish and wildlife affected by resource exploitation. The [Act] ensured the "equitable treatment" of fish and wildlife; it marked the shift of the burden of uncertainty - of proving specific harm to salmon from particular activities - from the salmon to the hydropower system, or so was its intent. In doing so, it created a new obligation on the region and various Federal agencies to protect, mitigate, and enhance fish and wildlife.

*Id.* at 1377-78 (citation omitted, emphasis added).

The Act placed a premium on prompt action, allowing decisions to be made on the best available scientific knowledge. It also limited the role of economic considerations in decision-making. Most importantly, however, the Act acknowledged fish and wildlife as an irreplaceable finite resource.

Bonneville has specific obligations to implement the Columbia River Basin Fish and Wildlife Program developed by the Northwest Power Planning Council:

> The Administrator shall use the Bonneville Power Administration Fund and the authorities available to the Administrator under this Act 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 [Act].

16 U.S.C. 839b(h)(10)(A). In addition, the Act requires:

> The Administrator and other Federal agencies responsible for the managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—exercise such responsibilities, taking into account at each relevant stage of decision making processes to the fullest extent practicable, the program adopted by the Council pursuant to this subsection.

16 U.S.C. 839b(h)(11)(A).



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1 Bonneville did not analyze its equitable treatment obligations in its proposal. *See*
2 exhibit SN-03-E-CR-01L.
3 In other administrative proceedings, Bonneville has taken the position that it relies
4 on its implementation of the Council's Fish and Wildlife Program is a significant
5 contribution to meeting Bonneville's equitable treatment responsibilities. *See* Northwest
6 Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1533 (9th Cir.1997).
7 While Bonneville has argued that it must balance power needs with the needs of
8 fish and wildlife, it is doing so to the detriment of fish. *See* SN-03-E-BPA-01, Page 1-8,
9 line 25 and SN-03-E-BPA-04, page 15, line 3. Bonneville's proposed rates are about 16
10 percent below the market price for power *See* SN-03-E-02 HH and II. Bonneville has
11 agreed to repurchase power from its utility and aluminum smelter customers at a total
12 cost of more than $2.8 billion. *See* attachments SN-03-E-CR-01NNNN and OOOO.
13 There are numerous financial measures Bonneville should implement instead of
14 curtailing fish operations. Bonneville should, for example, utilize all of its financial tools
15 instead of reducing fish and wildlife commitments. *See* SN-03-M-25 (Joint Motion to
16 Admit Liquidity Tools Document).
17 There are several references in Bonneville's testimony regarding its balancing of
18 fish and wildlife funding and minimizing rates. *See* SN-03-E-BPA-04, page 15, line 3
19 and SN-03-E-BPA-18, page 6, line 10 through 13. Bonneville has reduced fish and
20 wildlife funding and reduced the probability of repaying Treasury to minimize rate
21 increases. Such actions keep Bonneville customers' rates below the market rates for
22 power purchases while shifting the risk and biological costs to fish and wildlife. Such


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actions are not consistent with equitable treatment under the Northwest Power Act. 16 U.S.C. § 839b(h)(11)(A)(i), and Bonneville must structure its SN-03 rates to avoid such outcomes in the future.

**Request to Reconsider Order Striking Certain Testimony**

Bonneville successfully moved to consider testimony that it declared emergencies allowing the agency to curtail spill for salmon, including stocks listed species under the ESA in order to produce more power and might do so in the future based on its financial needs. *See* SN-03-E-CR/YA-01, page 39, line 16 through page 40, line 4, SN-03-E-CR/YA-01, page 42, line 14 through page 43, line 3, SN-03-E-CR/YA-02, page 5, line 12 through page 6, line 8 and SN-03-E-CR/YA-02EE. Bonneville has also successfully moved to strike testimony that it cut fish and wildlife funding.

**Summary: BPA's proposal must comply with federal laws and treaties. BPA has not considered the costs and risks associated with meeting the Endangered Species Act and the Northwest Power Act. Failure to consider this information increases the risks that Bonneville's Proposal is not sufficient to meet its costs and repay the Treasury.**

**B. Bonneville's proposal does not adequately address cost and revenue uncertainties.**

**Issue: Does Bonneville's proposal address the uncertainties it faces in costs and revenues? If not, Bonneville's proposal will be unlikely to meet its costs and assure repayment to the Treasury.**

Much of Bonneville's Proposal addresses the rationale and basis for the costs and revenue it has assumed. For example, See SN-03-E-BPA-01, pages 1-1 through 7-18. Bonneville testimony details the changes in costs and revenue, interest charges, and other


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1 factors that affect the Proposal. *See* SN-03-E-BPA-06, page 2, line 15 through page 14,
2 line 18.
3 However, the Bonneville report entitled What Led to the Current BPA financial
4 Crisis? A BPA Report to the Region, however documents that of the $5.3 billion of
5 higher costs in 2002-2006 compared with the last rate period, about $3.9 billion is due to
6 serving 3,300 average megawatts of load beyond Bonneville's resource base. Bonneville
7 was vulnerable to high market prices. Bonneville over-estimated revenues from surplus
8 power sales.
9 Bonneville needs to do a better job establishing and managing its costs. Some of
10 its costs were unrealistically optimistic and not sustainable. Bonneville's culture
11 frequently results in Bonneville taking on substantial risks. Bonneville has gone beyond
12 the limits of risk it can take on. Bonneville should heed these concerns by accepting the
13 CR/YA proposal for Bonneville to be more risk averse.
14 **Request to Reconsider Order Striking Certain Testimony**
15 Bonneville moved to strike information that was supplied in a data response from
16 Bonneville on the uncertainties associated with planning and meeting future electric
17 energy needs. SN-03-E-CR/YA-02AA and BBa (documents regarding uncertainties
18 facing Bonneville); SN-03-M-05 (BPA motion to strike). In response to BPA's motion,
19 the hearing officer struck these portions of the tribes' testimony. SN-03-O-11 (order
20 striking portions of CR/YA direct testimony). As discussed earlier, it would be wrong for
21 Bonneville to keep this evidence out of the record. The tribes request that the
22 Administrator set aside the determination in SN-03-O-11 to strike SN-03-E-CR/YA-


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1 02AA and BBa, consider and respond to these stricken attachments, and include these
2 attachments to the tribal testimony in the record of this proceeding. The stricken
3 attachments rebut Bonneville's direct testimony at SN-03-E-BPA-01 and demonstrate
4 that Bonneville faces revenue uncertainties that add risk to Bonneville's ability to meet
5 its total system costs. Bonneville repeats many of the mistakes described in its own
6 report because the Proposal does not address the actual uncertainties and risk facing
7 Bonneville. Bonneville's recent history is directly relevant to Bonneville's Proposal. By
8 failing to address these uncertainties Bonneville increases the risk that the Proposal will
9 not meet its costs and repay the Treasury.

10 **1) Bonneville's Proposal has not addressed the uncertainties associated**
11 **with future fish and wildlife costs.**
12
13 Bonneville has not adequately addressed the uncertainties associated with
14 implementation of the Biological Opinions and the Fish and Wildlife Program.
15 Bonneville states in its proposal that it has abandoned the range of fish and wildlife costs.
16 *See* SN-03-E-BPA-01, Page 3-7, line 24 through 3-8, line 22. But, Bonneville does not
17 factor in the uncertainties associated with pending litigation or other activities that could
18 affect its costs. *See* SN-03-E-CR-01RRRR. We believe there is high probability that one
19 or more of the pending lawsuits will change the circumstances that affect Bonneville and
20 will likely increase Bonneville's costs. *See* SN-03-E-CR/YA-01, page 48, lines 11
21 through 20. Bonneville should address these uncertainties in this rate process, and
22 incorporate uncertainty about other pending litigation and related issues as part of its
23 analysis of the SN CRAC.



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1 **Request to Reconsider Order Striking Certain Testimony**

2 We offered testimony that would have documented the uncertainties associated
3 with development of recovery plans, subbasin plans, the check-ins required by the
4 Biological Opinions, the implementation of the Clean Water Act, and changes that may
5 result from pending litigation. Our testimony would have shown that there are significant
6 risks that Bonneville's future costs would be higher than assumed in this Proposal. *See*
7 SN-03-E-CR/YA-01, page 20, line 18 through page 23, line 13 and SN-03-E-CR/YA-02E
8 (a summary of the pending litigation and its potential effect on Bonneville). Bonneville
9 succeeded in striking the specifics that were contained in our testimony. In addition to
10 the arguments set forth previously, the Administrator should consider our evidence
11 because it responds to testimony in Bonneville's proposal at *See* SN-03-E-BPA-01, Page
12 3-7, line 24 through 3-8, line 22, and is relevant to the uncertainties that will affect
13 Bonneville's total system costs. It would be inappropriate to exclude this information
14 from the record. We request the Administrator overturn the Hearing Officer's decision to
15 strike this information, SN-03-O-11,[6] consider and respond to this testimony, and include
16 it in the record.

17 **2) Bonneville's Proposal does not address the uncertainties associated**
18 **with natural gas volatility.**
19
20 Bonneville is not using historical price data to forecast forward natural gas price
21 volatility. *See* SN-03-E-CR-01SSSS. Instead, Bonneville relies on the data in AURORA.
22 This computer model simulates future natural gas prices based on a high, medium, and

[6] The stricken testimony referenced here that we asked to be restored to the record is: SN-03-E-CR/YA-01, page 20, line 18 through page 23, line 13 and SN-03-E-CR/YA-02E (a summary of the pending litigation and its potential effect on Bonneville)


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1 low natural gas forecast. Each of these forecasts assumes a fairly constant price. We
2 have attached a graph prepared by PacifiCorp entitled Gas Price Volatility. *See* SN-03-E-
3 CR-01TTTT. It shows historical data from 1990 through 2001. The volatility is striking.
4 For example, there are several periods where prices spiked to $7 to $10 per MMbtu and
5 the volatility index was over 120%. Relying on the AURORA simulations ignores this
6 historic volatility. This uncertainty would affect both the cost of power Bonneville
7 purchases for augmentation and the value of secondary sales. Failure to properly address
8 this uncertainty increases the likelihood that Bonneville's rates will not be sufficient to
9 meet its costs and repay the Treasury.

10 **3) Bonneville's Proposal does not address the uncertainties associated**
11 **with the West Coast power market.**
12
13 Bonneville describes how it treats the uncertainty associated with the West Coast
14 power market in exhibit SN-03-E-CR-01UUUU. Based on the market manipulations
15 seen in California during 2000 and 2001, we believe Bonneville should model more
16 market uncertainty in its risk analysis. Failure to properly address this uncertainty
17 increases the likelihood that Bonneville's rates will not be sufficient to meet its costs and
18 repay the Treasury.
19 The electric price volatility in 2000-2001 was the result of the manipulation of the
20 California deregulation scheme and a drought in the Pacific Northwest. We note that the
21 State of California is considering a change in the laws that govern the regulation of
22 electricity, but not all of these changes have been implemented. We also note that the
23 price caps adopted by FERC are temporary and it is unclear what will happen to market
24 prices if the caps are removed or modified. Therefore, it is our judgment that there is


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1 some probability exists that wholesale energy providers will find ways to manipulate the
2 market and/or the Northwest will experience another significant drought prior to and
3 including 2006. To assume that there is no probability of these events ignores history.
4 We are concerned that BPA has not addressed all of the risks and uncertainties it faces
5 and has not set its rates high enough to cover its costs and repay the Treasury. *See* SN-
6 03-E-CR&YA-02V (our analysis of the situation), -02W and -02X (Reports by Robert
7 McCullough on the manipulation of the California market) , -02Y (an article on
8 manipulation of the California market and the challenge of providing future electricity),
9 and -02Z (a report by the FERC staff on the manipulation of the California market).

10 **4) Bonneville's Proposal does not address the uncertainties associated**
11 **with its internal costs.**
12
13 Bonneville describes changes in its internal costs in several data requests. *See*
14 SN-03-E-CR-01FFFF. We note that Bonneville's internal costs reported during Financial
15 Choices were approximately $222 million higher than the assumptions made in the WP-
16 02 rate case. *See* SN-03-E-CR-01-EEEE. At SN-03-E-BPA-06, page 5, lines 21-26
17 Bonneville reported that its internal costs were $279 million higher than the forecast in
18 the May 2000 proposal. In SN-03-E-CR-01FFFF, Bonneville reports that its internal
19 costs exceeded its 2002-2006 forecast by $313 million. The change during the nine
20 months between Financial Choices and the data response was $91 million. The
21 difference between the proposal and the errata—a four day period—was $34 million.
22 These changes are significant. The assumption that the new estimates are certain does
23 not seem reasonable given the recent history. Failure to properly allow for uncertainty



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1 increases the likelihood that Bonneville's rates will not be sufficient to meet its costs and
2 repay the Treasury.
3 Bonneville's customers have not independently reviewed Bonneville's
4 assumptions about its costs. Instead, they have relied on Bonneville's processes. In SN-
5 03-E-JC-01, page 3, lines 15 through page 5, line 9, the Joint Customers describe
6 Bonneville's processes to review costs and conclude that the Customers are willing to
7 rely on Bonneville's estimates. In data responses, the Joint Customers acknowledge that
8 they did not perform independent analysis of many of the assumptions that Bonneville
9 has used. *See* SN-03-E-CR/YA-02P through S.
10 If the customers had performed this role in prior proceedings Bonneville might
11 have used more realistic estimates for its costs and revenues. Failure to independently
12 evaluate the current proposal increases the risks that Bonneville will not be able to meet
13 its costs and repay the Treasury during the remainder of this rate period
14 In SN-03-E-JC-01, page 12, line 18 through page 13, line 22, the Joint Customers
15 describe $580 million in further cost reductions that Bonneville is pursuing and
16 recommend that these savings should be incorporated in to Bonneville's revenue
17 requirement. This approach would force Bonneville to assume no uncertainty associated
18 with achieving these savings. Given Bonneville's recent history and its statutory
19 responsibilities this assumption is not appropriate. The joint customer recommendation
20 ignores the significant potential that certain of Bonneville's cost will be higher than
21 Bonneville has assumed. It appears from the data responses from the Joint Customers that


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1 they have not evaluated this issue and instead relied on the BPA Financial Choices
2 process. *See* SN-03-E-CR/YA-02C.
3 Our direct testimony provides numerous examples where Bonneville has not
4 addressed uncertainties that would increase its costs or reduce its revenues. The Joint
5 Customers recommendation would assume that uncertain cost reductions are certain and
6 ignores uncertainties that would increase costs or reduce revenues. If Bonneville adopted
7 this approach it would increase the risks that its rates were not sufficient to meet its costs
8 and repay the Treasury. *See* CR&YA/JC:008 and 009, herein incorporated by reference
9 (attachment SN-03-E-CR/YA-02A and B)

10 **5) Bonneville's Proposal does not address the uncertainties associated**
11 **with the costs of the Bureau of Reclamation, the Corps of Engineers,**
12 **and Energy Northwest.**
13
14 Bonneville is assuming that the costs for the Bureau of Reclamation, the Corps of
15 Engineers, and Energy Northwest will not change from the assumptions used in the SN
16 CRAC Proposal. Bonneville provided several data responses on this subject. None of
17 them provide guarantees that the costs for these organizations will not go up. *See*
18 attachments SN-03-E-CR-01BBBB, CCCC, and DDDD. Bonneville's estimate in WP-
19 02 for the costs associated with the Bureau of Reclamation, the Corp of Engineers, and
20 Energy Northwest were too low by $349 million. *See* SN-03-E-CR/YA-01EEEE. That is
21 a significant underestimation of costs. The assumption that the new estimates are highly
22 certain does not seem reasonable given the recent history. Failure to properly address
23 this uncertainty increases the likelihood that Bonneville's rates will not be sufficient to
24 meet its costs and repay the Treasury.


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**6) Bonneville's Proposal does not address the uncertainties associated with the secondary revenues.**

During the Financial Choices process, Bonneville revealed that it had overestimated its secondary revenues by $710 million. *See* SN-03-E-CR/YA-01EEEE. Given this large mistake and the complexity of estimating these costs, Bonneville should assume that there will be significant uncertainty associated with these costs through 2006. *See* attachment SN-03-E-CR-01VVVV. Failure to properly address this uncertainty increases the likelihood that Bonneville's rates will not be sufficient to meet its costs and repay the Treasury.

**Summary: BPA's proposal does not address the cost and revenue uncertainties that it faces. BPA has not considered many of the costs and risks that it faces. Failure to consider this information increases the risks that Bonneville's Proposal is not sufficient to meet its costs and repay the Treasury.**

**C. Bonneville's proposal does not appropriately address capitalizing certain fish and wildlife costs.**

Bonneville's testimony describes the capital borrowing that it assumed for the Proposal. These estimates include "investment in fish and wildlife recovery funded by BPA and by appropriations and implemented by various groups in the Northwest including the Corps and Reclamation. Fish and wildlife investment includes tributary passage, habitat construction, supplementation construction, gas abatement, and mainstem passage." The discussion also includes Bonneville's estimate for that amount that will be capitalized for fish and wildlife recovery. This category totals $817 million. Annual capital borrowing is described in Table 3-4 entitled: TABLE 3-4: Federal Columbia River Power System (FCRPS) Projected Capital Funding Requirements For



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1 The Power Business Line. *See* SN-03-E-BPA-01, page 3-8, line 24 through 3-10, line 1.
2 The Bonneville testimony also describes the standards for repaying debt. *See* SN-03-E-
3 BPA-01, page 3-38, line 14 through 26. If Bonneville addresses our recommendations in
4 this proceeding it would allow Bonneville to fund more of its fish and wildlife costs using
5 capital borrowing. This would allow Bonneville to meet more of its costs while
6 minimizing the effects on rates. To avoid prejudicing any determination of allowable
7 types of fish and wildlife investments that can be capitalized, BPA should clearly and
8 broadly define allowable fish and wildlife investments in the Record of Decision to
9 include land and water interests. Alternately BPA could deem all of its fish and wildlife
10 capital investment as revenue producing, since Bonneville's share of such investments
11 include only those costs that are directly attributable to the development and operation of
12 the power purposes and to federal dams. In this regard, the capital investments are
13 inextricably linked to maintaining power generation marketed by BPA.

14 **Request to Reconsider Order Striking Certain Testimony**

15 The Federal Register Notice specifically allows "capital recovery matters such as
16 interest rate forecasts, scheduled amortization, ... and interest expenses" to be addressed
17 in this proceeding. *See* FRN Vol. 68, No.49, March 13, 2003, page 12051. In the
18 Bonneville SN CRAC workshops, Bonneville staff stated that the issue of capitalizing
19 fish and wildlife land and water acquisition could be addressed in the SN-03 process.
20 Bonneville has moved to strike our testimony and exhibits that relate to how
21 Bonneville should treat capitalization of land and water acquisition. This testimony is



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directly relevant to Bonneville's total system costs. The testimony that Bonneville moved to strike states:

> Following Section 4(h)(10)(B) of the NW Power Act, "capital facilities" costing more than $1 million and having a useful life exceeding fifteen years must be capitalized. In the past BPA has defined capital facilities indirectly through its practices. It has:
>
> • Capitalized the planning and design costs as well as the construction costs;
> • Combined costs of several small separate facilities to meet the threshold (e.g., Yakima Phase II Screens); and,
> Aggregated costs over several years (i.e., costs less than $1 million in any one year).
>
> The Executive Budget for FY 2003 summarizes BPA's intended use of capital borrowing for fish and wildlife:
>
> Bonneville's fish and wildlife capital program is directed at activities that increase numbers of Columbia River Basin fish and wildlife resources including projects designed to increase juvenile and adult fish passage in tributaries and at mainstem dams, increase fish production and survival through construction of hatchery and acclimation facilities, fish monitoring facilities, and fish habitat enhancement. Funding is also included for pre-engineering design and studies for new and developing projects. The priority for capital project funding will focus first on implementing the reasonable and prudent alternatives contained in the NMFS and USFWS Biological Opinions, and second on implementing the Planning Council's Fish and Wildlife Program...
>
> In addition to a number of specific hatchery and tributary passage programs, the Executive Budget identifies the following facilities that BPA intends to capitalize in FY 2003:
>
> - Construct habitat improvement, passage projects and small irrigation screening projects including development and enhancement of model watersheds. The design and construction is expected to continue.
>
> - Continue implementation of high priority Endangered Species Act related projects, and activities associated with the USFWS BO and the NMFS BO.



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> The fish and wildlife managers have developed a definition for BPA capital facilities that is similar to those used by other public agencies, which we shared with BPA. (*See* attached February 18, 2003 letter to Therese Lamb, BPA-CR-020B.doc) It is:
>
> ***
>
> Specifically, Bonneville may use its permanent borrowing authority to acquire land and interests in land, water or water rights, and to finance construction of capital facilities and improvements to land including, but not limited to, buildings, roads, culverts, stream bank stabilization, fences, utilities, sewage treatment and discharge, diversion screens and ladders, instream structures, fish propagation facilities, and other tangible improvements.
>
> We recommend that BPA specifically include this definition in the rate case to be clear that it intends to collect revenue from rates to purchase land.
>
> Based on the above requirements, we identified current BPA-funded fish and wildlife projects that could be capitalized and compared the list with those projects that BPA actually capitalized in FY 2002. The attached table indicates that, although BPA had the ability to fund $36 million in fish and wildlife capital projects, it chose to capitalize only $5.9 million (*See* BPA-CR-020A.xls).
>
> BPA has not yet identified which projects it intends to fund in FY 2003, so it is not possible to identify which facilities it is not planning to capitalize. However, the attached table lists $81 million in FY 2003 projects that meet the above requirements for capitalization.

The Hearings Officer struck this material in SN-02-O-17. We ask that the order as applied to this particular stricken material be set aside. The Administrator needs to consider this stricken material because it directly relates to issues raised in Bonneville's testimony. The Federal Register Notice specifically excluded such material from exemption. BPA staff invited such material at the SN CRAC workshops. We are very concerned that BPA may interpret FAS 71 to require that non-revenue producing



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1 facilities like fish and wildlife facilities must be identified in the rate case as facilities for
2 which rates will be collected. In this case BPA must set forth the fish and wildlife
3 facilities including property interests in land and water that it intends to acquire.
4

5 **III. BONNEVILLE IS NOT LIKELY TO ASSURE PAYMENT TO THE**
6 **TREASURY**
7
8 **Issue: Does Bonneville's Proposal assure repayment to the Treasury?**
9
10 **A. Bonneville has significantly lowered the probability of paying the**
11 **treasury**
12
13 In this Proposal, Bonneville has reduced the probability of making all of its
14 Treasury payments on time and in full from 80 percent to 50 percent. However,
15 Bonneville is not abandoning its long-term goal of 88 percent TPP and is only lowering
16 the standard for this SN CRAC Proposal. *See* SN-03-E-BPA-04, page 14, lines 3-12.
17 In previous proceedings the TPP standard has been an important indicator of
18 Bonneville's financial health. *See* SN-03-E-CR-01MMM. Bonneville has moved from a
19 relatively high probability to a fifty-fifty chance that it will make all of its payments
20 through the rate period.
21 Our testimony on the costs and uncertainties facing Bonneville demonstrate that it
22 is likely that Bonneville will face higher costs than it has assumed in the Proposal. These
23 higher costs, along with the limits for the SN CRAC in the Proposal would further reduce
24 Bonneville's TPP. Bonneville's new TPP standard in combination with the uncertainties
25 discussed above makes it unlikely that it will be able to make all of its Treasury payments



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1 on time and in full. Therefore, Bonneville's proposal has not met the requirements of 16
2 U.S.C. 839e(a)(2).
3 This raises significant concerns about Bonneville's ability to meet its fish and
4 wildlife obligations under the Endangered Species Act, the Northwest Power Act, and its
5 trust responsibilities to Columbia Basin Indian tribes. In our testimony, we supported
6 TPPs that would meet the Fish and Wildlife Funding Principles standards. The Principles
7 recognized that Bonneville needed a high probability of paying the Treasury in order to
8 ensure that it could also meet its other costs.
9 To keep rates down, Bonneville sets its rates under the assumption that it may
10 defer Treasury payments. In practice, Bonneville operates to a 100 percent TPP. The
11 result is that when Bonneville gets into financial trouble, it shifts the risk to fish and
12 wildlife. For example, in 2001, Bonneville eliminated river operations designed to
13 protect migration salmon and steelhead to avoid a deferral of its Treasury payment. In
14 2003, Bonneville has cut fish and wildlife funding to deal with its financial crisis. These
15 actions took place after Bonneville commitments in writing to the Columbia Basin
16 Tribes. If Bonneville has not honored its commitments in the past, it is difficult to
17 support a standard with such a low probability of fully repaying the Treasury *See* SN-03-
18 E-CR/YA-02JJa.
19
20 **B. Bonneville's TPP does not address the political risks it faces**
21
22 Bonneville states in its testimony that it has lowered the TPP to 50 percent
23 because of its concern that a rate increase that would meet the 80 to 88 percent standard
24 is not sustainable in the current economy. *See* SN-03-E-BPA-04, page 14, lines 8-11.


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1 We also provided evidence that the General Accounting Office is conducting a
2 study. It will address, among other things Bonneville's use of additional borrowing
3 authority, the risks of failing to make Treasury payments over the next few years, and the
4 options to minimize that risk. The concerns referenced by Steve Wright are reinforced by
5 the GAO study. *See* SN-03-E-CR&YA-01EEa. We are also concerned that Treasury
6 payment is not the true measure of Bonneville's exposure to risk. One of Bonneville's
7 risk mitigation tools has always been deferral of Treasury payment. It is the payment of
8 other creditors that is the true financial risk Bonneville faces as those financial
9 obligations cannot be deferred, a Creditor Payment Probability (CPP) as it were. The
10 4(h)(10)(C) credits and the Fish Cost Contingency Funds (FCCF) cannot be used to pay
11 creditors. In order to determine this financial risk, the 4(h)(10)(C), FCCF, and MOA
12 monies (and perhaps other funds) must be taken out of the calculations used to determine
13 what Bonneville's CPP is. As Bonneville evaluates what its financial risk of making its
14 CPP is, the pressure to maximize revenues by running the river contrary to the
15 recommendations of state, tribal, or federal fish managers may prove to be financially
16 compelling; but nevertheless unlawful. Bonneville must avoid this circumstance by
17 designing its SN-CRAC accordingly. *See* SN-03-E-CR/YA/01, page 43, lines 4-15.

18 **Request to Reconsider Order Striking Certain Testimony**

19 The CR/YA testimony attempted to rebut Bonneville's assertion regarding the
20 acceptability of such a high probability of missing a Treasury payment. Bonneville
21 moved to strike our testimony that quoted Bonneville Administrator Steve Wright on the
22 political risks to Bonneville if it failed to make a Treasury payment. Our evidence stated:


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> In 2001, the Bonneville was facing a financial crisis and proposed elimination of spill and flows measures to protect migrating fish at all of the federal dams. At the time, CRITFC recommended deferring a Treasury payment so that some fish protection measures could be implemented. This recommendation was denied by Bonneville because of the political problems associated with a Treasury deferral. We note that Steve Wright, the Bonneville Administrator, told federal regional executives and tribal leaders that there would be political fallout if the region failed to meet a Treasury payment. The minutes from the March 16, 2001 Regional Executives Meeting also indicate that he said that "We want to operate without creating the view that taxpayers are subsidizing the federal Columbia River system, he said. If Congress thinks there's a subsidy, the region could lose control of the federal system, Wright indicated." *(see* attachment SN-03-E-CR/YA-02DD). Now, BPA is facing a financial crisis and the proposal of both Bonneville and the utilities is to increase the risk of Treasury deferral to minimize the rate increase. We are concerned that this strategy will shift the risk to fish and wildlife and Bonneville will face additional political risk. When Bonneville faces the possibility of a Treasury deferral, we have seen in the past that it is likely to eliminate protections for fish and wildlife, and incur risk of litigation by states, tribes, and others. *(see* BPA-CR-002 herein incorporated as attachment SN-03-E-CR/YA-02E). (emphasis added)

SN-03-E-CR?YA-02 page 5, line 21 to page 6, line 8.

The hearing officer order SN-03-O-17 struck this evidence. We ask that the order as applied to this particular stricken testimony be set aside[7]. In addition to the statutory duties to consider this information discussed previously, the Administrator needs to consider this testimony because it rebuts the trade offs and assessments of political risk that Bonneville has applied in this Proposal and directly relates to Bonneville's ability to make its Treasury payments.

**Summary: Bonneville has reduced its probability of repaying the Treasury on time and in full to 50 percent. This reduced standard in combination with uncertainties that could further reduce TPP does not meet 16 U.S.C. 839e(a)(2).**

[7] The stricken testimony referenced here that we asked to be restored to the record is: SN-03-E-CR?YA-02 page 5, line 21 to page 6, line 8.


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## IV. BONNEVILLE IS NOT MEETING THE FISH AND WILDLIFE FUNDING PRINCIPLES

**Issue: Does Bonneville's Proposal meet the Fish and Wildlife Funding Principles?**

### A. The proposal does not meet the principles

The Bonneville Proposal does not meet the Principles. Bonneville's most positive statement on this issues is at SN-03-E-BPA-04, page 15, line 3, where the testimony states that "BPA believes that the combination of TPP, TRP and accumulated net revenue targets will put BPA on a path to meet the intent of the Fish and Wildlife Funding Principles, given the state of the economy.

If we look at how Bonneville addressed the specific targets in the Principles we see that Bonneville's "path" is very far removed from the Principles (a copy of the principles can be found at SN-03-E-CR-01MMM).

#### 1) Bonneville's Proposal does not meet all of its fish and wildlife obligations.

The first principle says "Bonneville will meet all of its fish and wildlife obligations once they are established, including its trust and treaty responsibilities." As discussed above, federal agencies have failed to meet the flow and spill standards in the Biological Opinions about 40 percent of the time. Bonneville is not meeting the offsite mitigation and propagation measures defined by the Provincial Review. The Bonneville proposal does not address the trust and treaty responsibilities at all.

#### 2) Bonneville's Proposal does not address the full range of fish and wildlife costs.

The second principle is that "Bonneville will take into account the full range of fish and wildlife costs." The Principles recognized that Bonneville was facing significant


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1 uncertainty regarding the cost of implementing the Biological Opinions. Bonneville
2 originally adopted a range for the direct program of $109 to $179 million per year. Now,
3 it has assumed this budget at $139 million and is working to reduce the amount further
4 See SN-03-E-CR-01NNN and OOO. Our testimony above details the continuing
5 uncertainty Bonneville faces. Bonneville has unilaterally abandoned the range of fish
6 and wildlife costs developed by the region in Principle number two. Bonneville's
7 position ignores the higher costs developed during the Provincial Review and other
8 estimates. It also ignores the continuing uncertainty about how much implementation of
9 the Biological Opinions and Fish and Wildlife Program will cost.

10 **3) Bonneville's Proposal does not meet the TPP standard set in the**
11 **Principles**
12
13 Principle number three calls for a TPP of 88 percent for 2002-2006. Bonneville
14 has lowered the TPP target to 50 percent. Bonneville has provided several data responses
15 on this issue that we wish to include in the record. See data responses at SN-03-E-CR-
16 01PPP, QQQ, and RRR. We continue to be concerned that one of the many uncertainties
17 we have described in this testimony will increase Bonneville's costs or reduce its
18 revenues and cause it to face the prospect of missing a Treasury payment. Based on
19 Bonneville's historical behavior, the agency will push for cuts to fish and wildlife costs
20 and fish river operations to try to avoid the political ramifications of failing to make a
21 Treasury payment. This happened in 2001 and 2003. Under Bonneville's proposal there
22 is a 50-50 chance it will happen at least once more during this rate period. This is a clear
23 indication that the SN CRAC proposal does not meet Bonneville's costs and assure
24 repayment to the Treasury.


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**4) Bonneville's Proposal does not position Bonneville to meet future fish and wildlife costs.**

Principle number four said: "Given the range of potential fish and wildlife costs, Bonneville will design rates and contracts which position Bonneville to achieve similarly high Treasury payment probability for the post-2006 period by building financial reserve levels and through other mechanisms."

Bonneville's proposal results in an expected value for the ending reserve in 2006 of $348 million. Bonneville's own testimony and study describes how the agency used up much higher reserves to adjust to the volatility of the West Coast power market and other changes in its costs and revenues. Failure to build an adequate reserve will potentially limit Bonneville's ability to address higher future costs while keeping its rates competitive with the power market.

This issue was important to Columbia Basin Indian tribes for several reasons. There is broad consensus among fish and wildlife managers that fish and wildlife costs will be higher in future years as Bonneville begins to pay for the capital costs of facilities that need to be built. The purchase and restoration of habitat is also expected to increase in cost with inflation. It is also important to ensure that Bonneville's rates are competitive with market rates in the future. Therefore, it is important to build an ending reserve that can cover expected future costs and allow Bonneville to remain competitive.

The assumptions in the 2000 rate case produced an expected ending reserve of approximately $1.25 billion. The current proposal has an expected ending reserve of $348 million. *See* SN-03-E-CR-01SSS. We asked Bonneville for any analysis on whether it was meeting this Principle. In data responses, Bonneville stated that it had not


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1 performed any analysis. *See* SN-03-E-CR-01TTT, TTTb, UUU, and VVV. Bonneville
2 also states that "had it done such analysis, it likely would have shown that higher reserves
3 would increase the ability for BPA to meet potentially higher fish and wildlife costs and
4 still remain competitive after 2006. Low reserves would likely have shown a reduction in
5 BPA's ability to remain competitive and meet increased fish and wildlife costs after
6 2006.

7 In SN-03-E-CR-01WWW and XXX, Bonneville states that some of the Principles
8 are no longer relevant. We asked Bonneville for any documentation of the public process
9 that lead to this conclusion, but none was provided.

10 Bonneville asserts that it is on a "path" to achieve the Fish and Wildlife Funding
11 Principles. As shown above, Bonneville has provided no analysis to support this
12 assertion. In other testimony, Bonneville contends that some of the Principles are no
13 longer relevant. We assert that the principles are still relevant to Bonneville's statutory
14 obligations, including fish and wildlife and Treasury repayment. Given the commitments
15 made to Columbia Basin Indian tribes, these issues should have been analyzed and
16 subjected to public review. These fundamental changes in the Principles should also
17 have been discussed in government-to-government consultations with the tribes.

18 **B. Failure to meet the principles reduces Bonneville's financial health**
19 **and reduces its ability to meet its costs, remain competitive, and repay the**
20 **Treasury.**
21
22 The Bonneville proposal does not adequately address the costs and uncertainties
23 facing the agency. It increases the chances that Bonneville will not make its Treasury
24 payments, with concomitant political risks associated with a Treasury deferral. The



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1 proposal does not position Bonneville to be able to meet its costs. The proposal also
2 utilizes a number of the risk mitigation strategies that Bonneville assumed in the WP-02
3 rate case. This will make it harder for Bonneville to maintain financial health when some
4 of the uncertainties facing the agency materialize.

5 In the WP-02 rate case, Bonneville had several shock absorbers that allowed it to
6 address some of the risk and uncertainty that it was facing. For example, all of its rate
7 calculations assumed that PBL's costs and revenues were independent of the TBL. In an
8 emergency, Bonneville could rely on reserves in the TBL. The current proposal already
9 assumes the TBL reserves—that shock absorber is gone. The risk exposure for
10 Bonneville is quite large. Bonneville cannot choose to address some financial risk while
11 ignoring the costs and risks we have identified. Simply ignoring these issues or trying to
12 limit them as outside the scope of this proceeding will not make them go away or relieve
13 Bonneville of its financial risk. *See* SN-03-E-CR/YA-01, page 5, line 8 through page 7,
14 line 5.

15 **Summary: Bonneville's Proposal does not meet the Fish and Wildlife Funding**
16 **Principles. Failure to meet the Principles reduces the likelihood that Bonneville will**
17 **be able to meet its costs and repay the Treasury.**
18
19 **V. BONNEVILLE IS NOT MEETING ITS TRIBAL TRUST AND**
20 **TREATY OBLIGATIONS**
21
22 **A. Federal Trust Responsibility**

23 The federal trust responsibility imposes strict fiduciary standard on the conduct of
24 executive agencies. Federal actions affecting Indian tribes are "judged by the most exacting
25 fiduciary standards." *Seminole Nation v. United States,* 316 U.S. 286, 296-297 (1942);
26 *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966). Federal agencies are


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1 required to "assert [their] statutory and contractual authority to the fullest extent possible" to
2 fulfill their trust obligations. *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256
3 (D.D.C. 1972) Such standards apply to all executive departments that may deal with Indians
4 and not simply to the Bureau of Indian Affairs. *See e.g., Pyramid Lake Paiute Tribe of*
5 *Indians v. United States Department of Navy*, 898 F.2d 1401, 1411 (9th Cir. 1991); *Covelo*
6 *Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990); *Nance v. EPA*, 645 F.2d
7 701, 711 (9th Cir. 1981).
8 Both the Department of Energy (DOE) and Bonneville have explicitly recognized
9 that a trust relationship exists between federal agencies and Indian tribes as discussed *supra*.
10 The DOE has acknowledged that the agreements that the United Stats enters into with
11 Indian tribes "create a variety of legal responsibilities by the United States toward American
12 Indian Tribes" and that the DOE and, accordingly Bonneville, has the duty to uphold
13 obligations of the federal government to Indian tribes. *See* U.S. Department of Energy
14 American Indian Policy, DOE Order No. 1230.2 (April 8, 1992).
15 In its rebuttal testimony, Bonneville states with regard to its trust responsibility
16 that " CRITFC [has not] identified any actions BPA should be taking to ensure the United
17 States is in compliance with its treaties with the Tribes." McNary, et al. SN-03-E-BPA-
18 18, page 14. Bonneville's rebuttal testimony fails to acknowledge the efforts the tribes
19 have undertaken to inform Bonneville of their interests and recommendations regarding
20 salmon, which is a trust resource for which the United States has responsibilities and for
21 which it is accountable to Yakama and CRITFC's other member tribes. For example, as
22 part of this proceeding we provided testimony concerning operation of the federal hydro


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1 system and impacts on salmon. This information included the CRITFC 2003 River
2 Operations Plan, which recommends river operations needed to protect the salmon as a
3 treaty and trust resource. However, Bonneville successfully moved to strike this
4 document from the record. CRITFC also provided its cost estimates for fish and wildlife
5 measures, including estimates of the contributions needed from Bonneville. Again,
6 Bonneville successfully moved to strike this material from the record.
7 Bonneville's actions are contrary to its fiduciary obligations. Not only is
8 Bonneville placing the burden of proof on the salmon and the tribes, Bonneville is
9 compounding its error by refusing to even consider relevant information that addresses its
10 financial risks and abilities to fulfill needed fish and wildlife measures. Bonneville
11 should remedy this error by admitting the CR/YA testimony, carefully considering it, and
12 adopting our recommendations. Bonneville must be risk averse with respect to the
13 protection and restoration of Columbia River salmon and other fish and wildlife resources
14 impacted by the dams.

15 **VI. THE ADMINISTRATOR MUST PROPERLY COMPLY WITH NEPA**
16 **IN THIS PROCEEDING**
17

18 While CRITFC and Yakama acknowledge that Bonneville has indicated that it
19 intends to comply with NEPA in a separate proceeding, we do not waive any NEPA
20 claims and reserve the right to address these issues as part of this proceeding. The
21 Business Plan EIS and subsequent NEPA compliance documents do not consider the
22 environmental impacts and alternatives associated with the policy choices Bonneville
23 will make in this proceeding. These include, but are not limited to, the allocation of


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1 risk and benefits between Bonneville's fish related obligations and the desires of its
2 customers, the high risk of failure to repay Treasury on time and in full, the need for
3 increased revenues necessary to support the agency's statutory mission, and the
4 additional policy choices reflected in concerns of CRITFC and Yakama as set forth in
5 this brief and our testimony. Failure by Bonneville to raise its rates sufficiently to
6 recover all of its costs and timely repay Treasury was not among the alternatives
7 contemplated in the Business Plan EIS and subsequent NEPA documentation.
8 Bonneville can remedy its NEPA problems by adopting the recommendations of
9 CRITFC and Yakama offered in this brief and in our direct and rebuttal testimony.

10 **VII. BONNEVILLE'S RATE DESIGN REDUCES THE PROBABILITY**
11 **OF MEETING ITS COSTS AND REPAYING THE TRESURY**
12

13 **Issue: Does Bonneville's Proposal limit its ability to adjust its rates to meet its costs**
14 **and repay the Treasury?**
15
16 **A. Limits on the SN CRAC**

17 Bonneville has proposed to limit the SN CRAC to $470 million per year. See SN-
18 03-E-BPA-01, page 7-4, line 2. This limit unnecessarily constrains Bonneville's ability
19 to raise revenues to meet its costs and repay the Treasury. The limit is not consistent with
20 Bonneville's legal obligations. We recommend that Bonneville remove any limits to the
21 amount of the SN CRAC. If increased costs or reduced revenues create financial
22 problems that are larger than Bonneville has assumed, Bonneville must have the tools to
23 increase rates to meet its costs and repay the Treasury.
24 We also recommend that Bonneville adjust the trigger levels to increase the TPP
25 and ending reserves to meet the Fish and Wildlife Funding Principles. This will also


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1 increase the probability that Bonneville will be able to meet its costs and fully repay the
2 Treasury.
3 At SN-03-E-BPA-04, Page 17, lines 18-25, the Bonneville testimony states that
4 "BPA is open to a way that BPA could be precluded from recovering excess BPA
5 internal operating costs in the SN CRAC rate design, if those costs exceed the further-
6 reduced limits for FY 2003-2006."
7 It appears that such a provision would not affect Bonneville's program funding
8 for fish and wildlife. *See* SN-03-E-CR-01WWWW. However, such a limitation could
9 force Bonneville to reduce its reserves if its internal costs were higher than it currently
10 assumes. A mechanism that reduced reserves and Bonneville's ability to adapt to the
11 uncertainties that it faces would increase the risk that Bonneville could not meet its costs
12 and repay the Treasury. We oppose this suggestion in the Proposal.
13 **B. Limits on calculating the SN CRAC**
14 At SN-03-E-BPA-10, page 9, line 9 the testimony discusses factors that could be
15 considered in adjusting the SN-CRAC. It appears that Bonneville is proposing to only
16 consider information that shows increased revenues and decreased costs. Limiting the
17 evaluation to positive news will reduce Bonneville's ability to adjust its rates to address
18 higher costs or lower revenues. If Bonneville was not able to incorporate these negative
19 factors into the calculation of the SN CRAC it would reduce Bonneville's ability to meet
20 its costs and repay the Treasury.


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1 **C. Forward looking SN CRAC**

2 We support incorporation of a forward-looking trigger for the SN CRAC. Such a
3 trigger should evaluate information that would increase or decrease the size of the SN
4 CRAC. This would increase the likelihood of meeting Treasury payments.

5 **Summary: Bonneville's proposals to limit the costs that are subject to the SN CRAC**
6 **and limit the factors that will be considered in calculating the SN CRAC reduce its**
7 **ability to meet its costs and repay the Treasury.**
8
9 **VIII. BONNEVILLE COULD RAISE ITS RATES AND STILL BE**
10 **COMPETITIVE**
11
12 **Issue: Could Bonneville raise its rates to meet the Fish and Wildlife Funding**
13 **Principles and still be competitive?**
14
15 **A. Bonneville could meet the cost in the provincial review with rates that**
16 **are 12 percent below market.**
17

18 CRITFC and Yakama prepared analysis for our testimony and rebuttal that
19 reviewed the impact of meeting several levels of additional funding to meet the Fish and
20 Wildlife Funding Principles. *See* SN-03-E-CR?YA-02, page 8 lines 1-6, incorporating by
21 reference. SN-03-E-CR/YA-01HH through JJ.

22 We used the Bonneville Toolkit model to analyze the changes that would be
23 needed to cover an additional $100 million per year for fish and wildlife costs. This is
24 approximately the added cost from the Provincial Review.

25 Our analysis did not assume any additional cost reductions or increases in
26 revenue. We note that the testimony from customers has provided a number of
27 recommendations to BPA on how to reduce its costs. Customer testimony has also
28 indicated that BPA assumptions about 2003 run off and secondary sales may



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1 underestimate the revenue that BPA will receive. Additional revenue or budget cuts
2 would reduce the rate impacts of providing adequate funding for the projects in the
3 Provincial Review, biological opinions, subbasin plans, and recovery plans. We also note
4 that other analysts, who have more experience with toolkit, could likely refine the
5 analysis to minimize the rate increases.

6 We developed a simple spread sheet that displays the fish and wildlife costs that
7 were assumed, the TPP, the ending reserves, the percentage increase for rates over the
8 base case, the estimated rates, and comparisons of BPA rates to market rates for several
9 alternatives. *See* SN-03-E-CR-01VV.

10 The first column lists the alternatives. The base is the trigger toolkit analysis on
11 the BPA webpage entitled Toolkit SN_Trigger_2-6-03_BPA.xls. The BPA proposal for
12 the SN CRAC is also on the website at TK_178_Case_E3ud_030225.xls. The
13 assumptions and results for the third alternative can be found in Attachment SA-CR-
14 001A.xls. This alternative increases the costs for fish and wildlife by $100 million per
15 year (this is shown as a -100 in cells H25, H26, and H27). The fourth alternative can be
16 found in attachment SA-CR-001B.xls. It provides the toolkit inputs and results for a case
17 that includes the additional funding for fish and wildlife and has a three-year TPP of 80
18 percent. Finally, SA-CR-001C.xls is an alternative that includes that additional fish and
19 wildlife funding, an 88 percent TPP and a significant ending reserve.

20 The first seven columns of data are taken from the BPA proposal, material
21 provided at the workshops, and the results of the toolkit runs. The next four columns are
22 the result of multiplying the percentage increase times the flat base rate of $19.76 per


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MWh. We compared the average BPA rates to an estimate of the market developed by the Council. The most recent Council AURORA model estimates that the long-term market cost for 2006-2025 (*See* attachment SA-CR-001D-NPPC AURORA Mid-C (012803).xls). This is the most recent estimate prepared by the Council. In our opinion, it is the closest proxy for a long-term contract to purchase firm flat power from the market. Purchase of a gas-fired generating resource would likely be slightly higher. We believe that these are the alternative most utilities when compared to a firm contract with BPA. In SN-03-E-CR-01VV we rounded the Council present value estimate of $39.51 per MWh to $40 per MWh.

Our analysis indicates that all of the alternatives result in rates that are below the long-term market price of power. The case with an additional $100 million per year for fish and wildlife expenses to address the Provincial Review is approximately 12 percent below the long-term market rate for electricity. Whereas, Bonneville's proposal results in a rate that is 16.5 percent below the long term market price of power. Addressing these costs would add approximately $0.0017 per kilowatt-hour, or approximately $1.90 for the average residential consumer. The alternative that adds the $100 million per year and also achieves an 88 percent TPP is six percent below the long-term market price of electricity.

**Summary: Bonneville could increase the SN CRAC to meet higher fish and wildlife costs and improve its TPP and still have rates that are competitive with the long-term market price of electricity.**

## IX. BONNEVILLE HAS NOT ANALYZED THE ECONOMIC EFFECTS OF ITS PROPOSAL



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**Issue: Has Bonneville evaluated the economic impact of its Proposal? Does Bonneville's Proposal appropriately balance the economic impacts of its proposal with the impacts of failing to meet its fish and wildlife obligations?**

**A. Bonneville has not evaluated the economic impacts of its proposal**

At SN-03-E-BPA-01, Page 1-8, line 25 Bonneville cites its concern about the impact of a rate increase on the Northwest economy. Also, BPA states that the regional economy cannot support a huge rate increase now. *See* SN-03-E-CR-01C. Bonneville also has balanced near-term achievement of the Fish and Wildlife Funding Principles with it concerns about the economic impact. At SN-03-E-BPA-04, page 15, line 3, the Bonneville testimony states that "BPA believes that the combination of TPP, TRP and accumulated net revenue targets will put BPA on a path to meet the intent of the Fish and Wildlife Funding Principles, given the state of the economy." The result of this balancing is to reduce the ability to meet fish and wildlife and other costs and repay the Treasury in order to minimize the SN CRAC rate increase. Given the prominent role that economic considerations play in the decisions that went into the Proposal, Bonneville should have conducted analysis, provided testimony, and these issues should have been subject to review by the Parties in this rate case process.

In evidence in the record, Bonneville concedes that it has not done any analysis of the economic impacts of raising rates. *See* SN-03-E-CR-01D, E, and F. Bonneville also reports that it has not seen any reduction in electricity purchases as a result of the 48 percent rate increase that has been implemented to date. *See* SN-03-E-CR-01G, H, I, and J. Finally, Bonneville has not analyzed the economic impacts of reducing fish and wildlife recovery activities on local communities and economies. *See* SN-03-E-CR-01K.



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1 We calculate that the Proposal results in a rate increase of approximately $4.50
2 for the average residential consumer served by Bonneville wholesale power. While no
3 one likes rate increases, this level is far from the huge rate increase that Bonneville
4 describes. *See* SN-03-E-CR/YA-01C. This small increase for residential consumers
5 may explain why Bonneville has not seen any reductions in electricity used based on the
6 rate increase it has implemented since 2001.
7 Bonneville has provided no independent analysis of the economic effects of it
8 Proposal. It has not shown any reduction in electricity use as a result of previous rate
9 increases. Bonneville should not use the effects on the economy as a rationale to increase
10 the risk of failing to make its Treasury payments or to set rates that do not meet its costs.

11 **B. Bonneville has not evaluated the economic impacts to tribal and rural**
12 **communities**
13
14 Bonneville has not analyzed the economic impacts of reducing fish and wildlife
15 recovery activities on local communities and economies. *See* SN-03-E-CR-01K.
16 Bonneville's customers that raised concerns about the economic impacts of a rate
17 increase have also not analyzed this issue. *See* SN-03-E-CR&YA-02EE and GG.
18 As discussed above, the size of a rate increase associated with meeting the
19 Provincial Review budget would be small. Addressing these costs would add
20 approximately $0.0017 per kilowatt-hour, or approximately $1.90 for the average
21 residential consumer. Recovery revenues sufficient to Implement the Provincial Review
22 budget would significantly reduce the uncertainties faced by Bonneville in meeting its
23 fish and wildlife and Treasury obligations. Moreover increasing salmon runs would
24 improve the health and economies of Indian people. *See Tribal Circumstances and*


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1 *Impacts of the Lower Snake River Project on the Nez Perce, Yakama, Umatilla, Warm*
2 *Springs and Shoshone Bannock Tribes*, SN-03-E-CR-01AAA. The study shows that
3 tribal communities have high unemployment and average incomes on reservations are
4 about half the level in non-tribal communities. Unemployment ranges from 20 percent to
5 as high as 80 percent in the winter when there is no fishing. The death rate on
6 reservations is double the rate for non-tribal communities. The loss of fish and wildlife
7 has had a significant effect on tribal culture, religion, and health.
8 In addition, improving salmon runs would have a significant positive impact on
9 rural economies from additional construction, tourism, and recreational activity. The
10 economic benefits are considerable and are produced in two ways. First, much of the
11 Bonneville Power Administration fish and wildlife expenditures are spent locally in rural
12 areas east of the Cascades. It is spent on local wages and supplies that benefit local
13 economies. Adding approximately $100 million per year for habitat restoration and the
14 construction and operation of propagation facilities would provide jobs and economic
15 development for rural communities. Given economic multipliers, such and increase in
16 habitat restoration activity could increase economic activity by at least $200 million to
17 $300 million per year and provide thousands of jobs in rural communities. Second, as
18 fish and wildlife populations increase, as result of Bonneville's investments and for other
19 reasons, the recreation-based economies flourish. For example, as a result of the strong
20 spring Chinook run in 2001, Idaho was able to open a Chinook fishing season, which
21 added $46.1 million to the state's economy in direct angler expenditures, with an
22 additional $43.8 million in indirect benefits (based on IDFG studies). Most of these


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1 economic benefits went to local stores, gas stations, motels, and restaurants. See SN-03-
2 E-CR-01BBB.

3 **C. Bonneville has not appropriately balanced the impacts of its proposal**
4

5 Increasing fish and wildlife funding to the levels identified in the Provincial
6 Review would add approximately $100 million per year to Bonneville's rates and result
7 in a rate increase for the average residential consumer of approximately $1.90 per
8 kilowatt-hour. This increase would likely result in increased economic activity of $300
9 million to $500 million per year, primarily in tribal and rural communities. The high end
10 of this range assumes approximately $300 million per year of increased economic activity
11 from the habitat restoration activities and that the experience in Idaho is similar to
12 expanded recreational economic activity in Oregon and Washington.
13 We believe our economic analysis is conservative and more benefits are likely
14 with adequate funding to restore fish and wildlife populations. Bonneville should have
15 analyzed these issues before it decided to limit implementation of the Fish and Wildlife
16 Funding Principles to address economic concerns. Such analysis could have allowed
17 Bonneville and the Parties to this rate case make an informed decision on the appropriate
18 balancing between the Principles and economic impacts.
19 As part of its equitable treatment obligations, Bonneville should have also
20 analyzed the equity of the benefits from Bonneville's rate and power sales actions. For
21 example, Bonneville reported that it paid its investor-owned utilities approximately $1.5
22 billion to reduce load on Bonneville. It also paid aluminum smelters approximately $1.3
23 billion to reduce load on Bonneville. In both cases, this was after a decision by


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Bonneville to sign power sales contracts to sell electricity to these customers at rates that were significantly below the market price for electricity. On the other hand, Bonneville has not paid Columbia Basin Indian tribes for the loss of livelihood, or other economic and social costs for the loss of fish and wildlife resources. Bonneville should compare the relative benefits and risks that it has provided, including the effects on fish and wildlife and tribal communities in this Proposal. *See* SN-03-E-CR/YA-01, page 22, lines 1 through 11 and SN-03-E-CR-01NNNN and OOOO.

**Summary: Bonneville has not analyzed the economic impacts of its Proposal. It has not analyzed the negative impacts on tribal and rural economies. Bonneville has not analyzed how it has balanced the benefits and risks of its rate and power sales decisions compared to its decisions regarding fish and wildlife and other trust resources. If Bonneville had conducted such analysis it is likely that the studies would have shown that economic benefits from habitat restoration activities in rural communities would far outweigh any adverse effects of the associated rate impact. It is also likely that the study would show that Bonneville's customers have received billions of dollars of benefit while tribal economies and cultures dependent on fishing have been decimated.**

## X. RESERVATION OF CLAIMS

CRITFC and Yakama reserve the right to raise additional issues in briefs or on appeal. Among other things, CRITFC and Yakama anticipate that they will respond to arguments of other parties and reserve the right to do so on any issue raised.

## XI. REMEDIES

For the reasons stated above, CRITFC on behalf of its members and the Yakama Nation urge the Administrator to adopt the following recommendations:

**A. Bonneville should revise its revenue requirements to address its obligations under Treaties with Columbia Basin Indian tribes,**



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**Federal laws, and the Fish and Wildlife Funding Memorandum of Agreement.**

**1) Consider the additional fish and wildlife costs associated with implementing the Biological Opinion and Council Program.**

CRITFC and the Yakama Nation recommend that the Administrator admit the relevant stricken testimony and use the Results of the Provincial Review: Estimated Budget Needs through FY 2006 as the best estimate of fish and wildlife funding needs for the remainder of the SN CRAC. *See* SN-02-E-CR/YA-01UU.

**2) Revise river operation assumptions.**

Bonneville should not assume revisions that would reduce spills or flows provided for the protection for fish and wildlife. In the alternative, Bonneville should admit the relevant CR/YA testimony and use the river operations recommended by CRITFC in its loads and resources studies. See the Columbia River Inter-Tribal Fish Commission 2003 River Operation Plan at SN-02-E-CR/YA-01Y.

**3) Address the cost and revenue uncertainties described above.**

Bonneville should reinstitute the use of the NORM model, incorporate at least the uncertainties we have discussed above, and adjust its rates accordingly. Failure to adequately address these uncertainties is likely to result in setting a SN CRAC that does not meet Bonneville's costs.

**4) Bonneville should capitalize land and water acquisitions.**

The fish and wildlife managers have developed a definition for BPA capital facilities that is similar to those used by other public agencies. It is:



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> Bonneville may use its permanent borrowing authority to acquire land and interests in land, water or water rights, and to finance construction of capital facilities and improvements to land including, but not limited to, buildings, roads, culverts, stream bank stabilization, fences, utilities, sewage treatment and discharge, diversion screens and ladders, instream structures, fish propagation facilities, and other tangible improvements.

Adopting this definition would improve Bonneville's ability to meet its fish and wildlife costs while minimizing the associated rate increase.

**5) Bonneville should increase its TPP standard.**

Bonneville should return to the 80 percent TPP standard used in WP-02. This will significantly improve the probability of repaying the Treasury and reduce the conflict between making those payments and meeting fish and wildlife obligations. Bonneville can meet the 80 percent TPP standard and keep its rates below long-term market prices for electricity.

**6) Bonneville should modify its Proposal to meet the Fish and Wildlife Funding Principles.**

Bonneville should address its fish and wildlife obligations in the Provincial Review. Bonneville should return to a range forecast for future fish and wildlife costs to address the uncertainties associated with subbasin and recovery planning, litigation, and check-ins for the Biological Opinion. Bonneville should increase its TPP standard and develop a proposal with an ending reserve that will position Bonneville to meet future fish and wildlife costs.

**7) Bonneville should modify its Proposal to meet its tribal trust and treaty obligations.**



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1 Bonneville should admit the CR/YA testimony that describes the actions that are
2 needed to address Bonneville tribal trust and treaty obligations. Bonneville should
3 carefully consider this information. Bonneville should adopt our recommendations for
4 improving its Proposal as part of its tribal trust and treaty responsibilities. In addition,
5 Bonneville should be risk averse with respect to the protection and restoration of
6 Columbia River salmon and other fish and wildlife resources impacted by the dams.
7 Bonneville should not shift risks to these important tribal trust resources.
8
9 **8) Bonneville should modify its rate design.**
10
11 Bonneville should eliminate the proposed $470 million per year limit on the SN
12 CRAC. This would increase TPP and ending reserves. It would improve the chances of
13 addressing the significant uncertainty facing Bonneville.
14 Bonneville should modify the SN CRAC triggers and other parameters to achieve
15 the Fish and Wildlife Funding Principle targets for TPP and ending reserves.
16 Bonneville should not adopt a limit on collecting funds under the SN CRAC in
17 the event that Bonneville's internal costs are higher than assumed in this Proposal.
18 Bonneville should incorporate both positive and negative information about costs
19 and revenues in calculating the SN CRAC. Failure to look at information that costs will
20 be higher or revenues will be lower will make it more difficult for Bonneville to meet its
21 costs and repay the Treasury.
22 Bonneville's SN CRAC calculations should include a forward looking
23 component. This would improve the ability to adjust rates to meet future changes.


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1 These changes in rate design would improve Bonneville's ability to meet its costs
2 and repay the Treasury.

3 **9) Bonneville should analyze the economic tradeoffs associated with its**
4 **proposal.**
5

6 Bonneville should conduct an economic analysis of the costs and benefits of its
7 proposal compared to an alternative that fully implements the Provincial Review budget.
8 Bonneville should give special attention to the impacts on tribal and rural communities.

9 **10) Bonneville should explicitly address its equitable treatment**
10 **responsibilities.**
11

12 Bonneville should provide a detailed rationale regarding how its Proposal
13 appropriately allocates benefits and risks according to its responsibilities
14 under 16 U.S.C. § 839b(h)(11)(A)(i).
15
16 **11) Bonneville should consult and coordinate with fish and wildlife**
17 **managers.**
18

19 Bonneville should consult and coordinate with fish and wildlife managers as it
20 implements its responsibilities to provide equitable treatment for fish and wildlife and to
21 take into account, at each relevant stage of decision making, the Council Program
22 according to its responsibilities under 16 U.S.C. § 839b(h)(11)(B). This would include
23 decisions regarding funding for fish and wildlife and river operations to protect fish and
24 wildlife.

25 **B. These remedies will improve Bonneville's ability to meet its costs, assure**
26 **repayment to the Treasury, and improve its competitiveness.**
27
28 The costs and revenues assumed in Bonneville's Proposal do not fully cover the
29 likely costs to restore fish and wildlife under the Endangered Species Act, the Northwest


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1 Power Act, and Treaties with Columbia Basin Indian tribes or other Federal laws. By
2 setting its rates too low to cover its costs Bonneville will make it difficult to cover its
3 total system costs and assure repayment of its debt to the Treasury. We are concerned
4 that Bonneville's policy will mean that fish and wildlife restoration will not be
5 implemented. Under Bonneville's rate proposal it will be forced to defer fish and
6 wildlife restoration or to reduce the probability of repaying the Treasury for the debt
7 associated with the Federal Columbia River Power System. We are further concerned
8 that if the choice is either deferring Treasury payments or fully funding fish and wildlife
9 restoration then fulfillment of our Treaty rights will be at risk.
10 Bonneville has a responsibility to meet its Treaty and trust obligations and
11 responsibilities under Federal law. Those responsibilities have associated costs that
12 should be included in Bonneville's total system costs for the purpose of setting rates.
13 We believe the changes we have recommended would result in rates below the
14 market rate of electricity. It would allow Bonneville to meet all of its costs and assure
15 full repayment of the FCRPS pursuant to 16 U.S.C. 839e(a)(2) (A)&(B).
16 Raising rates would have several other advantages for meeting Bonneville's
17 requirements under the standards required by Federal law in 16 U.S.C. 839e(a)(2).
18 Higher rates during 2002-2006 would put Bonneville in a better financial position to
19 cover the other uncertainties it faces. Higher rates would potentially build a reserve that
20 could position Bonneville to pay the total system costs associated with the added
21 repayment obligations during 2007-2011 of the fish and wildlife restoration measures
22 implemented during 2002-2006. Such a reserve would also increase the probability that





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1 Bonneville could keep its rates below future market rates in the 2007-2011 period.
2 Finally, increasing rates now to meet the likely total system costs Bonneville will face
3 would also reduce the size of a rate increase in 2007 to cover higher costs, including fish
4 and wildlife restoration costs
5
6 **VI. CONCLUSION**
7 For the reasons contained in this brief, CRITFC and the Yakama Nation
8 respectfully request Bonneville modify its Proposal to address our concerns and
9 incorporate the remedies we have recommended.
10
11 DATED May 23, 2003
12 Respectfully submitted,
13 /s/ Tim Weaver
14 _____
15 Tim Weaver
16 Attorney for the Yakama Nation
17
18 /s/ Rob Lothrop
19 _____
20 Rob Lothrop
21 Attorney for the Columbia River
22 Inter-Tribal Fish Commission
23
24



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United States General Accounting Office

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Testimony
Before the Committee on Indian Affairs, U.S. Senate

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# BONNEVILLE POWER ADMINISTRATION

## Obligations to Fish and Wildlife in the Pacific Northwest

Statement of Jim Wells, Director, Natural Resources and Environment Team

GAO-PUB No. (GAO-03-844T)

June 4, 2003

BONNEVILLE POWER ADMINISTRATION

# Obligations to Fish and Wildlife in the Pacific Northwest

## What GAO Found

In accordance with the Pacific Northwest Electric Power Planning and Conservation Act of 1980, Bonneville must ensure an adequate, efficient, economical, and reliable power supply for the Pacific Northwest while also protecting, mitigating and enhancing fish and wildlife. Under other laws and presidential directives, Bonneville is also required to consult with Indian tribes and fulfill trust responsibilities for fish and wildlife. Finally, Bonneville must comply with the Endangered Species Act as it pertains to 12 populations of salmon and steelhead that have been listed as either endangered or threatened.

Between fiscal years 1997 and 2001, Bonneville spent over $1.1 billion to support fish and wildlife programs, primarily salmon and steelhead. These expenditures funded fish and wildlife projects undertaken by Bonneville, other federal agencies, Indian tribes, private entities, and the states of Idaho, Oregon, Montana, and Washington. Bonneville has also funded operations, maintenance, and capital costs for the Army Corps of Engineers, the Bureau of Reclamation, and the Fish and Wildlife Service for projects such as fish bypass facilities at dams. Additionally, Bonneville estimates that spilling water from dams to enhance fish survival has resulted in over $2.2 billion in foregone revenue or increased power purchases.

Bonneville is currently in a financial crisis. Cash reserves have fallen and Bonneville estimates an increased risk that it will miss future Treasury debt payments. To avoid defaulting on Treasury debt and to cover its costs, Bonneville has increased its power rates by more than 40 percent since fiscal year 2001, and is considering further increases.

Recent Bonneville actions appear to have caused financial difficulties for some fish and wildlife programs. Northwest Power Planning Council staff and representatives of some Indian tribes have pointed out that a change in Bonneville's budgeting approach resulted in the loss of around $40 million in fish and wildlife funding for fiscal year 2003. Bonneville described the change as necessary to improve management controls over fish and wildlife program funding. Bonneville has also placed on hold plans to acquire land to be used as habitat for fish and wildlife.

Bonneville's two roles, as supplier of economical and reliable power and as protector of fish and wildlife, inherently conflict. Bonneville spills water to benefit fish and directly funds fish and wildlife projects. These actions reduce power revenue and increase costs, respectively. On the other hand, demands on Bonneville to supply greater amounts of power will put pressure on fish and wildlife, either through more intensive use of

Mr. Chairman and Members of the Committee:

We are pleased to be here today to discuss the Bonneville Power Administration's roles in providing power and protecting fish and wildlife in the Northwest. As you know, Bonneville provides a large fraction of the Pacific Northwest's electric power, produced largely from hydroelectric projects in the Federal Columbia River Power System. Bonneville also has obligations to protect, mitigate, and enhance fish and wildlife populations affected by these hydroelectric projects. Through its revenues from power sales, Bonneville provides the majority of fish and wildlife program money in the region. Over the past 20 years, demand for electric power in the region has grown and Bonneville's involvement in and expenditures on fish and wildlife programs have increased.

In the past several years, Bonneville has faced increasing financial difficulty, in part because of drought conditions, rising costs of providing power, and lower-than-projected revenue from selling surplus power. This financial situation has implications for fish and wildlife. For example, during the drought of 2001, Bonneville determined that in order to maintain an adequate and reliable power supply during the declared power emergency, available water would be used to generate electricity rather than spilled (released) over the dams to aid juvenile fish passage. Significantly reducing the amount of water spilled over the dams can affect the survival rates of some juvenile populations of migrating fish, which in turn ultimately reduces the number of adults returning to spawn in the future. In addition, a number of stakeholders have expressed concern that some Bonneville actions have effectively reduced spending on fish and wildlife programs.

In this context, you asked us to (1) discuss Bonneville's statutory and other obligations to support fish and wildlife programs, (2) describe Bonneville's historical spending and other efforts in support of fish and wildlife protection and enhancement, (3) evaluate

Bonneville's current financial condition, (4) discuss some of Bonneville's recent management actions that affect fish and wildlife programs, and (5) discuss challenges Bonneville faces in supplying electricity to the region while simultaneously protecting, mitigating, and enhancing fish and wildlife. To meet these objectives, we relied on information in our previous report on salmon and steelhead recovery efforts[1], interviewed officials at Bonneville, and interviewed stakeholders in Bonneville's fish and wildlife programs, including the Northwest Electric Power and Conservation Planning Council (Power Planning Council)[2] and the Columbia River Intertribal Fish Commission.[3] At the request of Chairman Hobson and Ranking Member Visclosky of House Appropriations, Subcommittee on Energy and Water Development, we are also currently in the process of reviewing Bonneville's financial situation. This statement includes the preliminary findings of this effort as well.

In summary, we found that:

- In accordance with the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) of 1980, Bonneville is required to ensure an adequate, efficient, economical, and reliable power supply for the Pacific Northwest and also to protect, mitigate, and enhance fish and wildlife affected by operation of the Federal Columbia River Power System. Under the provisions of various treaties,

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[1] U.S. General Accounting Office, *Columbia Basin Salmon And Steelhead: Federal Agencies' Recovery Responsibilities, Expenditures and Actions,* GAO-02-612 (Washington, D.C.: July 2002).

[2] The Power Planning Council was authorized by the Pacific Northwest Electric Power Planning and Conservation Power Act of 1980 (Northwest Power Act). It consists of representatives of the states of Idaho, Montana, Oregon, and Washington and is funded by Bonneville. The Northwest Power Act directs the Power Planning Council to develop 1) a plan to guarantee adequate and reliable energy for the Pacific Northwest and 2) a program to protect and rebuild populations affected by hydropower development in the Columbia River Basin.

[3] The Columbia River Intertribal Fish Commission is the coordinating agency for fishery management policies of the four Columbia River treaty tribes, (the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe).

laws, court cases, and presidential directives, Bonneville is required to consult with Indian tribes and to fulfill trust responsibilities for fish and wildlife. Under various laws, Bonneville also funds fish and wildlife mitigation costs incurred by the Army Corps of Engineers and the Bureau of Reclamation. These costs may arise as a result of compliance with biological opinions issued by the National Oceanographic and Atmospheric Administration (NOAA) Fisheries (formerly the National Marine Fisheries Service) and the Fish and Wildlife Service or as mitigation measures recommended in the Columbia River Fish and Wildlife Program adopted by the Power Planning Council. In addition, a number of fish populations in the region have been listed as either threatened or endangered under the Endangered Species Act. With these listings, Bonneville and other federal agencies became responsible for ensuring that operation of the Federal Columbia River Power System does not jeopardize the continued existence of these populations.

- From fiscal years 1997 through 2001, Bonneville spent over $1.1 billion in support of fish and wildlife programs—primarily to benefit salmon and steelhead. Some of these expenditures have funded fish and wildlife efforts, including those undertaken by Bonneville, other federal agencies, Indian tribes, and the four northwest states (Idaho, Montana, Oregon, and Washington). Bonneville has also funded operations and maintenance and capital costs for the Army Corps of Engineers, Bureau of Reclamation, and the Fish and Wildlife Service for projects such as fish bypass facilities at dams and fish hatcheries. In addition, Bonneville estimates that from fiscal years 1997 through 2001, spilling water from dams and augmenting flows to enhance fish survival resulted in over $2.2 billion in forgone revenues or increased power purchases.

- Bonneville is currently in a financial crisis. Cash reserves have fallen and Bonneville has estimated an increased risk that it will miss future Treasury debt payments. Specifically, for the fiscal year 2002-2006 rate period, Bonneville estimates that its

costs will be about $5.3 billion higher than for the previous five-year rate period and revenues will be about $1.4 billion less than projected in June 2001. To avoid defaulting on Treasury debt and to cover its costs as required by law, Bonneville has increased its rates for power by over 40 percent since fiscal year 2001 and is considering further increases. In addition, Bonneville has plans to reduce costs and hopes that favorable water and price conditions will enable it to increase revenues from power sales.

- Some recent management actions by Bonneville appear to have adversely affected fish and wildlife programs enhancement efforts. Specifically, Power Planning Council staff and representatives of some Indian tribes have pointed out that a change in Bonneville's approach to budgeting for fish and wildlife expenditures, adopted in October 2002, caused the loss of around $40 million in planned fish and wildlife funding for 2003. Stakeholders have also observed that the budgeting change was not well understood by program managers and that funding was lost when expenditures incurred in fiscal year 2002 were counted by Bonneville against fiscal year 2003 fund levels. Bonneville staff described the change as necessary to improve management controls over the funding of fish and wildlife programs but acknowledged that the change in budgeting was abrupt and not well understood by many of those affected by the change. Bonneville has also placed on hold its plans to acquire land to be used as habitat for fish and wildlife and is working with the Power Planning Council and constituents on how to prioritize purchases in the future.

- Bonneville's dual roles—as supplier of economical and reliable power and as protector of fish and wildlife—inherently conflict. Supporting fish and wildlife efforts, either by spilling water that could otherwise be used to generate electricity, or by directly funding other fish and wildlife programs, can only be achieved by raising Bonneville's power rates. On the other hand, demands on Bonneville to

supply greater amounts of power will put pressure on fish and wildlife, either through more intensive use of generating facilities at the expense of spilling water, or through reduced revenues available for funding fish and wildlife programs as has occurred during the current crisis. Bonneville's management problem is more severe in drought years—lower water availability causes both higher electricity prices and natural stresses on fish populations—and will only increase as growing populations and demand for power bump up against increased efforts to mitigate fish and wildlife.

BACKGROUND

The Columbia River Basin is North America's fourth largest, draining about 258,000 square miles and extending predominantly through the states of Washington, Oregon, Idaho, and Montana and into Canada. The basin contains over 250 reservoirs and about 150 hydroelectric projects, including dams on the Columbia River and its primary tributary, the Snake River. The Columbia River Basin also provides habitat for many species of fish and wildlife, including a number of threatened and endangered species.

The development of the reservoirs and hydroelectric projects in the basin has posed hazards for some of the species in the basin, especially anadromous fish, such as salmon and steelhead. Such fish are born in freshwater streams, where they live for 1 to 2 years before migrating down river to the ocean to mature. After 2 to 5 years, the fish migrate back to the freshwater streams to spawn a new generation. To migrate past a dam, juvenile fish must either go through its turbines, go over the spillway, use other installed bypass systems, or be transported around the dams in trucks or barges. Each alternative has risks and increases the mortality rate of juvenile fish. To return upstream to spawn, adult fish must find and use fish ladders provided at each of the dams.

Bonneville is responsible for marketing the power that the 31 federal dams in the Federal Columbia River Power System produce. Depending upon the annual amount of water available to the system, Bonneville provides about 45 percent of the electric power used in the Pacific Northwest each year. In addition, Bonneville's transmission system accounts for about 75 percent of the region's high-voltage grid, and includes major transmission links with other regions. Through its revenues from power sales, Bonneville provides the majority of fish and wildlife program money in the region. These programs fund a variety of activities including tribal fish hatcheries, fish screens at irrigation diversions, habitat improvement projects, watershed restoration, land acquisition, and various research studies.

Bonneville sets its power rates high enough to cover its internal costs, the costs of fish and wildlife programs, and to repay its debt, including its revolving Treasury debt and any other appropriated funds used to build and operate the power system.

BONNEVILLE HAS NUMEROUS FISH AND WILDLIFE RESPONSIBILITIES

In addition to its responsibility for providing transmission services and marketing the electric power generated by the dams in the Federal Columbia River Power System, Bonneville is obligated by the Northwest Power Act of 1980 to protect, mitigate, and enhance fish and wildlife populations affected by these hydroelectric projects. In addition to this mandate, significant declines in historical returns of salmon and steelhead to the Columbia River Basin have resulted in the listing of 12 populations as threatened or endangered under the Endangered Species Act. With these listings, Bonneville and other federal agencies became responsible for ensuring that operation of the Federal Columbia River Power System does not jeopardize the continued existence

of these 12 populations. The table below identifies, and provides a brief explanation of, some of the laws defining Bonneville's responsibilities.

**Table 1: Legislation Defining Bonneville's Responsibilities for Fish and Wildlife**

| | |
|---|---|
| Bonneville Project Act (1937) | Creates the Bonneville Power Administration and authorizes it to market power produced by the Bonneville Project and to construct transmission lines to transmit electric energy. Requires Bonneville to set its rates to recover the cost of producing and transmitting electric energy from the Federal Columbia River Power System, including the amortization of the capital investment. These rates must be based on the cost allocations among the project's purposes that Congress authorized—typically power, navigation, flood control, and irrigation. |
| Endangered Species Act (1973) | Directs the National Marine Fisheries Service and the United States Fish and Wildlife Service to return endangered and threatened species to the point where they no longer need special protection measures by protecting threatened or endangered species and the ecosystems upon which they depend. |
| Transmission System Act (1974) | Designates Bonneville as the marketing agent of all electric power generated by federal plants constructed by the Army Corps of Engineers or the Bureau of Reclamation in the Pacific Northwest, except for power required for the operation of such projects and the power from Bureau of Reclamation's Green Springs project. Authorizes Bonneville to operate and maintain the federal transmission system within the Pacific Northwest and to construct appropriate additions and improvements. Establishes the Bonneville Fund within the United States Treasury, a revolving fund that consists of all of Bonneville's receipts and proceeds, and from which Bonneville's administrator may make expenditures determined to be necessary or appropriate. |
| Pacific Northwest Electric Power Planning and Conservation Act (1980) | Authorizes the formation of the Pacific Northwest Electric Power and Conservation Planning Council (Council) and directs it to develop a program to protect, mitigate, and enhance the fish and wildlife of the Columbia River Basin. Requires Bonneville's administrator to use Bonneville's funding authorities to protect, mitigate, and enhance fish and wildlife affected by the development and operation of the Federal Columbia River Power System and to do so in a manner consistent with the Council's program while ensuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply. Limits Bonneville's share of mitigation costs to those necessary to deal with adverse effects caused by the development and operation of the dams' electric power facilities only. Requires federal agencies responsible for managing, operating, or regulating hydroelectric facilities in the Columbia River Basin to provide equitable treatment for fish and wildlife with the other purposes for which these facilities are operated and managed. These agencies must, at every relevant stage of their decision-making process, also consider, to the fullest extent practicable, the Council's fish and wildlife program. |

Source: GAO review of legislation.

In addition to the laws summarized above, Bonneville must comply with other environmental laws and also has a trust responsibility with the 13 federally recognized tribes in the Columbia River Basin. In an April 29, 1994 Memorandum to the Heads of Executive Departments and Agencies, then President Clinton made trust responsibilities and tribal relations the responsibility of all federal departments. To

fulfill this responsibility, Bonneville developed a formal tribal policy, which provides a framework for a government-to-government relationship with the 13 tribes. This framework includes a commitment to fulfill its obligations under the terms of treaties, as well as other applicable laws and regulations. Various treaties and court cases guarantee the rights of the tribes to fish at their usual and accustomed fishing locations and to take 50 percent of the annual harvestable surplus of salmon. The table below identifies, and provides an explanation of, some key environmental laws and treaties.

**Table 2: Other Laws, Treaty Obligations, and Court Cases Affecting Bonneville's Responsibilities for Fish and Wildlife**

| | |
|---|---|
| Clean Water Act (1972) | Authorizes the Environmental Protection Agency (EPA) to establish water quality standards and to issue permits for the discharge of pollutants from a point source to navigable waters. Authorizes EPA to approve total maximum daily loads established by states and tribes. These standards are determined by the maximum amount of a pollutant that a water body can receive and still meet water quality standards for specified uses, including fish and wildlife. |
| Columbia River Treaty (1961) | Defines the relationship between the United States and Canada concerning the operation of Columbia River dams and reservoirs. |
| National Environmental Policy Act (1969) | Procedural act requiring federal agencies to examine the impacts of proposed federal actions that may significantly affect the environment. |
| Magnuson-Stevens Fishery Conservation and Management Act (1976) | Requires federal agencies, in consultation with the National Marine Fisheries Service (NMFS), to promote the protection of essential fish habitat. NMFS shall provide conservation recommendations for any federal or state activity that may adversely affect essential fish habitat. |
| Pacific Salmon Treaty (1985) | Treaty signed by the United States and Canada in 1985 governing the harvest of certain salmon stocks in the fisheries of the Northwest states (including Alaska) and Canada. |
| *U.S. v. Oregon, U.S. v. Washington* (1969 and 1974) | Court decisions affirming the right of certain Indian tribes to 50 percent of the harvestable surplus of salmon. |
| Treaties between individual Indian tribes and the United States | Establish federal agency responsibilities for trust assets, hatchery and harvest issues, and tribal water rights. |

Source: GAO review of legislation, treaties, and court cases.

BONNEVILLE'S SPENDING AND OTHER EFFORTS TO PROTECT FISH AND WILDLIFE ARE CONSIDERABLE BUT EFFECTS ARE DIFFICULT TO ISOLATE

In total, Bonneville estimates it has spent over $1.1 billion (in 2001 dollars) from 1997-2001 on fish and wildlife efforts. Of this total, Bonneville spent over $460 million on direct programs and funding for fish and wildlife related activities of other agencies and entities. The bulk of Bonneville's expenditures for fish and wildlife are spent on the 12 populations of salmon and steelhead currently listed as endangered or threatened under the Endangered Species Act.[4] Bonneville's direct spending on projects as well as their funding of other agencies and entities in support of fish and wildlife programs for 1997-2001 are shown in table 3 below.

**Table 3: Bonneville's Expenditures and Funding Provided to Others (in thousands of 2001 dollars)**

| Group | 1997 | 1998 | 1999 | 2000 | 2001 | Total |
|---|---|---|---|---|---|---|
| Bonneville | $5,533 | $4,913 | $5,608 | $4,507 | $5,444 | **$26,005** |
| Federal Agencies | $12,740 | $9,082 | $9,150 | $9,675 | $16,543 | **$57,247** |
| States | $16,249 | $22,137 | $21,286 | $17,873 | $20,011 | **$103,361** |
| Tribes | $22,054 | $21,465 | $17,438 | $18,126 | $22,344 | **$95,622** |
| Power Council | $375 | $686 | $1,784 | $686 | $353 | **$3,883** |
| Others | $23,554 | $37,527 | $38,165 | $32,758 | $44,855 | **$176,858** |
| **Total** | **$80,505** | **$95,810** | **$93,429** | **$83,625** | **$109,550** | **$462,976** |

Source: GAO presentation of data provided by Bonneville Power Administration.

[4] GAO recently completed a review of these expenditures for 11 federal agencies—U.S. General Accounting Office, *Columbia Basin Salmon And Steelhead: Federal Agencies' Recovery Responsibilities, Expenditures and Actions*, GAO-02-612 (Washington, D.C.: July 2002). This report dealt only with salmon and steelhead programs, but Bonneville staff told us that this represents the bulk of Bonneville's support for fish and wildlife programs. Therefore, the data provided in this testimony are indicative, but not a complete accounting, of Bonneville's recent financial commitments to fish and wildlife protection, mitigation, and enhancement.

In addition to the expenditures shown above, Bonneville (1) reimburses the Treasury for the hydroelectric share of Army Corps of Engineers, Bureau of Reclamation, and the Fish and Wildlife Service operation and maintenance and other non-capital expenditures for fish and wildlife, and (2) funds the hydroelectric share of capital investment costs of the Army Corps of Engineers and Bureau of Reclamation fish and wildlife projects. Such projects include fish bypass facilities at dams and fish hatcheries. Bonneville estimates that its operation and maintenance reimbursements between fiscal year 1997 and 2001 were $215.1 million and its funding of capital investment for the same time period totaled $453.9 million.

Bonneville also estimates that spilling water and augmenting flows to assist fish migration has led to over $2.2 billion in forgone revenues and purchases of replacement power. Bonneville's estimates of these costs are included in the table below. GAO did not audit these figures.

**Table 4: Bonneville's Estimated Power Purchases and Forgone Revenues (in millions of 2001 dollars)**

| Cost Category | 1997 | 1998 | 1999 | 2000 | 2001 | Total |
|---|---|---|---|---|---|---|
| Purchase Power costs | $0.0 | $5.7 | $49.7 | $66.1 | $1,389.0 | $1,510.5 |
| Foregone Revenues | $115.5 | $123.3 | $206.4 | $197.1 | $115.9 | $758.2 |
| Total | $115.5 | $129.0 | $256.1 | $263.2 | $1,504.9 | $2,268.7 |

Source: Bonneville Power Administration

There are some indications that Bonneville's actions in conjunction with other agencies' have increased fish survival.

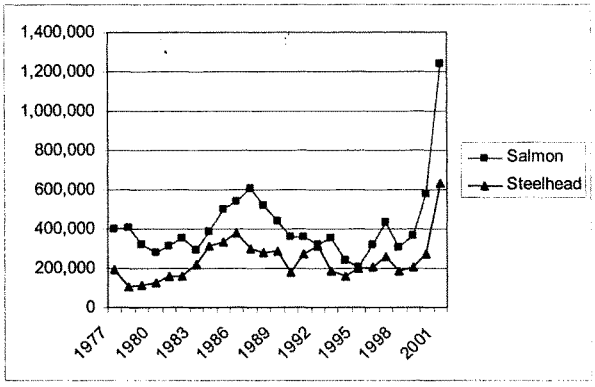
- Bonneville worked with the Army Corps of Engineers and Bureau of Reclamation to increase fish passage survival at dams, on average, by 5 percent or more at each dam.

- Predator control throughout the Federal Columbia River Power System and the estuary saved approximately 7 to 12 million juvenile salmon and steelhead per year, an approximate 5 to 10 percent increase in juvenile fish survival.
- In-river survival of juveniles through the Federal Columbia River Power System is now higher than ever measured.

While these results are promising, the available data are not sufficient to fully isolate the effects of overall fish and wildlife programs on fish populations generally, because of a number of confounding factors, including changing weather and ocean conditions and the length of time it takes for project benefits to materialize. For example, if ocean temperatures rise, adult fish may be unable to find and consume enough food to fortify themselves for spawning and, therefore, die before they can return. At other times, abnormally high or low water in the spawning streams, can mean that adults face dried up or washed out spawning beds. In low water years, flows may also be insufficient to transport juvenile salmon and steelhead to the ocean in time to make the transition to salt water, so they die in the streams. Given such variable conditions, federal efforts to enhance water flows or improve passage are difficult to assess. Moreover, project benefits may take several years to materialize. For example, during the declared power emergency brought on by the drought of 2001, barges and trucks were used to transport juvenile fish past the dams. However, it will be 2 to 5 years before these juveniles return as adults and uncontrollable factors like ocean temperatures will also affect how many will eventually make it back. In the end, it will be difficult to isolate the success of the transportation program from the impacts of uncontrollable factors.

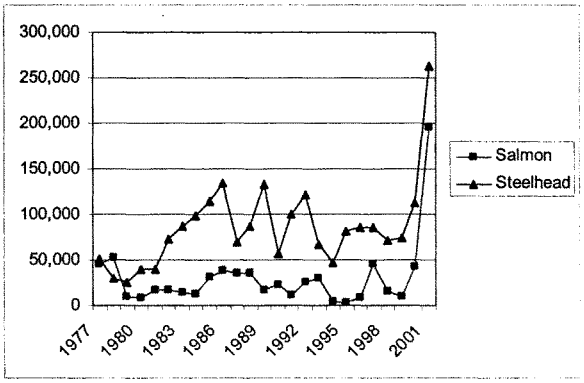
The figures below show the fluctuation in adult salmon and steelhead returns to the Columbia River Basin for the past 25 years as counted at two dams. Bonneville Dam is the first dam adult fish must pass on their way up the Columbia River, and Lower Granite Dam is the last dam they must pass on the Snake River before they can migrate into Idaho.

**Figure 1: Returning salmon and steelhead at Bonneville Dam (1977-2001)**




Source: GAO analysis of data from the Fish Passage Center.

**Figure 2: Returning adult salmon and steelhead at Lower Granite Dam (1977-2001)**




Source: GAO analysis of data from the Fish Passage Center.

As figures 1 and 2 indicate, fish populations can vary widely from year to year. While 2001 was the best year since 1977 for salmon and steelhead overall, there is no clear

long-term trend over the entire period. Moreover, it is important to point out that while overall salmon numbers may be improving, the situation for individual species remains far less favorable. Further, all of the 12 populations of salmon and steelhead initially listed as either threatened or endangered remain so despite the efforts and spending described above.

BONNEVILLE IS FACING A FINANCIAL CRISIS

In recent years, Bonneville's financial position has deteriorated significantly. For example, Bonneville's cash reserves totaled $811 million at the end of fiscal year 2000 but had fallen to $188 million by the end of fiscal year 2002. In addition, for the fiscal year 2002-2006 rate period, Bonneville recently estimated that its costs will be about $5.3 billion higher than in the previous five-year rate period. A large part ($3.9 billion) of the estimated higher costs came from purchases of power to meet demand over and above what the Federal Columbia River Power System can. To meet this additional demand, Bonneville took a number of steps, including purchasing power in long-term contracts at prices above current market prices and above the $22/MWh rates it initially set for the fiscal year 2002-2006 rate period. In addition, Bonneville estimated that its revenues will be about $1.4 billion less than were projected in 2001. A large part of the decreased revenue estimates are the result of lower than projected market prices. These lower than projected prices caused Bonneville to revise its expected surplus power revenues downward by over $700 million. Drought conditions in 2001 and low water conditions in 2002 also contributed to Bonneville's reduction in estimated revenues. In early 2003, Bonneville announced that it estimated a greater than 50 percent chance of missing a payment on its outstanding debt to the Treasury this fiscal year.

In response to the financial crisis, Bonneville has increased its rates for power by over 40 percent over fiscal year 2001 levels and is considering further increases if necessary to increase the likelihood it will be able to make its Treasury payments. In addition,

Bonneville plans to reduce costs or expenditures and hopes that favorable water and price conditions will enable it to increase revenues from power sales. Bonneville is also seeking to (1) refinance some of its debt, (2) renegotiate some long-term power contracts, and (3) reach agreement on the reduction and/or deferral of financial benefits to certain customers. Bonneville is also involved in a regional dialogue with its power customers, the Power Planning Council, and other stakeholders to try to avoid similar problems in the future.

RECENT ACTIONS BY BONNEVILLE MAY HAVE REDUCED TOTAL SPENDING ON FISH AND WILDLIFE

Bonneville has recently undertaken several actions that are viewed by members of the fish and wildlife community as reducing the amount of funding available to support fish and wildlife protection and recovery efforts. These actions include changes in approach to contract management and the planning and budgeting system that have resulted in some work completed in fiscal year 2002 being paid for with fiscal year 2003 funds.

Starting in fiscal year 2003, Bonneville eliminated the automatic carryover of funding for fish and wildlife programs that had previously been provided under contract management. Under the previous methods, if the funds were not spent in the year approved, they were generally carried over and were available to be spent in the following year. As a result, Bonneville officials stated that they did not have current and reliable information on the cost of work performed each year. With the switch to the new planning and budgeting system, Bonneville has requested that contractors inform Bonneville by a certain date in the new fiscal year how much they are owed for work actually performed in the last fiscal year. Bonneville uses the information to establish an account that sets aside monies from that fiscal year to pay bills as they come in during the next year. If contractors do not provide Bonneville with this information

then bills that come in for work done in the previous fiscal year must be paid for with monies from the next fiscal year.

Contractors and others told us that this change was made with little advance notice or training and without a clear understanding on their part of its ramifications on fiscal year 2003 funding. As a result, funding for fiscal 2003 planned projects is being reduced by the amount needed to pay for work completed in fiscal year 2002, which they failed to notify Bonneville was completed. In addition, they note that if a project is approved but no work is done on it in a given fiscal year it now runs the risk of having to go back through the formal funding approval process, potentially causing delays.

Stakeholders told us of several concerns they have about Bonneville's funding of fish and wildlife programs:

- According to Power Planning Council officials:
    - Bonneville's budgeting change caused a reduction in fish and wildlife funding. In a February 2003 letter to the Bonneville Administrator, Power Planning Council staff stated that over $40 million in fish and wildlife obligations that had been carried over from the 1997 - 2001 rate period were no longer available. The Power Planning Council says that its fish and wildlife program has had to absorb the $40 million in previous obligations in its 2003 budget.
    - In December 2001, Bonneville told the Power Planning Council that it estimated an annual average of $150 million for the 2002 - 2006 rate period to fund the Power Planning Council's fish and wildlife program and actions required by the biological opinion for the Federal Columbia River Power System. Bonneville reduced this figure to $139 million. Furthermore, in March 2003 Bonneville notified the Power Planning Council that this figure may be reduced further and asked the Power Planning Council if further reductions would be feasible.

- Although Bonneville had agreed to provide $36 million in capital funding to be used to purchase land or easements to protect fish and wildlife, Bonneville notified the Power Planning Council that all land or easement purchases had been placed on hold due to Bonneville's financial condition. Bonneville further indicated that capitalizing land or easement purchases may not be appropriate, a contention the Power Planning Council disputes. While the Power Planning Council has agreed to Bonneville's decision to place fiscal year 2003 land purchases on hold, it has also notified Bonneville that this issue must be resolved before the Power Planning Council can evaluate future program requirements.

- According to representatives of the Columbia River Intertribal Fish Commission:
  - Bonneville cancelled funding for the acquisition of approximately 2,500 acres along Squaw Creek in Oregon. Habitat enhancement in the Squaw Creek area is administered by the Confederated Tribes of the Umatilla Indian Reservation.
  - The Columbia Basin Fish and Wildlife Authority, is slated to lose half of its funding. The Columbia Basin Fish and Wildlife Authority coordinates the work of the 13 tribes and 7 fish and wildlife agencies in the Columbia River Basin, administers aspects of the provincial review process, coordinates project reviews and research, and acts as a funding vehicle for projects involving multiple agencies. This organization is important to the tribal community because it assists tribes in coordinating with each other as well as with outside fish and wildlife agencies.
- According to representatives of the Yakama tribe:
  - The tribe lost between $6 and $8 million in fish and wildlife funding due Bonneville's change in the new planning and budgeting system.
  - A deal the tribe had reached to get conservation easements, remove dams impassable to fish, and upgrade irrigation systems to reopen several

steelhead spawning streams fell through when the funds allocated for these projects became unavailable after the budgeting change.

Bonneville described the changes in their budgeting and accounting of fish and wildlife program funds as follows:

- Overall, Bonneville's yearly direct program expenditures have increased since 1996 from $68.5 million in expense spending to $138 million in 2002. Those direct program expenditures - now totaling $139 million a year through FY 2006 - have been the principal source of funding support for tribal fish and wildlife programs and the implementation of projects that address Bonneville's mitigation obligations and recovery objectives. In the Fall of 2002, Bonneville changed the planning and budgeting process that is used with regional entities for these fish and wildlife expenditures from an obligations to an accrual-based planning and budgeting process. As required under Generally Accepted Accounting Principles (GAAP), Bonneville records expenditures on an accrual basis. In an effort to more closely align the budgeting process with accrual based accounting, Bonneville moved from an agency obligation budgeting method to agency budgeting based on accruals in the mid-1990s. However, due to processes documented in the original Fish Funding Memorandum of Agreement, the regional planning and budget process for fish and wildlife funding remained on an obligations basis. Due to Bonneville's dire financial circumstances, the planning and budgeting process was changed to more closely correlate with accrual accounting, and the agency's planning method.
- Due to difficult financial circumstances, Bonneville accelerated a change from an obligations to an accrual based planning and budgeting process for the fish and wildlife program. This approach to planning correlates more closely with the agency's planning method and provides greater

accuracy in fiscal year expenditure forecasts. In addition, Bonneville has initiated changes in contract management to provide Bonneville managers with accurate and current information to facilitate administration of Bonneville's fish and wildlife program on an accrual basis.

- In December 2002, as Bonneville's financial concerns deepened, the Administrator asked the Power Planning Council to take appropriate steps to assure that spending for the fish and wildlife program did not exceed the budgeted level of $139 million in expense accruals for fiscal year 2003.
- Bonneville acknowledges that these changes affected the planned expenditures for fiscal year 2003. However, the 2003 funding level of $139 million is consistent with the funding commitment made in a December 2001 letter to the Power Planning Council and is a 40 percent increase in program support from the previous rate period. In that letter, Bonneville supported a planning assumption of $150 million in expense for fish and wildlife; this was expected to result in an actual expense accrual of $139 million.
- While Bonneville has spent well over $100 million on wildlife habitat since 1989, only one agreement has been capitalized. The Montana Trust resolved and indemnified Bonneville for all losses resulting from the construction of Libby and Hungry Horse dams and was funded with a one-time commitment of $12 million.
- Bonneville instituted a temporary hold on land acquisitions until the Power Planning Council could make recommendations on how to prioritize 2003 expenditures. Upon review of the forecasted expenditures for 2003, the Power Planning Council recommended the deferral of land acquisitions for the remainder of fiscal year 2003 to allow consideration of a change to Bonneville's capitalization policy for fiscal year 2004. This allowed other projects to move forward within the $139 million budget.

Bonneville is currently working with the Power Planning Council and constituents to develop a method for capitalizing land acquisitions that is consistent with GAAP accounting standards and Bonneville's limited borrowing authority.

## BONNEVILLE'S CHALLENGES STEM FROM ITS DUAL AND CONFLICTING ROLES AND RESPONSIBILITIES

Bonneville's dual roles—as supplier of economical and reliable power and as protector of fish and wildlife—are inherently in conflict. Bonneville's stakeholders include both consumers of electricity and proponents of fish and wildlife protection, and both groups apply pressure on Bonneville to deliver more of what they want. However, providing more support for fish and wildlife comes at the cost of less electricity and higher rates. Similarly, providing more electricity can put greater pressure on fish and wildlife, either through more intensive use of generating facilities at the expense of spilling water, or through reduced revenues available for funding fish and wildlife programs as has occurred during the current crisis.

Further, Bonneville operates in a changing environment with regard to demand for its electricity and with regard to the treatment of fish and wildlife required by law and treaty agreements. For example, demand for electricity has generally grown throughout Bonneville's existence and it has responded up until now by increasing its generating capacity or buying electricity from other sources to meet the needs of its electricity customers. As Bonneville has continued to provide electricity beyond the capacity of federal hydroelectric facilities, it has encountered higher costs. In addition, over the past two decades, Bonneville's spending and actions in support of fish and wildlife have grown considerably with the enactment of various environmental laws and with increased regulations put in place to protect the environment. Most recently, a ruling in federal court has determined as inadequate the biological opinion developed

by the National Marine Fisheries Service (now NOAA Fisheries) to direct the protection of endangered fish species in the Columbia River Basin. The judge has remanded the biological opinion to NOAA Fisheries and suggested that greater certainty will be required for specific mitigation measures before NOAA Fisheries can rely upon them for protecting listed endangered species. The consequences of this ruling on river and dam operations is uncertain as is any subsequent impact on the amount and timing of power Bonneville has to sell and on fish and wildlife.

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In closing Mr. Chairman, while the future is uncertain, one thing is very clear—Bonneville and its numerous stakeholders are faced with some potentially painful decisions in the coming years. The outcomes of these decisions will affect the health and viability of fish and wildlife populations and the way of life of Northwest residents who benefit from electric power. Given the competing priorities that involve making trade-offs, we continue to support public oversight of the decisions being made and will continue to pursue our ongoing work relating to your request that we study Bonneville's obligations to support fish and wildlife programs.

Mr. Chairman, that concludes our prepared statement. We would be happy to answer any questions that you or Members of the Committee may have.

For further information, please contact Jim Wells at (202) 512-3841. Individuals making key contributions to this testimony include, Jill Berman, Jonathan Dent, Samantha Gross, Cynthia Norris, Frank Rusco, and Barbara Timmerman.

**COMMENTS OF PROFESSOR CHARLES WILKINSON
REGARDING FISH AND WILDLIFE MANAGEMENT
TO THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE**

**JUNE 4, 2003**

**WASHINGTON, D.C.**

Thank you for inviting me to appear before the Senate Committee on Indian Affairs. It is a great honor to be here and to address the role of Indian tribal governments in salmon management in the Pacific Northwest.

In addition to my oral comments, I am attaching as background an article I have written on the Secretarial Order that sets out procedures and standards for the government-to-government relationship between tribal governments and the departments of the Interior and Commerce with respect to the administration of the Endangered Species Act. The citation is Charles Wilkinson, "The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order," 72 Wash. L. Rev. 1063 (1997).

Thank you for your courtesy.

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**Symposium: Indian Law Into the Twenty-First Century**

# THE ROLE OF BILATERALISM IN FULFILLING THE FEDERAL-TRIBAL RELATIONSHIP: THE TRIBAL RIGHTS-ENDANGERED SPECIES SECRETARIAL ORDER

Charles Wilkinson*

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On June 5, 1997, Secretary of the Interior Bruce Babbitt and Secretary of Commerce William Daley signed a jointly-released Secretarial Order entitled "American Indian Tribal Rights, Federal-Tribal Trust Respon-sibilities, and the Endangered Species Act."[1] The Order culminated a year-and-a-half of work by tribes and federal officials to craft an administrative system for resolving difficult questions involving tribal rights and the Endangered Species Act (ESA).[2] The Order is important for the ESA's implementation. It also carries broader significance, for it serves as one major example of how the government-to-government relationship between the United States and Indian tribes can be successfully implemented.

Most tribes have quite regular governmental relations with federal agencies and members of Congress concerning those matters that affect just that tribe—for example, a land acquisition, the construction of a new clinic, or retrocession of jurisdiction for a particular reservation. The relationship becomes far more complex, however, when it comes to those overarching, comprehensive issues that affect all tribes, whether those issues involve natural resources, tribal jurisdiction, health, education, child welfare, economic development, the trust relationship, or other concerns.

Part of the difficulty traces to the sheer number of tribes—about 500 recognized tribes, each with its own sovereignty and individual circumstances, in the continental United States and Alaska. Tribal leaders are at once protective of their own tribe's independence and respectful of the independence of other tribes. As a result, the idea of creating a national tribal consensus, however useful it might be on a particular issue, breeds extreme caution. Because the necessary condition for relations with the United States—a consensus among the tribes—is difficult to achieve, the tribes tend to move slowly with inter-governmental relations on national issues.

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* Moses Lasky Professor of Law, School of Law, University of Colorado. Gary Morishima of the Quinault Management Center and Bruce Davies of the Northwest Indian Fisheries Commission prepared summaries and analyses of these events; their work has been most useful in preparing this article. I also thank my assistants, Scott Miller and Cynthia Carter, for their support.

I took part in most aspects of this process as one of the tribal representatives. Much of this article is drawn from those personal experiences. I am indebted to all of the many participants in this venture; their knowledge and insights have greatly expanded my understanding of these issues.

[1] The Secretarial Order and its Appendix are reproduced as an addendum to this article, infra pp.1089-1107.

[2] 16 U.S.C. § § 1531-1543 (1994).

The federal government has its own difficulties arising from the same basic fact—the large number of tribes. To be sure, many a federal official has eschewed government-to-government dealings because of a busy schedule, inadequate knowledge of complex subject matter, or indifference that can border on racism. Yet many other good and capable federal officers have been stymied by legitimate questions. Who speaks for the tribes? How do I know that Indian country is on board?

Once the predicate for government-to-government dealings—a reasonably clear consensus in Indian country—is established so that both tribal and federal officials can proceed with negotiations, other questions arise. Who will sit at the table? What will the protocols be? Additional problems stem from the fact that Indian issues affect many parts of the federal government other than the Bureau of Indian Affairs or the Department of the Interior. In the case of the ESA, for example, the U.S. Fish and Wildlife Service (in the Department of the Interior) and the National Marine Fisheries Service (in the Department of Commerce) administer the ESA. In addition, the Bureau of Land Management and the Bureau of Reclamation, both in the Department of the Interior, had considerable interest in the tribal-ESA negotiations, as did the Forest Service (in the Department of Agriculture). As a result, people without much knowledge of Indian policy and law may be at the table. How much time should be spent bringing them up to speed?

The matter of educating negotiators unfamiliar with Indian issues is not easy to resolve. It is critical that federal participants have a strong sense of the context of tribal claims, which are legally complex, historically based, and culturally influenced. On the other hand, busy federal negotiators may resist time-consuming briefings on what might appear to be background material.

Still another problem involves the many interested federal officials not at the table. Some of them have strong interests—and views—and yet will not have the benefit of the information and perspectives gained by the negotiators. How can the negotiators have authority and flexibility in the face of attempts by other officials, not at the table, to undermine or overrule their efforts and commitments?

The negotiations over the ESA involved these and other aspects of the government-to-government relationship. This essay recounts the processes leading up to the issuance of the Order and explores the extent to which the development and content of the Order fulfills the promise of a serious, bilateral relationship between the federal and tribal governments.

## I. DEVELOPING THE TRIBAL POSITION

During the 1970s, as Congress vastly expanded federal environmental laws, tribes had intermittent brushes with the enforcement of laws protecting animal species, notably eagles.[3] By the mid-1990s, the ESA had become a major concern for tribes. Stresses on the environment had increased, especially in the West. The tribes had become much more active in resource management and development. The Act, fortified by the U.S. Supreme Court's ruling in

[3] See, e.g., United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980) (holding that Bald Eagle Protection Act abrogated treaty right to hunt); United States v. White, 508 F.2d 453 (9th Cir. 1974) (holding that Bald Eagle Protection Act was inapplicable to takings by Indians pursuant to treaties). Later, the U.S. Supreme Court held that the Bald Eagle Protection Act superseded tribal hunting rights. United States v. Dion, 476 U.S. 734 (1986).

Tennessee Valley Authority v. Hill,[4] was administered strictly by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). Although the environmental impacts had been created by non-Indian development, the tribes were facing considerable pressure from ESA enforcement over matters such as timber harvesting, building construction, water development, and salmon harvesting; tribal leaders strenuously objected to the federal officials' lack of respect for tribal sovereignty and resource management practices.[5] In Congress, legislative proposals regarding ESA reauthorization were pending.[6]

During November and December 1995, and January 1996, an ad hoc group, comprised mostly of tribal resource managers and tribal lawyers, held a series of conference calls to see what, if anything, should be done.[7] The group explored a variety of options, ranging from simply doing nothing to various forms of legislation, administrative relief, and litigation. An overriding question was whether it was realistic for the tribes to develop a unified tribal position on a course of action.

The ad hoc group decided that the ESA issue was of sufficient importance to the tribes that a national meeting should be held. The workshop should be held quickly, since there was a great deal of activity in Washington, D.C., on ESA issues; there was a danger that, with the tribes inactive, other interest groups—industry, environmentalists, and the states—might adopt firm positions on ESA reauthorization without any tribal input. Because sensitive issues of strategy would be discussed, the meeting would be open only to tribal members and tribal representatives. The American Indian Resources Institute agreed to act as convener, and fifteen other national and regional organizations joined as co-sponsors.[8]

The first tribal workshop on the ESA met in Seattle on February 1-2, 1996. In spite of very short notice, approximately 130 people from Indian tribes and tribal organizations across the country attended. The conveners kept the workshop open and flexible, with an opportunity for broad participation from the attendees. Presenters explained the ESA and the current status of tribal rights. Representatives from different areas discussed the impact of the ESA in their regions. Members of the ad hoc working group presented various options. The meeting was then

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[4] 437 U.S. 153 (1978).

[5] See generally Indian Tribes and the Endangered Species Act: Experiences and Perspectives from the Pacific Northwest (report), presented to Tribal Workshop on the Endangered Species Act, Seattle, Wash. (Feb. 1-2, 1996) [[[hereinafter Tribal Workshop] (copy on file with author); see also, e.g., Ed Marston, Cease-fire Called on the Animas-La Plata Front, High Country News, Nov. 11, 1996, at 1.

[6] See, e.g., Endangered Species Conservation and Management Act of 1995, H.R. 2275, 104th Cong.; Endangered Species Act Reauthorization: Hearings Before the Subcomm. on Drinking Water, Fisheries, and Wildlife of the Senate Comm. on Env't and Pub. Works, 104th Cong. (1995).

[7] Participants in these conference calls included: Jim Anderson and John Hollowed, Northwest Indian Fisheries Commission; Howard Arnett, attorney for Confederated Tribes of the Warm Springs Reservation of Oregon; Sylvia Cates, attorney for White Mountain Apache Tribe; John Echohawk, Native American Rights Fund; Billy Frank, Jr., Nisqually Tribe; Laurie Jordan and Ted Strong, Columbia River Intertribal Fish Commission; Gary Morishima and Richard Reich, Quinault Management Center; Mark Phillips, Legislative Consultant for Confederated Tribes of the Warm Springs Reservation of Oregon; Stanley Pollack, attorney for Navajo Nation; Ken Poynter, Native American Fish & Wildlife Society; Joann Reynolds, Intertribal Timber Council; Richard Trudell, American Indian Resources Institute; Charles Wilkinson, University of Colorado School of Law; Mary Wood, University of Oregon School of Law; Jim Zorn, Great Lakes Indian Fish & Wildlife Commission.

[8] In addition to the American Indian Resources Institute, the consortium consisted of Affiliated Tribes of Northwest Indians; Alaska Federation of Natives; Colorado River Basin Tribes Partnership; Columbia River Intertribal Fish Commission; Great Lakes Indian Fish & Wildlife Commission; Intertribal Agricultural Council; Inter-Tribal Council of Arizona; Intertribal Timber Council; Mni Sose Intertribal Water Rights Council; National Congress of American Indians; National Tribal Environmental Council; Native American Fish & Wildlife Society; Native American Rights Fund; Northwest Indian Fisheries Commission; and United Southeast and Eastern Tribes.

opened up for discussion. The Seattle Workshop, which was perhaps the most informed and comprehensive discussion of natural resources issues I have ever attended, laid the foundation for the tribal effort that would lie ahead.

As is typical of Indian gatherings, the quality of the language at the Seattle Workshop was notably different than at Anglo meetings. Instead of generic allusions to "forests," "rivers," and "species," the discourse was replete with specific references to eagles, hawks, ducks, geese, salmon and steelhead, suckers, sea lions, wolves, bison, ferns, wocus, berries, meadows, mountains, hillsides, rocks, soil, and many other aspects of the natural world. Importantly, most of these references were not made with respect to some issue or conflict. Instead, they were made to illustrate how we are connected to all of nature, or were offered in an almost offhanded way—not to make any specific point, but simply as an organic part of a statement by a person who knew the natural world and felt a part of it. Ted Strong, a member of the Yakama Nation and Director of the Columbia River Intertribal Fish Commission, alluded to this, saying, "That is something the elders speak about continuously—the idea of knowing something about where we come from, why we are here, and the appropriate names for species, suggesting a reverence for the reasons these species exist."[9]

The remarks of a few speakers will serve as examples of the level and detail of the discourse. Elwood Miller, of the Klamath Tribe in Oregon, following a custom of many Indian people, introduced his remarks by explaining what his homeland is like. "In our neck of the woods, that's where the waters begin. It jumps out of the ground right there in the Klamath country and begins its trek toward the ocean and ends up down in Yurok territory on the coast."[10] Billy Frank, Jr., who has lived his life along the Nisqually River, also told the gathering about his homeland, where the meeting was being held.

> As you see, our mountain is sticking up today and our mountain along the coast is sticking up. . . . Our salmon here travel a long way. They travel up to the Aleutian Islands when they leave these rivers along this mountain and they travel clean out as far as the Japanese waters to Russia and they come home, right back to these waters here.[11]

Later, Frank alluded to the habits of one of the Northwest's protected species:

> The marbled murrelet stays in the old growth trees, in this canopy, along our coast, along our Puget Sound, along our range of mountains. We can't see them but they're living there. Early in the day, they go out into the ocean, and they float around like ducks, out in the Sound, out in the Strait of Juan de Fuca.[12]

One enduring message from the Seattle Workshop, then, emerged from the texture of the language—low-key, subtle, and instinctive—a reminder of how much knowledge exists in Indian country. Evidencing reverence for the land, the language also serves as a pervasive reminder of Indian people's stake in the administration of the ESA.

A number of themes emerged at the Seattle Workshop. One recurring message was that the ESA is too narrow; its emphasis on single-species management fares poorly in comparison with the tribes' holistic management approach. Several tribal resource managers emphasized that,

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9 Ted Strong, Remarks at the Tribal Workshop, supra note 5 (transcript on file with author).
10 Elwood Miller, Remarks at the Tribal Workshop, supra note 5 (transcript on file with author).
11 Billy Frank, Jr., Nisqually Tribe, Remarks at the Tribal Workshop, supra note 5 (transcript on file with author).
12 Id.

striving for true integrated resource management, they focus on whole natural systems. Chairman Ronnie Lupe of the White Mountain Apache Tribe had previously testified before Congress:

> In our Apache tradition, we do not manage our lands for the benefit of a particular species[,] we strive to protect the land and all the life forms that it supports. Our homeland is too vast for just one species. . . . The diversity of our land provides habitat for a wide variety of plants and animals and each is important to us. The pressures of environmentalists and the Ecological Services Branch of the U.S. Fish and Wildlife Service to manage our lands for a single species was a contradiction of our view of life.[13]

Indian spiritual beliefs and ties to the natural world affect their land and water management practices. To the tribes, these beliefs and practices result in different, but better, management than required by the ESA. Numerous speakers underscored the spiritual tie that Indian people feel toward the natural world. Chairman Lupe observed:

> White Mountain Apaches never saw themselves as separate from Mother Earth. We are one with the land. Hunting was not for sport but to provide food and clothing. We have always been taught to respect the land and living things because we have a sacred responsibility for the stewardship of the lands that the Creator has provided us.[14]

Jody Calica, of the Confederated Tribes of the Warm Springs Reservation, said:

> I'm glad we have three chiefs [on the Warm Springs Reservation] there. Those three chiefs represent a history and a heritage that goes back about 40,000 years, 800 generations. The problems that we're talking about today have come about in the last three or four generations. There was a quality of life that our people enjoyed which was carried on for at least 800 generations because the values, the visions, and the practices of our people were not driven by dollars or material gain. This was a time when spiritual law, natural law, and human law were one. Now we're in a situation where it seems human law is manipulating spiritual law and natural law.[15]

Ted Strong also spoke to the spiritual dimensions of tribal laws:

> We have proven to the world that it is possible for tribal peoples and thus any peoples to sustain their life and their culture if they are willing to respect the laws of nature. These are the laws that have been here since the beginning of time, that should provide the guidance, whether it be legally, spiritually, or otherwise, for such things as the Endangered Species Act. But it is difficult to take that sense of spiritualism that is inherent in natural law and transform that into legal language. The tribes have done that over the years by their practices, their customs, their traditions, that are heavily endowed in their ceremonies. The ceremonies that we have helped insure that the laws of nature are implemented. Our elders taught our children by the use of our ceremonies.
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> . . . .
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> [W]e have seen [natural resources] transformed from their original purposes of spiritual, neighbor[ly] kind of existence with native peoples, to economic and financial conversions.

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[13] Endangered Species Act Reauthorization: Hearings Before the Subcomm. on Drinking Water, Fisheries, and Wildlife of the Senate Comm. on Env't and Pub. Works, 104th Cong. (1995) (written testimony of Ronnie Lupe, Chairman, White Mountain Apache Tribe) (copy on file with author).

[14] Ronnie Lupe, Keynote Address at the Tribal Workshop, supra note 5 (transcript on file with author).

[15] Charles Jody Calica, Remarks at the Tribal Workshop, supra note 5 (transcript on file with author).

> That is measured and thus today, rather than having spiritual qualities, natural resources have a financial quality. They're measured in terms of their ability to provide some kind of wealth. . . . We feel particularly concerned about this.[16]

Many people at the workshop expressed outrage at any attempt to regulate Indians under the ESA because it implies that tribes lack the capability to manage their resources in a way that protects animal species. Tribal resource management has become increasingly professionalized over the past generation. Nearly all tribes now have formal natural resources agencies, and most of the larger tribes have natural resources staffs of fifty, one hundred, or more.[17] Importantly, tribes have worked hard to utilize traditions, values, and knowledge that have been gained over millenia. One major development has been the ability of tribes to contract with the Bureau of Indian Affairs (BIA) to take over the BIA's management functions.[18] The BIA has been heavily criticized for its resource management, especially in the areas of mineral development and timber harvesting, and many tribes have now assumed these responsibilities.[19]

Participants at the Seattle Workshop emphasized the cutting-edge work by individual tribes and intertribal resources organizations. In timber harvesting alone, the White Mountain Apache Tribe has reduced the timber harvest from ninety-two million board feet under the BIA regime to fifty-four million under tribal control,[20] the Yakama Nation allows only minimal clearcutting,[21] and the Jicarilla Apache Tribe adopted a five-year moratorium on harvesting in the early 1990s.[22] As Jody Calica put it, "Some reservations out there are managing in 250-300 year time frames, managing old-growth forests—that's visionary."[23]

The workshop gave considerable attention to the question of whether, as a matter of law, the ESA applies to activities by Indian tribes or individuals exercising treaty rights. The U.S. Supreme Court has held that federal statutes do not abrogate Indian treaty rights unless there is "clear evidence" that Congress actually considered the issue and chose to abrogate the treaty.[24] With the exception of a special provision for Alaska Natives,[25] the ESA is silent as to Native Americans. The cases are split on the applicability of the ESA to tribes.[26] One middle ground

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[16] Strong, supra note 9 and accompanying text.

[17] Interview with James R. Anderson, Executive Director, Northwest Indian Fisheries Commission, in Olympia, Wash. (Jan. 31, 1997); Interview with Robinson Honani, Hopi Dep't of Natural Resources, in Kykotsmovi, Ariz. (Mar. 23, 1993); Interview with Joe Muniz, Tribal Councilmember & Director of Natural Resources, Jicarilla Apache Tribe, in Dulce, N.M. (Mar. 26, 1997); Interview with Richard Trudell, Executive Director, American Indian Resources Institute, in Seattle, Wash. (Feb. 1, 1996).

[18] See generally Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203, 2203-07, 2209-10, 2212-13 (codified as amended at 25 U.S.C. § § 450a-450n (1994)).

[19] See, e.g., David H. Getches et al., Federal Indian Law: Cases and Materials 652 (3d ed. 1993) (citing Angelo A. Iadarola, Indian Timber: Federal or Self-Management? (1979) (characterizing BIA management of tribal forests as ranging from "mediocre to abysmal")).

[20] Lupe, supra note 14.

[21] Telephone Interview with Edwin Lewis, Dep't of Forestry Management, Yakama Indian Nation (Sept. 16, 1997).

[22] Muniz, supra note 17.

[23] Calica, supra note 15.

[24] United States v. Dion, 476 U.S. 734, 740 (1986).

[25] See 16 U.S.C. § 1539(e) (1994).

[26] See United States v. Dion, 752 F.2d 126 (8th Cir. 1985) (en banc) (finding no abrogation), rev'd on other grounds, 476 U.S. 734. On review in Dion, the U.S. Supreme Court based its ruling on the Bald Eagle Protection Act and did not reach the ESA issue. 476 U.S. at 745. But see United States v. Billie, 667 F. Supp. 485 (S.D. Fla. 1987) (finding abrogation).

See generally Robert J. Miller, Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act, 70 Or. L. Rev. 543, 563-74 (1991); Tim Vollmann, The Endangered

between complete coverage and complete exclusion of tribes under the ESA is that federal agencies can impose restrictions on tribes if, and only if, the agency can meet the requirements of "conservation standards" developed in federal cases under analogous circumstances. The "conservation standards" allow regulation if:

(1) The proposed conservation measures are reasonable and necessary for species preservation;

(2) The proposed conservation measures are the least restrictive available to achieve the required conservation purpose;

(3) The proposed conservation measures do not discriminate against Indian activities, either on their face or as applied;

(4) The conservation purpose cannot be achieved through the regulation of non-Indian activity; and

(5) Voluntary tribal conservation measures are not adequate to achieve the conservation purpose.[27]

The Seattle Workshop made no "hard and fast decisions," but it did authorize a report that set out "principal findings" and detailed an "emerging consensus" as to how tribes should proceed under the ESA[28]. The participants agreed to a finding that the "the ESA does not and should not apply to Indian tribes."[29] Instead, "Tribal rights to manage their resources in accordance with their own beliefs and values must be protected."[30]

Another main finding emphasized that non-Indian development has resulted in widespread habitat destruction: "[T]ribes are now being asked or required to shoulder an unfair and disproportionate responsibility for conservation to make up for past and continuing degradation of the environment resulting from non- Indian development."[31] This was a continuing theme at the workshop. Lionel Boyer, from the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho, was one of the many who spoke to it:

> With the encroachment of the non-Indians into our territory, we have seen vast losses of our land, vast losses of areas that we used to enjoy and where we used to exercise our traditions.
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> . . . .
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> We saw a great loss of resources—resources that were traditional for our subsistence, medicinal purposes. . . . We saw the loss of many of our spiritual objects—for instance the buffalo. They thought to get rid of the buffalo was a good way to defeat the Indians. But the buffalo are slowly returning. We saw the loss of the wolf, a very spiritual animal to many of us. The bear, the salmon, the seals—all of these we have lost access to, if not all, a portion of them. The great spirit bird, the eagle. Many of the tribes have lost access to the use of this great bird. They have lost access to be able to use the bird the way they normally do in their

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Species Act and Indian Water Rights, 11 Nat. Resources & Env't 39 (1996); Mary Christina Wood, Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance, 25 Envtl. L. 733, 778-79 (1995).

[27] See Wood, supra note 26, at 792-93 (discussing standards).

[28] See Memorandum summarizing Tribal Workshop on the Endangered Species Act (Feb. 20, 1996) [hereinafter Tribal Memorandum] (copy on file with author).

[29] Gary S. Morishima, Indian Tribes and Endangered Species 4 (report), presented to National Indian Timber Symposium (June 6, 1997) (copy on file with author).

[30] See Tribal Memorandum, supra note 28, at 2.

[31] Id.

> spiritual ventures. We have lost the hawk, which is spiritual to many of us, the osprey. We have also lost the spiritual sites, if not total loss, we have lost access, or presently have restricted access to those spiritual sites, where we make contact with the Creator. We have lost access to many of our spiritual healing waters. We have even lost access to many of the soils that we use for spiritual and healing purposes. The things we use which have great significance to each of us in a spiritual way is very limited, we have lost access to be able to seek them out, to go into the areas where they are. Any time that we disclose a site to the non-Indians, we tend to lose access to that site. These sites we protect. The uses of these resources we protect.[32]

The federal trust responsibility to tribes, the workshop participants found, goes far beyond the ESA and includes an affirmative duty[33] to restore tribal lands and adjacent federal lands so that tribes will be able to utilize the species: "The ESA deals with existence thresholds for individual species. Trust responsibilities require the restoration of resource productivity to the point where [resources] are capable of sustaining tribal utilization."[34]

As the workshop dealt with many complex issues, the participants wanted time to reflect and to report back to their tribes before settling on a course of action. The participants did conclude, however, as the foundation for the "emerging consensus," that it was time for tribes to take some form of action. "There is a critical need for tribes to deal with the ESA since issues strike at the heart of trust . . . protection and tribal sovereignty."[35] Tribes should take the initiative.

> Tribes should look beyond the ESA to accomplish long-term objectives. Consideration should be given to pushing tribal legislation on "ecosystem management approaches" to move beyond [the] species-by-species, last ditch focus of the ESA, toward addressing causes for species declines and sustainable cultures and economies. The effort should build upon principles of holistic management, sustained utilization of resources, spirituality and continuity of unique cultures and beliefs, and stewardship.[36]

The Seattle participants organized a working group to examine legislative and administrative alternatives. The broad-based working group, comprised of twenty-five people from all regions of the country, was directed to make its recommendations at a second workshop, the date of which would be decided upon later.[37] Working group members were urged to keep tribes advised, formally and informally, of the group's deliberations.[38]

The working group held numerous telephone conference calls. After considering various options involving litigation and legislation, the group increasingly focused on the approach taken in the Statement of Relationship that the White Mountain Apache Tribe and the USFWS signed

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32 Lionel Boyer, Remarks at the Tribal Workshop, supra note 5.
33 See generally Wood, supra note 26, at 742-49.
34 Tribal Memorandum, supra note 28, at 2.
35 Id. at 3.
36 Id.
37 Id. at 4.
38 Members of the working group were: Jim Anderson, Howard Arnett, Karen Atkinson, Lionel Boyer, Charles Jody Calica, Sylvia Cates, John Echohawk, Billy Frank, Jr., Keller George, Donna House, Laurie Jordan, Gary Morishima, George Nemago, Mark Phillips, Jaime Pinkham, Stanley Pollack, Ken Poynter, Richard Reich, Joann Reynolds, Kim Simon, Richard Trudell, Charles Wilkinson, Mary Wood, Patricia Zell, and Jim Zorn. Robert Brauchli, Charles O'Hara, and Charles Stringer, all staff at White Mountain Apache, joined the working group during the summer and made major contributions.

in 1994.[39] The Statement of Relationship, personally negotiated by Chairman Lupe and Director Mollie Beattie, is designed to move away from "train wrecks"—swords' point disputes over whether or not the ESA affects tribal rights—and toward on-the-ground professional management. The Statement calls for extensive cooperation and exchange of information between the Tribe and the Service, and effectively gives a presumption of regularity to the Tribe's integrated resource management plan. The essence of the Statement—which all parties agree has worked well at White Mountain—is to avoid ESA conflicts through good, cooperative tribal land management. The Statement, which never explicitly refers to the ESA, takes no position on the statute's applicability to the Tribe.[40]

The working group decided to recommend to the tribes that they pursue a joint secretarial order by the Secretaries of the Interior and Commerce based on the concept of the Statement of Relationship. The working group put together a draft position paper calling for a secretarial order that would apply nationally and that would expand upon the ideas in the Statement of Relationship. The basic policy decision was that such an administrative system, if effective, might result in deference to tribal sovereignty and good working relationships with the federal agencies and, as well, obviate or greatly diminish the need for legislation or litigation.

The proposed position paper was widely circulated to Indian country, and a second workshop was held in San Francisco on June 24-25, 1996. With the context set by the Seattle Workshop, the San Francisco Workshop participants— satisfied that an attempt to achieve a secretarial order was the best course—spent most of their time making technical changes to the position paper. The redrafted position paper was then circulated to the tribes and further changes were made in response to tribal comments. By August, the tribes were ready to present their case to Secretary of the Interior Bruce Babbitt.

## II. IMPLEMENTING THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP

Jim Anderson, Director of the Northwest Indian Fisheries Commission, agreed to serve as the tribal coordinator with Secretary Babbitt's office. Anderson was able to schedule a meeting with Babbitt in Washington, D.C., on September 4, 1996. A week in advance of the meeting, five Indian Leaders—Billy Frank, Jr., John Echohawk, Richard Trudell, Ted Strong, and Jaime Pinkham—sent a letter to Babbitt enclosing the Tribal Position Paper, entitled "Indian Tribes, Endangered Species, and the Trust Responsibility."[41] The position paper, twelve pages long, explained the tribal concerns and set forth a proposal for administrative reform. The letter requested that the meeting accomplish three objectives:

(1) appointment of a small task force of high-level Interior Department officials to work with a similar team of tribal representatives to develop a secretarial order relating to tribal rights and the ESA;
(2) coordination with the Secretary of Commerce so that high-level Department of Commerce officials will actively participate in the negotiations; and
(3) creation of a schedule calling for negotiations to start in September and conclude by mid-November.[42]

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[39] Statement of the Relationship between the White Mountain Apache Tribe and the U.S. Fish and Wildlife Service (Dec. 6, 1994) (copy on file with author).
[40] See generally Lupe, supra note 13, at 4-5.
[41] Letter from Billy Frank, Jr., et al. to Bruce Babbitt, Secretary of the Interior, Department of the Interior (Aug. 28, 1996) (copy on file with author).
[42] See id. at 1.

Babbitt had been briefed on the issues and the nature of the tribal position by advisors, including Professor David Getches of the University of Colorado School of Law, who, during his sabbatical, was serving as Special Counsel to Babbitt. The September 4th meeting between tribal leaders and Babbitt went well, and Babbitt agreed that the tribal requests were reasonable. At a second meeting, on September 20th, Babbitt agreed to proceed with the development of a joint secretarial order with the Department of Commerce and to give the negotiations with tribal representatives a high priority as requested in the tribal letter.[43]

Babbitt, working closely with the Commerce Department, appointed a negotiating team. Over the next several months, four two-day negotiating sessions were held with tribal negotiators: in Boulder, Colorado, on October 23-24, 1996; in Minneapolis, Minnesota, on December 18-19, 1996; in Fairfax, Virginia, on January 8-9, 1997; and in Albuquerque, New Mexico, on January 29- 30, 1997. The main characteristics of those meetings, with respect to the extent they fulfilled a working government-to-government relationship, were as follows.

First, besides technical advisors, the federal and tribal negotiating teams included high-level representatives of acknowledged stature from federal agencies and Indian country. The lead Interior negotiators were Don Barry, Deputy Assistant Secretary for Fish, Wildlife, and Parks, and Jamie Rappaport Clark, Assistant Director for Ecological Services, USFWS.[44] Other members of the federal team were Terry Garcia, General Counsel of the National Oceanic and Atmospheric Administration (NOAA) (the parent agency of NMFS); Bob Ziobro, Fishery Biologist, NMFS; and Molly Holt, Office of General Counsel of NOAA.[45] John Leshy, Solicitor of the Department of the Interior and one of Babbitt's closest confidants, was not at the table for the federal team, but followed the negotiations and made several important rulings on legal issues. Indian leaders included Billy Frank, Jr., Chairman Ronnie Lupe, Jaime Pinkham, John Echohawk, and Terry Williams.[46]

Second, the structure and protocols of the negotiating sessions were carefully negotiated between representatives of the two teams. This was a bilateral federal-tribal effort, not a unilateral federal enterprise, despite the fact that the negotiations were aimed at a secretarial

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[43] Tribal representatives at the September 4th and 24th meetings included: Billy Frank, Jr., Northwest Indian Fisheries Commission; Ted Strong, Columbia River Intertribal Fish Commission; Pliny McCovey, Intertribal Timber Council; Delvis Heath, Confederated Tribes of the Warm Springs Reservation of Oregon; Nelson Wallulatum, Confederated Tribes of the Warm Springs Reservation of Oregon; Richard Trudell, American Indian Resources Institute; Terry Williams, Northwest Indian Fisheries Commission; John Echohawk, Native American Rights Fund; Gary Morishima, Quinault Management Center; Howard Arnett, attorney for Confederated Tribes of the Warm Springs Reservation of Oregon; and Jim Anderson, Northwest Indian Fisheries Commission. Secretary Babbitt was accompanied by Anne Shields, his Chief-of-Staff, and David Getches, Special Counsel to the Secretary.

The secretarial order procedure is not subject to federal rulemaking requirements because it sets internal policy within agencies of two departments, principally USFWS and NMFS, and does not create new law. See Secretarial Order: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, June 5, 1997, § 2(A)-(C), reproduced infra pp.1089-90 [hereinafter Secretarial Order]. See generally U.S. Dep't of the Interior, Departmental Manual, pt.12, ch. 1 (July 24, 1992) (outlining guidelines for secretarial orders).

[44] During the negotiations, Secretary Babbitt nominated Barry to fill the position of Assistant Secretary for Fish, Wildlife, and Parks, vacated by George Frampton, and put forth Clark's name for the Director of Fish and Wildlife, as a successor to the late Mollie Beattie.

[45] Representatives of the BIA and the office of Assistant Secretary of Indian Affairs Ada Deer (Mike Anderson, Gary Rankel, and Kate Vandemoer) and NMFS (Bob Turner) also attended most of the meetings. Administrative support for the meetings was provided by tribal, NMFS, and USFWS staff.

[46] Technical advisors, who also participated at various times as tribal negotiators, included Howard Arnett, Robert Brauchli, Gary Morishima, Charles O'Hara, Charles Stringer, and Charles Wilkinson.

order. The locales of the sessions were set to meet the conveniences of both sides equally. Agendas were jointly developed and drafted. Extensive protocols for the conduct of negotiating sessions were drafted and adhered to during the negotiations.[47]

Third, and critically, the negotiators recognized that the subject was thick with context, especially on the tribal side, and the negotiators would have to allow ample time for presentations on, and understanding of, the cultural, historical, and legal background. Similarly, the negotiators on both sides would have to understand the real-world problems faced by field-level federal and tribal administrators.

In response to this, at the first meeting in Boulder, the agenda set aside a two-hour block of time in the morning—one hour for the federal team and one hour for the tribes—to make introductory presentations. During this segment, Chairman Ronnie Lupe of the White Mountain Apache Tribe delivered an extemporaneous oration about the Apache world view and his tribe's philosophical web of family, community, land, and spirituality. Chairman Lupe's speech included a poignant tribute to Mollie Beattie, who died at the age of forty-nine and with whom the Chairman negotiated the Statement of Relationship at White Mountain—ultimately an agreement based on trust and mutual love for the natural world.[48] Chairman Lupe's deeply moving words set the tone for the whole process and were referred to many times during the negotiations that ensued. In addition to the scheduled presentations during the first morning of

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[47] See Ground Rules for Joint Tribal/Federal Team (Oct. 23, 1996) (copy on file with author). The Rules provide:

1. The intended products for these discussions are described in the initial (October 23-24) meeting "Objectives."
2. Discussion in joint team meetings will be conducted by team members. It is expected, however, that, at the request of a team member, other individuals may be called upon from time to time to contribute their knowledge and perspectives to make sessions more productive and successful.
3. Interested observers invited by Indian tribes, or federal agencies involved in the discussions, may attend meetings, but will be asked to make their views known through their respective team members.
4. Each team can request caucuses as needed to discuss issues.
5. Results of proceedings will be recorded via mutually agreed minutes.
6. All members will make a good faith effort to try to reach consensus on all aspects of the discussions.
7. If the participants are unable to reach consensus on a particular topic, they shall develop a mutually acceptable issue statement and of [sic] the alternative views and supporting rationales for addressing the issue. Tribal and federal teams shall jointly make a presentation of the agreements reached and of the areas of remaining disagreement to Secretary of Interior Babbitt when the personal attention of the Secretary appears advisable.
8. The parties will maintain a consolidated working draft of a Secretarial Order as discussions proceed, memorializing areas of agreement and identifying areas of disagreement. At each meeting, the participants will review the issue list and determine if agreements can be reached and identify critical issues that must be resolved in order to reach a satisfactory conclusion.
9. Agendas will be jointly developed by the tribal and federal teams.
10. Discussion team members will make a good faith effort to attend all sessions. If a team member is unable to attend a meeting, an alternate may be designated.
11. A neutral facilitator(s) may be used as mutually agreed.

Id.

[48] As far as I can tell, Chairman Lupe's speech was, unfortunately, never recorded or transcribed. On Mollie Beattie's remarkable career, see Tributes: Mollie H. Beattie (1947-1996), 21 Vt. L. Rev. 735 (1997).

the Boulder meeting, several other agenda items were designed to allow the tribal side to explain some of the many unique and varied circumstances that apply when federal laws are sought to be extended into Indian country. All of the later negotiating sessions dedicated substantial amounts of time—sometimes as scheduled formal agenda items, more often in response to particular needs at particular times—to background information about tribal experiences.

The importance of this aspect of the process cannot be overstated. The detailed education about tribal issues allowed the federal negotiators, most of whom had previously spent little time on Indian matters, to understand the true distinctiveness of Indian policy: the depth of the commitment of Indian people to preserve and protect tribal sovereignty, their homelands, the trust relationship, and Indian culture. With that foundation, the federal negotiators were able to see the tribal positions with new eyes.

Yet the wealth of information came at a cost. On one level, this Order was developed with exceptional speed—a major policy document of this sort would normally take years, not months, to wind its way through two federal cabinet- level agencies. But, on another level, the process was enormously burdensome on the federal team. The members had to put aside many of their other duties to deal with the preparation for meetings, the meetings themselves, several long conference calls, and countless individual phone calls, faxes, and e-mail messages. All of that, however, was necessary to address the complicated concepts and legions of details that had to be resolved in order to craft a fair and workable system for harmonizing the administration of a complex federal statute with special Indian rights.

One inescapable characteristic of implementing a meaningful government-to- government relationship with Indian tribes is that it requires a commitment of time by high-level government officials that exceeds the time required to make decisions in most other areas of public policy.

Fourth, the federal negotiators—all of whom came into the process thinking of themselves as administrators of the ESA and its implementing regulations— came to understand that this Secretarial Order necessarily had to encompass both Indian law and the ESA. Although the BIA is often associated with the trust relationship, officials across the federal government, in and out of the Interior Department, are charged with trust duties when special Indian rights are involved.[49] At the end of the Boulder meeting, Deputy Assistant Secretary Don Barry, referring to the objectives set out in the negotiated agenda for the session, reminded the participants that the central objective of these negotiations was to "harmonize" Indian law and the ESA.[50] Over the course of the negotiations, the meaning of this observation became much more sweeping than even Barry had appreciated, as the participants struggled to find an accommodation between two complex and often conflicting bodies of law that had never been previously examined together in the administration of federal policy. For example, when the ramifications of treaty rights and the trust relationship had been fully explored, it became apparent that the ESA should be applied differently, and in a more limited manner, with respect to consultations under Section 7 and takings under Section 9 than is the case with any other entities or persons.[51] There are numerous

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[49] See generally Felix S. Cohen, Handbook of Federal Indian Law 220-25 (Rennard Strickland et al. eds., Michie Co., 1982) (1942); Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 Utah L. Rev. 1471, 1523-35; Wood, supra note 26, at 743-44. See also id. at 749-62 (providing detailed examination of trust policies of several federal agencies); id. at 762-99 (discussing trust in ESA context).

[50] SeeGovernment-to-Government Relations to Promote Healthy Ecosystems: A Joint Tribal/Federal Effort to Develop a Secretarial Order Concerning Indian Tribes and the Endangered Species Act (ESA) (Oct. 23-24, 1996, Boulder, Colo.) (discussing "harmonizing" objective) (copy on file with author).

[51] See Secretarial Order § 5, princ. 3(C), infra p. 1095 (addressing Section 9 takings); id. app. § 3(C), p. 1104 (addressing Section 7 consultations).

other examples in the Secretarial Order. The order of the subjects listed in the title of the Secretarial Order—"American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act"—carries an important substantive message.

The final distinguishing feature of the negotiating process plainly dulled some of the impressive accomplishments. In the view of tribal participants, federal positions were unduly influenced by persons who had not been at the table and who had not had the benefit of the detailed background on Indian issues that the federal team members had received. Although the federal negotiating team had considerable autonomy, ultimately its work was not sealed off from federal officials in other agencies.

The issue arose shortly after the Boulder meeting. Tribal representatives drafted a proposed secretarial order and submitted it to the federal team. The federal team reviewed the tribal proposal and submitted its own version. In developing its proposal, the federal team circulated drafts to individuals in NMFS, USFWS, the Bureau of Land Management (BLM), the Bureau of Reclamation, the Interior Solicitor's Office, the Forest Service, and other agencies. In several cases, the federal team frankly acknowledged that provisions had been included in the draft because outside people had insisted upon them. This pattern continued throughout the negotiations as the two teams exchanged drafts and, eventually, began negotiating on a single merged draft. Tribal representatives were frustrated and angry at the continuing influence of these "shadow" figures, who, in some cases, had been longtime opponents of the recognition of tribal rights.

To the credit of the federal team and Solicitor John Leshy, these "shadow" positions were scrutinized carefully and the great majority of them were rejected—precisely because the proponents lacked the full context of the negotiations. Further, it would be unrealistic to expect that federal negotiators could be completely insulated from the many people in the bureaucracy concerned with the issues—any more than tribal negotiators could proceed without input from Indian country. Nevertheless, the tribal team had attempted to determine the scope of its authority through the tribal meetings and the development of the tribal position paper; in turn, the tribal representatives sought and expected a procedure in which an informed, high- level team—in consultation with a fully-involved Solicitor—would have broad authority and would report directly to the Secretary. The process achieved that to a significant degree but, as the next section will discuss, the final Order was influenced in a number of respects by the views of people who had little understanding of the federal-tribal relationship the Order was designed to implement.

## III. THE SECRETARIAL ORDER

The Order that resulted from the tribal-federal negotiations, rather than amounting to a victory for either side, achieved what it was designed to accomplish—a sensible harmonizing of Indian law and the ESA. At the same time, Indian tribes and federal agencies both gained a lot. If the Order is implemented as intended, management and administration by both federal and tribal officials will proceed more smoothly and effectively. The tribes will have considerably more autonomy in managing the resources of their homelands. Animal species and the ecosystems upon which they depend will benefit as well.

Structurally, the first three sections of the Order set out technical provisions and definitions. Section four summarizes the nature of tribal rights to land, tribal sovereignty, and the federal

trust responsibilities.[52] The purpose of this section is to give federal employees administering the ESA in the field notice of the special tribal rights that are an essential part of the Order. Section five sets out five principles, or directives, that, with explanatory text, form the substantive basis for the Order:

Principle 1. The Departments shall work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.

Principle 2. The Departments shall recognize that Indian lands are not subject to the same controls as federal public lands.

Principle 3. The Departments shall assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.

Principle 4. The Departments shall be sensitive to Indian culture, religion and spirituality.

Principle 5. The Departments shall make available to Indian tribes information related to tribal trust resources and Indian lands and, to facilitate the mutual exchange of information, shall strive to protect sensitive tribal information from disclosure.[53]

The text accompanying Principles One and Three calls for extensive cooperation between tribes and federal administrators, especially when tribes are adopting, amending, and implementing tribal conservation and management plans. Federal administrators and representatives from the White Mountain Apache Tribe emphasized that this cooperation has had significant positive effects and is the reason that the Statement of Relationship has worked so well at White Mountain. With tribal and federal administrators exchanging information on a regular basis, they should be able to anticipate and respond to developing problems in furtherance of the common goal of protecting species and promoting healthy ecosystems. In this context, Principle 3(B) of the Order sets out one of its central provisions, that "the Departments shall give deference to tribal conservation and management plans."[54]

The text accompanying the principles has other important provisions. Departmental employees should generally seek tribal permission before entering Indian reservations.[55] Indian lands are specifically identified as retained lands belonging to tribes and not public lands—correcting a misconception held by many federal employees.[56] If the layers of cooperation and the provision of federal support to tribes raise the possibility of an incidental take under Section 9 of the ESA, the Departments must still satisfy the "conservation standards"[57] before enforcement is sought under the ESA or under the trust responsibility.[58]

The Order also contains provisions establishing special studies, leading toward recommendations to the Secretary, on Alaska Natives[59] and on cultural and religious uses of natural products.[60] The intent is that both of these efforts will involve bilateral negotiations similar to those that resulted in the Order. The Order also encourages the use of dispute resolution processes, evidencing the negotiators' determination to resolve disputes outside of

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52 Id. § 4, p. 1091.
53 Id. § 5, p. 1092.
54 Id. § 5. princ. 3(B), p. 1095.
55 Id. § 5, princ. 1, p. 1093; see also infra text accompanying note 77.
56 See Secretarial Order § 5, princ. 2, infra p. 1094.
57 See supra note 54 and infra note 73.
58 Secretarial Order § 5, princ. 3(C), infra p. 1095.
59 Id. § 7, p. 1097. See also infra text accompanying note 70.
60 Secretarial Order § 8, infra p. 1097.

court if possible.[61]

The Order includes an appendix that sets out additional provisions. The idea of an appendix was set forth at the first negotiating session by Jamie Rappaport Clark, since appointed as USFWS Director, who wanted to be certain that the Order would contain specific, detailed instructions to aid field personnel in on-the-ground administration.[62] As the negotiations progressed, the appendix became every bit as important as the Order proper. Especially notable are sections setting out special procedures for cooperating and consulting with tribal governments during the listing process,[63] Section 7 consultations,[64] and the development of habitat conservation plans involving non-tribal entities but affecting tribes.[65] As further evidence of the concern for seeing that the Order actually be implemented on the ground, Clark emphasized that the Departments would begin an extensive training program for employees after the signing of the Order.

These government-to-government negotiations, then, resulted in several advances for the tribes. The Order recognizes the unique characteristics of tribes and tribal lands. It establishes a special place for tribes, tailored to the characteristics of tribal sovereignty and the trust duty, in all the key areas of administration of the ESA. It is also a practical document that focuses on relationships in the field between tribal and federal resource managers. The Order does not accomplish what the tribes would cherish most—a definitive statement that the ESA does not restrict tribes. However, it is neutral on the issue of ESA coverage, gives explicit deference to tribal decisions, and establishes a number of significant procedural steps and substantive requirements before federal officials can seek to apply the ESA to tribes.

While the Order is, on balance, favorable from the tribes' standpoint, there were a number of disappointments. Five issues were chief among them. First, the negotiators refused to acknowledge the duties of the affirmative trust obligation, as set forth in the important scholarship of Mary Christina Wood.[66] The affirmative trust obligation would require the federal government, as trustee, to take actions in managing federal lands and sometimes in regulating non-Indian lands to restore habitat degraded by non-Indian development.[67] The response of the federal negotiators, apparently at the behest of BLM and Bureau of Reclamation employees not at the table, was that fulfilling the affirmative trust obligation would establish a duty higher than ESA recovery standards, and that these negotiations should be limited to the context of the ESA.[68]

The federal negotiators also refused to include Alaska Native tribes in the Order. The megapolitics of Alaska, where the Ninth Circuit Court of Appeals has recently recognized Indian country for Alaska Native village governments, [69] made the issue too sensitive for inclusion in

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[61] Id. § 9, p. 1098.

[62] See Memorandum from Bruce Davies, Northwest Indian Fisheries Commission, to participants in Seattle and San Francisco Workshops on Indian Tribes and the Endangered Species Act 4-5 (Apr. 11, 1997) [hereinafter Davies Memorandum] (copy on file with author).

[63] Secretarial Order app. § 3(B), infra p. 1102.

[64] Id. app. § 3(C), p. 1104.

[65] Id. app. § 3(D), p. 1105.

[66] See Mary Christina Wood, Protecting the Attributes of Tribal Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources, 1995 Utah L. Rev. 109.

[67] Id. at 227-33.

[68] Davies Memorandum, supra note 62, at 7.

[69] Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286 (9th Cir. 1996) (holding that Alaska Native Claims Settlement Act did not extinguish Indian country in Alaska), cert. granted sub nom. Alaska v. Native Village of Venetie Tribal Gov't, 117 S.Ct. 2478 (1997).

spite of bitter protests by tribal negotiators. The Alaska situation, however, is addressed in section seven of the Order, a middle-ground position that calls for a special study, to be completed within one year, "to harmonize . . . the rights of Alaska Natives . . . and the [ESA]."[70] The study will proceed with the "full cooperation and participation of Alaska tribes and Natives."[71]

A third area of disappointment for the tribes involved the application of the "conservation principles."[72] The Order applies the principles directly to Section 9 takings,[73] but applies them only in a highly attenuated fashion with respect to Section 7 consultations.[74] In addition, the Order distinguishes "direct" from "incidental" takings and applies the conservation standards as a whole only to incidental takings.[75] In the tribes' view, comprehensive application of the conservation standards is a key to avoiding confrontations between the ESA and tribal rights.

Fourth, the Order limits special tribal rights, including the power to regulate, to "Indian lands," rather than applying the more expansive Indian country definition.[76]

A final major objection by tribes involved entry onto reservations.[77] The provision has much to commend it, generally prohibiting entry without tribal permission onto Indian reservations. The provision contains a loophole, however, allowing entry "when determined necessary for . . . law enforcement activities."[78] This was insisted upon by Justice Department attorneys not involved in the negotiations. For tribal negotiators—although the guarantee in the Order is apparently the first statement on record in favor of a requirement of tribal permission for entry by federal officials onto reservations—the qualifier smacks of a retreat to old notions current when the BIA, not tribes, was the real government in Indian country. The qualifier is not typical of the Order as a whole, but it left a bad taste in the tribal negotiators' mouths, especially, coming as it did from "shadow" negotiators not privy to the rich and extensive background that had been obtained by the federal negotiators at the table.

## IV. CONCLUSION

The two Secretaries signed the Order at a festive ceremony, attended by nearly 200 people, in the ornate, high-ceilinged Indian Treaty Room in the Old Executive Office Building. Jaime Pinkham, Chairman Ronnie Lupe, and Billy Frank, Jr., made statements on behalf of the tribes. U.S. Senator Daniel K. Inouye, longtime champion of tribal rights, offered brief remarks. Secretary William M. Daley and Secretary Bruce Babbitt offered their views. The Secretaries then signed a poster-sized ceremonial document inscribed with the title of the Order and several of its key passages. To underscore the bilateral nature of the process, Chairman Lupe and Billy

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[70] Secretarial Order § 7, infra p. 1097.
[71] Id.
[72] See supra note 57 and accompanying text.
[73] Secretarial Order § 5, princ. 3(C), infra p. 1095. The Order, however, articulates the second "conservation principle" as requiring that tribal officials show that "the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities." Id. Tribal negotiators believed the proper formulation to be that the purpose of the regulations cannot be achieved solely by regulation of non-Indians.
[74] Id.
[75] Id.
[76] "Indian lands" is defined in the Order, § 3(D), infra p. 1091. Regarding "Indian country," which includes all land—including fee lands— within reservation boundaries, see 18 U.S.C. § 1151 (1994).
[77] Secretarial Order § 5, princ. 1, infra at 1093.
[78] Id.

Frank, Jr., also affixed their signatures.

Secretary Babbitt stressed the issue of bilateralism in his remarks. He reported that he had asked his staff, in preparation for the occasion, to research the history of the Indian Treaty Room. He learned that no Indian treaty had ever actually been signed there. But the Order, he said, was "the equivalent of a treaty" because it was created out of a "mutuality" between the United States and "sovereign tribal governments." "It is my hope," he concluded, "that from this day on we will banish forever the traditional treaty process that has been one-sided, overbearing and not infrequently unfair."[79]

One secretarial order, of course, cannot eliminate two centuries of overbearing federal policy toward Indian people. Yet the Order does show that the government-to-government relationship can be admin-istered mutually, faithfully, and productively. Already, there is talk of using "the tribal rights-ESA process" to address other problem areas—not just the two study areas identified in the Order (cultural and religious uses of natural products and the relationship with Alaska Native governments), but also other difficult issues such as Indian water rights.

The idea of replicating the process, however, should include warning signals. Even in the late 1990s, most federal employees think of Indian policy as being carried out by unilateral federal actions, not by a mutual government-to- government relationship. It would be easy, in future efforts supposedly patterned after this one, to dilute the process, accomplish little, and generate anger in Indian country. So it is important to mark down the distinguishing characteristics that allowed this process to succeed.

The Order did not result from the traditional Interior Department process in which an agency, occasionally consulting with the tribes, develops a policy on some Indian issue and then works a proposal up through the departmental approval system for the signature of the Secretary or some other senior official.

Instead, the Secretary himself initiated this process. The tribes had been hard at work on the issue for more than a year, but the essential quality of bilateralism did not exist until September 1996, when the Secretary met with tribal representatives and ordered his staff to negotiate with a tribal team.[80]

Babbitt's directives encompassed more than bilateral negotiations. He gave the project the highest priority, urging that talks begin within one month and that a negotiated secretarial order be put on his desk no later than early January 1997.[81] Babbitt's request that any disagreements between the federal and tribal teams be submitted to him for mediation underscored that this was a secretarial-level enterprise. The final critical element of the process, the appointment of high-level departmental officials to the federal team, assured that the process would carry weight in the Interior and Commerce agencies—where opposition inevitably develops for any proposal that recognizes substantial tribal rights.

The bilateralism was carried through the negotiating process where the two teams, as equals, developed protocols, set meeting dates, negotiated, developed working drafts, and eventually

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[79] Remarks of Bruce Babbitt, Washington, D.C. (June 5, 1997); see also Scott Sonner, Feds Defer to Tribes on Species Act, America Online News (June 5, 1997).

[80] See supra text accompanying note 43.

[81] In fact, although the Order was signed in June 1997, it was completed, except for minor word changes, in February, and the process was given top priority by all participants from beginning to end.

agreed upon a final Secretarial Order. As noted, the tribes found warts in the process, most notably the influence of "shadow" negotiators not at the table. This is a difficult issue that was not anticipated (although it should have been) by Secretary Babbitt or either team at the beginning of the negotiations. Otherwise, all of the previously discussed elements of bilateralism were followed faithfully in the development of the Order.

Strong headwinds will have to be faced if this approach is to be followed in the future. The role of federal officials not at the table will have to be resolved satisfactorily. Even more fundamentally, an Interior Secretary (and often, as here, secretaries from other departments) must have the will to give the issue in question a high priority, as Babbitt did. And the negotiators must be willing to make a major time commitment to the process. Although the time period usually will not be as short as it was for this Order, bilateralism of this kind will always be taxing on the participants.

One of the perpetual obstacles to implementing the trust and the government- to-government relationship successfully was capsulized in a recent discussion I had with an experienced, conscientious, and able official of USFWS. He is a strong advocate for wildlife protection and has no agenda against Indians. He had seen the final Order, and we discussed it. At the end of the conversation, he said, "Well, I'll abide by it but I can't be expected to carry out Indian policy. My job is to administer the Endangered Species Act."[82] For him, implicitly, Indian policy is cabined and subordinate.

He would not have made that comment if he had served on the negotiating team and had engaged in the long discussions about how the trust does bind federal officials when they deal with tribes—and how ultimately the Interior Department, including USFWS, must harmonize Indian law and the ESA. Nor, since I believe that USFWS will put on quality training sessions in the implementation of the Act, would he be likely to make such a statement after going through the training program. Yet inevitably, both in this tribal rights- ESA process and in others that may follow, people not at the table will try to influence the process and people without the necessary background will be called upon to carry out policy at the junctions of Indian law and other laws. Achieving true bilateralism will be a continuing challenge.

Still, I hope that conscientious people will go down this path in the future. The Order is no dramatic breakthrough, no Olympian moment in federal Indian policy. It is just a sensible, fair approach to a thorny area of policy developed by people who took the time to listen, negotiate, open up their minds, and take some chances. But, in a complicated world, this is exactly where progress is often made—in measured, collaborative approaches to particular problems. And the worth of the process stands out in sharp relief because it was set against the long and mostly dreary canvas of federal-tribal relations. The pageantry in the Indian Treaty Room did not commemorate some epic event, but it did rightly celebrate a solid accomplishment that holds out promise for those who believe that an honest, open, and hardworking mutuality ought to serve as the foundation for Indian policy.

**SECRETARIAL ORDER**

**Subject: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act**

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[82] Conversation with USFWS official, in Washington, D.C. (Mar. 11, 1997).

**Sec. 1. Purpose and Authority.**

This Order is issued by the Secretary of the Interior and the Secretary of Commerce (Secretaries) pursuant to the Endangered Species Act of 1973, 16 U.S.C. § 1531, as amended (the Act), the federal-tribal trust relationship, and other federal law. Specifically, this Order clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce (Departments), when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in this Order. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

**Sec. 2. Scope and Limitations.**

(A) This Order is for guidance within the Departments only and is adopted pursuant to, and is consistent with, existing law.

(B) This Order shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Order be construed to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(C) This Order does not preempt or modify the Departments' statutory authorities or the authorities of Indian tribes or the states.

(D) Nothing in this Order shall be applied to authorize direct (directed) take of listed species, or any activity that would jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Incidental take issues under this Order are addressed in Principle 3(C) of Section 5.

(E) Nothing in this Order shall require additional procedural requirements for substantially completed Departmental actions, activities, or policy initiatives.

(F) Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

(G) Should any tribe(s) and the Department(s) agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

(H) This Order shall not be construed to supersede, amend, or otherwise modify or affect the implementation of, existing agreements or understandings with the Departments or their agencies, bureaus, or offices including, but not limited to, memoranda of understanding, memoranda of agreement, or statements of relationship, unless mutually agreed by the signatory parties.

**Sec. 3. Definitions.**

For the purposes of this Order, except as otherwise expressly provided, the following terms shall apply:

(A) The term "Indian tribe" shall mean any Indian tribe, band, nation, pueblo, community or other organized group within the United States which the Secretary of the Interior has identified on the most current list of tribes maintained by the Bureau of Indian Affairs.

(B) The term "tribal trust resources" means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

(C) The term "tribal rights" means those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

(D) The term "Indian lands" means any lands title to which is either: (1) held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

**Sec. 4. Background.**

The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the federal government. This relationship has given rise to a special federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long- standing Congressional and Administrative policies promote tribal self- government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities. The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources. The Departments shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to- government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

**Sec. 5. Responsibilities.**

To achieve the objectives of this Order, the heads of all agencies, bureaus and offices within the Department of the Interior, and the Administrator of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce, shall be responsible for ensuring that the following directives are followed:

**Principle 1.** THE DEPARTMENTS SHALL WORK DIRECTLY WITH INDIAN TRIBES ON A GOVERNMENT-TO-GOVERNMENT BASIS TO PROMOTE HEALTHY ECOSYSTEMS.

The Departments shall recognize the unique and distinctive political and constitutionally based relationship that exists between the United States and each Indian tribe, and shall view tribal governments as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources. Accordingly, the Departments shall seek to establish effective government-to-government working relationships with tribes to achieve the common goal of promoting and protecting the health of these ecosystems. Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable. This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes. To facilitate the government-to-government relationship, the Departments may coordinate their discussions with a representative from an intertribal organization, if so designated by the affected tribe(s).

Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials. If a tribe believes this section has been violated, such tribe may file a complaint with the appropriate Secretary, who shall promptly investigate and respond to the tribe.

**Principle 2.** THE DEPARTMENTS SHALL RECOGNIZE THAT INDIAN LANDS ARE NOT SUBJECT TO THE SAME CONTROLS AS FEDERAL PUBLIC LANDS.

The Departments recognize that Indian lands, whether held in trust by the United States for the use and benefit of Indians or owned exclusively by an Indian tribe, are not subject to the

controls or restrictions set forth in federal public land laws. Indian lands are not federal public lands or part of the public domain, but are rather retained by tribes or set aside for tribal use pursuant to treaties, statutes, court orders, executive orders, judicial decisions, or agreements. Accordingly, Indian tribes manage Indian lands in accordance with tribal goals and objectives, within the framework of applicable laws.

**Principle 3.** THE DEPARTMENTS SHALL ASSIST INDIAN TRIBES IN DEVELOPING AND EXPANDING TRIBAL PROGRAMS SO THAT HEALTHY ECOSYSTEMS ARE PROMOTED AND CON- SERVATION RESTRICTIONS ARE UNNECESSARY.

**(A) The Departments shall take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems.**

The Departments shall take affirmative steps to achieve the common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government relationships under this Order, by assisting Indian tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species (including candidate, proposed and listed species) depend.

The Departments shall offer and provide such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the ecosystems upon which sensitive species (including candidate, proposed, and listed species) depend, including the cooperative identification of appropriate management measures to address concerns for such species and their habitats.

**(B) The Departments shall recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources.**

The Departments acknowledge that Indian tribes value, and exercise responsibilities for, management of Indian lands and tribal trust resources. In keeping with the federal policy of promoting tribal self-government, the Departments shall respect the exercise of tribal sovereignty over the management of Indian lands, and tribal trust resources. Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for the purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species. The Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species.

**(C) The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions.**

At the earliest indication that the need for federal conservation restrictions is being considered for any species, the Departments, acting in their trustee capacities, shall promptly notify all potentially affected tribes, and provide such technical, financial, or other assistance as may be appropriate, thereby assisting Indian tribes in identifying and implementing tribal conservation and other measures necessary to protect such species.

In the event that the Departments determine that conservation restrictions are necessary in order to protect listed species, the Departments, in keeping with the trust responsibility and

government-to-government relationships, shall consult with affected tribes and provide written notice to them of the intended restriction as far in advance as practicable. If the proposed conservation restriction is directed at a tribal activity that could raise the potential issue of direct (directed) take under the Act, then meaningful government-to- government consultation shall occur, in order to strive to harmonize the federal trust responsibility to tribes, tribal sovereignty and the statutory missions of the Departments. In cases involving an activity that could raise the potential issue of an incidental take under the Act, such notice shall include an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non- Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

**Principle 4.** THE DEPARTMENTS SHALL BE SENSITIVE TO INDIAN CULTURE, RELIGION AND SPIRITUALITY.

The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The Departments shall avoid or minimize, to the extent practicable, adverse effects upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes. When appropriate, the Departments may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act.

**Principle 5.** THE DEPARTMENTS SHALL MAKE AVAILABLE TO INDIAN TRIBES INFORMATION RELATED TO TRIBAL TRUST RESOURCES AND INDIAN LANDS, AND, TO FACILITATE THE MUTUAL EXCHANGE OF INFORMATION, SHALL STRIVE TO PROTECT SENSITIVE TRIBAL INFORMATION FROM DIS-CLOSURE.

To further tribal self-government and the promotion of healthy ecosystems, the Departments recognize the critical need for Indian tribes to possess complete and accurate information related to Indian lands and tribal trust resources. To the extent consistent with the provisions of the Privacy Act, the Freedom of Information Act (FOIA) and the Departments' abilities to continue to assert FOIA exemptions with regard to FOIA requests, the Departments shall make available to an Indian tribe all information held by the Departments which is related to its Indian lands and tribal trust resources. In the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments. The Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act.

**Sec. 6. Federal-Tribal Intergovernmental Agreements.**

The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments' missions under the Act with the Indian tribe's own ecosystem management objectives.

**Sec. 7. Alaska.**

The Departments recognize that section 10(e) of the Act governs the taking of listed species by Alaska Natives for subsistence purposes and that there is a need to study the implementation of the Act as applied to Alaska tribes and natives. Accordingly, this Order shall not apply to Alaska and the Departments shall, within one year of the date of this Order, develop recommendations to the Secretaries to supplement or modify this Order and its Appendix, so as to guide the administration of the Act in Alaska. These recommendations shall be developed with the full cooperation and participation of Alaska tribes and natives. The purpose of these recommendations shall be to harmonize the government-to-government relationship with Alaska tribes, the federal trust responsibility to Alaska tribes and Alaska Natives, the rights of Alaska Natives, and the statutory missions of the Departments.

**Sec. 8. Special Study on Cultural and Religious Use of Natural Products.**

The Departments recognize that there remain tribal concerns regarding the access to, and uses of, eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes. Therefore, the Departments shall work together with Indian tribes to develop recommendations to the Secretaries within one year to revise or establish uniform administrative procedures to govern the possession, distribution, and transportation of such natural products that are under federal jurisdiction or control.

**Sec. 9. Dispute Resolution.**

(A) Federal-tribal disputes regarding implementation of this Order shall be addressed through government-to-government discourse. Such discourse is to be respectful of government-to-government relationships and relevant federal- tribal agreements, treaties, judicial decisions, and policies pertaining to Indian tribes. Alternative dispute resolution processes may be employed as necessary to resolve disputes on technical or policy issues within statutory time frames; provided that such alternative dispute resolution processes are not intended to apply in the context of investigative or prosecutorial law enforcement activities.

(B) Questions and concerns on matters relating to the use or possession of listed plants or listed animal parts used for religious or cultural purposes shall be referred to the appropriate Departmental officials and the appropriate tribal contacts for religious and cultural affairs.

**Sec. 10. Implementation.**

This Order shall be implemented by all agencies, bureaus, and offices of the Departments, as applicable. In addition, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service shall implement their specific responsibilities under the Act in accordance with the guidance contained in the attached Appendix.

**Sec. 11. Effective Date.**

This Order, issued within the Department of the Interior as Order No. 3206, is effective immediately and will remain in effect until amended, superseded, or revoked.

This Secretarial Order, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," and its accompanying Appendix were issued this 5th day of June, 1997, in Washington, D.C., by the Secretary of the Interior and the Secretary

of Commerce.

Bruce Babbitt
Secretary of the Interior

William M. Daley
Secretary of Commerce

Date: June 5, 1997

## APPENDIX

*Appendix to Secretarial Order issued within the Department of the Interior as Order No. 3206*

**Sec. 1. Purpose.**

The purpose of this Appendix is to provide policy to the National, regional and field offices of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), (hereinafter "Services"), concerning the implementation of the Secretarial Order issued by the Department of the Interior and the Department of Commerce, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." This policy furthers the objectives of the FWS Native American Policy (June 28, 1994), and the American Indian and Alaska Native Policy of the Department of Commerce (March 30, 1995). This Appendix shall be considered an integral part of the above Secretarial Order, and all sections of the Order shall apply in their entirety to this Appendix.

**Sec. 2. General Policy.**

**(A) Goals.** The goals of this Appendix are to provide a basis for administration of the Act in a manner that (1) recognizes common federal-tribal goals of conserving sensitive species (including candidate, proposed, and listed species) and the ecosystems upon which they depend, Indian self- government, and productive government-to-government relationships; and (2) harmonizes the federal trust responsibility to tribes, tribal sovereignty, and the statutory missions of the Departments, so as to avoid or minimize the potential for conflict and confrontation.

**(B) Government-to-Government Communication.** It shall be the responsibility of each Service's regional and field offices to maintain a current list of tribal contact persons within each Region, and to ensure that meaningful government-to-government communication occurs regarding actions to be taken under the Act.

**(C) Agency Coordination.** The Services have the lead roles and responsibilities in administering the Act, while the Services and other federal agencies share responsibilities for honoring Indian treaties and other sources of tribal rights. The Bureau of Indian Affairs (BIA) has the primary responsibility for carrying out the federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultations under the Act. Accordingly, the Services shall consult, as appropriate, with each other, affected Indian tribes, the BIA, the Office of the Solicitor (Interior), the Office of American Indian Trust (Interior), and the NOAA Office of General Counsel in determining how the fiduciary responsibility of the federal government to Indian tribes may best be realized.

**(D) Technical Assistance.** In their roles as trustees, the Services shall offer and provide technical assistance and information for the development of tribal conservation and management plans to promote the maintenance, restoration, and enhancement of the ecosystems on which sensitive species (including candidate, proposed, and listed species) depend. The Services should be creative in working with the tribes to accomplish these objectives. Such technical assistance may include the cooperative identification of appropriate management measures to address concerns for sensitive species (including candidate, proposed and listed species) and their habitats. Such cooperation may include intergovernmental agreements to enable Indian tribes to more fully participate in conservation programs under the Act. Moreover, the Services may enter

into conservation easements with tribal governments and enlist tribal participation in incentive programs.

**(E) Tribal Conservation Measures.** The Services shall, upon the request of an Indian tribe or the BIA, cooperatively review and assess tribal conservation measures for sensitive species (including candidate, proposed and listed species) which may be included in tribal resource management plans. The Services will communicate to the tribal government their desired conservation goals and objectives, as well as any technical advice or suggestions for the modification of the plan to enhance its benefits for the conservation of sensitive species (including candidate, proposed and listed species). In keeping with the Services' initiatives to promote voluntary conservation partnerships for listed species and the ecosystems upon which they depend, the Services shall consult on a government-to-government basis with the affected tribe to determine and provide appropriate assurances that would otherwise be provided to a non-Indian.

**Sec. 3. <u>The Federal Trust Responsibility and the Administration of the Act</u>.**

The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities and encourage meaningful tribal participation in the following programs under the Act, and shall:

**(A) Candidate Conservation.**

(1) Solicit and utilize the expertise of affected Indian tribes in evaluating which animal and plant species should be included on the list of candidate species, including conducting population status inventories and geographical distribution surveys;

(2) Solicit and utilize the expertise of affected Indian tribes when designing and implementing candidate conservation actions to remove or alleviate threats so that the species' listing priority is reduced or listing as endangered or threatened is rendered unnecessary; and

(3) Provide technical advice and information to support tribal efforts and facilitate voluntary tribal participation in implementation measures to conserve candidate species on Indian lands.

**(B) The Listing Process.**

(1) Provide affected Indian tribes with timely notification of the receipt of petitions to list species, the listing of which could affect the exercise of tribal rights or the use of tribal trust resources. In addition, the Services shall solicit and utilize the expertise of affected Indian tribes in responding to listing petitions that may affect tribal trust resources or the exercise of tribal rights.

(2) Recognize the right of Indian tribes to participate fully in the listing process by providing timely notification to, soliciting information and comments from, and utilizing the expertise of, Indian tribes whose exercise of tribal rights or tribal trust resources could be affected by a particular listing. This process shall apply to proposed and final rules to: (i) list species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; and (v) designate experimental populations.

(3) Recognize the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights. The Services shall notify affected Indian tribes and the BIA, and solicit information on, but not limited to, tribal cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development, for use in: (i) the preparation of economic analyses involving impacts on tribal communities; and (ii) the preparation of "balancing tests" to determine appropriate exclusions from critical habitat and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.

(4) In keeping with the trust responsibility, shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

(5) When exercising regulatory authority for threatened species under section 4(d) of the Act, avoid or minimize effects on tribal management or economic development, or the exercise of reserved Indian fishing, hunting, gathering, or other rights, to the maximum extent allowed by law.

(6) Having first provided the affected Indian tribe(s) the opportunity to actively review and comment on proposed listing actions, provide affected Indian tribe(s) with a written explanation whenever a final decision on any of the following activities conflicts with comments provided by an affected Indian tribe: (i) list a species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; or (v) designate experimental populations. If an affected Indian tribe petitions for rulemaking under Section 4(b)(3), the Services will consult with and provide a written explanation to the affected tribe if they fail to adopt the requested regulation.

**(C) ESA § 7 Consultation.**

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

(2) Provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.

(3)(a) When the Services enter formal consultation on an action proposed by the BIA, the Services shall consider and treat affected tribes as license or permit applicants entitled to full participation in the consultation process. This shall include, but is not limited to, invitations to meetings between the Services and the BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinions. In keeping with the trust responsibility, tribal conservation and management

plans for tribal trust resources that govern activities on Indian lands, including for purposes of this paragraph, tribally- owned fee lands, shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable.

(b) When the Services enter into formal consultations with an Interior Department agency other than the BIA, or an agency of the Department of Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process.

(c) When the Services enter into formal consultations with agencies not in the Departments of the Interior or Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process.

(d) In developing reasonable and prudent alternatives, the Services shall give full consideration to all comments and information received from any affected tribe, and shall strive to ensure that any alternative selected does not discriminate against such tribe(s). The Services shall make a written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.

**(D) Habitat Conservation Planning.**

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected tribal governments in habitat conservation planning that may affect tribal trust resources or the exercise of tribal rights. The Services shall facilitate tribal participation by providing timely notification as soon as the Services are aware that a draft Habitat Conservation Plan (HCP) may affect such resources or the exercise of such rights.

(2) Encourage HCP applicants to recognize the benefits of working cooperatively with affected Indian tribes and advocate for tribal participation in the development of HCPs. In those instances where permit applicants choose not to invite affected tribes to participate in those negotiations, the Services shall consult with the affected tribes to evaluate the effects of the proposed HCP on tribal trust resources and will provide the information resulting from such consultation to the HCP applicant prior to the submission of the draft HCP for public comment. After consultation with the tribes and the non-federal landowner and after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility.

(3) Advocate the incorporation of measures into HCPs that will restore or enhance tribal trust resources. The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources. The Services shall be cognizant of the impacts of measures incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources.

(4) Advocate and encourage early participation by affected tribal governments in the development of region-wide or state-wide habitat conservation planning efforts and in the development of any related implementation documents.

**(E) Recovery.**

(1) Solicit and utilize the expertise of affected Indian tribes by having tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian lands (including tribally-owned fee lands), affects tribal trust resources, or affects the exercise of tribal rights.

(2) In recognition of tribal rights, cooperate with affected tribes to develop and implement Recovery Plans in a manner that minimizes the social, cultural and economic impacts on tribal communities, consistent with the timely recovery of listed species. The Services shall be cognizant of tribal desires to attain population levels and conditions that are sufficient to support the meaningful exercise of reserved rights and the protection of tribal management or development prerogatives for Indian resources.

(3) Invite affected Indian tribes, or their designated representatives, to participate in the Recovery Plan implementation process through the development of a participation plan and through tribally-designated membership on recovery teams. The Services shall work cooperatively with affected Indian tribes to identify and implement the most effective measures to speed the recovery process.

(4) Solicit and utilize the expertise of affected Indian tribes in the design of monitoring programs for listed species and for species which have been removed from the list of Endangered and Threatened Wildlife and Plants occurring on Indian lands or affecting the exercise of tribal rights or tribal trust resources.

**(F) Law Enforcement.**

(1) At the request of an Indian tribe, enter into cooperative law enforcement agreements as integral components of tribal, federal, and state efforts to conserve species and the ecosystems upon which they depend. Such agreements may include the delegation of enforcement authority under the Act, within limitations, to full-time tribal conservation law enforcement officers.

(2) Cooperate with Indian tribes in enforcement of the Act by identifying opportunities for joint enforcement operations or investigations. Discuss new techniques and methods for the detection and apprehension of violators of the Act or tribal conservation laws, and exchange law enforcement information in general.

**Testimony of Steve Wright**

**Senate Indian Affairs Committee Hearing on**
**The Impacts on Tribal Fish and Wildlife Management Programs**
**In the Pacific Northwest**
**June 4, 2003**

Mr. Chairman, and Members of the Committee. My name is Steve Wright. I am the Administrator of the Bonneville Power Administration (BPA). It is a pleasure to appear before you today to discuss the impacts on tribal fish and wildlife management in the Pacific Northwest.

BPA is a federal agency, under the U.S. Department of Energy, that markets wholesale electrical power and operates and markets transmission services in the Pacific Northwest. The power comes primarily from 31 hydro projects and one nonfederal nuclear plant. About 45 percent of the electric power used in the Northwest comes from BPA. BPA's transmission system accounts for about three-quarters of the region's high voltage grid.

BPA is a self-funding agency, paid for through power and transmission sales. As required by Federal statue, both power and transmission are sold at cost and BPA repays any borrowing from the U.S. Treasury with interest.

BPA's revenues can fluctuate widely with water and power market conditions. Ninety percent of our resources are hydropower, and snowpack and spring runoff each year are highly variable. Since electricity deregulation, the volatility of market prices for power has also contributed to the unpredictability of BPA's revenues. Despite these fluctuations and other financial challenges, BPA has consistently met our fish and wildlife obligations.

The revenues BPA earns help it to fulfill public responsibilities that include low-cost and reliable power and investments in energy conservation and renewable resources. One of BPA's responsibilities is to fund the region's efforts to protect and recover fish and wildlife populations affected by hydro development in the Columbia River Basin. This work has provided the foundation for an invaluable partnership with Pacific Northwest Tribes that has spanned over two decades. I want to assure you that BPA is fully committed to continuing this important relationship.

At an annual estimated cost exceeding $600 million (including about $175 million in annual direct program support, about $58 million in BPA funding of reimbursable power expenditures by other federal agencies and funding of the Power Council, about $90 million in BPA expenses to repay prior capital investments and about $303 million for power system modifications and purchases of replacement energy), BPA believes its effort to preserve salmon and other fish and wildlife species is among the largest and most notable environmental mitigation programs in the nation. According to the Northwest Power Planning Council (Council), BPA has spent more than $6 billion on fish and wildlife recovery since 1978. Almost 1000 average megawatts (aMW) of the

Federal Columbia River Power System's (FCRPS) roughly 9000 aMW capability is dedicated to fish operations, leaving about 8,000 aMW capability to be marketed.

What is of primary importance, though, is that we are focused on – and we are achieving – real results. Today I would like to start off my testimony by discussing the results and the progress BPA has made to date in fish and wildlife and our performance-based approach. Next, I'll talk about our legal obligations to fish and wildlife and how we implement them. I will highlight some of the many accomplishments that we have achieved in collaboration with tribal resource program managers. Finally, I will talk about BPA's efforts to provide budget certainty and stability – independent of our current financial difficulties and the continual unpredictability of our revenues.

**Fish and Wildlife Recovery Progress to Date**

Despite drought conditions in 2001, dry conditions at the start of this year, and BPA's poor financial circumstances, the Northwest Region of the National Oceanic and Atmospheric Administration ("NOAA Fisheries") recently verified that we are fully implementing over 95 percent of the measures called for in NOAA Fisheries' 2000 Biological Opinion (BiOp). These Endangered Species Act (ESA) actions are also helping to fulfill our responsibilities under the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) to protect and enhance fish and wildlife affected by the FCRPS.

As underscored by NOAA Fisheries, the steps BPA has taken over the last decade have significantly improved juvenile fish survival through the federal hydro system. Today, according to NOAA Fisheries data, young fish survive their trip downriver at roughly the same rates as the 1960s, when fewer dams were in place.

These improved survival rates through the dams and reservoirs are not the only gauge of performance. We are also seeing rebounds in the numbers of returning adult fish throughout the Columbia River Basin. For example, in 2001, the upriver Spring Chinook salmon return of 405,500 fish, counted by the Washington Department of Fish Wildlife at Bonneville Dam, was the largest return on record (since 1938). A total of 172,000 fish were counted by the Washington Department of Fish and Wildlife as having made it past Lower Granite Dam on the Snake River. For the first time in many years there were enough surplus fish to allow full-scale commercial fisheries on this stock. Returns for other stocks have seen similar results. Upriver steelhead saw record returns of nearly 640,000 salmon. Generally good to excellent returns and spawning have continued for most stocks in 2002 and so far in 2003.

Some of this recent good news is attributable to favorable ocean conditions, which are cyclic. However, we believe that it also reflects the combined benefits of our efforts to improve juvenile fish survival, habitat, hatchery management, and harvest control. We see these strong returns as indicators that we are on the right long-term path with our salmon recovery program.

That long-term path emphasizes performance rather than budgets. Earlier efforts, rather than targeting and measuring biological performance, merely specified actions. Starting with the NOAA Fisheries' and the U.S. Fish & Wildlife Services' (FWS) 2000 Biological Opinions (BiOps) we have instituted a performance-based, least-cost approach. The transition to performance standards as the measure of fish enhancement has been difficult at times. BPA has taken a leadership role in showing that it is not how much money we spend that is the gauge of our success – rather, the appropriate measure of performance is the results we have to show. In the words of the Northwest Power Act [Section 4(h)(6)(C)], the Council's Fish and Wildlife Program seeks to "utilize, where equally effective alternative means of achieving the same sound biological objective exist, the alternative with the minimum economic cost . . .." Under this approach, we are using a biological yardstick, while still keeping our eye on costs.

**Implementation of BPA's Fish and Wildlife Responsibilities**

As a foundation for discussing BPA's approach to project funding, I would like to first talk about our legal obligations.

**The Northwest Power Act:** Section 4(h)(10)(A) of the Northwest Power Act is the cornerstone of BPA's fish and wildlife responsibilities under this law. It provides that BPA shall protect, mitigate and enhance fish and wildlife to the extent affected by the development and operation of the FCRPS in a manner consistent with the Council's Fish and Wildlife Program and the purposes of the Act.

BPA mitigation under the Act must also be consistent with the other purposes of the Act, such as the purpose to ". . .assure the Pacific Northwest of an adequate, efficient, economical and reliable power supply. . ." while keeping rates to consumers as low as possible ". . .consistent with sound business principles."

The Northwest Power Act includes a duty for Federal agencies that manage, operate, or regulate hydroelectric facilities in the Basin to provide "equitable treatment" for fish and wildlife with the other purposes for which the hydro facilities are managed and operated. BPA's Record of Decision implementing BPA's portion of the 1995 NMFS Biological Opinion for FCRPS operations put fish second only to flood control (and above those for power generation, with limited exceptions during emergency situations) in the priority of how the dams are to be operated.

Finally, Section 4(h)(11)(B) calls upon the Administrator to consult with federal, state, and tribal fish managers in carrying out the provisions of the Act.

**Endangered Species Act:** ESA essentially requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of listed species or their habitat. It also proscribes take of listed species, unless such take is consistent with an incidental take statement or permit issued by NOAA Fisheries or the US Fish and Wildlife Service (FWS), or is otherwise exempt from take.

According to regulations issued by NOAA and FWS, "jeopardize" means "to reduce appreciably the likelihood of both the survival and recovery" of listed species. The 2000 Biological Opinions of NOAA Fisheries and FWS advised the managers of the Federal Columbia River Power System (FCRPS) how to avoid jeopardy. BPA documented its decision to implement the biological opinions in one- and five-year implementation plans and possibly subsequent consultations. The decision document also responded to the essential fish habitat conservation recommendations by NOAA Fisheries. It also recorded BPA's intent to implement the biological opinions consistent with treaties, executive orders, and other Federal laws recognizing Native American Indian Tribes and the federal government's trust and treaty responsibilities to Tribes.

**BPA's Trust Responsibility:** As a government-entity BPA shares a recognition of an undisputed existence of a general trust relationship between the United States and the Tribes. Agencies and tribes implement this trust relationship in accordance with the requirements that Congress and the Executive Branch give to agencies through statutes or executive orders. For BPA, the applicable statutes include the Northwest Power Act, ESA, National Historic Preservation Act, and the National Environmental Policy Act (NEPA).

The 1855 Stevens-Palmer treaties with Basin tribes are especially important sources of authority upon which the trust responsibility is based. With these treaties the tribes reserved the right to fish for up to half the harvestable surplus of salmon and steelhead at usual and accustomed fishing sites. The treaties also established the basis for the tribes being co-managers along with state and federal resource management agencies.

**Project Selection Process:** BPA endorses and implements a regionally developed, collaborative and unified approach for project selection and funding that fully integrates Council Program measures with those of the FCRPS BiOps, in a manner that is scientifically and financially credible and robust.

BPA's obligations under the Northwest Power Act and the ESA overlap extensively. (See attached, Chart 1.) The Council has found that "[a]lthough Bonneville has fish and wildlife responsibilities under both the [ESA] and the Northwest Power Act, in many cases, both responsibilities can be met in the same set of actions." The Council's Provincial Review Process provides a mechanism for integrating activities under the existing Fish and Wildlife Program with the measures focusing on the needs of ESA-listed fish stocks identified in the BiOps. BPA is also relying on the Council's sub-basin planning initiative to further integrate the needs identified through recovery planning and implementation of the FCRPS biological opinions with those of the Council's Fish and Wildlife Program. We refer to this combined effort as the Integrated Program.

BPA anticipates that requests for project implementation funding in support of the Integrated Program will continue to exceed the level of available program funds. Because of this, BPA reviews and prioritizes projects – including those that implement ESA requirements – in partnership with the Council and the region's tribal, state, and

federal fish and wildlife managers. We focus funding on those projects that provide the greatest biological benefit at the lowest cost. The tribes are involved throughout.

Chart 2 (attached) outlines the Council's Provincial Review Process. It starts with a joint BPA/Council Request for Proposals for fish and wildlife protection, mitigation, and recovery. After the proposals are received, the Columbia Basin Fish and Wildlife Authority (CBFWA), an organization of state and tribal fish and wildlife managers reviews and prioritizes the projects for technical and management merit. Then, an Independent Scientific Review Panel (ISRP) authorized by the Northwest Power Act reviews the proposals and recommends those that meet scientific and biological objectives for the program. The Council reviews the list and makes its recommendations to BPA for funding.

BPA reviews the final Council list and sends its decision letter to the Council identifying the list of projects that it will fund. Through careful work with the Council over the years, we have reached the point where there is significant alignment on the projects the Council recommends and those that BPA ultimately decides to fund in each of the geographic Provinces.

**Tribal Partnerships and Programs**

Chart 3 (attached) shows how, from 1978 through 2003, BPA provided generally increasing funding for a nearly $1.5 billion program of support the implementation of fish and wildlife projects by Federal, state and Tribal governments and others. Of that amount, nearly $426 million supported the implementation of fish and wildlife projects by Tribal government with $219 million, or 51 percent of total funding during the four-year period from 2000 through 2003.

Following are some of the highlights of recent fish and wildlife projects funded by BPA and operated by the Tribes:

- In the Albeni Falls area, the Kalispel Tribe, the Coeur d'Alene Tribe, and the Kootenai Tribe of Idaho have worked with federal, state and non-profit agencies to provide protection for approximately 5,987 acres of wildlife habitat, representing approximately 15 percent of the total wildlife habitat lost to the Albeni Falls project. To date, BPA has funded about $10 million in land purchases and mitigation.

- The Cle Elum Supplementation and Research Facility began operations in 1997 under the co-management of the Yakima Nation and the State of Washington. BPA invested $37 million in construction of the facility, and funds operations and maintenance at a level of $2.5 million per year. The facility was built to enhance production of spring Chinook and re-introduce stocks formerly present in the Yakima basin. Since then, the spring Chinook return jumped from 2,500 per year to greater than 15,000 per year since 2000, with over 23,000 spring Chinook estimated to have returned in 2001.

- The Nez Perce Tribal Hatchery, dedicated in 2002, is designed to help restore naturally reproducing populations of spring and fall Chinook salmon in the Clearwater River basin. The hatchery will help preserve the genetic integrity of these fish populations and in the long term, establish harvest opportunities for Tribal and non-Tribal anglers. Several innovative rearing techniques are used to encourage the hatchery-reared fish to behave like wild fish.

BPA's historic support of tribal programs in support of our ESA and Northwest Power Act requirements reflects the agency's recognition and endorsement of the unique status of tribes in the region as sovereign governments, and of their crucial role as managers of the natural and cultural resources on reservation lands, in the ceded areas, and at usual and accustomed sites. The expertise and experience of tribal program and policy staff, and the insight of elected leaders and tribal elders, have greatly improved the content of program measures and enhanced the quality and level of performance of the region's fish and wildlife mitigation projects.

In many respects, too, BPA's mitigation investments have helped build the capacity within tribal communities to engage in meaningful mitigation initiatives. Through contracting with tribes, BPA investments have strengthened tribal resource programs, provided employment opportunities for tribal members and others and expanded the economic base of reservation communities – while improved fish runs have provided greater harvest opportunities. Through the Council processes, the tribes have been provided means to voice their concerns about federal fish and wildlife management in the Columbia River Basin. Oversight forums such as the Fish Passage Center give tribes another voice in hydro system operations.

**Budget Stability for the Fish and Wildlife Program**

**The Effect of the West Coast Energy Crisis:** Beginning with the West Coast energy crisis in 2000-2001, BPA has been managing through a very difficult financial situation. When the West Coast encountered a power shortage, historic sources of power from California and Canada were unavailable, market prices for electricity soared to unprecedented levels, and the Northwest was hit with severe drought, the hydro system was stretched beyond its limits. BPA declared a power system emergency, as provided for under the NOAA Fisheries'2000 BiOp, reducing hydro system mitigation activities in order to preserve electric system reliability.

BPA developed a policy to offset adverse impacts to fish that may have otherwise resulted, and we did not reduce our expenditures to implement the Council's Fish and Wildlife Program. Our efforts included load reductions through buy-downs, saving 500,000 acre-feet of water in-stream through irrigation programs, achieving region-wide energy conservation measures, funding a greater catch of northern pike minnow to reduce predation, and funding 20 additional habitat projects aimed at helping fish affected by the

power emergency. At the same time, we met our obligations to provide electric energy to customers, but to do so we were forced to incur over $1.5 billion in costs for 2001 fish operations-about $115 million in foregone revenues and the balance in replacement power costs.

The combination of BPA's efforts to acquire power and reduce load and the types of mitigation we implemented enabled the Pacific Northwest to avoid blackouts and escape many of the problems that befell California—while still maintaining substantial fish and wildlife benefits. I believe this is exactly the balance the Northwest Power Act asked of BPA when it included, on the one hand, protecting, mitigating, and enhancing fish and wildlife, and providing them with equitable treatment, while on the other hand providing the Pacific Northwest with an adequate, efficient, economic, and reliable power supply.

**BPA's Financial Difficulties:** The West Coast energy crisis took its toll on BPA's financial situation, though. Since then, we have had to raise our wholesale power rates by 46 percent. We have depleted our financial reserves to dangerously low levels.

In February 2003, BPA proposed another 15 percent rate increase. Before we proposed the rate increase, we made cost cuts and deferrals totaling $350 million for the remainder of the FY2002 – FY2006 wholesale power rate period. We recently cut another $35 million from the cost estimates used to develop our initial rate proposal. We continue to work hard with our cost partners – the U.S. Army Corps, Bureau of Reclamation, Energy Northwest, and the fish agencies – to get this increase down to a lower number. With the difficulty the Northwest economy is currently experiencing, we are hearing that the region cannot absorb another rate increase.

**Impact on the Integrated Program:** While BPA has worked hard to bring its internal costs that must be recovered in power rates back to 2001 levels, we did not propose a similar reduction in funding for the Integrated Program. In fact, we reaffirmed our previous commitment to an increase in direct program support of almost 40 percent over the previous rate period (See attached, Chart 4). The program is composed of $139 million in expense funding and $36 million in capital funding, but the primary focus has been on expense funding. However, we are closely monitoring total fish and wildlife program expenditures in order to assure the pace of implementation spending remains within the level of BPA's program funding commitments. We believe that we must hold the line on fish and wildlife spending for FY 2003 at $139 million in expense.

In December 2002, BPA asked that the Council – in consultation with the region's fish and wildlife managers – take the lead to ensure that expensed spending for the Integrated Program did not exceed $139 million in FY 2003. In addition, we asked the Council to re-order priorities to create the opportunity to spend less than $139 million annually in expense for the remainder of the current wholesale power rate period which, covers FY 2002 through FY 2006. We have made considerable progress in developing the tools necessary to more carefully manage program finances within the limits of a $139 million yearly expense budget. We continue to make every effort in this prioritization process

with the Council to maintain our ability to initiate new work in the near-term without compromising our existing long-term investments.

We are proceeding to work with the Council on implementing this approach, consistent with our statutory responsibilities, for FY 2003 and the remainder of the rate period. All of our actions have been consistent with the Council's recommendations. BPA has not terminated, breached, or abrogated any contracts for fish and wildlife implementation – with the Tribes or any other parties – in this process. Where appropriate, we have modified the pace of the work under some contracts and sponsors have reduced their costs – for travel, training, incidental materials and similar line items.

Among other things, the Council recommended that BPA change its policy with regard to expensing habitat acquisitions. We've been asked to capitalize land acquisitions for fish and wildlife habitat, rather than continue to treat these costs as a yearly expense. The Council recommended that all land acquisition projects scheduled for implementation in FY 2003 be placed on hold pending discussions on BPA's capitalization policy for FY 2004. Capitalizing land acquisitions represents a significant change from our current policy and financial practices and BPA has limited access to borrowing authority/capital. BPA is working with the Council's wildlife subcommittee and others to address our concerns about capitalization of land acquisitions and to help resolve this issue.

**Goals for the Integrated Program:** BPA has a responsibility to ratepayers to ensure that funds spent for fish and wildlife are used cost effectively to achieve measurable and biologically effective results. To that end, we are working to establish contract management tools that deliver biological and financial accountability. Together with contractors and contract sponsors, we are embarking on a contract improvement process that will take some time to complete. Our goal is to implement performance based contracts that:

1. Simplify current contracting processes for both contractors and BPA;

2. Implement standard business practices to promote consistent program implementation by BPA project managers;

3. Provide clear accountability for achieving measurable, performance-based biological results on the ground to support implementation of the NOAA Fisheries' and FWS's BiOps and the Council's Fish and Wildlife Program; and

4. Provide BPA managers with accurate and current information to facilitate management of BPA's fish and wildlife funds on an accrual basis.

Looking toward the next wholesale power rate period, BPA intends work with the tribes and other regional parties to develop a long-term agreement on fish and wildlife program issues. BPA believes such a discussion would be appropriate in the context of the current regional dialogue regarding BPA power service post-2006. With the establishment of performance standards and related tools, we have made tremendous progress defining the

biological requirements under the BiOps. To develop a successful long-term agreement for the fish and wildlife program, we must establish similar standards and tools that define our biological requirements under the Northwest Power Act.

We understand that parties in the region want budget stability. The challenge is how to provide that stability given the volatility of hydro conditions, market conditions, and BPA revenues.

**Conclusion**

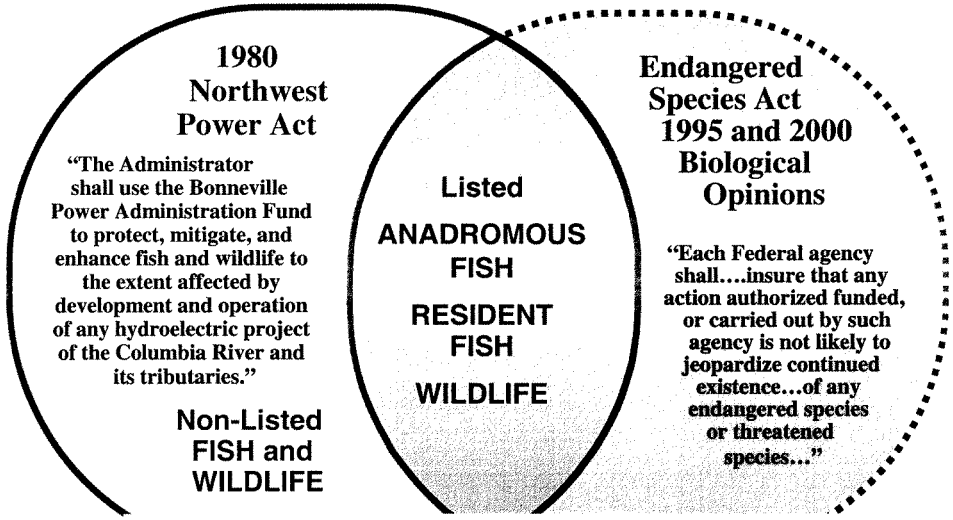
The path we have set will strengthen BPA's performance and preserve our ability to meet all of BPA's responsibilities, as well as our commitments to tribal partnerships, programs, and trust and treaty obligations. In recent meetings with Columbia River Basin tribal leaders and representatives, I have reaffirmed our BPA Tribal Policy regarding government-to-government consultation with the Northwest Tribes. It is through both formal and informal consultation that I expect we will work through these issues – fairly, openly, and deliberately.

BPA ratepayers are funding a fish and wildlife program that is one of the most significant in the country. The amount of that investment is far greater than any other agency in the Northwest makes in tribal resource programs or in fish and wildlife mitigation and recovery. Yet the test of performance is results. It is certainly encouraging that we are seeing record returns of adult salmon and that juvenile survival through the dams is as good as it was before the four lower Snake River dams were in place. We must continue to seek those results in the most cost-effective way possible, and in a way that meets all of our statutory mandates.

Mr. Chairman, I thank you for the opportunity to testify and would be pleased to answer your questions.

# Fish and Wildlife Legal Mandates

**Although BPA has fish and wildlife responsibilities under the Endangered Species Act and the Northwest Power Act, in many cases, both responsibilities can be met in the same set of actions.**

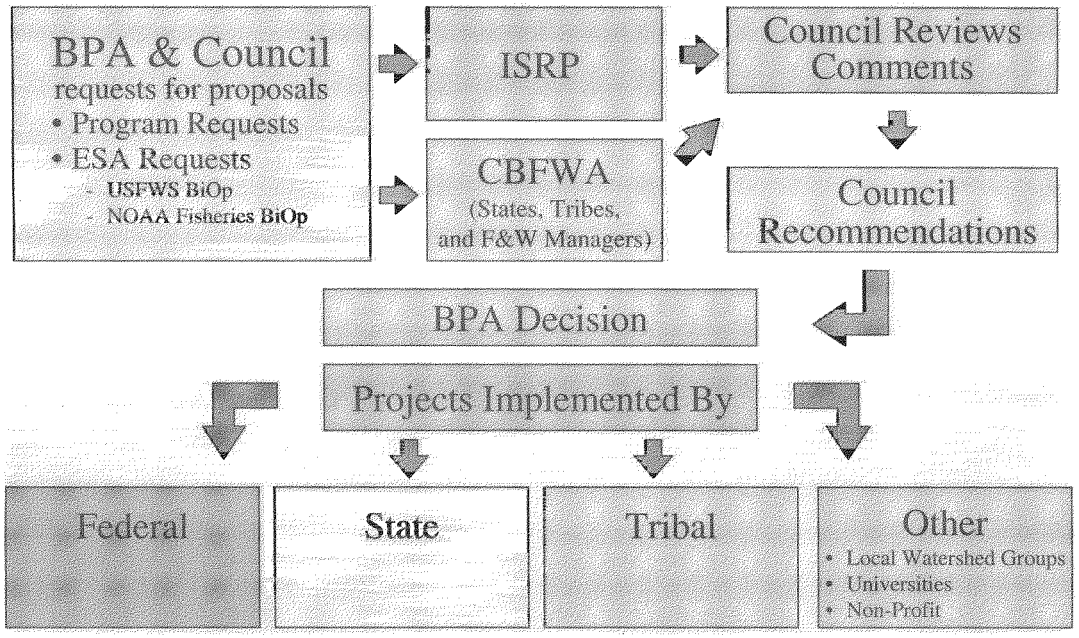



## Treaty and Non-Treaty Tribal Policy

**BPA will consult with the Tribal governments prior to BPA taking actions, making decisions, or implementing programs that may affect Tribal resources.**

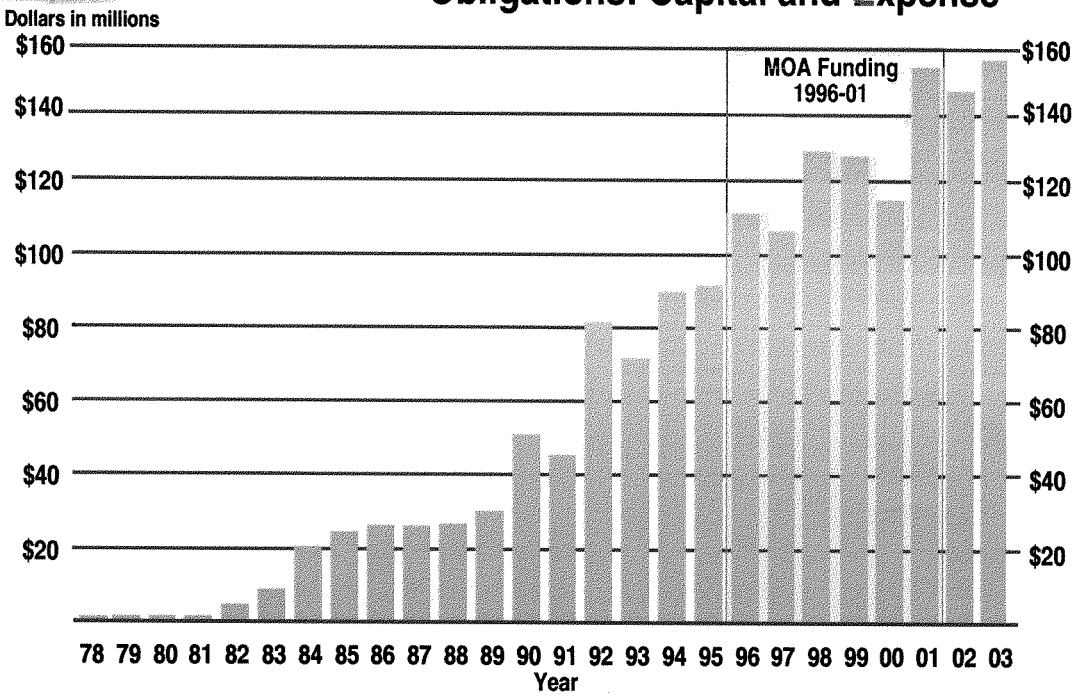
# Council's Provincial Review Process

## for Receiving and Selecting Proposals to Meet FCRPS Obligation

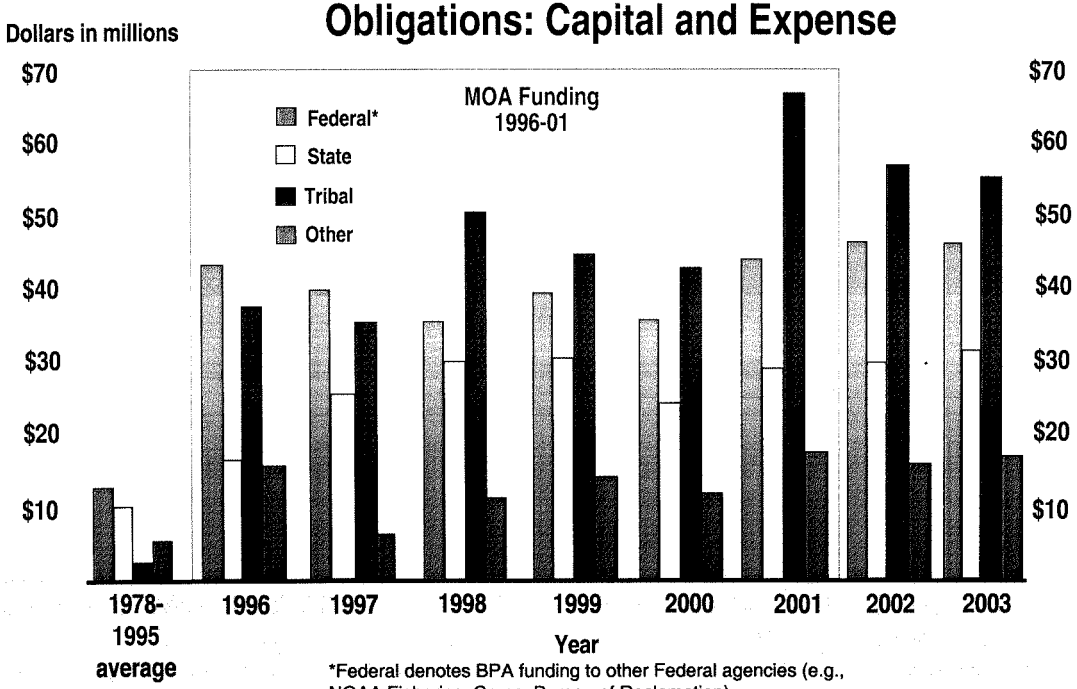


Bonneville Power Administration

# BPA Fish and Wildlife Integrated Program Obligations: Capital and Expense



# BPA Overall Integrated Program Spending
## Obligations: Capital and Expense




*Federal denotes BPA funding to other Federal agencies (e.g., NOAA Fisheries, Corps, Bureau of Reclamation)

**Department of Energy**

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

EXECUTIVE OFFICE

April 16, 2003

In reply refer to: P-6

**To our customers and Northwest citizens:**

In the past three years, the Bonneville Power Administration (BPA) has gone from an agency that was financially healthy to one that is clearly in trouble. We are well aware that many of our regional constituents believe BPA is not meeting the expectations we created when we set rates and signed new power contracts in 2000. Because we want to ensure we are managing the region's federal resources optimally, we conducted a careful and sometimes uncomfortably candid examination of the events that led up to the present situation. The result is the enclosed report to the region that was developed to answer these key questions:

- Why are BPA costs and rates so much higher now than they were in 2001?
- Why is BPA losing money after putting in place large rate increases?
- What lessons can be learned from this that should translate into future actions?

Some of the things that happened to us were outside our control, such as a serious drought, the West Coast energy crisis and, most recently, a dry fall and winter. But some things we did to ourselves. It is only through exploring this history that we can hope to improve in the future. As we went through the process of examination, some key takeaways emerged.

1. The 2001 drought and the West Coast energy crisis were external factors that substantially damaged the agency financially. The 2001 drought cost BPA approximately $600 million, and low water this past fall and winter is projected to cost about $200 million. The costs associated with 2001 would have been substantially worse if BPA had not declared power system emergencies. The West Coast energy crisis also led to BPA serving more load at a higher price than was forecast, although the financial magnitude of this impact is difficult to quantify.

2. BPA has seen its costs increase by approximately $1 billion annually in the years since 2001. The bulk of this increase, 75 to 80 percent, is due to our decision to serve 3,300 megawatts beyond our resource base. This service was requested by customers and is included in the Subscription contracts signed in 2000.

3. Revenues we had forecast from the sale of seasonal surplus hydropower have not materialized. Most of this was due to assumptions that reflected the spot market in 2001 but now have turned out to be overly optimistic. This has created substantial problems because our program funding commitments assumed we would realize these revenues.

4. The budgeted costs of operating our generating assets (Corps of Engineers and Bureau of Reclamation dams and Energy Northwest nuclear plant) and of BPA's internal operations have not been achieved by a substantial margin. This is due to four factors: (1) the original cost estimates were unrealistically optimistic and did not reflect the needs to operate the core assets that create the value of the system; (2) there were not adequate cost management plans internally or with our cost partners to achieve these estimates; (3) the fundamental business model that was assumed to develop the cost estimates was altered (i.e., that BPA would serve only a limited amount of load), and (4) the changing environment created unanticipated costs (security and operational requirements).

5. BPA has several internal process issues that must be improved to provide higher value to the region. Principal among them is our need to substantially improve our risk management systems. Given our size, it has made sense historically for BPA to take on risk. But, with wild price volatility, the level of risk BPA can take on is finite. The primary risks BPA took on were service to 3,300 megawatts of load beyond our resource base and committing to fixed funding based on projections of secondary revenue.

6. While not intended to do so, our decisions have over time led to a lack of equity, with some stakeholders realizing benefit increases and others realizing benefit reductions.

7. We took a number of crucial actions that successfully mitigated what could have been a worse situation. In particular, BPA's purchases and load buydowns to serve the 3,300 megawatts of load beyond our resource base represent a reasonably priced portfolio given the time period in which it was acquired.

8. Even with increased operating costs, the value of the federal system's core assets (the Federal Base System composed of the federal dams and the Energy Northwest nuclear plant), compared against market purchases, is still substantial. This system, properly managed, can and should provide substantial benefits and increased value for the people of the Pacific Northwest for a very long time.

The enclosed report is long, detailed and not always flattering, but I wanted a candid examination that would allow us to learn truly constructive lessons. We are committed to using these lessons to improve the management of the agency and the Federal Columbia River Power System.

We take this report very seriously and expect it to lead to improvements. We have begun development of an action plan to apply the lessons learned from this experience and to better position us to serve you and the region. We will share this plan with you in the very near future.

Sincerely,

Stephen J. Wright
Administrator and Chief Executive Officer

# WHAT LED TO THE CURRENT BPA FINANCIAL CRISIS? A BPA REPORT TO THE REGION

## Executive Summary

In May of 2000, the Bonneville Power Administration was on a path to sign long-term power sales contracts with an expectation that BPA rates would not be significantly higher than they had been for the previous five years. From 1997 to 2001, BPA's average preference power rates had remained steady at about $22 per megawatt-hour (MWh). During that time, the agency's financial reserves rose from $278 million at the end of 1996 to $625 million at the end of 2001.

But our world began to change that May, and since then we have been on a different path than we'd anticipated. BPA raised rates for 2002 by an average of 43 percent over 2001 levels, and, despite that, we've watched our reserves plummet toward zero. Midway into fiscal year 2003, we and our customers face the specter of another rate increase – possibly in the neighborhood of 15 percent – to restore the agency's financial health.

We have not been alone in facing economic distress. The Northwest economy as a whole is stressed. Industrial loads have been down since the West Coast energy crisis of 2000-2001, and higher electricity prices threaten many companies. Irrigators are faced with shutting down their pumps and letting their fields go fallow or turning to dry-land crops. Individuals are unable to pay their electricity bills and are having their power turned off in record numbers.

To limit the rate increase, BPA has cut back its internal costs and is asking its partners in managing the Federal Columbia River Power System to hold down their costs as well. We have also asked the fish and wildlife managers to limit their spending.

The economic impacts, however, have not been distributed evenly throughout the region. One group of customers made early commitments to continued BPA service and signed what are known as "pre-Subscription" power sales contracts and are paying the same rates now that they did in the previous rate period. The residential and small-farm consumers of investor-owned utilities have seen their benefits rise from $70 million annually to over $400 million annually. These elements are producing significantly different rates between neighboring communities. Additionally, thousands of Northwest aluminum workers have continued to receive paychecks for periods of six months to two years while their smelters have been idled under agreements with BPA. This is at a time when world aluminum prices have been at such low levels that, when combined with higher power prices, it would have been difficult for the smelters to operate.

All this is outlined in the report that follows. We have attempted to provide an analysis that describes what happened between the optimistic outlook we had in early 2000 and today's reality. We have tried to go beneath the events in order to understand why the changes occurred. In describing what happened, we found it useful to describe two different perspectives: one compares BPA's costs during this five-year rate period with costs during the previous rate period, and another compares the current expectations for this five-year rate period with what we expected for this time frame when we set rates in 2001.

We know that merely explaining what happened and why is only the beginning. We need to follow through with the implementation of changes that will improve our long-term results.

**Background**

After BPA lost a significant amount of load in 1996 and market prices fell below BPA's rates for several years, our role was re-examined in the late 1990s by the Comprehensive Review of the Northwest Energy System and by BPA's blue-ribbon Cost Review Board. Reports from both reviews envisioned a BPA that sold the federal hydropower under simple contracts that did not service the region's load growth.

The agency adopted that model and began work to "subscribe" customers to the system – that is, offering long-term contracts for power sales. Because BPA's prices were higher than the market at the time, the agency made an effort in 1997 to re-attract the load we had lost through the offer of competitive, fixed rates for a five-year period. A number of utilities – mostly small full-requirements customers – pre-subscribed to BPA's power sales and made an early (and some believed risky) commitment to BPA. As a result, they are still paying about $22/MWh and will continue to pay this rate through 2006.

By the time of BPA's May 2000 rate proposal, the world was changing as the West Coast energy crisis began to unfold and market prices dramatically increased. As all of BPA's customers (public utilities, investor-owned utilities and direct-service industries) found BPA's offer of low five-year fixed power rates attractive in the context of increasing market prices, they turned to BPA to supply more of their post-2001 power supply needs. BPA made key decisions around that time (mid-2000) that put BPA in a different role from that described by the Comprehensive Review and Cost Review. We had signed new power sales contracts for five- and 10-year periods by October 2000 that wound up exceeding the firm power production of the Federal Base System by about 3,300 average megawatts (aMW). We had accomplished some augmentation of our power supply to serve additional loads by that time, but the majority of our power purchases had to be accomplished with only a one-year notice before the new contract period started on Oct. 1, 2001. Because new power supplies had a cost significantly higher than the Federal Base System (and the other costs embedded in our base power rates), our original rate estimates would not be sufficient to recover the costs of serving the higher loads. We worked with our customers in developing a strategy of keeping base rates as low as possible while designing a three-layer series of cost recovery adjustment clauses (CRACs) to respond to potential increases in costs.

As market prices for new power supplies continued to soar, we led an extensive load reduction effort among all customers in an attempt to keep the Load-Based (LB) CRAC as low as possible. As it ended up, we went into the new rate period with a 46 percent LB CRAC over the base rates of $22/MWh in the May 2000 proposal.

In the first two years of the current five-year rate period, BPA has continued to lose money despite the higher rates. This is principally because some costs are higher than we anticipated and because our assumptions about the amount of secondary revenues we expected to receive in extraregional markets have proved too optimistic. We project that we have about $5.3 billion more in costs over the five years than we did in the last rate period. We now expect to receive about $1.4 billion less in revenues than we projected in June 2001 when we established the CRAC mechanisms, and this is compounding the problems we are experiencing on the cost side. The principal drivers behind these changes are described below.

**Expenses**

BPA's total costs over the five-year rate period of 2002-2006 are about $5.3 billion higher than they were in the previous rate period. From the perspective of both the costs of the last rate period and the costs estimated by the rate case for the 2002-2006 period, the six largest drivers behind the current rate pressure are as follows:

- The cost of augmenting the Federal Base System – including both power purchases and load reductions – makes up about three-fourths of the increase in costs over the last rate period. This increase in costs of $3.9 billion occurred because BPA assumed responsibility for serving about 3,300 average megawatts (aMW) of load beyond the firm generating capability of the Federal Base System.
- BPA power and financial benefits for the residential and small-farm consumers of investor-owned utilities (IOUs) make up the next category of increases compared to both the last rate period and the costs in the base rates – about $370 million over five years. Including the payments reflected in the augmentation costs above to reduce the IOUs' load on BPA, total benefits flowing to the residential and small-farm consumers are over $400 million per year for the current rate period (or over $2 billion in total) as compared to about $70 million per year over the last rate period.
- Fish and wildlife costs are also up about $370 million over the five-year period compared to the previous rate period. These costs include lost opportunity costs of operating the hydro system for fish mitigation and U.S. Army Corps of Engineers and Bureau of Reclamation reimbursable fish and wildlife program costs. However, fish and wildlife costs are being managed within the budget established in our base rates.
- Compared to 2001, net interest expenses have increased $320 million over five years primarily because of the reduction in our net interest income due to lower cash reserves. Compared to our expectations embedded in our base rates, this category of expenses is up $60 million over the five-year period.
- Federal hydropower costs and Columbia Generating Station costs have increased a total of $160 million over five years compared to 2001 and have increased $267 million compared to our expectation in the rate case. The increase in costs is primarily driven by the need for increased maintenance, capital replacements and increased security.
- Internal operations expenses assigned to BPA's power function can be looked at two ways. From 2003 forward, these costs will be controlled at 2001 levels net of revenue gains from efficiency improvements achieved by these expenditures. Compared to the rate case, however, these net expenses are up by almost $280 million. The rate case assumed they would decline in response to a reduced role for BPA and, in retrospect, had an unrealistic view the level of costs necessary to carry out BPA's power operations in a radically different world of wholesale competition and a separation of our power and transmission functions due to new FERC regulations.

### Revenues

While increased costs have had a substantial impact on rates, revenue shortfalls have also caused BPA's financial condition to erode and put additional pressure on rates. These revenue shortages are attributable to the following causes:

- Lower revenue from secondary power sales due to lower market prices is the major source of our shortfall – a total of $715 million over five years. West Coast power market prices declined rapidly after our new rates were instituted in October 2001. While we anticipated the market price for power to decline over the rate period, we counted on it to stay higher longer than it did. This is particularly significant because the revenue we receive from secondary sales (about 20 to 25 percent of our total revenues) allows us to keep our prices for firm power delivered in the Northwest lower than they would otherwise be.
- The 4(h)(10)(C) and Fish Cost Contingency Fund (FCCF) revenue credits are estimated to run about $300 million less over the five-year period than we assumed when we established the CRAC mechanisms. These credits are provided by the U.S. Treasury to ensure that nonpower functions of the federal dams bear their share of the costs of fish recovery. The power function should not bear the entire burden of those costs. These credits are lower for three reasons. First, they are linked to the price of power. When power prices decline, so, too, do the revenue credits. Second, between the time we established the CRAC mechanisms and the time when the rates went into effect, a reallocation of costs to the multiple project purposes of Grand Coulee Dam increased the power function's share and at the same time, lowered the level of credits available. Third, the FCCF was all but used up at the end of 2001 due to the severe drought and is largely no longer available.
- Lost hydro generation in 2002 due to the lingering effects of the drought in 2001 resulted in about $145 million in lost revenue. Additionally, in 2003 we expect revenue losses of about $200 million due to below-normal hydro conditions, and there will be smaller lingering effects into 2004.
- Credit exposure due to unpaid power bills by certain Northwest aluminum smelters and by the California Independent System Operator and Power Exchange is a new experience for the agency. We are currently owed more than $100 million by these insolvent or bankrupt enterprises.

### Impacts of droughts and the West Coast energy crisis

The experiences of the past few years have taught us several lessons to which we must respond through changes that will improve our performance.

A large portion of our financial problems can be traced to just two sources: two years of drought (out of the last three years) and the West Coast energy crisis. However, choices and assumptions made by Bonneville also contributed to the problems we face today. Many of these decisions were made in concert with BPA's customers and other regional stakeholders, but BPA was the final decision maker.

The impacts of the 2001 drought and the high wholesale power prices during 2000-2001 were profound. The unprecedented combination of factors resulted in BPA's power function losing in excess of $400 million. In addition, BPA used $245 million of revenue credits available from a contingency fund (the FCCF described above) used to cover fish-related costs in dry

years, which all but depleted the fund and made it largely unavailable for future use. In 2002 there was a carry-over effect from the drought as reservoirs began the year less than full. All told, the drought and high prices created new direct costs of over $600 million just for basic operations to keep the lights on. The West Coast price escalation also led to more load being placed on BPA, which pushed BPA into an extremely high-priced market to acquire more power. This means that a significant fraction of the $4.3 billion in augmentation costs and increased IOU residential benefits, as shown in Figure 2 on page 14, would likely not have occurred but for this crisis.

The low 2002-2003 winter snow pack will also substantially reduce BPA revenues. Our current estimate is that revenues will be about $200 million lower in 2003 compared to our expectations. We expect 2004 will have smaller lingering revenue impacts due to 2003's below-average hydro conditions.

### What have we learned?

The lessons of this report, however, are not focused on the external events that have hampered our business operations. Instead, they are focused on actions that are within our control and that we can take to reduce our risk or improve our operations.

In many areas of our operation, we made good choices or took actions that helped reduce adverse impacts of the events that occurred. These include the adoption of the CRAC structure to accommodate the greater volatility and risk we now face; the development, in a very short time, of a reasonably priced portfolio of purchases to augment our firm resources; a load reduction program that kept dollars within the Northwest instead of sending them out of the region; and a successful debt optimization program that has reduced interest expenses and extended BPA's borrowing authority.

In other instances, however, there are some conclusions from the analysis that clearly identify choices we made that led to higher rates or contributed to BPA's current financial difficulties. We've learned several lessons from our experiences:

- Of the $5.3 billion of higher costs in 2002-2006 compared to the last rate period, about $3.9 billion is due to serving 3,300 aMW of load beyond BPA's resource base. BPA assumed substantial additional load service responsibilities, equivalent to more than all the total load growth in the region in the 1990s. Clearly, if BPA's costs and rates and risks are to be lower, then BPA's load-serving obligations will need to match up more closely with its resource base.
- Delays in defining our load-serving obligations led to increased costs and risks. We didn't sign Subscription contracts until less than one year before they went into effect, and that left us highly vulnerable to the very high market prices that existed at that time. We should have clarified our obligations sooner to avoid going into the 11th hour without adequate supply to meet demand.
- BPA receives substantial revenues from the sale of seasonal surplus power into secondary markets. While BPA's estimates of secondary revenues, made when we established the CRAC mechanisms in 2001, were lower than the then-prevailing market forecasts, they have proven to be too optimistic. Exacerbating the problem is that BPA made inflexible financial commitments based on the assumption that these secondary revenues would be realized.

- We need to better establish and manage our costs. Our costs for operating the system (BPA internal costs, Corps of Engineers and Bureau of Reclamation operation of the hydro system, and Energy Northwest operation of the Columbia Generating Station) exceeded the estimates that were developed by the Cost Review and adopted in the May 2000 rate case by a significant amount. This is the result of a number of factors:
  - The cost estimates were unrealistically optimistic, and the costs, once embedded in the rate case, were not backed by firm plans and agreements to manage to those levels.
  - Estimates of cutting by nearly half the internal operations costs were, in retrospect, not sustainable given (1) the increasing complexity of the task of managing the system and (2) the underlying business model that allowed the cost reductions assumed a reduced, simpler role for BPA (for example, limited amount of service to load, simple contracts, fixed rates) that ultimately was not adopted. While the rate case estimates do not appear to be achievable, BPA is seeking to maintain its internal operating costs at 2001 levels for the period 2003-2006, net of offsetting revenues.
  - Estimates of the cost of producing energy on the system (from the dams and the nuclear plant) were never committed to by the operators (Corps, Reclamation and Energy Northwest) and did not reflect the costs of properly maintaining an aging system.

  The lessons learned are that (1) costs and budgets should be realistic and established with a clear link to the outcomes desired, and cost estimates need to change if the fundamental assumptions underlying the estimates change; (2) we should obtain the support and commitment of our cost partners to our budgets; and (3) once budgets are established, we should develop firm plans and agreements to manage to those levels.
- The impacts of BPA's high rates have widely varied among BPA's customers. This creates issues of intraregional equity, and we need to take steps to minimize this in the future. There may be a need to allow for more flexibility in the structure of our contracts, or for shorter contract lengths, or for mechanisms that maintain equitable relationships between customer classes to allow for changing conditions that could significantly affect equity calculations and/or perceptions.
- BPA's culture is one that seeks to respond positively to a variety of service and funding requests while also seeking to avoid rate increases. This frequently results in BPA taking on substantial financial risks. We need to be rigorous, objective and realistic about the financial impacts of the obligations before we take them on.
- BPA has historically assumed and managed a significant amount of risk on behalf of its customers and others. However, BPA has gone beyond the limits of risk that it can take on in the face of these increases in risk and uncertainty.
- We believe there are a number of areas in which our management practices need to be improved.
  - We must have a clear view of the long-term outcomes that we seek to achieve and must establish measurable goals that support those outcomes. We dramatically switched directions during the 2000-2001 period from that of the Comprehensive Review, and that led to misaligned activities and inefficiencies. While we need to respond appropriately to changing circumstances, our response needs always to be in the context of a clear long-

term vision and strategy that drives our actions. Establishing clear measures will enhance our understanding of our progress in achieving those desired outcomes.

- BPA's business systems and processes need to be enhanced. We need to better track actual costs against rate case assumptions and develop more responsive and standardized methods for modeling, testing alternatives and monitoring results. We must also ensure that we are effectively using BPA's enterprise software that relies on a common data architecture and data repository.
- We must ensure that we have strong analytic capabilities across many functions. We cut our load forecasting and rates functions to save costs in the late 1990s, and that reduced our ability to produce complete, timely and thoroughly coordinated analyses of the many complex rate and financial issues we encountered.
- We must improve our risk management practices. While BPA has always had to deal with a significant degree of uncertainty, the range of risks we now face has increased enormously. The sophistication of BPA's risk management has not kept up with the complexity of the restructuring market or the multiplicity of demands being placed on us by all our stakeholders. We must reconcile the difficulty involved with the relatively high certainty of our costs and the relatively low certainty of our revenues.
- We must enhance our executive and management skills and practices in several critical areas and improve aspects of our culture that will create a better flow of communication. Several points above relate to this area, including establishing and managing to clear outcomes and improving risk management practices. We need to improve communication up, down and across the agency to ensure that alternative views and ideas receive an appropriate degree of consideration.

### Next steps

This review of events, together with the lessons we have learned, is only valuable if it serves as a guide to future improvements. In some cases, we have already begun implementing some of the improvements that are needed; for example, the use of our enterprise software system to track and manage costs has been significantly improved over the last year. Our next step will be to develop a set of action plans that will guide our implementation of the additional improvements needed. A more detailed examination of some of the internal management and communication problems and recommended changes will be completed soon, as will a report documenting the changes we intend to implement in our risk management policies and practices.

All BPA's managers and employees take the stewardship role that has been entrusted to them very seriously. We know that our customers and the Northwest public expect improvements in the results for which we are responsible, and we intend to deliver on those expectations.

# WHAT LED TO THE CURRENT BPA FINANCIAL CRISIS? A BPA REPORT TO THE REGION

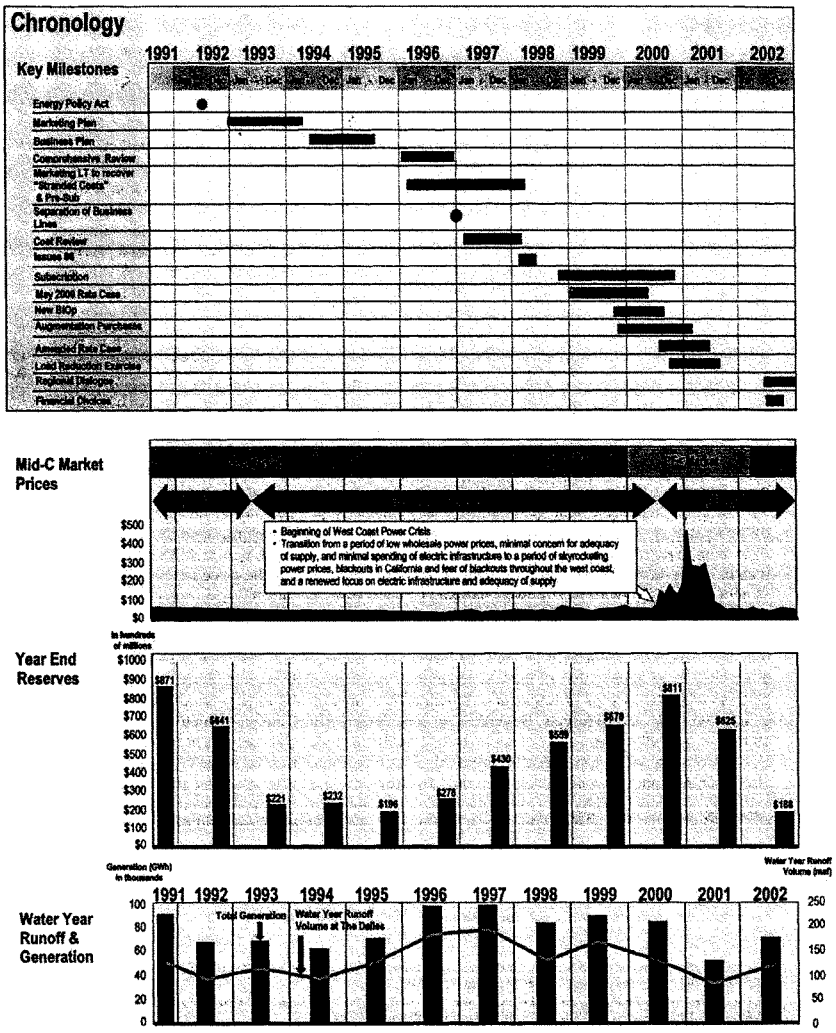
In May of 2000, the Bonneville Power Administration was on a path to sign long-term power sales contracts with an expectation that BPA wholesale power rates would not be significantly higher than they had been for the previous five years. From 1997 to 2001,[1] BPA's average preference power rates had remained steady at about $22 per megawatt-hour. During that time, the agency's financial reserves rose from $278 million at the end of 1996 to $625 million at the end of 2001. This was due largely to a period of very good hydro conditions. Under average water conditions, BPA would have expected to end the rate period with the same level of reserves that it had at the beginning. BPA's earnings from secondary (surplus) power sales helped keep rates steady and allowed reserves to increase. By May of 2000, end-of-year reserves were expected to be more than $850 million.

But our world began to change that May, and since then we have been on a much different path. BPA raised rates for 2002 an average of 43 percent over 2001 levels for most customers and, despite that, we've watched our reserves plummet toward zero, the lowest level in many years. As we go into 2004, we face the specter of another rate increase – possibly in the neighborhood of 15 percent above 2003 rates – to restore the agency's financial health.[2]

Given that this reality is a significant departure from our expectations just three years ago, we believe it is important to examine the chain of events that led to BPA's deteriorating financial condition and to see what lessons we can learn for the future.

[1] All years identified are fiscal years unless otherwise noted. BPA's fiscal year runs from October through September.

[2] All forecasts of revenue, expenses, market prices and hydro conditions are as of March 2003 unless otherwise noted.


Chronology
Key Milestones
1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002
Energy Policy Act
Marketing Plan
Business Plan
Comprehensive Review
Separation of Business Lines
Cost Review
Subscription
May 2000 Rate Case
New BiOp
Augmentation Purchases
Mid-C Market Prices
$500
$400
$300
$200
$100
$0
• Beginning of West Coast Power Crisis
• Transition from a period of low wholesale power prices, minimal concern for adequacy of supply, and minimal spending of electric infrastructure to a period of skyrocketing power prices, blackouts in California and fear of blackouts throughout the west coast, and a renewed focus on electric infrastructure and adequacy of supply
Year End Reserves
$1000
$900
$800
$700
$600
$500
$400
$300
$200
$100
$0
$871
$441
$221
$232
$196
$278
$430
$639
$670
$811
$625
$188
Water Year Runoff & Generation
1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002
100
80
60
40
20
0
250
200
150
100
50
0
Total Generation
Water Year Runoff Volume at The Dalles

# Background

### 1994-1996: Market prices fall below BPA's power rates

In 1994, market prices were dropping and conventional wisdom was that power market deregulation was likely to deliver consistently lower wholesale prices. By 1995, many BPA customers were clamoring to reduce their purchases from BPA so they could take advantage of lower prices offered by the burgeoning population of power marketers. The direct-service industries (DSIs) reduced their take from BPA by around 800 aMW in 1995, and public utilities followed in 1996 with over 1,000 aMW of load reductions. At this time, it was taken as a given by many of BPA's customers that they would no longer rely on BPA to meet all their requirements. The question was whether BPA could keep its costs low enough to avoid loss of so much load that a major "stranded cost" problem would result.

### 1996-1998: The Comprehensive Regional Review[3] and Regional Cost Review[4]

In 1998, a Regional Cost Review (Cost Review) of BPA was completed that set cost targets, many of which were incorporated into the May 2000 rate case and, as a result, were reflected in our base rates. The Cost Review was built on the earlier Comprehensive Regional Review (Comprehensive Review), which envisioned a dramatically shrinking role for BPA. Getting BPA's existing system power sold at cost was viewed as a major challenge in a persistent low-price wholesale power market. The goal was to drive costs down and get the entire Federal Base System committed under long-term power sales contracts. Our view was that keeping the price of the federal system competitive and covering costs required emphasizing cost minimization over output maximization in managing generating plants, cutting BPA power staffing by more than half by eliminating or nearly eliminating most functions except those required to operate the system, cutting the Northwest Power Planning Council costs by almost 20 percent, cutting conservation spending by almost 30 percent and cutting a variety of other functions.

BPA accepted the direction in the Comprehensive Review and adopted the overall cost reduction target recommended by the Cost Review. However, it should be noted that there was doubt within the agency that all the cost reductions could be achieved, and, furthermore, our cost partners within the Corps of Engineers, Bureau of Reclamation and Energy Northwest never committed to those cost targets. Nevertheless, considerable effort and planning took place from 1997 through 1999 within BPA to achieve the overall cost reductions defined in the Cost Review, though with a somewhat different mix of actions than specified in the Cost Review; we also assumed higher revenue levels than the Cost Review did. In retrospect, the forecast levels of expenses recommended by the Cost Review were unrealistically optimistic given the increasing complexity of the task of managing the power system and conducting essential functions.

### Pre-Subscription power sales contracts

Facing what was broadly believed to be a persistent struggle to sell power at prices high enough to cover costs, we sought out customers willing to make the kind of long-term

[3] Comprehensive Review Final Report, Toward a Competitive Electric Power Industry for the 21st Century, Document 96-CR26 (Northwest Power Planning Council).

[4] Cost Review of the Federal Columbia River Power System Management Committee Recommendations, March 10, 1998, Document CR98-2 (Northwest Power Planning Council).

commitments to buy power at full cost envisioned in the Comprehensive Review. In 1997, we offered "pre-Subscription" power sales contracts to all our regional customers. Forty, mostly small full-requirements public utilities, took a perceived risk and signed these pre-Subscription power sales contracts offered by BPA at a guaranteed rate averaging about $22/MWh through 2006. BPA saw these sales as a means of providing some protection against stranded costs and demonstrating that BPA power could be competitive. These power sales contracts are now extremely beneficial for the utilities that signed them, but, at the time they were signed, many of these utilities were criticized for making such long-term high-priced purchase commitments. The pre-Subscription sales total about 950 aMW for the 2002-2006 period.

### May 2000: We thought we had wrapped up rates

In May of 2000, we thought we were wrapping up a two-year process of developing power sales contracts (known as "Subscription" contracts) and setting wholesale power rates for the 2002-2006 period. We completed and filed our rate proposal with the Federal Energy Regulatory Commission and were moving to sign Subscription contracts that included the 2002-2006 period based on those rates. The rates in the proposal to FERC in May 2000 averaged about $22/MWh for preference power – roughly the same as for the 1997-2001 period. Over the 2002-2006 period, we expected to earn a total of $414 million in net revenues.[5]

By the May 2000 rate proposal, we had departed from one of the key elements of the direction set in the Comprehensive Review. Market prices for wholesale power had slowly but steadily risen, creating a shift from a conventional wisdom that BPA would struggle to cover its costs and had to worry about "stranded costs," to steadily increasing customer interest in placing more and more load on BPA. Responding to what we saw as strong demands to do so, we departed from the Comprehensive Review mandate to limit power sales to the existing system. By October 2000, we had completed our Subscription process, signing new power sales contracts for a total load that exceeded the Federal Base System's capability by about 3,300 aMW.

Three major decisions led to greater sales. First, we did not tier our power rates or contractually limit public utilities' choices to buy from us up to their net requirements; many of BPA's public utility customers had argued strongly that tiering rates or taking other steps to limit sales to them was inappropriate. This decision made it feasible, even economically attractive, for many of our public customers to request load service up to their net requirements as they are allowed by statute. As of the May 2000 rate case, these loads were forecast to total about 5,200 aMW for the 2002-2006 period, though there was considerable uncertainty about this estimate as rising prices and a strong economy increased the retail loads of these utilities and increased their interest in buying more than that estimate. For context, the total public utility load placed on BPA in the 1997-2001 period was around 4,200 aMW.

Second, we agreed to sell up to 1,500 aMW to the direct-service industries in response to their fervent argument that to do otherwise would devastate many communities. The DSIs made this argument strongly and effectively – both in the Northwest and at the national level. At the time, we believed that we could accommodate them without significantly raising rates.

Third, some IOUs made vigorous arguments, through media campaigns and in other forums, that their residential ratepayers were not getting their fair share of federal system benefits. These arguments were strongly supported by state public utility commissions and bolstered by public

[5] In May 2000, we expected to earn a total of $414 million in net revenues after accounting for $121 million in risk allowance for non-operating cost uncertainty (see footnote 6).

campaigns. In response, we agreed to sell 1,000 aMW of power to investor-owned utilities for the benefit of their residential and small-farm consumers. We agreed to sell power to IOUs with the belief that the best long-term way to provide federal system benefits to these customers was to provide them power at the same price (and with the same risks) as our other customers. In addition to the 1,000 aMW of power sales to IOUs, we agreed to provide a cash payment designed to be the financial equivalent of another 900 aMW of power for the benefit of their residential and small-farm consumers. Again, we believed at the time, and told our public utility customers, that we could provide these benefits to IOU residential and small-farm consumers and additional service to the DSIs without increasing BPA power rates.

At that time, the following key expectations about the future were built into our rates. These assumptions were important in supporting our efforts to produce a rate proposal that offered no overall increase over the previous rates.

- **Additional load service & cost.** As a result of the three decisions described above, we predicted that the Subscription contracts would result in more than 1,700 average megawatts (aMW) of load beyond that which our generating assets could produce on a firm basis. We also expected we would be able to buy power at an average price of $28/MWh to serve that additional load. This assumption seemed reasonable given that, by May 2000, we had already purchased about 1,000 aMW for the 2002-2006 period at an average price below $28/MWh. We planned to cover most of the remaining need with a few hundred aMW of additional five-year purchases to be secured over the next year, leaving a small amount of the need to be covered in the short-term wholesale power market as necessary depending on actual hydro conditions.
- **Cost reductions.** We used a cost forecast that required that we come close to meeting the very aggressive cost reduction targets coming out of the 1998 Cost Review. We knew by then that our ability to achieve all the Cost Review cost savings was in doubt. For example, we had not followed through on the vision of BPA as limiting itself to selling just the existing federal system. We made some allowance for this through the addition of $121 million in expected costs through the risk analysis for non-operating costs.[6] Another example is that the Cost Review assumptions about Corps, Reclamation and Energy Northwest costs were extremely aggressive and were not supported by those partners.
- **IOU residential & small-farm benefits.** We expected to hold our cash payments to IOUs for their residential and small-farm consumers at about the same level as we paid from 1997 to 2001, which was about $70 million per year. In addition to this cash payment, we expected to sell 1,000 aMW of flat block power to IOUs for their residential and small-farm loads at about $20/MWh.

[6] Through the risk analysis for non-operating costs (called NORM), the May 2000 and June 2001 rate filing included an expected value of increased operating costs that was about $121 million more than the base case costs in the revenue requirement study. In essence, this risk analysis had the consequence of ensuring that rates were set high enough to cover the risk of certain expenses increasing. The risk analysis was done to recognize the difficulty of meeting those aggressive cost targets in light of the risks associated with the future that the Cost Review had assumed when making its recommendations. The NORM analysis used for these calculations can be found in WP-02-FS-BPA-03A, pages 19-20 or page 189. Not included in this evaluation are the possible increases in efficiencies modeled in the rate case.

- **Fish recovery.** We expected to increase our annual financial commitment to fish recovery (through cash outlays and operational costs) by about $80 million per year due to the change from the Fish Funding Memorandum of Agreement to the implementation of the 2000 Biological Opinion.
- **Fish credits.**[7] We forecast that we would receive nearly $600 million over the rate period in credits from the Fish Cost Contingency Fund and under section 4(h)(10)(C) of the Northwest Power Act.

### The world began to change

As we filed our rates, our world was changing. May 2000 was the beginning of the 2000-2001 West Coast energy crisis and marked the transition from a period of low wholesale power prices, minimal concern on the West Coast in general for adequacy of supply and minimal spending on electric infrastructure to a period of skyrocketing power prices, blackouts in California, fear of blackouts throughout the West Coast and a renewed focus on electric infrastructure and adequacy of supply.

As the West Coast crisis unfolded, it became ever more apparent that BPA's attractively low prices would cause customers to demand much more power than previously anticipated. Between May 2000 and November 2000, we finished signing Subscription contracts for 2002-2006, which gave us a clear picture of how much load we faced serving – about 1,600 aMW more load from public utilities than predicted in May 2000 and about 3,300 aMW more than our existing system could supply.

At the time, power to meet this load was increasingly scarce and it became apparent that the wholesale power market was far more volatile than we assumed in the rate case.

### Change leads to a supplemental rate case

Against the backdrop of the West Coast energy crisis, increased load placed on us and extremely high and volatile market prices, we asked the Federal Energy Regulatory Commission to stay the review of our rate filing while we conducted a supplemental rate case to reflect the new situation. At this point, we had a basic choice – we could either raise base rates substantially to recover the higher costs and much-greater risks, or we could leave base rates as proposed in May 2000 and institute a system of rate adjustment clauses that would raise rates only as necessary to cover actual costs and actual financial shortfalls. In close consultation with customers and other parties, we chose the latter.

We worked with customers to develop the three-layer system of cost recovery adjustment clauses (CRACs) with the objective that rates would be able to cover the cost of serving the additional load plus our other operating risks. The system of CRACs made it possible for us to avoid putting the risk associated with the severely volatile wholesale power market into our base rates. The load-based CRAC (LB CRAC) covered the direct cost of buying power and buying down loads (see below). The financial-based CRAC (FB CRAC) provided a fairly automatic, but limited, rate increase each year if our actual accumulated net revenues fell below certain

[7] These are credits toward our Treasury payments based on fish-related costs and impacts on operations. These credits contribute to BPA's overall revenue forecast through a Treasury payment credit that is based upon a calculation tied to market prices of power. When market prices are higher, the size of the credit available to BPA increases.

thresholds. We expected that the FB CRAC had a 25 percent chance of triggering each year. The safety net CRAC (SN CRAC), as the name implies, allowed the FB CRAC to be increased to cover extraordinary financial stresses. We expected there to be a very low likelihood that the SN CRAC would trigger.

In June 2001 we filed the final supplemental rate case with FERC that reflected these changes since May 2000.

### Covering the 3,300 aMW supply gap

The 3,300 aMW gap between our load obligations and the firm output of our existing federal system was very large – three times the consumption of the city of Seattle. As the full size of this obligation became clear, we accelerated efforts to buy power to cover the gap. We bought another 480 aMW for 2002-2006 after May 2000, but prices were rising relentlessly, mirroring a perception of a continuing shortage until new generation could be built – the same price rise that was causing our customers to maximize their reliance on our supply. By early 2001, it did not look possible to buy anywhere near 3,300 aMW of power at reasonable prices. We turned to our customers to ask for agreements to reduce their loads. The alternative we saw was purchasing power at astronomical prices that would have required approximately a 250 percent rate increase in October 2001, though that amount would have declined during the five-year rate period.

By June 2001, after a strenuous push by BPA, customers agreed to over 1,330 aMW of load reduction for the 2002-2006 period, for an average payment of roughly $30/MWh. By comparison, wholesale market prices for power for five-year purchases ran as high as $100/MWh in early 2001. Most public utilities and five of the six IOUs agreed to 10 percent load reductions in 2002, for an average payment of roughly $20/MWh. Some DSIs agreed to keep all their load off BPA for periods of up to two years for payments of about $20/MWh, with most of the payment required to go to pay salaries and benefits of out-of-work aluminum workers.

But by April 2001, we still had not met all the supply need and still faced the prospect of buying power for extremely high prices to cover the remainder of the need, which would cause our rates to more than double. We approached the IOUs about reducing our 1,000 aMW power delivery obligation to them. We offered two IOUs a payment of $38/MWh in 2002 through 2006 to eliminate their combined 620 aMW load on BPA. By comparison, market prices for 2002-2006 were at a level of nearly $100/MWh at the time. These companies were not willing to agree to this while they faced the threat of litigation taking their BPA benefits away. In response, we offered to pay them $38/MWh in 2002 and $45/MWh for 2003-2006 but with a discount back to $38/MWh if the litigation threat was settled by December 2001. Our view was that even the $45/MWh payment left our rates much lower in 2002 than the next-best alternative power supply to augment the Federal Base System, and this arrangement preserved the ability to bring the cost down to $38/MWh. Our view was that this arrangement was better than purchasing power from a marketer because the payments were required to flow to the residential customers of Northwest utilities.

An apples-to-apples comparison of these buydowns to the alternative purchases requires the lost revenue we would have received from the "bought down" load to be added to the buydown payment. Even with this addition, the buydowns were far lower-cost than the alternative purchases available at the time.

The action of augmenting the Federal Base System with firm resources to serve the additional load is known as "augmentation." To cover the costs of augmentation, rates for all but the pre-Subscription sales were set 46 percent higher than the May 2000 base case in the first

half of 2002 through the LB CRAC. We structured our augmentation purchases so that they diminished over the five-year rate period, allowing us to take advantage of expected market price declines and thus bring the LB CRAC down. Because of this, we expected the LB CRAC to ramp down to the 25 to 30 percent range by 2004 as augmentation costs diminished.

### The June 2001 supplemental rate case

We did not conduct a full-blown rate analysis for the June 2001 filing. Instead, we left the basic revenue requirements analysis unchanged, thereby leaving BPA's base rates intact. However, we re-assessed the Treasury payment probability (TPP) analysis to reflect the major changes since May 2000. We built the following key expectations into the TPP analysis for the June 2001 rate filing:

- **Cost of additional load service.** We assumed that the LB CRAC would recover all the direct costs of augmentation above $28/MWh to serve the original 1,700 aMW plus all of the direct costs to serve the additional 1,600 aMW of load.
- **IOU residential and small-farm benefits.** We included an additional payment to the IOUs for their residential and small-farm consumers of $74 million per year above the original $70 million embedded in our base rates. This increase totals about $370 million over the 2002-2006 period. Our customers advocated for and we agreed to this additional payment because prices in the wholesale power market had increased greatly from the time we established the original payment in May 2000. This increase in payment is not connected to the payment we made to IOUs to reduce their load that is described above in "Covering the 3,300 aMW supply gap." With this increase, the annual cash payments to the IOUs for their residential and small-farm consumers totals about $144 million.
- **Secondary revenue.** We expected electric infrastructure development to take about two years to catch up with demand. As a result, we expected market prices for power to stay very high through 2003, making BPA's secondary sales revenue far higher than predicted in May 2000. For 2002, we predicted that revenues for our secondary sales would average $57/MWh versus $22/MWh on average that was assumed in the May 2000 rate case. Over the five-year period, we predicted that secondary net revenues would total about $1 billion higher than we forecast in May 2000.
- **Fish credits.** In June 2001, we forecast credits from the Fish Cost Contingency Fund and under section 4(h)(10)(C) of the Northwest Power Act to be about $150 million more in total over the five-year period than the May 2000 estimate, mainly because much higher market prices for power were predicted. With a forecast of higher wholesale market prices for power, 4(h)(10)(C) credits increased to cover higher costs to buy power to replace power lost to fish operations.

In the crisis year before June 2001, the world BPA faced appeared to be the opposite of what the Comprehensive Review envisioned. BPA's role was expanding in major ways – based on our understanding of increasing expectations from regional stakeholders – and priority went to expanding the amount of generating resources to serve an increasing load, rather than minimizing BPA's total costs, as concern grew about a multiyear period of inadequate generation infrastructure and high prices. In the face of the energy crisis and of the dramatic change in our

future role relative to the world envisioned by the Comprehensive Review, we put more priority on dealing with these challenges than on managing cost to Cost Review levels.

By June 2001, it was clear that the forecasts of internal costs, hydro system costs and Energy Northwest costs in the May 2000 rate case were optimistic. In early 2001, we did not know the current magnitude of the cost increases over rate case estimates, described in Figure 2 on page 14, but we saw signs that there was pressure on the May 2000 rate case estimates of internal and generating system costs. It was becoming more likely that the forecast levels of expenses recommended by the Cost Review were not sustainable given the increasing complexity of the tasks of managing the power system and of conducting essential functions. Despite this, we decided not to modify the base rates for two reasons. First, rates needed to be in place by October 2001 concurrent with the new Subscription contracts, and there was no assurance a full rate proceeding could have been conducted within the time remaining. Revising the revenue requirement study would have lengthened the supplemental rate case process. Second, the Treasury payment probability analysis we performed suggested that revenues from secondary sales, even with very conservative assumptions relative to the actual forward market price for power existing at the time, would very likely cover any cost overruns.

### After June 2001: Recession and steep market price for power declines

Helped along by a struggling economy and the completion of several new power plants, wholesale electricity prices began to decline in the spring of 2001 and continued to drop more quickly and lower than virtually anyone expected. As late as April of 2001, forward wholesale electricity prices for 2002 had been well over $150/MWh. Actual spot electricity prices in 2002 averaged about $20/MWh for a flat block. Retail loads dropped for almost every utility. Electric-intensive industries and irrigated agriculture were (and are) being hammered by low commodity prices and high power prices. The Northwest aluminum industry, which had consumed over 3,000 aMW not long ago, was totally shut down because of low world aluminum prices.

### Differing impacts on Northwest interests

Now, in early 2003, the expectation that BPA's 46 percent rate increase in October 2001 would be significantly declining over the rate period is gone. BPA is struggling to minimize the size of a further increase. High retail rates, due to BPA wholesale power rate increases and power rate increases from a variety of other causes, are hurting a Northwest economy that has some of the highest unemployment rates in the nation. Additional industries could be forced to close by further power rate increases. Low-income ratepayers are having their service cut off for inability to pay and formerly irrigated land has returned to dry land farming.

The impacts of BPA rate increases have varied dramatically from customer to customer. Much of the money collected from higher rates is flowing back to other customers. The payments we made to the DSIs to reduce their load totaling $260 million in 2002 and 2003 have kept thousands of aluminum workers paid who would otherwise be out of work due to low aluminum prices. As a result of payments we made to reduce IOU load and a higher financial formula, the BPA payment to IOUs for the benefit of their residential and small-farm consumers has risen from about $70 million per year before 2002 to an average of over $400 million per year (an amount which includes load buydown payments of about $250 million per year), leaving residential rates for some IOUs largely unchanged. On the other hand, rates of surrounding public utilities have skyrocketed. The 40 customers who took the risk in committing

to BPA power under pre-Subscription contracts when a $22/MWh rate looked high are now benefiting from those rates when other BPA customers are paying on average about $33/MWh.

### The impact of the West Coast energy crisis & the 2001 drought on BPA's finances

Prior to realizing that 2001 would bring a severe drought on top of the West Coast energy crisis already under way, we had expected to lose about $9 million in net revenue but we actually lost $418 million. For the 2002-2006 rate period, there were six primary impacts of the overlapping West Coast energy crisis and 2001 drought on BPA's current financial condition.

First, during this period we needed to secure much of the remaining firm resources to serve customer load placed on us through Subscription contracts. The severity of the drought highlighted the firm energy shortage in the Northwest and drove prices higher than we or the region at large had ever seen previously – and higher than we ever expected to see. The coincidence of the drought and the energy crisis during the time when we needed to purchase was the primary driver to our strategy to reduce load on BPA as the least-costly means to meet this load. Even so, the need to augment our firm resources during this period led to some substantial additional augmentation costs.

Second, we used $245 million of the Fish Cost Contingency Fund (FCCF) in 2001, using up about two-thirds of the total available. This contingency fund is maintained at the U.S. Treasury and can be accessed in low-water years. In effect, it has provided some insurance against droughts. Less than $80 million in total credits remain in the FCCF for use this year and in any other future year.

Third, because of the energy crisis in 2001, we are still owed a portion of monies by the California Independent System Operator and Power Exchange that we are seeking to recover through the California refund process. These funds are tied up in bankruptcy proceedings. As of today, the California Independent System Operator and Power Exchange still owe us roughly $90 million.

Fourth, in 2002 we experienced two lingering effects from the 2001 drought. Although the hydro condition appeared to be about normal over the January-July 2002 period, we had to store a significant amount of water to replenish low reservoirs from the 2001 drought, which caused hydro production in 2002 to be about 600 aMW less than average. Also, natural stream flows were well below average in the fall of 2001 (the beginning of our fiscal year). This resulted in an impact of approximately $145 million in lost revenue relative to our expectation in June 2001, shown in Figure 2 on page 14. Additionally, the power that was generated was largely during unexpectedly low priced periods during the summer of 2002.

Fifth, the 2003 water year is only about 70 percent of average,[8] and this drought is expected to cause lower revenues of about $200 million this year with smaller lingering revenue impacts in 2004.

Finally, the effects of the West Coast energy crisis and the 2001 drought are also manifested in an additional payment established in June 2001 to the IOUs for their residential and small-farm consumers over the 2002-2006 rate period because prices in the wholesale power market had increased so greatly from the time we established the original payment in May 2000.

[8] Forecast as of February 2003.

# Why BPA costs are higher today

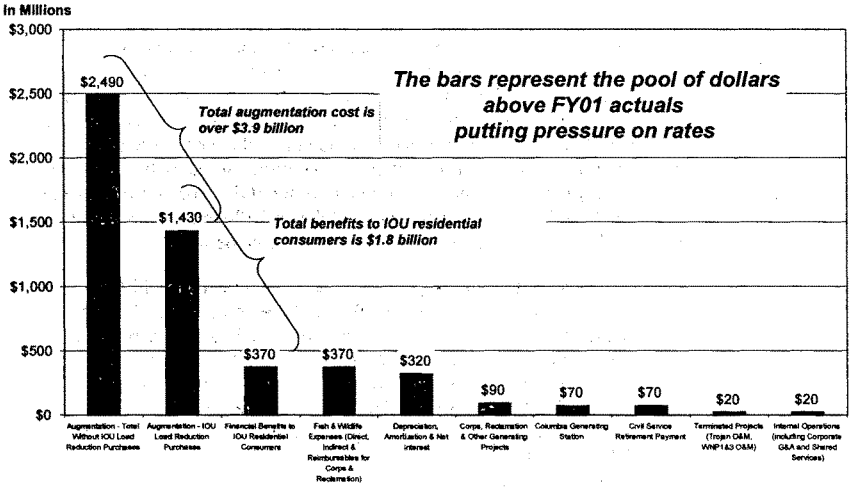
## A comparison between BPA's costs in 2001 and today

The prior sections describe the chronology of development of BPA power rates over the last three years. This section addresses more specifically the factors that are causing costs to be higher than they were in the previous 1997-2001 rate period.

BPA's costs are over a billion dollars per year higher over the 2002-2006 period than they were in 2001. Following is a look at individual cost categories. The sources of the cost increase are shown in Figure 1 in order of magnitude and are described below. The chart lists five-year totals and is net of increased revenues that partially offset cost increases.

*Figure 1*

**Why BPA costs are higher today than over the last rate period**
**Total pressure on rates: almost $5.3 billion (5-year totals)**




**Costs to augment the Federal Base System: $3.9 billion total increase, averaging $780 million per year.** BPA's customers were making decisions about how much federal power to buy from BPA just as market prices started to soar in the summer of 2000. By November 2000 when Subscription contracts were executed, the agency had contractual obligations to serve about 3,300 aMW of the region's load over and above what BPA's existing resources could supply. In order to meet our load obligation over the 2002-2006 period, along with wholesale market purchases of power and other actions, we agreed to pay IOUs to reduce their load with the stipulation that these payments would flow directly to their residential and small-farm consumers – these payments account for over one-third ($1.4 billion) of the $3.9 billion total increase. Augmentation costs increased rates 43 percent on average over base rates in 2002, for all but

pre-Subscription customers. Since, over time, we expect augmentation costs will decline, we expect the percentage increase over base rates that recovers these costs (through the LB CRAC) will decline to roughly 31 percent on average for the 2004-2006 period.

Looking back, BPA's average direct costs of serving this additional load ($35/MWh) are reasonable in the context of today's marginal cost of new power plants but they are still much higher than the cost of the existing Federal Base System, which is dominated by low-cost hydro. Augmentation costs account for the largest cost increase, primarily because of the significant size of our obligation. The regional load was turning to BPA, but, had this load gone to other wholesale suppliers, regional ratepayers would have had rate impacts from those other sources as well. However, the distribution of those higher costs among various customer groups would likely have been different.

In 2001, there were no costs associated with augmenting the federal system. The term augmentation applies to those purchases we made to serve firm load under Subscription contracts that commenced in 2002. Therefore, the $3.9 billion increase over 2001 actuals represents the direct expenses associated with purchasing power to augment the federal system beginning in 2002.

**Financial benefits to IOU residential and small-farm consumers: $370 million total increase, averaging $74 million per year.** As described in the chronology on page 2, BPA made payments averaging about $70 million per year to IOUs from 1997 to 2001 to reduce the rates of their residential and small-farm consumers. We increased this amount to $144 million per year over 2002-2006, an increase of $74 million per year or $370 million in total over the 2002-2006 period. This increase was to reflect the higher market prices that were caused by the West Coast energy crisis. Including the payments described above to reduce the IOUs' load on BPA, benefits flowing to the residential and small-farm consumers now total over $400 million per year for the rate period as compared to about $70 million per year over the last rate period.

**Fish and wildlife costs: $370 million total increase, averaging $74 million per year.** Fish and wildlife costs are up about $74 million per year for the 2002-2006 period compared to the prior rate period. These costs include lost opportunity costs of operating the hydro system for fish mitigation, the operation and maintenance costs for fish and wildlife at U.S. Army Corps of Engineers and Bureau of Reclamation facilities, and expenses related to the Northwest Power Planning Council and Lower Snake River Compensation Plan hatcheries. The increase in expenses is due to the implementation of the 2000 Biological Opinion as compared to the Fish Funding Memorandum of Agreement in effect between 1997 and 2001. However, current fish and wildlife expenses are being managed within rate case forecasts.

**Debt service, depreciation and net interest expenses: $320 million total increase, averaging $64 million per year.** Net interest expense has substantially increased because of the reduction of interest income from having significantly lower cash reserves than we had in 2001. About $60 million of the increase is depreciation related to Conservation Augmentation, which we didn't have in 2001, from the projected fish-related appropriations of over $400 million that was to be declared in service during the 2002 to 2006 period and from additional investments in the hydro system.

**Federal hydropower and other generating projects costs: $90 million total increase, averaging $18 million per year.** The operating costs of the U.S. Army Corps of Engineers and the Bureau of

Reclamation were relatively low in the late 1990s — to a point at which projected availability and future reliability of some of the hydro units began to suffer. Over the 2002-2006 period, these costs are somewhat higher compared to 2001, reflecting a so-far successful attempt to restore the condition of these assets. Included in these costs is a resource new to the FCRPS, Green Springs, operated by the Bureau of Reclamation and resources newly marketed by BPA for the National Park Service, Elwah/Glines. Security costs as a result of Sept. 11, 2001, have added $6.3 million annually (or $31.5 million in total over the rate period) to the current increase. Additionally, due to a cost reallocation of project purposes at Grand Coulee, a larger percentage of the project's costs are now allocated to power, thereby increasing costs above rate case projections. Other generating resources included in this category are resource output contracts for Cowlitz Falls, Wauna, Idaho Department of Water Resources Dworshak Project, Billing Credits generation and other projects.

**Columbia Generating Station costs: $70 million total increase, averaging $14 million per year.**[9] After significant cost cutting and deferred maintenance in the late 1990s, Columbia Generating Station expenses increased with capital investments to replace obsolete equipment, major maintenance activities to address projects deferred over the last three to five years, increased costs associated with on-site spent fuel storage and increased security to implement measures required by the Nuclear Regulatory Commission since Sept. 11, 2001. Security costs as a result of Sept. 11, 2001, have added about $4 million annually (or $20 million in total over the rate period) to the current increase.

**Pension costs: $70 million total increase, averaging $14 million per year.** These costs reflect the unfunded liability of the Civil Service Retirement and Disability Fund, the Employees Health Benefits Fund and the Employees Life Insurance Fund that was not covered prior to 1998. In general, these costs ensure that BPA employee pensions are covered through BPA's rates, not by the U.S. taxpayer. We delayed repaying these costs from the 1997-2001 rate period to the 2002-2006 rate period, which explains the dramatic increase relative to 2001 actuals.

**Trojan, WNP-1 and WNP-3 terminated projects costs: $20 million total increase, averaging $4 million per year.** Trojan nuclear plant decommissioning costs and other costs are up. For instance, slippage in the schedule of Trojan decommissioning has pushed actual costs into the current rate period from the last rate period.

**BPA's internal costs supporting the power function: $20 million increase in 2002, $0 and no increases for 2003-2006 on average.**[10] Internal operating costs supporting BPA's power function[11]

[9] This comparison was normalized to account for the two-year refueling cycle of CGS.

[10] We are committed to manage the level of our internal costs for the 2003-2006 period on average to equal the 2001 actual level, net of offsetting revenues. The increase shown is solely due to the 2002 expense level being above the 2001 actual level.

[11] BPA's internal costs supporting the power function reflect all these factors: staffing and internal operating costs associated with Corporate and Shared Services; BPA's part of the joint management of the hydro system; Energy Northwest oversight; weather and stream-flow forecasting; system operations planning; schedule planning; pre-scheduling; duty scheduling; after-the-fact accounting of power transactions; administration of Canadian Treaty; rate setting; power billing; customer account executives and customer service support staff; development and administration of power sales contracts; resolution of major power-related public policy issues; public and internal communications; tribal relationship management; real-time, balance-of-month and forward bulk power sales; short- and long-term power purchasing; renewable resource development and green power marketing;

are those costs that sustain our many programs, including corporate overhead. We commit to managing our internal costs for 2003-2006 to 2001 actual levels, net of offsetting revenues.

## Why is BPA losing money?

### A comparison between forecasts when rates were set and today

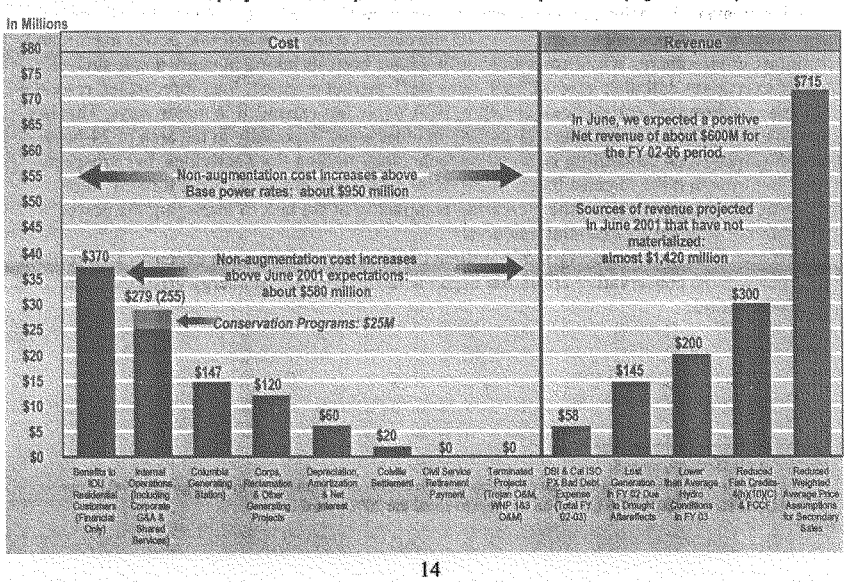
The previous section described all the cost increases that are causing BPA's cost-based rates for 2002-2006 to be higher than they were in 2001. This section addresses a different question – why is BPA still expecting to lose money after all the rate increases that have already been put in place? (Note: This analysis doesn't include the cost of augmentation, since the LB CRAC is designed to recover revenues to cover all of those costs.)

The answer is two-fold: Some expenses have increased since the rate cases and revenue that BPA assumed it would receive when the CRAC mechanisms were established in June 2001 did not materialize. Increases in expenses are delineated in Figure 2 below by category.[12,13] On the revenue side, the most significant factor by far is the revenue from secondary sales that did not materialize in 2002 and is not expected to materialize over the remainder of the rate period due to lower prices we received and expect to receive for our secondary sales. Additionally, the impact of drought conditions has led to lower hydro generation in both 2002 and 2003. It is very difficult to predict hydro conditions and the market price for power, so estimates of the revenue impact of a dry year can vary widely. Areas that affect net revenues are depicted in Figure 2.

*Figure 2*

**Why is the PBL losing money?**

**Current projections compared to June 2001 expectation (5-year totals)**



year to IOUs from 1997 to 2001 for their residential customers and small-farm consumers. In the May 2000 rate case, we embedded a similar amount of financial benefits to be covered by base rates. In June 2001, we included an additional payment to the IOUs for their residential and small-farm consumers of $74 million per year bringing the total financial payments to IOUs to $144 million per year. Our customers advocated and we agreed to this additional payment because prices in the wholesale power market had increased so greatly from the time we established the original payment in May 2000.[14] This increase in payment is not connected to the payments we made to IOUs to reduce their load, which are augmentation costs covered by LB CRAC and shown in Figure 1.

**BPA's internal costs supporting the power function: $279 million higher than rate case in total, averaging $56 million per year.**[15] Internal operating costs supporting BPA's power function are costs that sustain our many programs. In the rate case, the estimates for these expenses were largely based on the Comprehensive Review and the Cost Review recommendations described earlier.

Changes in this category are detailed in the next section titled "Cost Control Efforts." As previously noted, the Comprehensive Review and the Cost Review envisioned a dramatically shrinking role for BPA and a very simple wholesale power market and operating environment with less than half the FTE currently needed to operate BPA's power function. The implication of these reviews was that the fundamental relationship between BPA and its long-term power customers would significantly change and that BPA's traditional customer support services would no longer be needed. For instance, the Comprehensive Review assumed Northwest customers would not exercise their statutory right to obligate BPA to provide new resources and expanded services. Further, the Cost Review estimates were predicated on greatly simplified billing, scheduling and inventory systems. Similarly, the Cost Review contemplated Northwest Power Planning Council costs to be 20 percent lower than they are today.

Changes in the industry, however, have required significant personnel and information technology investments just to keep pace with the current complex wholesale power market and scheduling environment. While costs and staffing have been shrinking in many areas, such as account executives and their support staff, rates staff, market research, load forecasting, resource planning and development, and conservation, BPA's role has expanded in major ways. This has led to offsetting increases in costs and staffing in other areas, especially in the area of 24-hour seven-days-per-week scheduling information technology trading floor activities. In retrospect, we believe now that the forecast levels of expenses recommended by the Cost Review were unrealistically optimistic given the increasing complexity of the task of managing the power system and of conducting essential functions.

Also included in this category is $25 million of increased conservation expense. This reflects the increase in the conservation effort that began with the West Coast energy crisis over the 2000-2001 period.

[14] See WP-02-E-BPA-74, page 8.

[15] The current expense level of our internal operating costs reflects our commitment to manage the level of our internal costs for the 2003-2006 period on average to equal the 2001 actual level.

**Columbia Generating Station costs: $147 million higher than rate case in total, averaging over $29 million per year.**[16] In the mid-1990s, Energy Northwest substantially reduced the cost of operating the Columbia Generating Station. We expected that the dramatic cost reductions experienced in the mid-1990s would continue through the 2002-2006 period. However, after significant cost cutting and deferred maintenance in the late 1990s, Columbia Generating Station needs increased capital investments to replace obsolete equipment, major maintenance activities to address projects deferred over the last three to five years, increased costs associated with on-site spent fuel storage and increased security to implement measures required by the Nuclear Regulatory Commission since Sept. 11, 2001. Security costs as a result of Sept. 11, 2001, have added about $4 million annually (or $20 million in total over the rate period) to the current increase. It should be noted that Energy Northwest had not committed to the rate case estimates for their costs during the 2002-2006 rate period.

**Federal hydropower costs and other generating projects: $120 million higher than rate case in total, averaging $24 million per year.** In the rate cases, the operating costs of the U.S. Army Corps of Engineers and the Bureau of Reclamation were predicted to be relatively low. What has materialized is that the expense projections were at such a low level that we believed availability and future reliability would have been jeopardized, based on subsequent benchmarking against other hydro plant operators. Further, rate case estimates did not have the benefit of system assessment benchmarking, which ensures that we are closely monitoring our investment levels vis-à-vis other comparable systems. Over the 2002-2006 period, these costs are significantly higher, reflecting a so-far successful attempt to restore the condition of these assets. Security costs totaling $6.3 million annually (or $31.5 million in total over the rate period) as a result of Sept. 11, 2001, have added to the current increase and were, of course, not contemplated in the rate cases. Additionally, due to a cost reallocation of project purposes at Grand Coulee, a larger percentage of the project's costs are now allocated to power, thereby increasing costs above rate case projections. Reimbursable fish and wildlife program costs covered by the Corps and Reclamation are embedded in the estimates above. Also, included in this category are other resource output contracts for Elwah/Glines, Greensprings, Cowlitz Falls, Wauna, Billing Credits generation and other projects. Compared to the rate case, these projects have increased costs of almost $3 million annually or $14 million in total over the rate period.

**Debt service, net interest and depreciation: $60 million higher than rate case in total, averaging $12 million per year.** Net interest expense has increased primarily because of the reduction of interest income from having significantly fewer cash reserves than we expected in the May 2000 rate case. The other factor is in federal projects depreciation, specifically conservation. We did not have Conservation Augmentation capital in the rate case and coupled with the policy for writing it down only over the period through 2011 (versus the standard 20 years for Legacy conservation), depreciation has increased.

**Colville settlement: $20 million higher than rate case in total, averaging $4 million per year.** The Colville Settlement is the program for settling with the Colville Nation lands lost with the construction of Grand Coulee dam and is based on an algorithm of actual generation from Grand Coulee with sales revenue. Until recently, the average annual payment has been about $16 million, but market prices in 2001 caused it to increase to over $21 million for 2002. To the

[16] This comparison was normalized to account for the two-year refueling cycle of CGS.

extent that the price we receive for our secondary energy is higher than what we originally expected in May 2000, the cost of the Colville settlement will increase, since the payments are a direct function of the revenue produced by the dam. Additionally, increased efficiency (generation) at Grand Coulee is expected to drive the costs of the settlement higher than historic levels, thus increasing the expenses over rate case levels.

**Pension and terminated project costs** are not up relative to the rate case.

**Cal ISO/PX & DSI bad debt expense: $55 million total (2002-2003).** BPA is owed a total of over $120 million from California parties and the DSIs, and about $55 million has been written off since the start of FY 2002.

*California receivables*: The California Independent System Operator (ISO) and California Power Exchange (PX) owe BPA a total gross amount of $90 million. BPA has established a bad-debt reserve of $39.4 million related to these California receivables. ($24 million was booked in 2002 and $15.4 million in 2001). Significant events, including FERC refund hearings and bankruptcy hearing for PG&E (Pacific Gas & Electric) and the PX, need to be concluded before BPA can determine how much of the receivable will be collected.

*Direct-service industry receivables:* There are three primary DSIs that have significant overdue receivables to BPA. Two of these entities have filed Chapter 11 bankruptcies. In total, these DSIs owe BPA a total gross amount of $34 million. BPA established a bad-debt reserve of $31 million (in 2002) related to these DSI receivables. The DSI receivables are related to liquidated damages, transmission services provided and power that has been delivered. Claims for future damages will be determined by the bankruptcy court proceedings.

**Impact of drought conditions.**[17] The 2002-2006 period has gotten off to a very bad start in terms of hydro production, and our current five-year financial forecasts reflect this. The lingering effects of the 2001 drought on the 2002 hydro conditions and the poor hydro conditions in 2003 are costing BPA almost $350 million. Two drought years so close together is a huge hit to BPA's revenue picture and adds to the upward pressure on rates. When we set rates, we base our projections of net secondary revenue on the average historical runoff on the Columbia River system. Net secondary revenue is a function of hydropower inventory (stream flows) and the price we can get for that inventory.

**Lost revenue from reduced hydro generation in 2002: $145 million total (2002).** In 2002 we experienced a lingering effect from the 2001 drought. Although the hydro condition appeared to be about normal over the January–July 2002 period, we had to store a significant amount of water to replenish low reservoirs from the 2001 drought, which caused hydro production in 2002 to be about 600 aMW less than we expected. Also, natural stream flows were well below average in the fall of 2001 (the beginning of our fiscal year) and the power that was generated was largely during low-value periods during the summer of 2002. This resulted in an impact of approximately $145 million in lost revenue relative to our expectation in June 2001.

[17] These Figure 2 bars attempt to isolate the impact of reduced generation due to drought effects. These bars do not reflect price changes relative to June 2001 expectations, which are shown in a subsequent bar.

**Lost revenue from reduced hydro generation in 2003: $200 million.** This year, again, we are experiencing below normal hydro conditions. As of March 2003, we are now looking at a hydro volume forecast that is 70 percent of normal which we expect to result in about 20 percent less hydro production or about 1,200 aMW less secondary energy to sell. We expect this impact to result in about $200 million in lost revenue relative to our expectation in June 2001. Although it is not illustrated in Figure 2, we also expect that drought conditions this year will, in turn, result in a less than average hydro condition in 2004, which will produce smaller lingering revenue impacts in 2004.

**Reduced 4(h)(10)(C) and FCCF credits: $300 million total.** Over the 2002-2006 rate period, the credits toward our Treasury payments based on fish-related costs and impacts on operations are expected to be over $300 million less in total than we assumed in June 2001 for several reasons: a reallocation of project purposes at Grand Coulee, a lower forecast of power market prices and reduced availability of Fish Cost Contingency Fund credits that were all but exhausted at the end of 2001 because of the severe drought.

**Lower secondary revenues due to lower price received for surplus sales: $715 million total.**[18] Net secondary revenue from our surplus power sales is far and away the key variable in determining our financial fate. These revenues often provide 20 to 25 percent of BPA's total revenues in a single year, so they help keep firm power rates down. As previously noted, in June 2001, we expected that electric infrastructure development to take about two years to catch up with demand. As a result, we expected market prices for power to stay relatively high through 2003, allowing BPA to earn significant secondary sales revenue under normal hydro conditions. For 2002, we predicted that revenues from our secondary sales would average $57/MWh. In 2002, market prices for power plummeted, and the actual price we received for our secondary energy turned out to be about $22/MWh – $35/MWh lower than our forecast in June 2001. Under normal hydro conditions, it now appears that the price we receive for secondary energy in the future will not reach our June 2001 forecast levels through the rate period.

**Other revenue impacts not depicted in Figure 2.** There are several other changes that have occurred since the May 2000 rate case that affect revenue. Although we have not precisely quantified these changes, it appears that they roughly offset each other.

- **We sold a flatter load shape than we assumed in base rates.** The May 2000 rate case assumed no sales of the Slice[19] product when, in fact, after Subscription contracts were all signed by November 2000, many customers had purchased a combination of Slice and block power. The "flatter" load shape of the block purchases reduced the average price paid for non-Slice requirements power. Additionally, in general, loads are not as high during peak periods as we expected in May 2000. For instance, mild weather in 2002 and 2003 made the load shape flatter than was expected which resulted in lower revenues from demand charges. Offsetting

[18] This bar attempts to isolate the impact of our expectation that we will receive lower prices for our secondary sales as compared to our expectation in June 2001 under average water conditions. This bar does not factor in the reduced generation experienced in 2002 and 2003, which are reflected in previous bars.

[19] "Slice" is a new power product that BPA starting selling in FY 2002. Customers buying Slice pay an agreed-upon percentage of BPA's actual power costs and in return they get the same percentage of the actual output of the federal system, on an hour-by-hour basis. This greatly changes the shape of deliveries to these customers, compared to traditional power products.

this somewhat is the fact that more secondary energy has been available in peak periods, which has likely increased the average price of secondary sales to some degree. However, it is difficult to isolate this impact and therefore quantify with any precision because of the variety of factors noted below.

- **Revenue from secondary sales is different today than we assumed in May 2000.** A variety of factors complicate the comparison of rate case estimates to actuals and current forecasts of revenue from secondary sales. One conclusion that can be made is that we expect to receive a slightly higher price on average for the 2004-2006 period for our secondary sales than we assumed in May 2000 – between $2-$3/MWh under normal water conditions. A dissection of our revenue from secondary sales is complicated by the following differences between our expectations in May 2000 and today. Actual hydro generation in 2002 and 2003 was very different and lower than what was modeled in May 2000; there have been many changes to our hydro regulation studies since May 2000 that are difficult to isolate; both the actual and current forecast load of our requirements customers is different; overall firm load levels (actual and forecast) are different; and, we secured augmentation based on a forecast load shape which is proving to be different than our actual firm load, making some firm resources available at times to be sold with our secondary sales. All of these factors are occurring simultaneously, which make it very difficult to isolate causal factors.

- **We entered into load reduction agreements with IOUs, public utilities, DSIs and other parties who had firm contracts, which appear to have an unintended impact on our revenue.** While the costs of serving the additional load placed on BPA is covered by the LB CRAC revenue and is, therefore, not depicted as an expense increase, the massive load reductions done to meet greatly increased augmentation needs were not anticipated in the rates process. It appears that these load reductions had at least two effects on our overall revenue picture, but they are very difficult to track precisely. First, as part of reducing load, we terminated or bought out contracts that were bringing in more revenue per MWh (which served as a credit to our revenue requirement in our base rates) than the load that the freed-up resource was to serve. In other words, we are receiving less revenue for that reduced megawatt-hour than we needed to recover in our revenue requirement. Second, we reduced a significant amount of load in the early part of the rate period — to the point that we reduced load that was covering part of our base revenue requirement. That is, we reduced not only the additional 1,600 aMW of load placed on us after establishing the base rate in May 2000 but also some of the load that we expected to serve as a part of our base rates. Because we reduced the load – and in some cases there was not a corresponding freed-up resource – the impact is that a portion of our base revenue requirement is not being recovered as we expected.

All of these changes have interrelated effects that are very difficult to separate and quantify. However, based on some rough comparisons, it appears that, in aggregate, these revenue changes roughly balance out to have no net effect on revenues and, thus, do not contribute to explaining the net revenue reduction from the May 2000 rate case. More precise estimates of these effects would require a great deal more effort.

## Cost control efforts

As shown in Figure 2, costs that are much above rate case forecasts are a major driver of BPA's current financial crisis. As presented above, major categories that are higher than rate case estimates are operations and maintenance costs for the hydro system, operations and maintenance costs for the CGS nuclear plant, depreciation/amortization/net interest and BPA internal operating costs recovered in power rates. Compared to actual costs prior to this rate period, these costs have not grown dramatically, or at all in the case of internal costs, but the forecasts built into the rate case called for decreases in these costs.

Our biggest effort has been and continues to be cost containment. We have scrutinized all of our expenses. We have gone to our employees, to our federal partners, to investor-owned utilities, to Energy Northwest, to the Northwest Power Planning Council and to others to seek more expense savings. We have consulted with our customers and others through the Financial Choices process in 2002. So far we have identified $350 million in expense savings, expense deferrals and other actions (about $292 million is directly attributable to closing the gap between revenues and expenses). We believe these savings are secured for the remainder of the rate period.

Much of this effort – about $140 million of the savings – has focused on BPA's internal operating costs. These costs were forecast to increase from actual 2001 levels. So far, we have brought 2003-2006 costs back down to 2001 actual levels, accounting for offsetting revenues, with no allowance for inflation. To do this, we are bringing many cost categories down below 2001 actual levels. Categories that are being cut to below 2001 actuals include:

- **Travel expenses** – Cut approximately in half from 2001 actuals (will save over $1.5 million over four years compared to 2001 actuals);
- **Training expenses** – Cut approximately by two-thirds from 2001 actuals (will save almost $1 million over four years compared to 2001 actuals);
- **Monetary awards** – Cut approximately 95 percent from 2001 actuals (will save over $7 million over four years compared to 2001 actuals);
- **Retention allowances for critical employees** – Eliminated (will save over $3.5 million over four years compared to 2001 actuals);
- **Materials and equipment expenses** – Cut significantly from 2001 actuals (will save over $25 million over four years compared to 2001 actuals);
- **Research and development spending** – Significant cut from 2001 actuals and fuel cell program terminated ($26.6 million reduction in Energy Efficiency and Conservation programs, including Market Development, Technology Leadership/Energy Web, Legacy Conservation contracts and Market Transformation);
- **Market research analysis** – Significant cut from 2001 actuals;
- **Association memberships** – Most canceled;
- **Rate staff, load forecasting staff and power account executives** – Reduced by over 25 percent over last five years to about 70 employees;

- **Communications and community outreach programs** – Reduced significantly from 2001 actuals; and
- **Nuclear oversight staff** – Cut in half due to improved performance of the Columbia Generating Station plant in the 1990s – reduced to seven employees.

We have placed a moratorium on outside hires with limited exceptions and have offered early retirement to reduce employment levels. We have canceled or deferred major information technology development projects such as the new Generation Management System, Real Time Operations Dispatch and Scheduling System (RODS) Migration project and System Backup and Recovery project. We also removed dollars from our budgets that would have been used to develop a scheduling coordinator for a regional transmission organization assuming that, if parties want this service, they will pay separately for it.

Despite these decreases, we have not yet brought total internal costs down below 2001 because there have been offsetting increases (or lack of decreases) in other areas. Some of these increases have been driven by the fact that BPA's power business volume increased greatly by the 3,300 aMW of additional load added in Subscription, which in turn increased the number and diversity of contracts to administer, added dozens of power purchase agreements and greatly increased the effort required to manage an extremely complex rate structure. The split of power and transmission business lines and compliance with FERC standards of conduct and other requirements has increased costs and staff demands. The increasing risks and revenue opportunities in the power market have dictated increases in staff to manage those risks and maximize surplus revenues, and increases in spending on automated systems to manage business and operational functions. Conservation and renewable resource development has remained a focus. A constant flow of regional policy issues has required ongoing staffing, as has RTO development and administration of the Asset Management Strategy with the Corps and Reclamation. Increases include:

- The number of duty schedulers, prescheduling staff, after-the-fact accounting staff and real-time trading staff on each shift to handle FERC mandates; the need to schedule transmission separately; Slice scheduling handling a greater volume of transactions due to Subscription power sales contracts and augmentation contracts.
- The workload associated with implementing the three CRACs.
- Hydro operations planning staff, to manage fish operations requirements and improve system optimization.
- Generation oversight staff, to develop and manage the hydro system Asset Management Strategy with the U.S. Army Corps of Engineers and the Bureau of Reclamation.
- Information technology systems development and maintenance staffing and contract costs, for the development of enhanced systems to meet FERC requirements and to optimize system operation.
- Transmission acquisition and management staffing and systems, to comply with FERC standards of conduct.
- Regional transmission organization development staffing.
- Risk management staffing.

- Legal staffing.
- Communications staffing.

Additionally, BPA is seeking greater efficiencies (while still complying with Standards of Conduct) in a number of functions that were dispersed across the organization when separate Transmission and Power Business Lines were created. The functions being addressed in this effort include:

- Power and Transmission billing.
- Financial reporting and analysis.
- Public affairs and public communications.
- Procurement.
- Training.
- Scheduling.
- Security.
- Information Technology.

In retrospect, the goal of cutting BPA's internal operating costs that support the power function roughly in half – as proposed in the Cost Review and largely reflected in the rate case – was overwhelmed by the large increase in business volume in Subscription and by the other changes in the industry which affected BPA's workload.

Our generation partners – Energy Northwest, U.S. Army Corps of Engineers and the Bureau of Reclamation – have all provided substantial cost reductions and deferrals from their planned budgets as well. Nonetheless, 2002-2006 operations and maintenance costs for the hydro system and nuclear plant are higher than those used in the rate case, and, to a lesser extent, they are higher than 2001 actuals. All three organizations are committed to seek further prudent cost reductions.

Extensive national and international benchmarking studies for the hydro system indicate that its operations and maintenance costs are about in the middle of comparable systems, suggesting that large additional operations and maintenance cost reductions for the hydro system are not likely achievable without degrading reliability and output.

Efforts to benchmark the operations and maintenance costs of the CGS nuclear plant are continuing. This study may or may not conclude that significant further reductions at CGS are possible while maintaining safety and reliability. In any event, post-September 11th security costs will continue to run higher into the foreseeable future.

In part, operations and maintenance costs of the generating system are higher than expected in the rate case because BPA and these agencies put priority on reliability and output maximization during the 2000-2001 period. But similar to BPA's internal operating costs, the conclusion in retrospect is that although these agencies will strive to bring costs down, the operations and maintenance costs for the generating system included in the rate case are not achievable, given the importance of maintaining an aging system for the future.

## What have we learned?

The analysis section above has provided a detailed examination of the chronology of events leading to the rate and financial crisis that BPA faces and of the specific factors that have created this situation. This section addresses some conclusions and the lessons we believe we need to learn from this examination of history, in the interest of avoiding a repetition.

### Significant drivers: Drought and the West Coast power crisis

The impact of the two years of drought (out of the last three years) and the West Coast energy crisis has been very significant. The 2001 drought and high wholesale power prices resulted in BPA losing in excess of $200 million that year. In addition, BPA used up $245 million of "fish credits" available from a contingency fund used to cover costs in dry years, leaving very little in this key 'insurance fund.' In 2002 there was a carry-over effect from the drought as reservoirs began the year less than full. All told, the 2001 drought and high prices created direct costs of approximately $600 million just for operations to keep the lights on. The West Coast price escalation during the power crisis had the compounding effect of increasing the load being placed on BPA, while simultaneously greatly inflating the cost of serving that load. This means that a significant fraction of the $4.3 billion in augmentation costs and increased IOU residential benefits shown in Figure 2 above would not have occurred without this crisis period.

The 2003 drought will also substantially reduce BPA revenues. Our current estimate is that revenues will be about $200 million lower in 2003 compared to what we expected just a year ago. We also expect that the below-average hydro conditions this year will reduce secondary revenues next year due to a lingering drought effect of lower than average generation for 2004.

But while drought and the market crisis dealt us a difficult hand, the key question for this report is what we can learn from these events to improve our performance on behalf of the region in the future. Following are what we believe are the most important lessons we learned.

### Some things went well

Most of the lessons learned below are about things that we need to do better or at least differently in future. First, we should recognize the things that turned out well and that we may want to build on or repeat.

- **CRAC structure:** In retrospect, collaborating with customers to put the CRAC mechanisms in our power rates was an appropriate response to risk. Having to use those mechanisms to the extreme extent that we are now is causing us and our customers great distress, but having a fixed rate structure without these CRACs could have left BPA with a much more dire financial outlook than even the one we now face.
- **Augmentation portfolio:** We started early (in 1999) purchasing power to meet 2002-2006 firm power needs. Overall, the portfolio of power purchases and load reduction has a reasonable price – about $35/MWh – even after averaging in high priced purchases from Enron and other parties.
- **Load reductions keep dollars in the Northwest:** Load reductions are a very large part of our augmentation portfolio and cost structure and, therefore, are a large part of our rate increase. One positive result of relying on load reductions in the augmentation portfolio is that total

costs are lower than they would have been if augmentation had relied entirely on power purchases. Another benefit of the load reduction approach is that a significant fraction of the dollars collected through higher rates is going back to Northwest citizens through higher payments to IOUs for their residential ratepayers and full-salary payments to aluminum workers who would otherwise be out of work. This is of little consolation to utilities whose rates are far higher than they expected, but Northwest average retail rates and unemployment rates are lower than they would be if the same dollars had flowed to power marketers for purchases.

- **Conservation jump started:** BPA accelerated the implementation for its two major rate case conservation programs eight months early to assist with the Energy Crisis. The Conservation and Renewables Discount (C&RD) and the Conservation as part of Augmentation (ConAug) programs provided opportunities for customers to re-engage in conservation. Many customers used these programs as part of their load reduction portfolios. This enhanced the re-establishment of a robust conservation delivery infrastructure that is paying dividends for the region now and into the future.
- **Debt optimization:** The debt optimization program, if followed to its fullest extent, can save ratepayers about $20 million per year while freeing up borrowing authority to be used for needed infrastructure projects.

### Lesson learned: Our costs and risks are driven heavily by the load obligations we assume

This perhaps is an obvious lesson, but in 1999 and 2000, before the large run-up in market prices, we believed we could acquire power to meet demands at a low-enough price to avoid significant rate increases, based on our experience in buying the first 1,000 aMW. Now, of the $5.3 billion of higher costs from 2002-2006, about $3.9 billion are due to serving 3,300 aMW of load beyond BPA's resource base. BPA took on substantial load service responsibilities, equivalent to more than all the total load growth in the region in the 1990s. Clearly, if BPA's costs and rates are to be lower, then BPA's load obligation will need to match up more closely with its resource base. Alternatively, if we take on more loads than our existing system can serve, we need to be very careful to assess the costs and risks of doing so. The decision needs to be well-connected to our long-term objectives and financial structure, and we need to be as clear as possible in explaining these effects to our customers and others affected by those decisions.

### Lesson learned: Delay in defining and meeting load obligations increased cost and risk

Again, this lesson may appear obvious in retrospect, but we believe it is key for the future. Subscription contracts were not all signed until less than a year before the new contracts went into effect, and market prices at the time were skyrocketing due to the West Coast energy crisis of 2000-2001. We could have avoided this situation by clarifying our load obligations and buying power sooner, or by limiting our load obligations through tiering rates or contractually limiting purchases. Either way, the lesson for the future is that we need to avoid again finding ourselves at the 11th hour without adequate supply to meet demand. The ongoing Regional Dialogue process will be key to achieving this early clarity.

### Lesson learned: Relied too much on highly variable secondary revenues to cover largely fixed costs

One very clear lesson is that we need to change how we treat secondary revenue forecasts in rate setting. In our June 2001 rate analysis, we forecast 2002-2006 secondary revenues over a billion dollars higher than we had predicted just a year ago. While BPA's estimates of secondary revenues made when rates were established in 2001 were consistent with then-prevailing market forecasts and the rates analysis did address the uncertainty of these revenues, they have proven to be too optimistic and we effectively relied on this variable revenue source to cover costs that were largely fixed. A major lesson learned is that we need to take a different approach to the high variability of secondary revenues in future rate setting. There are a variety of ways to do this, but change in this area is essential.

### Lesson learned: Need to better establish and manage costs

We need to better establish and manage our costs. Our costs for operating the system (BPA internal costs, Corps of Engineers and Bureau of Reclamation operation of the hydro system and Energy Northwest operation of the Columbia Generating Station) exceed the estimates that were developed by the Cost Review and adopted in the May 2000 rate case by a significant amount. This is the result of a number of factors:

- The cost estimates were unrealistically optimistic and the costs, once embedded in the rate case, were not backed by firm plans and agreements to manage to those levels.
- Estimates of cutting by nearly half the internal operations costs were, in retrospect, not sustainable given (1) the increasing complexity of the task of managing the system and (2) the underlying business model that allowed the cost reductions assumed a reduced, simpler role for BPA (for example, limited amount of service to load, simple contracts, fixed rates) that ultimately was not adopted. While the rate case estimates do not appear to be achievable, BPA is seeking to maintain its internal operating costs at 2001 levels for the period 2003-2006, net of offsetting revenues.
- Estimates of the cost of producing energy on the system (from the dams and the nuclear plant) were never committed to by the operators (Corps, Reclamation and Energy Northwest) and did not reflect the costs of properly maintaining an aging system.

The lessons learned are that (1) costs and budgets should be realistic and established with a clear link to the outcomes desired; cost estimates need to change if the fundamental assumptions underlying the estimates change; (2) we should obtain the support and commitment of our cost partners to our budgets; and (3) once budgets are established, we should develop firm plans and agreements to manage to those levels.

### Lesson learned: Long-term contracts that can lead to inequitable results need to be avoided

Some customers have been largely protected from the negative consequences of BPA's financial difficulties. Utilities that signed pre-Subscription contracts will be paying lower rates of roughly $22/MWh through the entire five-year rate period, as they are not subject to the CRACs. Investor-owned utilities have contracts that provide them with fixed benefit payments for the entire five-year period. These contracts were offered, negotiated and signed in the context of the

conditions that existed at the time; BPA often needs to make business decisions that have long-term risks embedded within them. When such issues affect the equity of how the benefits of the federal system flow to its customers, however, there may be a need to allow for more flexibility in the structure of such arrangements, or shorter contract lengths, or mechanisms that maintain equitable relationships between customers classes, to allow for changing conditions that could significantly affect equity calculations and/or perceptions.

### Lesson learned: A change in approach to decision making is needed

BPA's culture is one in which we seek to find ways to say "yes" to a variety of requests from our stakeholders while also seeking to avoid rate increases. This frequently results in the agency taking substantial financial risks. From 1999 to 2001 we took on increasing load obligations and funding obligations while telling our customers and ourselves that we could do so without large rate increases. Market prices that departed radically from forecasts, and failure to keep costs to rate case levels translated to large rate increases and great financial stress. The lesson learned here is that we need to be rigorous, objective and realistic about the financial impacts of the obligations we take on, before we take them on. Moreover, with the increasing price volatility in wholesale electric markets, we are going to have to be more conservative about the amount of risk we take on in the future. BPA has gone beyond the limits of risk it can absorb in the face of the increased risk and uncertainty in the industry. We also need to make sure that our customers and others affected by our decisions understand the potential implications of the decisions we make. We also need to ensure that, to the maximum extent possible, our decisions are linked to long-term strategy and objectives that are well understood internally and have been well reviewed externally. This links to the next lesson learned.

### Lesson learned: Limits to risk BPA can assume

BPA has historically assumed and managed a significant amount of risk on behalf of its customers and others. This is inherent in our role and will continue. But we believe a key lesson is that the amount of risk to be managed in the region's power system has grown substantially in recent years, and the fraction of that risk that BPA can absorb has therefore gotten smaller. Risks have increased because of unprecedented market price volatility and unprecedented concerns and problems with credit, coupled with ongoing uncertainties about industry restructuring. BPA has gone beyond the limits of risk that it can take on in the face of these increases in risk and uncertainty.

### Lesson learned: Changes needed in internal management

We conclude that a number of other improvements are needed in how we operate internally. The process of defining these improvements will be ongoing, but the following are the major areas we have identified to date.

**A need for clear and steady strategy and objectives.** In the late 1990s, the Comprehensive Review of the Northwest Energy System defined a more limited role for BPA. During Subscription, in response to what we saw as strong regional desires, we turned away from the limited role envisioned in the Comprehensive Review and committed to serve 3,300 aMW of load in excess of the firm production capability of the federal system. In addition, we agreed to

increase cash payments and energy deliveries to the IOUs to benefit their residential customers. Other interest groups also requested program expansions that increased our cost levels.

This was a fundamental change in the role BPA was to play in the Northwest energy system. As addressed above, there are some good things about how BPA accomplished this switch in role, but the rapid shift is also responsible for much of the huge rate increases and financial problems.

We need to determine the business model BPA should use in the post-2006 time frame, and the ongoing Regional Dialogue appears to be the proper venue for such a discussion. Having a clear and early understanding of what the region expects BPA to provide in the long term will allow BPA to deliver those benefits in the most efficient way. This clarity should allow for much more efficient development, management and tracking of systems to support those objectives. It should also enable clearer and more confident decision making by BPA's customers and their development of systems to support the conduct of their business, because BPA's decision making should be more predictable based on a more clearly articulated and stable set of objectives.

We also need to ensure that BPA's organizational structure, business systems and processes are tightly aligned around these long-term objectives, both to minimize costs and to maximize effectiveness.

**A need for enhanced business systems and processes.** The change in role described in the previous lesson learned also meant that we forced solutions onto existing business systems, structures and processes designed for a different business environment. This made it more difficult to create programs built on solid analysis. The rate system with its multilevel CRACs is far more complex than anything the agency or the region had devised previously. We are all still discovering some of the implications and results of that complexity.

In addition, our rate case accounting differs substantially from the accounting we use to collect and report actual costs, and this makes it hard to recognize and explain deviations from rate case financial expectations.

Specific enhancements are needed in the following areas:

- Effective monitoring of rate case cost assumptions against actual costs experienced in the rate period requires that relationships between rate case cost accounts and accounts used to budget and record actual expenditures be understood and documented within a set of consistently applied procedures to produce deviation reports for management review.
- Regular reports throughout the rate period of how BPA's actual costs compare with rate case assumptions should be prepared and communicated broadly to BPA's employees, customers and interest groups.
- Real-time course corrections in today's more complex risk environment demand more responsive and standardized methods for modeling, testing alternatives and monitoring results.
- The rate setting process involves many interdependent analytic steps that must be carefully followed and that became more challenging to complete under time pressures created by the rapidly changing events BPA encountered leading up to June 2001.

We must also place emphasis on bringing online and fully utilizing all modules of the Bonneville Enterprise System in order to assure that basic business systems work with a common data architecture and from a common data repository so that consistent and comprehensive tracking and reporting are possible.

**A need to better leverage analytical capability to support long-term objectives.** In the mid- and late 1990s, under the model proposed by the Cost Review, we cut our analytical resources substantially in the areas of rates, load forecasting and other areas. These changes reduced our ability to assure reliable, complete, timely and thoroughly coordinated analyses of the many complex rate and financial issues we encounter. This has made it difficult for the agency to develop a comprehensive view of BPA's financial picture, given the complexity of elements (including the CRACs and Slice) that contribute to it.

The overall lesson is that BPA needs to align its analytical resources to the type and scale of its long-term objectives. Adding significant numbers of analytic staff is not viable. Instead, we must better integrate and leverage our resources to assure robust, comprehensive and timely analysis in the face of an increasingly complex market and public policy considerations. Alternatives for organizing, staffing, developing and coordinating BPA's analytical capabilities should be carefully evaluated to determine the most effective support going forward.

**A need to improve risk management.** We have always had to deal with uncertainty because no one can accurately predict the weather, the performance of our generating asset base, the overall economy and the like. However, the West Coast energy crisis of 2000-2001 and the unfolding restructuring energy market introduced a range and level of uncertainty that neither the region nor we had ever experienced. For example, the creditworthiness of our customers and business partners was never a concern prior to the energy crisis, but BPA now faces $90 million of unpaid bills for sales to California and additional unpaid DSI bills. Another clear example is the price volatility we saw in 2000-2001 that was unprecedented. Though significant enhancements in risk analysis were done as part of the 2002-2006 rate case, still the sophistication of BPA's risk management has not kept up with the complexity of the business environment we faced.

More generally we also need to understand the appropriate balance between the risks that BPA is asked to absorb and the risks that are assumed by the rest of the region's utility industry. Again, the mechanism for determining those balances is the Regional Dialogue.

In 2002, we began a systematic study of our understanding and management of BPA's risks and we are now moving forward with actions to improve risk management across the agency. These actions will bring improvements to the systems, processes and procedures, and organizational structure for risk management.

**A need to improve skills and communications.** Our internal review has surfaced a number of needs for enhancement of executive and management skills and competencies. We need enhancements in risk management skills – both in risk analysis and in the use of risk analysis results by decision makers. Similarly, BPA needs to build its strength in financial analysis and use of financial analysis and reports for decision making. Also, though BPA has invested a great deal in management systems to ensure management to clear measurable targets, we still need to do better in this area.

We also need to work on communication. It is clear that we don't always make maximum use of our analytical skills because information from analysts distributed throughout the agency does not always flow smoothly from one group to another and up and down the reporting structure. Many BPA managers and staff feel that their views and ideas have not received an appropriate degree of consideration and that, if they had, better decisions would have been made. We need to explore this concern and make appropriate changes to address it.

### Conclusion

We believe that understanding and acting on these lessons learned, with understanding and input from those we serve in the region, will lead to greater assurance that BPA will continue to provide the benefits of the remarkable Federal Columbia River Power System.

# Confederated Tribes of the Umatilla Indian Reservation
# COLUMBIA BASIN SALMON POLICY

March 8, 1995

## I. Preamble

Salmon are in a state of crisis. We must act immediately and decisively if we are to save them from extinction and restore them to the levels guaranteed in our Treaty.

For thousands of years, salmon thrived in the Columbia Basin. Salmon always have been central to our religion and our culture, and we honored them accordingly. We had plenty of salmon to sustain us and plenty more to trade with others from far away.

In less than 150 years, the newcomers to our homeland have driven the once-plentiful salmon to the brink of extinction. Many salmon species already are gone forever.

It is not just the salmon which are endangered. Salmon are only a small symptom of a dying ecosystem. It is the Columbia Basin and the Pacific Ocean which are endangered. The salmon are telling us that the mountains, valleys, plains, rivers and ocean are all sick. Many other species now face extinction.

For thousands of years, we managed our resources with respect. This land was rich in natural resources when the first non-Indians arrived. The wasteful and disrespectful practices of the last 150 years have used up nearly all of these resources, creating ugly conflicts between those people now dependent on them.

These resources would be healthy if the Treaty of 1855 had been honored, and if the United States Government had honored its own laws. Salmon, sturgeon, eels, and many other fish face certain extinction unless immediate and drastic changes are made in the human management of the Columbia Basin and the Ocean.

Salmon have been a source of sustenance, a gift of religion, and a foundation of culture for our people since time immemorial. Their existence is vital and linked to ours. We will not allow them to go extinct.

We have the answers to this problem. We can save the salmon and make the economy of the Pacific Northwest even stronger at the same time. We must implement plans which meet not only our needs, but the needs of our grandchildren and their grandchildren.

A New Energy Plan, which would promote new economic development and which would significantly reduce the impacts of hydropower on the salmon is needed and is possible. This New Energy Plan must be a critical component of our solutions.

It is time to heal the resources of this region. We call upon the other Tribal Nations, upon the people of the United States of America, and upon the people of Canada to support our policy:

**IT IS THE POLICY OF THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION THAT THE HEALTH OF THE COLUMBIA BASIN AND THE PACIFIC OCEAN BE RESTORED, AND THAT ALL SALMON AND OTHER NATIVE FISH SPECIES BE RESTORED TO THE SAME POPULATION LEVELS AND TO ALL RIVERS IN WHICH THEY LIVED PRIOR TO THE TREATY OF 1855.**

**WE HEREBY DECLARE THAT A STATE OF EMERGENCY EXISTS IN THE COLUMBIA BASIN AND PACIFIC OCEAN WHICH REQUIRES IMMEDIATE ACTION.**

## II. Background

> **"This multitude of fish is almost inconceivable. The water is so clear that they can readily be seen at the depth of fifteen or twenty feet."**
> Captain W. Clark, Lewis and Clark Expedition, October 1805

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) are made up of the Umatilla, Cayuse, and Walla Walla Tribes. Before the Treaty of 1855, our Tribes had a thriving fishing economy. We traded salmon up into Canada, down into California, and far to the East for goods from those regions. We were a wealthy, self-sufficient nation at that time.

In 1855, our Tribes entered into a Treaty with the United States Government in which we ceded 6.4 million acres in what are now the States of Oregon and Washington. We never gave up certain rights, however. Instead, we reserved them in the Treaty and the Federal Government promised to protect them for us.

The rights we reserved were the basis of our economy and the core of our culture and religion. These rights include the right to fish at our usual and accustomed fishing stations throughout the Columbia Basin, and the right to a sufficient quantity and quality of water to maintain these fish runs. The Treaty also reserved the right of continued Tribal access to certain lands for hunting, for gathering traditional foods and medicinal herbs, and for religious purposes. Without the promise that these rights and resources would be protected, our ancestors would not have signed the Treaty.

The 6.4 million acres which we gave to the people of the United States contained a vast wealth of natural resources. The non-Indian economies of the Pacific Northwest are based upon these Treaty-given resources.

Our economies can co-exist. Instead, non-Indians have taken not only the resources we gave them, but the resources which we specifically reserved to ourselves. As a result, their economies have thrived, while ours has been driven to extinction.

The construction of the Hells Canyon Dam on the Snake River resulted in the complete extinction of all anadromous fish in all upstream watersheds. Within our ceded lands, this includes the entire Powder, Burnt, Owyhee, and Malheur watersheds. Each of these watersheds were significant producers of the Columbia and Snake River salmon runs.

Salmon are on the verge of extinction in the Grande Ronde, Yakima, Imnaha and Tucannon watersheds, and are now listed under the Endangered Species Act. Already, the Snake River coho, the Wallowa Lake sockeye, the Walla Walla chinook, and the Grande Ronde lamprey are extinct, among others.

The fish populations are so low in the Grande Ronde, Imnaha, Tucannon, and Walla Walla watersheds that we can no longer fish these tributaries. We have cut our harvest on the Columbia River to virtually nothing.

Our people are suffering because the United States has not honored our Treaty. In addition, the Federal Government and the States have many laws of their own which would have prevented the decline of salmon, but which they have not enforced. This policy calls for the enforcement of existing laws, and for new laws where necessary to right the wrongs of the past.

## III. Overview of Ecosystem Restoration and Management

### A. Water

Water is one of our most sacred gifts from The Creator, and is an essential part of our religion. Water is the lifeblood in the veins of the Pacific Northwest. Without good clean flowing water, nothing will survive. Instream flows and good water quality must be restored.

**"It is the National Goal...that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish...be achieved by July 1, 1983."**
Clean Water Act, 33 USC 1251(a)

Water is the home of the salmon. Like the salmon, water travels from the mountains to the ocean, and back again. Impacts to the water are felt throughout the ecosystem.

Inadequate instream flows are killing salmon by the millions, throughout the Columbia Basin tributaries and in the mainstem of the Snake and Columbia Rivers. Hydropower management changes the quality, timing and quantity of river flow. Irrigation permanently removes large quantities of water from the rivers.

Columbia and Snake River instream flows are now "managed" for power production. The Columbia River has become the energy "engine" for the economy of the Pacific Northwest. This economy is dependent on billions of dollars of Federal subsidies. To maximize energy output, the Federal agencies literally reverse the timing of instream flows. As a result, instead of a clean flowing river for salmon, the Columbia and Snake Rivers are a series of stagnant lakes.

Irrigation withdrawals dry up many tributary rivers, even the mainstem. For example, below Milner Dam in Idaho, the Snake River has zero flow. Further down the mainstem, flow velocities have dropped significantly as the once free-flowing Snake and Columbia Rivers have been changed into reservoirs. The many huge irrigation withdrawals from the mainstem further reduce the flow velocities.

The water itself is sick. Grazing, timber, mining, agricultural and recreational practices in the tributaries are drastically changing and damaging the health of the rivers.

Many tributaries now have temperatures which are lethal to salmon. Only high elevation streams with cool water now are utilized by salmon for spawning, rearing, and other needs, while formerly productive salmon habitat in the mid and lower parts of those same streams have become an aquatic wasteland.

Mainstem dams and reservoirs have increased water temperatures to dangerous levels. These high temperatures not only weaken salmon, but provide excellent habitat for their predators, such as squawfish. High temperature water from the tributaries only makes the mainstem temperature problems worse.

Land management practices have increased erosion and sedimentation. High levels of sediment smother redds, suffocate salmon, and reduce fish food production.

> **"Salmon can't get up here on their fins and say what they want; a cup of water can't get up here and talk...we've got to talk for the salmon and for the water, that is our duty."**
> Brian Conner, CTUIR Tribal Member
> Testimony at Special General Council Hearing on Salmon Restoration, August 27, 1994

Toxic pollutants poison the water. In the mountains, forest managers apply pesticides and herbicides which end up in the water. In the valleys and plains, farmers add more pesticides and herbicides, plus fertilizers. The Hanford Nuclear Reservation adds highly toxic radioactive and chemical wastes, much of it through contaminated groundwater which seeps into the Columbia River. Pulp and paper mills add millions of gallons of organochlorine wastes, including dioxins and related chemicals of extreme toxicity. Aluminum smelters also contribute a significant amount of pollutants to the Columbia Basin's ecosystem.

From the tributaries to the ocean, cities and industries add their wastes. This waste accumulates in the Columbia River estuary, a critical rearing ground for young salmonids.

The failure of the Federal Government and the States to honor our Treaty and to enforce their own laws has created these problems. Salmon have the superior legal claim to water in the Columbia Basin under our aboriginal rights, under our Treaty and under the States' Prior Appropriations Doctrine. Likewise, both our Treaty and laws such as the Clean Water Act mandate cleaning up the water.

From time immemorial, water has been the giver of all life. We must honor and protect it, from the tributaries to the ocean.

**It is the Policy of the CTUIR that:**

1. **The Federal and State Governments must begin honoring our reserved instream water rights, immediately. For instance:**

    a. **The Federal Government must recognize our superior legal right to instream flows for fish in its actions which affect instream flows, such as the development of the System Operation Review, the System Configuration Study, the Pacific Northwest Coordination Agreement, and the Canadian Entitlement Allocation Agreement.**

    b. **The Federal Government must release all uncontracted stored water for augmentation of instream flows for fish.**

    c. **The States must stop issuing new water rights anywhere in the Columbia Basin until our water rights are satisfied and the salmon have enough water for their needs.**

2. **To reduce the impacts of honoring our senior water rights on the power system, the Pacific Northwest needs a New Energy Plan which will reduce the energy production burden on the Columbia and Snake Rivers so that fish can, once again, live in these great Rivers.**

   a. **We will work with the Federal Government, the State Governments, local communities, and with other Tribal Nations to develop this Plan.**
   b. **We call upon the Federal Government, in particular, to work with us to develop and implement this New Energy Plan before the end of this century.**

3. **To reduce the impacts of honoring our senior instream water rights on junior irrigation water rights holders, the Federal and State Governments must:**

   a. **Require water conservation measures to reduce out-of-stream needs for water.**

   b. **Discourage economically unjustifiable uses of water, such as to grow surplus crops and low value crops.**

4. **The Federal and State Governments must begin monitoring water withdrawals and must halt all uses which are illegal under Federal or State law, immediately.**

5. **The Federal and State Governments must comply with our Treaty and with Federal and State laws which require protection and restoration of good water quality.**

6. **The Federal, State and Local Governments must aggressively enforce all existing laws governing toxics, and must themselves comply with such laws. They also must strengthen those laws to further minimize and eventually eliminate the discharge of toxics. Further, they must initiate and mandate clean-up measures to remove existing toxics from the water.**

## B. Harvest

Our harvest of salmon is not what is killing off the salmon. Salmon are being destroyed for economic profit by hydropower, irrigation, timber and grazing interests.

We harvested salmon for thousands of years at levels far higher than today. To protect the salmon, we have been reducing our harvests for decades. Over twenty years ago, we began shutting down our fisheries altogether in the tributaries. Now, even our mainstem harvest season lasts only a few days.

Yet, the industries which have been responsible for destroying the salmon runs have not made any sacrifices. They continue to slaughter salmon by the millions, while enjoying economic prosperity. Most of the salmon are killed as smolts, when they are only a few inches long. Few people witness this slaughter.

Meanwhile, many blame Tribal harvest for the decline of salmon. The participation of the Federal Government in perpetuating this lie is unconscionable and is a breach of its Trust Responsibility to protect our Treaty-reserved fishery.

For instance, the National Marine Fisheries Service reported that mainstem dams kill up to 93% of juvenile Snake River fall chinook. Yet, it determined that these Federal dams do not jeopardize Columbia River salmon. At the same time, they demanded that we shut down our tiny remaining harvest, which accounted for about 2% of all man-made mortalities.

Even with commercial harvest, this double standard continues. Tribes are told to shut down our harvest, while international and Alaskan fisheries on these same fish continue. Federal law requires that the burden of conserving a species be shared equally. When Indian Treaty rights are involved, those rights are to be limited only after all other non-Treaty users have shouldered their burden. This legal requirement has been grossly violated.

Federal courts have interpreted our Treaty to mean that half the salmon runs are ours and half are for non-Indians. The non-Indians have used up all of their half, and now have used up nearly all of our half as well.

We have voluntarily reduced our harvest to almost nothing to protect the salmon. We have opposed completely shutting down our fishery. Our connection to salmon is based on harvest for religious, cultural and economic purposes. We oppose any efforts to separate us from the salmon, and to keep us from asserting our Treaty right to demand restoration of the salmon runs.

**It is the Policy of the CTUIR that:**

1. **The Tribes, Federal Government and States must establish harvest and escapement goals which enable the recovery and restoration of all salmon and other native fish.**

2. **The Tribal fishery must meet the needs of Tribal members for cultural and religious purposes, for subsistence food, and for economic purposes.**

3. **The needs of the bear, eagle, cougar, and others for salmon must also be fulfilled. This balance between humans and our animal brothers is way out of balance, with humans consuming more than our fair share.**

4. **All killers of salmon must be considered as harvest.**

    a. **The artificial distinction between 'harvest' and those who kill salmon for other economic reasons must cease.**

    b. **Treaty reserved Tribal harvest must be met before harvest by the dams, irrigation, agriculture, grazing, timber harvest, and the Alaskan and Canadian fisheries.**

5. **We will re-establish traditional Tribal fisheries in all of our usual and accustomed fishing stations, and will support other Tribal Nations' efforts to do the same. The Federal Government must actively assist in restoring our Treaty-reserved access to our usual and accustomed fishing sites.**

6. **The Federal Government must stop blaming our fishery for the decline of salmon, and must take affirmative steps to correct this lie. The dams are by far the biggest 'nets' in the Rivers. It is time for the Federal Government to take responsibility for exterminating our salmon runs.**

## C. Supplementation

Hatcheries have been used by the Federal Government to mitigate for salmon losses due to the construction of hydroelectric dams. Now, under the Endangered Species Act, the Federal Government is telling us that hatcheries are no longer an appropriate tool to restore salmon, but rather only to preserve salmon as a museum piece.

Despite their intended purpose, hatcheries have never been used to restore salmon populations. Instead, hatcheries have been used to provide a fishery, primarily for non-Indians. Almost all of these hatcheries were located so that the fish would return below Tribal fishing areas.

Federal and State hatcheries failed to restore salmon because they never allowed the salmon to return to their habitat. The past hatchery policies have been "concrete to concrete" management. Instead of allowing the salmon to return to the river to reproduce naturally, they were returned to the hatcheries to reproduce artificially.

The population levels have fallen so low now that supplementation is mandatory if salmon are to be prevented from going extinct. Artificial propagation has been used successfully with many endangered species.

Now, however, the National Marine Fisheries Service is significantly limiting the use of hatcheries in this crisis situation. Using an arbitrary definition of species, the "evolutionarily significant unit", the agency is pursuing a policy which may well cause the extinction of the species they purport to be protecting.

Currently 75% of all returning salmon are hatchery-reared. This situation is not the result of Tribal actions nor is it our desire. Hatcheries need to be used, but they must be used properly.

Our philosophy is "gravel to gravel" management. Hatcheries should be used to reintroduce salmon into their habitat, from which they can continue to reproduce naturally. The CTUIR, working with the Federal and State Governments, has successfully reintroduced three stocks of salmon in the Umatilla River using this philosophy. We now watch fall chinook salmon spawning in river gravels where they have not spawned for nearly 80 years.

Hatcheries also have failed because the dams slaughter salmon by the millions. The current Federal policy of pretending the dams are not responsible for the decimation of Columbia River salmon, and using illogical interpretations of the Endangered Species Act to restrict the use of hatcheries, is a recipe for salmon extinction.

**It is the Policy of the CTUIR that:**

1. **Hatcheries have failed to mitigate the impacts of the mainstem dams on our Treaty fisheries.**

2. Salmon populations are in a state of crisis. Supplementation must be used to supplement existing remnant salmon populations and to restore lost salmon runs. The Federal Government must:

   a. Rescind its "evolutionarily significant unit" definition.

   b. Implement supplementation measures which are based on sound genetic science for survival and restoration of the species.

   c. Install adequate supplementation facilities in the upstream portions of the Columbia Basin to assist in the restoration of the salmon to their traditional habitat and to supply our Tribal fisheries.

   d. Use supplementation to assist in rebuilding all treaty-protected species, rather than just those favored by non-Indian fishery interests.

   e. Use supplementation as a tool to rebuild the salmon runs to the levels protected under the Treaty Of 1855 and to restore our Treaty fishery as quickly as possible.

3. The Federal and State "concrete to concrete" hatchery practices must be replaced with a restoration-based "gravel-to-gravel" use of supplementation.

4. Artificial production is a very important tool to restore salmon, but it is only one tool. Supplementation must be accompanied by other mandatory restoration efforts, such as habitat restoration (mainstem and tributary) and reductions in harvest.

5. Salmon and other native fish (such as bull trout and whitefish) must be restored to harvestable levels in all rivers they inhabited prior to 1855. Supplementation must be used, in combination with other restoration measures, to achieve this overall goal . General goals for CTUIR ceded area subbasins are as follows:

   a. The once extinct spring chinook, fall chinook and coho must be fully re-established in the Umatilla River.

   b. Currently extinct spring chinook, fall chinook and coho must be re-established in the Walla Walla River.

   c. Currently extinct coho and Wallowa Lake sockeye must be re-established in the Grande Ronde River.

   d. Depressed populations of spring chinook and fall chinook must be restored in the Grande Ronde, Imnaha, and Tucannon Rivers.

   e. Depressed populations of spring chinook, fall chinook and coho must be restored in the Yakima River.

   f. Depressed eel populations throughout the Columbia Basin must be restored.

g. **All salmon and other native fish must be re-established in the Burnt, Owyhee, Powder and Malheur Rivers.**

h. **The Umatilla Basin salmon restoration program should be used as a model for the proper use of supplementation.**

i. **The Grande Ronde River should be used as a model to develop a state of the art restoration program using hatcheries as a tool, in conjunction with (rather than in lieu of) increased survival in the mainstem and in the tributaries.**

## IV. Regional Ecosystem Restoration and Management

### A. Tributary Ecosystem

The tributary rivers and creeks, once the home and spawning grounds of the salmon, have now become hostile environments. High temperatures and pollutants kill, weaken and reduce productivity of the salmon. Silt smothers their eggs.

Watershed degradation has drastically changed the rivers and has made salmon habitat unlivable. The impacts of logging, road building, grazing, mining, farming and development run down hills, into streams, and progressively through watersheds.

**The Upper Grande Ronde has "...severe temperature and sedimentation problems."**
Forest Supervisor, Wallowa-Whitman National Forest, Fire Bug Timber Sale, Environmental Assessment, March 26, 1990
**"We see no evidence to support speculation that [a stream temperature] increase has occurred."**
District Ranger, LaGrande Ranger District, Wallowa-Whitman National Forest letter to National Marine Fisheries Service, September 14, 1992

Irrigation diversions compound the problem by dewatering streams. Because of poor or absent screens, diversions draw fish into ditches and then flush them onto fields.

Many of these impacts could have been prevented by respectful use of the watersheds. Although Federal, State and Local Governments and private interests have long pushed for voluntary measures to restore and protect salmon streams, very little has been done.

We have worked cooperatively with Federal and State agencies and with private individuals to develop methods to minimize the impacts on salmon while allowing continued use of the watersheds' resources. We have solutions, but they are not being implemented.

For instance, in 1989, we helped the U.S. Forest Service develop the Tri-Regional Anadromous Fish Policy and Implementation Guide. In 1992, at the request of the Wallowa-Whitman National Forest, we used our scarce resources to help them develop the Upper Grande Ronde River Anadromous Fish Habitat Protection Restoration and Monitoring Plan. Neither plan has been implemented by the Federal Government.

We have shown, however, that our solutions work. We used the Upper Grande Ronde River Anadromous Fish Habitat Protection Restoration and Monitoring Plan to guide our own timber sales on Tribal lands in the Upper Grande Ronde. We have shown that we can harvest timber profitably and still protect our watershed.

Economic use of watershed resources can co-exist with salmon restoration. Federal implementation of the Plan would similarly streamline the Federal timber sale program.

To restore salmon to their homes in the tributaries, watershed restoration efforts should be accompanied by supplementation measures where the salmon are gone or their populations are critically depressed. Our Umatilla Basin salmon restoration effort should serve as a model. Our goal is to restore our Treaty fisheries in the tributaries, fisheries which we had to begin shutting down decades ago.

**It is the Policy of the CTUIR that:**

1. **Watershed health must be restored to all of the Columbia River tributaries, from the headwaters to the ocean.**

2. **Federal and State agencies must begin enforcing all existing laws which prohibit or limit impacts to the watersheds, such as limitations on in-river activities.**

3. **Private landowners also must comply with our Treaty and must participate in all watershed restoration efforts as well.**

4. **Floodplains must be protected from further degradation and restored to a healthy condition:**

    a. **Federal, State, Local and Tribal Governments should place a moratorium on new development within floodplains.**

    b. **Critical floodplains should be identified for priority restoration efforts such as:**

        i. **Re-establishment of wetlands.**
        ii. **Reopening of old channels.**
        iii. **Identification of sites where houses, roads, fences, etc. can be relocated.**

5. **The beaver must be restored to all rivers. Beavers restore wetlands, reconnect floodplains with rivers and streams, and otherwise restore watersheds. Bring back the beaver and good quality salmon habitat will follow.**

6. **Farming practices must be modified so that they no longer degrade the watershed.**

7. **All irrigation diversions must be screened. The States must begin enforcing existing laws requiring screening of irrigation diversions, immediately.**

8. **All irrigation diversions must be gauged and monitored to assure the legal diversions of water.**

9. **Dams and other passage barriers in the tributary systems must be removed or modified to allow free passage of migrating salmonids.**

10. **Areas including and surrounding culturally sensitive areas should be closed to all activities.**

11. **Fire suppression should be used sparingly, and fires should be allowed to burn much as possible. Salvage logging after fires should be limited to only what can be removed without damaging the watershed.**

12. **All watersheds in the Columbia Basin must be managed with standards comparable to those in the Upper Grande Ronde River Anadromous Fish Habitat Protection Restoration and Monitoring Plan.**

13. **The U.S. Forest Service must implement the Upper Grande Ronde River Anadromous Fish Habitat Protection Restoration and Monitoring Plan immediately.**

14. **Salmon spawning streams such as the Grande Ronde, Umatilla, John Day, Tucannon, and Walla Walla have been stressed beyond their capacity and must be rested to allow recovery.**

15. **Kop Koppa ('the Place of the Cottonwoods'), otherwise known as the Grande Ronde Valley, must have its cottonwoods restored, and along with it the beaver, camas and wetlands.**

16. **In the Walla Walla River, where the United States Government first promised to protect our fish and water, the river itself must be restored.**

17. **The CTUIR will continue to take the steps outlined above to protect and restore the watersheds within our Reservation and, with our co-management authority, throughout our remaining ceded lands.**

## B. Mainstem Columbia and Snake River Ecosystems

> **"We can no longer look at the symptoms of the salmon's destruction, but must stop the deadly actions that have caused it."**
> Donald Sampson, Chairman, Board of Trustees
> CTUIR letter to System Operation Review lead federal agencies, December 15, 1994

The Columbia and Snake Rivers were magnificent rivers, around which we lived our lives. Celilo Falls and other great fishing places like it on the mainstem were central social, economic and religious places for us.

Nothing can ever make up for the inundation of Celilo Falls and the others. No words can explain away the dams that have been built or allowed by the Federal Government, who had pledged to protect our fishing stations. No words can express the loss.

The mainstem Columbia and Snake Rivers are critical habitat for salmon and other native fish. Salmon restoration efforts, however, typically refer to these great rivers as the "Hydrosystem".

This label ignores the fact that these rivers are fish habitat, and enables agencies to view them only as hydropower generating machines. Ignoring the rivers' role as habitat also enables agencies to substitute the interstate highway system and barges as appropriate "transportation" for salmon.

The eight lower Columbia and Snake River dams and reservoirs kill an estimated 77-96% of migrating juvenile salmon and an estimated 37-61% of migrating adults. Extremely warm temperatures in the reservoirs have disastrous effects on salmon, causing disease, stress and death. The reservoirs create ideal conditions for squawfish and other predators which feed on young salmon.

Conversion of the Columbia and Snake Rivers into reservoirs has resulted in a major loss of salmon habitat. The mainstem used to provide critical habitat for rearing of juveniles, overwintering of juveniles and for spawning.

Federal and State efforts to restore Columbia Basin salmon have failed because restoration of salmon has been separated from restoration of the Columbia and Snake Rivers. Rather than restoring these great rivers to the conditions needed by salmon, these efforts have treated only the symptoms.

For instance, rather than address the altered habitat conditions which favor predators of the salmon, river managers began a harvest program on squawfish. Other "solutions" have included removing the fish from the rivers altogether, and putting them in trucks and barges to take them to the ocean.

A cool, free-flowing Columbia River is good for salmon and sturgeon and the other cultural resources reserved by our Treaty. Salmon need a river. Salmon cannot live in a series of dammed stagnant reservoirs.

**It is the Policy of the CTUIR that:**

1. **Mainstem habitat conditions required by salmon, sturgeon, eels and other native fish must be restored. The Columbia and Snake Rivers must flow again.**

2. **Actions to decrease smolt travel times and to improve water quality sufficient to prevent extinction must be implemented immediately (March, 1995). These measures include:**

    a. **Structural modifications at dams including better juvenile bypass systems and adult fishways.**

    b. **Immediate improvement in river velocity.**

    c. **Increased spill when necessary.**

    d. **Implementation of drawdowns of the lower four Snake River dams and the John Day Dam.**

    e. **Release of stored water from the Upper Snake and Upper Columbia reservoirs to augment instream flows.**

3. **The Federal and State Governments must implement every action necessary to restore river velocity and improve water quality immediately. Every effort must be made to protect every juvenile salmon in the 1995 smolt out-migration.**

4. **The removal of juvenile salmon from the Columbia River for artificial means of "transportation" must be halted.**

5. **The Northwest Power Planning Council and the States of Oregon, Washington, Idaho and Montana should implement emergency mandatory energy conservation standards in 1995 as another means to increase flexibility in the operation of the Columbia hydrosystem.**

6. **We support the staged, strategic modification or removal of dams, such as the lower four Snake River Dams and the John Day Dam, coincident with development of a New Energy Plan for the region and implementation of aggressive energy conservation programs.**
7. **The Federal Government must take financial responsibility for mitigating the impacts of drawdowns and dam removal.**

## C. Estuary Ecosystem

The Columbia River estuary is a critical rearing ground for young salmon as they change from being fresh water fish to being salt water fish. They depend on the rich nutrients of the estuary for their growth and development before proceeding into the open ocean.

From 1870-1970, around two-thirds of all tidal swamps, marshes, and flats have been lost as a result of dredging, filling, diking, channelization and other development activities. The toxic material added to the waters from the headwaters through the mainstem accumulate in this sensitive estuary system.

**It is the Policy of the CTUIR that:**

1. **The States of Oregon and Washington should take all steps necessary to have this estuary formally added to the National Estuary Program, enabling Federal funding to assist in estuary restoration and in understanding the condition of the estuary.**

2. **The Federal and State Governments must take all steps necessary to halt further estuary degradation and habitat loss. They must:**

    a. **Take all steps necessary to significantly reduce in-river and off-shore discharges of waste water, toxic effluent, and other pollutants which are building up in this estuary.**

    b. **Prohibit further loss of tidal swamps, marshes or flats.**

3. **We will enlist the aid of other Tribal Nations, Federal and State Governments, private citizens and environmental groups to proactively bring about the necessary restoration in estuarine habitat conditions for the benefit of salmon and other anadromous fish.**

## D. Ocean Ecosystem

Salmonids spend the majority of their lives in the ocean. Despite this fact, the National Marine Fisheries Service has failed to designate the ocean as "critical habitat" under the Endangered Species Act. Degradation of the ocean habitat along with poorly regulated international fishing are having an unknown effect on salmon survival.

**It is the Policy of the CTUIR that:**

1. **The National Marine Fisheries Service must begin focusing its attention on the ocean. In 1995, this agency must assess the scope and impacts of Canadian and Alaskan fisheries, offshore foreign fisheries, ocean water quality degradation, and the condition of food chain processes that influence Columbia River salmon survival and productivity.**

2. **Any impacts to Columbia River salmon from ocean fishing or habitat degradation must be identified and curtailed immediately.**

## V. Obligations to Uphold the Treaty of 1855

The Treaty of 1855 is our "contract" with America. It is much more than a contract, however. Under the United States Constitution, the Treaty Of 1855 is considered "the Supreme Law of the Land."

**"It is hard to have a thriving economy when the basis of your economy is listed as an Endangered Species."**
Antone Minthorn, CTUIR General Council Chairman, Speech to the President's Council on Sustainable Development, November 3, 1994

The United States Government has a solemn obligation under both its own laws and under international laws to uphold our Treaty. This obligation extends to the individual States which make up the United States, and to the individual citizens of the United States.

The Federal Government, in addition, has a special Trust Responsibility to protect Tribal resources. This doctrine has been recognized by the United States Supreme Court and was first articulated by the first Chief Justice, John Marshall. This doctrine recognizes that States and citizens often are hostile to Tribes and greedy for our resources. It places a special obligation upon the United States Government to protect our people, our rights and our resources from those who do not honor our Treaty.

The Federal Government, however, is responsible for much of the hostility that we and our Treaty rights face. The conflict between salmon and other economic interests in many cases was the direct result of Federal actions. For instance, Federally constructed dams encouraged non-Indians to become dependent on the water we reserved for the fish. Now, non-Indian hydropower and irrigation interests view themselves as pitted against the restoration of the Treaty-reserved water needed by the fish.

**It is the Policy of the CTUIR that:**

1. **Our Treaty, in which we gave the people of the United States over 6.4 million acres of land rich with resources, has been violated. Our Treaty rights must be honored, and our Treaty resources restored.**

2. **The Federal Government has breached its Trust Responsibility to this and other Tribal Nations by managing the Columbia Basin and the Pacific Ocean in a way which has destroyed our Treaty resources.**

3. **In many cases, the conflict between our Treaty rights and other economic interests was caused by Federal actions. These situations are a particularly outrageous violation of the Federal Trust Responsibility. The Federal Government has an obligation to fix the conflicts it has created. Specifically, the Federal Government must restore our Treaty resources, and take responsibility for the resulting impacts on other users of those resources.**

4. **The Federal Government's Trust Responsibility requires that it protect and restore the salmon, sturgeon, and eels, and the Columbia Basin-Pacific Ocean habitat they require.**

5. **We will use our Sovereign powers to protect ourselves by using whatever means necessary to protect and restore the Columbia Basin and its Treaty-protected fish, wildlife, plant, water and cultural resources.**

> **"[C]onflicting responsibilities and federal actions taken in the 'national interest,' however, do not relieve [the Secretary of the Interior] of his trust obligations."**
> Federal District Court of Montana, Northern Cheyenne Tribe v. Hodel, 12 Indian Law Reporter 3065, 3071 (1985)

6. **We call upon the Federal and State Governments to enforce the laws and policies you have adopted. If compliance were met with the National Forest Management Planning and Conservation Act, the Clean Water Act, the Northwest Electric Power Act, and the Endangered Species Act, among others, the Columbia River salmon would not be on the brink of extinction. We support these laws and call for Congressional and administrative efforts to implement and strengthen them where necessary.**

7. **The policy of using hatcheries in lieu of protecting habitat in the mainstem and tributaries has failed. Restoration plans must be comprehensive, using both habitat restoration (mainstem and tributary) and supplementation.**

8. **Federal and State agencies must implement recovery and restoration actions which are consistent with the standards and procedures of U.S. v. Oregon.**

9. **Short-term and long-term management standards must be developed for operation of other economic activities and to restore the habitat within the tributaries and the mainstem.**

    a. **Immediate (1995) standards should recognize that a State of Emergency exists, and should be based on the goal of preventing extinction and initiating recovery of Snake River salmon as quickly as possible.**

    b. **Long-term (permanent) standards must restore our Treaty resources to their condition prior to 1855 as quickly as possible.**

10. **We call for the Pacific Salmon Commission, established under the Pacific Salmon Treaty, to live up to its established goal of rebuilding Columbia River salmon stocks by 1998. This is a first step towards rebuilding the salmon runs to their 1855 levels.**

11. **We call upon all other Tribal Nations in the Pacific Northwest to join with us to protect Tribal resources and Tribal people. The time for burying age-old conflicts is at hand. Let us join together as Indian People to protect what is rightfully ours and to show the non-Indian world that salmon, shellfish and wildlife can survive along with people and industry.**

12. **We call upon the non-Indian citizens of the United States to learn and understand from Indian people, and to remember what promises the United States made to us. We ask for you to do everything in your power to ensure that our Treaty rights are honored and that the salmon are restored to sustainable, harvestable populations.**

## VI. Conclusion:

> **"Great Nations, like great men, should keep their word."**
> The late Supreme Court Justice Hugo Black, Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960)

The restoration of the salmon and the honoring of our Treaty rights is just as important to the American people as it is to us. For us, it is a matter of our religion, culture and economy. For the citizens of the United States, it is a matter of honor. Right now, the integrity of the American people is being stripped away one salmon at a time, just as when the buffalo were slaughtered a century ago.

In implementing this policy, we will initiate actions to protect the salmon, the rivers, our religion, and our people. We are willing to work with others to minimize the impacts of these actions. We will, however, do everything in our power to restore salmon and their habitat, by any means necessary.

It is our vision and our hope that the Columbia Basin once again will be the largest salmon producer in the world. It is our vision that salmon once again will be a strong economic foundation in the Columbia Basin. We know that the existing economies of the Pacific Northwest can co-exist with salmon. We are going to make it happen.

YOGH KALO.

# Results of the Provincial Review: Estimated Budget Needs Through FY 2006

Thomas Giese, CBFWA
April 16, 2003

The Northwest Power Planning and Conservation Council (Council) conducted a three-year rolling review of fish and wildlife proposals to identify proposals for BPA funding starting in FY 2000. This rolling Provincial Review solicited, reviewed and prioritized project proposals to implement its Fish and Wildlife Program (Program). The purpose of this report to compile and summarize regional estimates of fish and wildlife funding needs.

## Origin of the Cost Estimates

Starting in FY 2000, project proposals from one-third of the subbasins in the US-portion of Columbia River Basin were reviewed each year in an extensive, public process the first cycle of which is just now being completed. Each proposal estimated its budget needs for three years. The review process is described in the Appendix. In the Provincial Review, local groups comprised of fish and wildlife managers, Council and CBFWA staff, public land managers, private land and water owners, and other interested parties developed "Subbasin Summaries." These summaries included information on the status of fish and wildlife species in the subbasin, problems that they face, managers' goals and objectives for fish and wildlife, and strategies to correct problems and meet the objectives. The Subbasin Summaries are available on the CBFWA web site (www.cbfwa.org). The summaries were reviewed by the ISRP for their scientific adequacy and approved by the fish and wildlife managers.

About 700 proposals were solicited through this process to address measures in the Program and problems identified in the Subbasin Summaries. The proposals stated their three-year objectives and explained how they would meet their objectives and estimated the costs required. All proposals are available on the CBFWA web site (www.cbfwa.org) The proposals underwent a detailed review with site visits by the ISRP for scientific adequacy and by the fish and wildlife managers through CBFWA of management appropriateness. The proposals were further reviewed and prioritized by local groups of managers and landowners. Detailed review comments and responses are available on the CBFWA web site (www.cbfwa.org). BPA staff was requested to participate in all aspects of the process.

## Results

Table 1 summarizes the budget needs by category for proposals that were recommended for funding by both ISRP and the fish and wildlife managers. BPA's administrative overhead, estimated to be $12 million per year has been included in Table 1, as BPA

deducts these costs from its Fish and Wildlife Program budget. The costs associated with the operation of the ISRP have also been included.

The F&W funding needs identified in the Provincial Review declines in FY 2005 and FY 2006 for two reasons. First, a few large investments in implementation or construction and some research and feasibility studies may be completed. Second, many proposals included only three years of budget estimates, even though budget needs will likely continue (e.g., for O&M and M&E).

In order to better represent these continuing Program costs, for example, operations and maintenance of facilities and monitoring and evaluation costs, all of the proposals summarized in Table 1 were reviewed. Table 2 estimates the additional increment of these ongoing costs by continuing the last year of funding shown in the proposal through FY 2006 thus summarizing proposals' funding needs beyond their three-year estimates.

Table 3 combines Tables 1 and 2 to estimate the fish and wildlife budget needs identified by proposals reviewed in the Council's provincial review. From Table 3 it is apparent that the provincial review estimate of fish and wildlife budgetary needs range from more than $310 million in FY 2003 and declining to more than $278 million in FY 2006. This represents the best available estimate of BPA fish and wildlife responsibilities that is available.

With the current discussion of BPA rates in mind, the BPA revenue requirements necessary to pay for these estimated fish and wildlife costs were estimated, based on two assumptions. First, this analysis assumes that BPA relaxes its self-imposed restriction on borrowing funds to purchase land. BPA can remove this limitation by announcing its intent to capitalize land purchases in the current rate case. Second, this analysis assumes that the revenue required to amortize borrowed capital is 10 percent of the amount borrowed.

Using a knowledge of the individual proposals, the amount of each category that could reasonably be capitalized was estimated. These estimated percentages capitalized are shown in Table 4. The capitalized portions of each category in Table 4 were reduced by 90 percent to estimate their revenue requirements. The annual revenue required, estimated in this manner, is about $247 million to fund basin-wide fish and wildlife needs. This is likely to be a minimum due to the uncertainties in the estimate.

**Uncertainty in the Cost Estimates**

All estimates of future costs will have associated uncertainty. In the case of the Provincial Review estimate, some sources of uncertainty are reduced by identifying resource problems and needs and addressing objectives and strategies from the Subbasin Summaries. The extensive and thorough scientific, management and public review of the Provincial Review materials further reduces the uncertainty of these estimates.

However, some sources of future fish and wildlife cost increases are not addressed in the Provincial Review estimates.

1. Over 700 proposals are summarized in this analysis, however, not all fish and wildlife needs have been addressed by proposals in the provincial review. The Provincial Review produced detailed estimates of costs needed to implement the Program which is intended to "protect, mitigate and enhance the fish and wildlife resources of the Columbia River Basin," and to meet some of the needs of listed species under the ESA. The NOAA Fisheries staff reviewed these projects and found them consistent with the Biological Opinions and RPAs. Because the requirements of ESA-listed and non-listed species overlap, the Program makes no distinction between them. Implementation of the Program will meet some, but not all, of the requirements of the Biological Opinions.

2. Inflation has been only partially accounted for in this summary. Many proposals did not provide for inflation in their estimated costs. In addition, the estimates of continuing costs presented in Table 2 do not account for inflation. A consistent application of inflation would increase estimated needs in the later years.

3. Only a very limited amount of degraded privately-owned salmon habitat is addressed by proposals here. No needed improvements to publicly-owned habitat (about 50 percent of the total) have been included.

4. The Council is developing more detailed Subbasin Plans that will replace the current Subbasin Summaries from the Provincial Review, when they are adopted as amendments to the Council's Fish and Wildlife Program. The Subbasin Plans will identify additional work needed to mitigate for the damage done by the Federal Columbia River Hydropower System. The current schedule calls for the Council adoption of some Subbasin Plans in FY 2004 with additional ones scheduled for subsequent years. This will increase BPA's fish and wildlife budget needs during the latter part of the rate period.

5. Under the 2000 Biological Opinion, BPA must check its progress in implementing the RPA both in FY 2003 and FY 2005. Early indications are that additional efforts will be required for BPA to be on schedule. No funds have been included in the current SN-CRAC proposal to cover these costs.

6. Recovery planning is underway in the Willamette and lower Columbia River areas for listed salmon ESUs. Similar planning efforts are just getting organized for the Snake River salmon ESUs. These efforts are likely to identify additional requirements for BPA funding in the latter part of the rate period.

All of these uncertainties point to the likelihood of increasing costs for BPA to meet its fish and wildlife responsibilities during the remaining portion of the rate period. Thus the fish and wildlife costs from the Provincial Review are minimum estimates.

Table 1. Fish and Wildlife Funding Needs
(from Provincial Review, "Fund/Fund" Proposals

| Category | FY2003 | FY2004 | FY2005 | FY2006 |
|---|---|---|---|---|
| **Administration Total** | $19,284,918 | $19,618,090 | $17,332,169 | $15,839,694 |
| **Data Management Total** | $10,205,801 | $9,189,902 | $9,355,836 | $1,414,017 |
| **Fish Propagation Total** | $50,526,033 | $53,819,674 | $38,144,227 | $25,449,202 |
| **Fish Propagation-RME Total** | $62,336,446 | $61,799,295 | $46,401,916 | $23,186,546 |
| **Habitat Total** | $54,619,991 | $56,854,169 | $51,104,152 | $38,703,563 |
| **Habitat-land acquisition Total** | $76,248,533 | $66,803,524 | $60,191,815 | $48,912,829 |
| **Habitat-research, monitoring and evaluation Total** | $6,915,322 | $6,795,122 | $6,015,775 | $1,836,940 |
| **Habitat-tributary passage Total** | $9,794,312 | $8,668,765 | $3,619,534 | $1,861,685 |
| **Habitat-water acquisition Total** | $6,338,733 | $6,987,386 | $2,984,307 | $1,724,835 |
| **Habitat-watershed assessment Total** | $6,934,711 | $5,827,410 | $3,280,561 | $2,334,790 |
| **Harvest Total** | $3,116,174 | $3,014,828 | $2,916,406 | $397,041 |
| **Mainstem Total** | $15,210,077 | $15,028,598 | $13,600,771 | $410,000 |
| **Terrestrial Total** | $985,759 | $862,319 | $548,807 | $0 |
| **Grand Total** | **$322,516,810** | **$315,269,082** | **$255,496,276** | **$162,071,142** |

Table 2. Additional Fish and Wildlife Funding Needs
(Through proposal continuation)

| Category | Additional FY2004 | Additional FY2005 | Additional FY2006 |
|---|---|---|---|
| Administration Total | $0 | $2,406,811 | $3,919,252 |
| Data Management Total | $59,000 | $194,000 | $8,135,819 |
| Fish Propagation Total | $0 | $6,676,953 | $14,332,243 |
| Fish Propagation-RME Total | $197,334 | $13,814,499 | $36,902,231 |
| Habitat Total | $0 | $8,316,724 | $20,588,248 |
| Habitat-land acquisition Total | $0 | $2,303,000 | $8,876,225 |
| Habitat-research, monitoring and evaluation Total | $344,410 | $608,251 | $4,195,498 |
| Habitat-tributary passage Total | $0 | $5,074,087 | $5,270,042 |
| Habitat-water acquisition Total | $478,000 | $4,590,226 | $5,216,738 |
| Habitat-watershed assessment Total | $0 | $1,303,725 | $2,308,416 |
| Harvest Total | $0 | $180,081 | $2,718,353 |
| Mainstem Total | $4,605,381 | $4,605,381 | $15,295,137 |
| Terrestrial Total | $0 | $309,012 | $857,819 |
| Grand Total | $5,684,125 | $50,382,750 | $128,616,021 |

Table 3. Currently Identified Fish and Wildlife Needs

| Category | Total FY2003 | Total FY2004 | Total FY2005 | Total FY2006 |
|---|---|---|---|---|
| **Administration Total** | $19,284,918 | $19,618,090 | $19,738,980 | $19,758,946 |
| **Data Management Total** | $10,205,801 | $9,248,902 | $9,549,836 | $9,549,836 |
| **Fish Propagation Total** | $50,526,033 | $53,819,674 | $44,821,180 | $39,781,445 |
| **Fish Propagation-RME Total** | $62,336,446 | $61,996,629 | $60,216,415 | $60,088,777 |
| **Habitat Total** | $54,619,991 | $56,854,169 | $59,420,876 | $59,291,811 |
| **Habitat-land acquisition Total** | $76,248,533 | $66,803,524 | $62,494,815 | $57,789,054 |
| **Habitat-research, monitoring and evaluation Total** | $6,915,322 | $7,139,532 | $6,624,026 | $6,032,438 |
| **Habitat-tributary passage Total** | $9,794,312 | $8,668,765 | $8,693,621 | $7,131,727 |
| **Habitat-water acquisition Total** | $6,338,733 | $7,465,386 | $7,574,533 | $6,941,573 |
| **Habitat-watershed assessment Total** | $6,934,711 | $5,827,410 | $4,584,286 | $4,643,206 |
| **Harvest Total** | $3,116,174 | $3,014,828 | $3,096,487 | $3,115,394 |
| **Mainstem Total** | $15,210,077 | $19,633,979 | $18,206,152 | $15,705,137 |
| **Terrestrial Total** | $985,759 | $862,319 | $857,819 | $857,819 |
| **Totals** | $322,516,810 | $320,953,207 | $305,879,026 | $290,687,163 |

Table 4. Average Annual Revenue Requirements: BPA Direct Fish and Wildlife Program

| | F&W Funding Total FY2003 | F&W Funding Total FY2004 | F&W Funding Total FY2005 | F&W Funding Total FY2006 | Average Annual Funding | % Capital | Average Capital | Revenue Required for Capital | Revenue Required for Expense | Total Annual Revenue Required |
|---|---|---|---|---|---|---|---|---|---|---|
| **ministration tal** | $19,284,918 | $19,618,090 | $19,738,980 | $19,758,946 | $19,600,234 | 0% | $0 | $0 | $19,600,234 | $19,600,234 |
| **ta Management tal** | $10,205,801 | $9,248,902 | $9,549,836 | $9,549,836 | $9,638,594 | 0% | $0 | $0 | $9,638,594 | $9,638,594 |
| **h Propagation tal** | $50,526,033 | $53,819,674 | $44,821,180 | $39,781,445 | $47,237,083 | 20% | $9,447,417 | $944,742 | $37,789,666 | $38,734,408 |
| **h Propagation-IE Total** | $62,336,446 | $61,996,629 | $60,216,415 | $60,088,777 | $61,159,567 | 0% | $0 | $0 | $61,159,567 | $61,159,567 |
| **bitat Total** | $54,619,991 | $56,854,169 | $59,420,876 | $59,291,811 | $57,546,712 | 20% | $11,509,342 | $1,150,934 | $46,037,369 | $47,188,304 |
| **bitat-land quisition Total** | $76,248,533 | $66,803,524 | $62,494,815 | $57,789,054 | $65,833,982 | 70% | $46,083,787 | $4,608,379 | $19,750,194 | $24,358,573 |
| **bitat-research, nitoring and aluation Total** | $6,915,322 | $7,139,532 | $6,624,026 | $6,032,438 | $6,677,830 | 0% | $0 | $0 | $6,677,830 | $6,677,830 |
| **bitat-tributary ssage Total** | $9,794,312 | $8,668,765 | $8,693,621 | $7,131,727 | $8,572,107 | 20% | $1,714,421 | $171,442 | $6,857,685 | $7,029,127 |
| **bitat-water quisition Total** | $6,338,733 | $7,465,386 | $7,574,533 | $6,941,573 | $7,080,056 | 20% | $1,416,011 | $141,601 | $5,664,045 | $5,805,646 |
| **bitat-watershed sessment Total** | $6,934,711 | $5,827,410 | $4,584,286 | $4,643,206 | $5,497,403 | 0% | $0 | $0 | $5,497,403 | $5,497,403 |
| **rvest Total** | $3,116,174 | $3,014,828 | $3,096,487 | $3,115,394 | $3,085,721 | 0% | $0 | $0 | $3,085,721 | $3,085,721 |
| **instem Total** | $15,210,077 | $19,633,979 | $18,206,152 | $15,705,137 | $17,188,836 | 0% | $0 | $0 | $17,188,836 | $17,188,836 |
| **restrial Total** | $985,759 | $862,319 | $857,819 | $857,819 | $890,929 | 0% | $0 | $0 | $890,929 | $890,929 |
| **Totals** | $322,516,810 | $320,953,207 | $305,879,026 | $290,687,163 | $310,009,052 | | $70,170,979 | $7,017,098 | $239,838,073 | **$246,855,171** |

**APPENDIX: Provincial Review Process Summary**

## Introduction

The Rolling Provincial Review process was developed by the Northwest Power Planning Council (NWPPC) in February 2000 in response to recommendations by the Independent Scientific Review Panel (ISRP) and the Columbia Basin Fish and Wildlife Authority (CBFWA). Under this new province based process each individual project proposal within a province will be reviewed for technical merit and management relevance every three years. Under the previous process all project proposals for Bonneville Power Administration (BPA) funding under the Fish and Wildlife Program were reviewed annually. The purpose of the NWPPC's new multi-year process is to reduce the burden of reviewing large numbers of proposals, most of which had been reviewed just one year before, and to provide for a more thorough review of the project proposals in the context of a subbasin summary. Additionally, the process is intended to provide the opportunity for site visits by reviewers, project presentations with a question and answer period, and provide reviewers with more detailed background and planning documents which will reduce the reviewer's reliance strictly on the proposal form.

The subbasin summaries developed under this process are intended to be interim and will be replaced by subbasin plans developed to meet requirements of the recently amended Fish and Wildlife Program.

The subbasin summaries were developed collaboratively by the NWPPC staff, ISRP, fish and wildlife managers, other stakeholders, and CBFWA staff, culminating in CBFWA project and budget recommendations for three years. The subbasin summaries are provided only as context for the project recommendations.

The CBFWA process for providing these recommendations utilized the ISRP preliminary findings and integrated manager evaluations of the technical and management merits of the project proposals relative to anadromous fish, resident fish and wildlife management needs, and the goals and objectives identified in the subbasin summaries.

## Project Review Process

### Subbasin Summaries

The Rolling Province Review was initiated in April 2000 in the Columbia Gorge Province. The review is scheduled to be completed for the final province, Mainstem and Systemwide, in June of 2003. For each province, an invitation was sent to an extensive distribution list to encourage all interested parties (i.e. land and water managers, representatives of watershed councils, etc.) to attend and provide input. The purpose of this first meeting was to provide all interested parties with the opportunity to identify sources of information necessary for the development of subbasin summaries for this province (i.e. monitoring data, habitat restoration results, existing assessments, etc.). The intent was to ensure BPA expenditures for fish and wildlife projects compliment and

enhance existing efforts and ensure that priority needs are addressed. Subsequent meetings were held to review draft summaries and identify goals and objectives.

Previously, ecosystem summaries for each subbasin were developed as a means of providing context for project proposals. Under the new process, a more formal structure with subbasin teams was formed to develop the more comprehensive subbasin summaries of the newly identified provinces. Other local interested parties also provided input to and participated on the subbasin teams (i.e. other land and water managers, representatives from watershed councils, etc.).

Subbasin summaries were completed for each subbasin in the Columbia River Basin that contain BPA funded projects. The project sponsors were asked to show a direct tie between their projects and the needs identified in the subbasin summaries.

### Review by the ISRP

The ISRP reviewed project proposals for each province. To ensure a consistent and fair evaluation, standard formats and criteria were applied to all proposals to generate comments and scores prior to the proposal review workshop. These scores and comments were not made available to the project sponsors at the workshop, but were used by the ISRP to develop questions for the site visits and workshop presentations. The workshops consisted of site visits and project presentations.

#### Site Visits

The ISRP, subbasin teams, fish and wildlife managers, the CBFWA province review team and other stakeholders toured the province to gain a better understanding of the existing ecological conditions and limiting factors as well as view some ongoing projects in each subbasin. During the tour, managers provided oral presentations for areas/projects within the province that the group was unable to visit.

#### Project Presentation

Prior to the presentation of individual project proposals, subbasin team leaders provided a general overview for their respective summaries. Following each subbasin summary presentation, project proposals relative to that subbasin were presented to the ISRP, CBFWA province review team, fish and wildlife managers, NWPPC staff, CBFWA staff and other stakeholders. All project sponsors were provided 15 minutes to present their proposal and answer questions. During this review, the CBFWA province review team applied Subbasin Project Review Criteria to each project. Every effort was made to be consistent among all project proposals reviewed.

### Preliminary ISRP Report

The ISRP released a *Preliminary Review of Project Proposals* for each province. This report summarized the ISRP's preliminary review of each project proposal and identified areas of concern where they had requested a written response to questions. The due date for written responses to this report was two weeks following its release.

### CBFWA Province Review Group

CBFWA Province Review Groups reviewed all project proposals within each province using standard criteria which resulted in a consensus "Yes" or "No." Subbasin team members also participated in the review of the project proposals. The following elements were considered during the review:

- How well does the project relate to the criteria
- Validation of existing work- is the current funding level appropriate (Section 6 O&M and Section 7 M&E of existing projects)? Is it appropriate to continue implementation of existing work (Section 4 P&D and Section 5 C&I of existing projects)?
- Evaluation of proposed new work- does a new project proposal demonstrate a priority need over implementation strategies within existing projects (Sections 4 and 5 of existing projects)?

Project proposals were grouped by program or focus area during their review. The preliminary ISRP technical review of all proposals was utilized while discussing the technical merits of each project. Following the technical and management review, the project proposals were prioritized within each area of focus according to the fish and wildlife and Program needs. The following definitions were used for the subbasin prioritization:

- Core Program - These projects are integral to the infrastructure and/or information needs of the F&W Program in the Columbia River Basin for planning and management.
- High Priority - These projects or tasks within a project are high priority within the subbasin. The project addresses a specific need within the subbasin (program) summaries.
- Recommended Actions - These are good projects that cannot demonstrate a significant loss by not being funded this year. These projects should be funded, but under a limited budget, they could be delayed temporarily without significant loss.
- Do not fund - These projects are either technically inadequate or do not address a need within the subbasin (program) summaries. These projects may be inappropriate for BPA funding.

### CBFWA Review and Approval of Subbasin Summaries and Project Recommendations

The final step in the project proposal review process was the consensus approval of the project recommendations by CBFWA Members. The CBFWA Members review and the recommendations in the subbasin summaries and province work plan demonstrate regional support by the fish and wildlife managers. The CBFWA provided three year funding recommendations for each province.

**Rolling Province Review Date Summary (decision points)**

| Province | Date of Initiation | Date of CBFWA Recommend. | NWPPC Recommend. | Months for Council Dec. | BPA Dec |
|---|---|---|---|---|---|
| Gorge | Mar-00 | Nov-00 | Mar-01 | 12 | Sep-03 |
| Intermountain | Mar-00 | Nov-00 | Mar-01 | 12 | Sep-03 |
| Mountain Columbia | Jul-00 | Mar-01 | Oct-01 | 15 | Mar-03 |
| Columbia Plateau | Nov-00 | Aug-01 | Jan-02 | 14 | Mar-03 |
| Blue Mountain | Mar-01 | Nov-01 | Apr-02 | 13 | Jun-03 |
| Mountain Snake | Mar-01 | Nov-01 | Apr-02 | 13 | Jun-03 |
| Columbia Cascade | Jul-01 | May-02 | Nov-02 | 16 | |
| Lower Columbia | Aug-01 | May-02 | Nov-02 | 16 | |
| Estuary | Aug-01 | May-02 | Nov-02 | 16 | |
| Middle Snake | Aug-01 | May-02 | Nov-02 | 16 | |
| Upper Snake | Aug-01 | May-02 | Nov-02 | 16 | |
| Mainstem/Systemwide | Oct-01 | Oct-02 | Jun-03 | 20 | |

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JUN-18-03 13:00 FROM:NW POWER PLANNING 2

JUDI DANIELSON
CHAIR
Idaho

Jim Kempton
Idaho

Gene Derfler
Oregon

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Oregon

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TOM KARIER
VICE-CHAIR
Washington

Frank L. Cassidy Jr.
"Larry"
Washington

Ed Bartlett
Montana

John Hines
Montana

June 18, 2003

The Honorable Ben Nighthorse Campbell, Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510

Dear Chairman Campbell:

The Northwest Power Planning Council was established by Congress in 1980 and created as an interstate compact by the states of Idaho, Montana, Oregon and Washington. Its purpose is to develop a 20-year regional electric power plan to assure for the Pacific Northwest an adequate supply of power at the lowest possible cost, and to develop a program to protect, mitigate and enhance fish and wildlife resources affected by hydroelectric development in the Columbia River Basin. The Council has a statutory responsibility to recommend fish and wildlife projects in the Columbia River Basin to the Bonneville Power Administration for funding.

The Council is pleased the Indian Affairs Committee is taking an interest in fish and wildlife activities in the Columbia River Basin, as demonstrated by the Committee's June 4 hearing. The Council is concerned, however, about some of the comments made during the hearing by Steve Wright, Administrator of the Bonneville Power Administration. Considering the importance of this issue to the Council, NOAA Fisheries, states, tribes and others in the Northwest, we believe it is prudent to ensure there is no misunderstanding the fact that Bonneville has made significant reductions in its fish and wildlife spending program in fiscal years 2002 and 2003.

Bonneville's fish and wildlife program is complex, and the Council's staff spends significant time and energy tracking expenditures and understanding the underlying accounting procedures. We are particularly disappointed, therefore, by Administrator Wright's answer to a question by Senator Gordon Smith pertaining to increases in Bonneville's fish and wildlife spending since 2001. According to the Administrator, the Council recommended more projects for Bonneville funding than Bonneville had agreed to fund. That is not consistent with the facts. The Council has recommended program implementation budgets that are within Bonneville's commitment, and Bonneville has repeatedly confirmed that the Council's recommendations were not the cause

of the potential to spend more than was planned in 2003. Rather, Bonneville's accumulated outstanding contract obligations caused the problem.

There are a number of other important factors that relate to Bonneville's current annual commitment to fish and wildlife. First, in a December 2001 letter to the Council, Bonneville actually committed to plan to spend an average of $186 million per year on fish and wildlife. Of this amount, the Council was told that it should plan for $150 million in expenditures and another $36 million in capital that would be obtained through Bonneville's ability to borrow capital funds from the Federal Treasury. As stated in that letter, the $150 million in planned spending was consistent with the funding range assumed in the power rate case and with the Fish & Wildlife Funding Principles that projected an annual average of $139 million in actual expenditures for purposes of setting BPA's revenue requirement. Unfortunately, due to Bonneville's deteriorating financial condition, in his December 10, 2002, letter the Administrator notified the Council that Bonneville's financial reserves had deteriorated to the point that it could not risk spending more than $139 million in FY 2003. Instead of adhering to an average of $139 million in accruals over the 2002-2006 period, actual expenditures would be capped at $139 million in FY 2003.

It is important for the Committee to also understand that Bonneville collected sufficient funds for fish and wildlife activities from its customers in the 1996-2001 contract period that could have paid its outstanding contract obligations. However, while the obligation to pay for fish and wildlife activities that were accomplished prior to 2002 were "rolled over" into the 2002-2006 rate period, funds collected to pay for those projects were not. The 1996 Memorandum of Agreement for Bonneville's fish and wildlife funding obligations, which was signed by four federal agencies, specifically provided these funds would remain available to meet Bonneville's commitments. Bonneville's requirement that $40 million of pre-2002 expenditures be absorbed in the $139 million budget for FY 2003 was a sudden reversal of contract management and interfered with the ability to implement projects on schedule.

Bonneville sought the Council's guidance on how to manage the program with no risk to more than $139 million in contract payments coming due in 2003. The Council reviewed several options including terminating $40 million of ongoing or scheduled projects. Instead, the Council recommended a strategy of project-specific spending limits that kept the full roster of projects in place but would likely result in some tasks being deferred to future years. In this way, the Council intended to preserve the full scope of its implementation recommendations even if substantial work would be delayed because of Bonneville's financial crisis.

These actions actually resulted in a sharp reduction of new funding for the program in FY 2003 -- $40 million less than planned. Accordingly, the current year is "flat-lined" in comparison to the funding levels of the 1996-2001 MOA period.

Although Bonneville initially agreed to spend $36 million a year on fish and wildlife capital, that commitment has fallen aside as well. In FY 2002 Bonneville utilized only $7 million in capital funds, and at this point in FY 2003 less than $6 million of capital funds have been used. Again, it would appear that Bonneville's claim of a 40-percent increase on the expense side of the ledger is largely offset by its drastic reduction in capital spending. On a more positive note, the Council

is working with Bonneville to determine appropriate uses of Bonneville's capital funds by developing a long-term capital plan and is hopeful that an accommodation can be reached.

It should also be noted that Bonneville's internal administrative costs for the fish and wildlife program have grown significantly, and those costs are paid from the program budget. Bonneville's administrative costs have increased approximately $4 million from a level of $8 million during the MOA period to $12 million this year. While these funds are a part of the $139 million that will be spent during FY 2003, they will not be spent on on-the-ground activities.

Finally, the Committee should be aware that Bonneville's financial picture has improved considerably this spring with above-normal rainfall and stronger market prices for electricity. This, in turn, has greatly improved Bonneville's probability of making its payment to the Federal Treasury on September 30, 2003. In addition, Bonneville has announced that it intends to further bolster its financial position with a rate increase for its electricity customers that will take effect on October 1, 2003. While Bonneville was quick to insist on funding reductions for fish and wildlife when its financial picture looked bleak, we have received no indication that any funds will be restored now that Bonneville's fiscal position has improved or that monies will be refunded to electricity ratepayers.

The Council regrets the need to contact you, but believes the public record should reflect the complexity regarding Bonneville's commitments to fund fish and wildlife activities. In addition, considering Bonneville's failure to carry funds it collected for fish and wildlife purposes into the current contract period, its reduction in capital spending, and the fact that Bonneville's internal costs have escalated significantly, we find the Administrator's statements of a 40-percent increase in spending to be inconsistent with the facts.

Thank you for this opportunity to provide our comments.

Sincerely,

Judi Danielson
Chair

Enclosures: Bonneville's December 3, 2001 letter to the Council
Bonneville's December 10, 2002 letter to the Council

Identical letter sent to The Honorable Daniel K. Inouye, Ranking Member

JUN-18-03 13:51 From:NW POWER PLANNING 2 5038202370 T-512 P.05/12 Job-702

**Department of Energy**

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

EXECUTIVE OFFICE

DEC 0 3 2001

In reply refer to: KE-4

000012

Mr. Frank L. Cassidy, Jr., Chairman
Northwest Power Planning Council
851 SW Sixth Avenue, Suite 1020
Portland, OR 97204

Dear Chairman Cassidy:

The purpose of this letter is to describe how the Bonneville Power Administration (BPA) will integrate funding for its fish and wildlife obligations for offsite mitigation measures as described in the Northwest Power Planning Council's (Council) Program, the December 2000 Federal Columbia River Power System's (FCRPS) Biological Opinions (BiOps), and the 1- and 5-year Implementation Plans. We also wish to clarify BPA's fish and wildlife spending estimates for fiscal years (FY) 2002 through 2006, now that the FY 1996 – 2001 Budget Memorandum of Agreement (MOA) has expired for that period.

BPA takes its fish and wildlife obligations for funding fish and wildlife seriously and understands that other Federal, State and Tribal governments likewise will do their fair share to fund and implement actions that will lead to recovery. BPA's success in meeting its fish and wildlife obligations will be measured against the goals, objectives and performance achievements in implementing the Council's Program and the performance standards established in the 2000 BiOps, not solely against the amount of dollars expended on fish and wildlife efforts. We anticipate use of Northwest ratepayer funds towards the highest biological benefit at the least cost. In order to meet our least cost objective we plan to leverage other sources of funding for these efforts through innovative partnerships with other Federal, State, and Tribal governments and others through cost sharing approaches.

**Unified approach**

BPA anticipates that implementation of fish and wildlife priorities will occur through a unified, integrated planning and implementation approach for the Council's Program and the reasonable and prudent alternative (RPA) actions described in the FCRPS BiOps. Many of the actions in the BiOps and the Council's Program overlap, particularly in the areas of habitat, hatchery and harvest offsite mitigation measures. It is BPA's desire that the Action Agencies' (Corps of Engineers (Corps), Bureau of Reclamation (Bureau) and BPA) FCRPS Biological Opinion Implementation Plans, and the Council's Program through Provincial Reviews, will describe an integrated approach for the actions needed within the hydro system and off-site, to avoid jeopardizing the survival of the listed species and to protect, mitigate and enhance all fish and wildlife affected by the operation of the FCRPS.

DEC 0 3 2001

I realize the challenges presented with this approach. The timing, analysis and scope of the various regional processes such as provincial reviews, subbasin assessments, subbasin plans, an implementation planning are not precisely synchronized and coordinated. We do not yet have a truly Unified Plan describing both ESA recovery efforts and Council Program mitigation priorities for fish and wildlife affected by the FCRPS in the Columbia River Basin. The first three-year cycle of Council Provincial Reviews will be completed by late summer 2002 while new locally developed Subbasin Plans that provide the priorities, scientific rationale, and contex for ongoing and additional efforts for fish and wildlife, including ESA listed populations, are ju now getting underway. Completion of these Subbasin Plans within the next two years will brin into focus and truly integrate these fish and wildlife needs. It is in the region's best interest to work within these processes as much as possible to develop a collaborative, unified, and implementable approach that is scientifically, legally, and financially sound. Specific activities that will facilitate integration of the Council's Program with those of the FCRPS BiOps include

1. Developing one set of regional criteria for Research, Monitoring and Evaluation;
2. Developing criteria for prioritizing ESA measures within the Council's Program;
3. Developing a crediting mechanism for action taken under the Council's Program and BiOps
4. Developing sub-basin plans and their relationship to recovery planning efforts under ESA.

However, to support true regional planning, it is helpful for all parties to understand BPA's expenditure estimates throughout the FY 02-06 rate period, and for BPA to continue to have an accurate and public accounting of actual commitments and expenditures for this Program.

**Aggregate fish and wildlife budget**

This letter establishes BPA's FY 02 – 06 aggregate fish and wildlife spending estimate for planning purposes. The expenditure categories reflect BPA's categorization of, and spending estimated for meeting, its fish and wildlife obligations. They are not meant in any way to chang previous commitments outlined in the Fish and Wildlife Funding Principles, nor commitments made to meet trust and treaty responsibilities, nor the basic roles currently underway by the Federal Caucus, Council, Columbia Basin Fish & Wildlife Authority, stakeholders and regional planning processes.

Consistent with principles that originally were identified in the 1996 MOA, BPA's fish and wildlife budget is intended to:

1. Provide financial certainty to BPA and the region by establishing a multi-year planning approach in meeting BPA's fish and wildlife obligations; and
2. Assure that ratepayer funds are expended for the survival, protection, mitigation and recover of runs of anadromous and resident fish as well as wildlife, as soundly and efficiently as possible, and directed at the highest possible biological results.

**Expenditure categories**

I. ESA Offsite Mitigation and Council Program Capital Expenditures

These costs consist of fish and wildlife-related borrowing by BPA, or future capital investments directly funded through BPA borrowing, that support activities called for in the 2000 BiOps and the Council's Program.

On a planning basis, an annual average of $36 million a year of capital for funding the offsite ESA Mitigation and Council Program is estimated by BPA. As a comparison, this figure is a third larger than the estimate of $27 million each year of capital for the previous FY 1996 – 200 Budget MOA.

II. ESA Offsite Mitigation and Council Program Expense

These costs are non-capital expenditures for fish and wildlife activities in the offsite mitigation categories and RPAs that are funded directly by BPA. Implemented activities are prioritized based on measures in the 2000 FCRPS BiOps, subsequent Action Agencies' Implementation Plans, and the Council's Program. This category also includes BPA's internal costs such as personnel, contracting, and environmental review devoted to fish and wildlife related efforts. When expending money, BPA will act in the manner consistent with all applicable laws, and wil consider the regional priorities and recommendations of the Council, Tribes, States and Federal agencies. In this way BPA will determine the effectiveness of meeting its fish and wildlife obligations under the requirements of the 2000 BiOps, Council Program and Federal treaty and trust responsibilities.

This expense figure for fish and wildlife funding as described in the previous FY 1996 – 2001 Budget MOA was $100 million each year. On a planning basis for FY 2002 - 2006, an annual average of $150 million a year of expense dollars is estimated by BPA for funding the offsite ESA Mitigation as described in the 2000 FCRPS BiOps and revised Council Program. This amount is fifty percent greater than the previous MOA and consistent with the funding range assumed in the power rate case and with the Fish & Wildlife Funding Principles that projected a annual average of $139 million in accruals for purposes of setting BPA's revenue requirement. The $139 million amount represents a weighted average of the thirteen modeled alternatives having a range of $109-$179 million as identified in the FY 02 - 06 rate period.

III. Other Categories of Fish and Wildlife Expenditures Outside of the Offsite Measures

Direct Funding Agreements: Since the MOA, direct funding agreements have been reached wit the Corps, Bureau, and U.S. Fish and Wildlife Service. These agreements cover costs of the hydroelectric share of operations and maintenance and other non-capital expenditures for fish and wildlife-related activities that previously were funded by Congressional appropriations and then reimbursed to the U.S. Treasury by BPA. Separate agreements have been signed with each Federal agency for FY 2002 through FY 2006. A portion of the Council's overhead costs is als in this category.

Hydro Capital Expenditures: Costs for hydro capital expenditures consist of the projected depreciation and interest payments for (1) the portion of past fish and wildlife capital investments by the Corps and Bureau for which BPA already is obligated to repay the U.S. Treasury; and (2) the hydroelectric share of future fish and wildlife related capital investments by the Corps and Bureau that will be funded through appropriations and then reimbursed to the U.S. Treasury by BPA, based on activities called for in the 2000 BiOps.

In summary, we recognize the greatly increased level of funding available for offsite fish and wildlife mitigation and the accountability entailed with this enhanced program. Target budget levels in the expense category have increased fifty percent, from $100 million to $150 million, and by thirty three percent in the capital category, from $27 million to $36 million from the previous budget MOA to the current FY 2002 through FY 2006 rate period. We look forward to working with you and our other regional partners who are essential to the success of our fish and wildlife mitigation and ESA recovery efforts. Considering the added challenges posed by current downturns in the regional and national economies, we will work collaboratively with the region to prudently and wisely invest the ratepayer funds towards effectively meeting our fish and wildlife obligations.

If you have any questions, please feel free to call me or Alex Smith at (503) 230-5136.

Sincerely,

Stephen J. Wright
Acting Administrator and Chief Executive Officer

cc:
Chairman Albert Teeman, Burns Paiute Tribe
Chairwoman Colleen Cawston, Confederated Tribes of the Colville Reservation
Chairman Ernest Stensgar, Coeur d'Alene Tribe
Chairman Gary Aitken, Sr., Kootenai Tribe of Idaho
Chairman Glen Nenema, Kalispel Tribe
Chairman Samuel Penney, Nez Perce Tribe
Chairman Fred Matt, Confederated Salish and Kootenai Tribes
Chairman Blaine Edmo, Shoshone-Bannock Tribes of Ft. Hall
Chairman Marvin Cota, Shoshone-Paiute Tribes of the Duck Valley Reservation
Chairman Alfred Peone, Spokane Tribe of Indians
Chairman Antone Minthorn, Confederated Tribes of the Umatilla Indian Reservation
Chairman Olney Patt, Jr., Confederated Tribes of the Warm Springs Reservation
Chairman Lonnie Selam, Sr., Confederated Tribes and Bands of the Yakama Indian Nation
Mr. Donald Sampson, Columbia River InterTribal Fish Commission
The Honorable Dirk Kempthorne, Governor of Idaho
The Honorable Judy Martz, Governor of Montana
The Honorable John Kitzhaber, Governor of Oregon
The Honorable Gary Locke, Governor of Washington

**Department of Energy**

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

EXECUTIVE OFFICE

December 10, 2002

In reply refer to: A-7

Mr. Frank L. Cassidy, Jr. Chairman
Northwest Power Planning Council
851 SW Sixth Avenue, Suite 1100
Portland, OR 97204

Dear Mr. Cassidy:

Earlier this year I met with the Northwest Power Planning Council (Council) and said Bonneville Power Administration (Bonneville) is confronted with its most severe financial challenge in at least 20 years. While we have taken many actions in the interim period, our financial situation continues to deteriorate. This letter is to ask for your specific help with respect to fish and wildlife expenditures.

At the outset I want to assure you that, although the immediate issue that makes this letter necessary is a financial one, Bonneville remains firmly committed to meeting its statutory and treaty obligations, including fish and wildlife responsibilities. It is my belief that, with the advice and close collaborative support of the Council, Bonneville will be successful in continuing to fulfill its obligations to the region's fish and wildlife.

In the last two years, Bonneville's total financial reserves have declined by over $800 million, leaving the agency in an extremely fragile position financially. In a November 22, 2002, letter to the region, I explained that Bonneville is facing a financial gap between revenues and expenses of $1.2 billion for the 2002-2006 rate period. The letter outlines how we have reduced our financial commitments through September 30, 2006, by about $350 million that we are prepared to declare as certain. These reductions have been deep and painful, but despite that fact, Bonneville believes it has managed to keep the essential programs intact that we are obligated to provide. We are also pursuing additional expense reductions and funding deferrals that potentially could contribute an additional $500 million toward closing the financial gap. Among these are potential reductions for fish and wildlife programs. At this point we are including practically no savings from fish and wildlife mitigation efforts in the $350 million of measures we believe are certain.

In addition, we are no longer assuming any rate decreases through the period. Even with these actions there was only a 50/50 probability of not having to raise rates further within the period. With the poor start to the water year we are currently experiencing, the odds of pursuing a rate increase, even if we are successful at finding the additional $500 million are increasing substantially. This is an option we have fought hard to avoid, given the state of the regional economy and hardship as a result of rate increases already put in place.

I appreciate the difficult task the Council and fish and wildlife managers have recently completed with the rolling provincial reviews; amending the program and setting three-year budgets to fall within financial targets I outlined a year ago. Seeing the strong leadership and dedicated work ethic exhibited in that trying process has led me to believe that the Council and the fish and wildlife managers are capable of once again leading the region in recommending project budgets and prioritizations that continue to help meet Bonneville's obligations in an increasingly difficult financial climate.

In a December 2001 letter to you, I stated our intention to provide funding for the Integrated Program (Endangered Species Act offsite mitigation and the Council's Fish and Wildlife Program) at an annual average of $139 million in accrual expense for the 2002-2006 rate period. This reflected an increase of 39 percent in the level of estimated expense funding over the 1996-2001 rate period. Historically, spending for the Integrated Program, on an accrual basis, has been below projected levels. But, already in the first year of the new rate period, Bonneville's expense accruals were $137 million. This rapid increase in program spending has surprised us. Bonneville, in cooperation with Council and Columbia Basin Fish and Wildlife Authority staff, has completed a draft FY 2003 accrual budget estimate that will be released for public comment. The analysis indicates that by the time the cost of new and expanded projects for 2003 are added to the current expense accrual level, there is a substantial risk that fish and wildlife spending for FY 2003 will far exceed the average expense accrual number of $139 million that Bonneville committed to fund. This type of increase would reduce the benefits achieved through cost reductions in other areas of Bonneville and aggravate any rate increase.

While Bonneville has worked hard to bring its internal costs that must be recovered in power rates back to 2001 levels, we are not proposing a similar roll-back in funding for the Integrated Program. However, we believe that we must hold the line on fish and wildlife spending for FY 2003 at $139 million in expense. I am asking that the Council in consultation with the region's fish and wildlife managers take the lead to achieve at least the following three goals. We are prepared to work with you in this effort to help better define what it will take to meet these goals:

1. Take appropriate steps to ensure that spending for the Integrated Program does not exceed $139 million in expense accruals in FY 2003.
2. Prioritize program spending to create the opportunity to spend less than $139 million in expense annually through the 2003-2006 period.
3. In accomplishing 1 and 2, prioritize program spending to assure Bonneville meets its obligations to fish and wildlife. We are asking the Council to establish criteria for setting priorities. We believe that core among these are projects needed to meet the requirements of the various biological opinions that apply to Bonneville, in particular the 2003 and 2005 check-ins for the 2000 Federal Columbia River Power System Biological Opinion and to preserve previous important investments of the Fish and Wildlife Program.

It is critical to recognize that, in containing costs, deferring spending to future years would not be a solution since, as mentioned above, Bonneville is facing a serious financial shortfall for the rest of this rate period.

In particular, we ask the Council's help in prioritizing program spending in a way that will continue the pace of the recovery effort that, based on increased runs and promising jack counts, appears to be under way. We are not recommending deferring or canceling projects that are essential to implementation of the Biological Opinion and to continued progress toward recovery.

Time is of the essence. We are already making decisions in other of Bonneville's program areas, and we need to know soon what contribution we can expect from the Integrated Program. We must continue to move quickly to address this issue. I ask that you provide us your recommendation by February 21, 2003, when we will be nearly half way through this fiscal year.

In the interim, Bonneville has begun to take actions to immediately contain the potential for FY 2003 fish and wildlife costs to exceed the planned budget. Enclosed is a copy of a letter posted on our external web site on November 20, 2002, informing contract sponsors of revised contract renewal guidelines that are effective this fiscal year. Last week I directed fish and wildlife staff to begin exploring policies and to begin modifying our contracting processes to assure that our near-term actions do not compromise the three goals I outlined above. The interim actions we are taking so far include:

- Placing all land or easement purchases on hold. Bonneville will make every effort to work with project sponsors to find ways to preserve the option of completing the purchase at a future time.

- For a limited duration, funding contracts due for renewal at a reduced level sufficient to preserve the existing investment and keep essential systems operating at the minimum level necessary to retain the benefits achieved to date for fish and wildlife.

We are concerned that this may not be enough and that other actions may be required.

We realize there has been little opportunity to discuss these actions to suspend incurring additional costs either with the Council or other interested parties. We want to work with the Council and others on interim actions that would help to appropriately contain FY 2003 fish and wildlife expenses. We are also open to working with the Council and others to quickly develop an expeditious process to review specific instances in which essential new information could affect specific applications of these interim measures. I would caveat that any such process must be completed expeditiously, and that we cannot afford to delay the implementation of interim actions, as to do otherwise could foreclose our future options.

I realize that these interim actions can create extreme disruption and hardship for project sponsors. I wish that it were not necessary. But the prospect of a potential budget overrun at a time when our financial circumstances are so dire requires dramatic action.

I would also note that we have worked together in the past on our financial reporting systems, but substantial work remains to be done to assure that we get a much earlier understanding of the budget path we are on than occurred this year. We want to work with you to assure that in the future we are not confronted with this kind of problem in the middle of a fiscal year.

We are seeking efficiencies and cost reductions in every segment of costs that Bonneville incurs. Fish and wildlife spending must be a part of that review. We also know that Bonneville has obligations to fish and wildlife that must be met. Our goal throughout the Financial Choices process has been to find the means to achieve these obligations in a more cost-effective and efficient manner. We hope that you can join with us in this effort.

Because Bonneville and the Council share a common goal of protecting and enhancing the Northwest's fish and wildlife while also maintaining an economic and reliable power supply for the region, I am confident that, working closely together, we can contain fish and wildlife costs while assuring that Bonneville meets its statutory obligations. This is a task we must accomplish. My staff and I look forward to working collaboratively with the Council and its staff and the region's fish and wildlife managers to achieve the best possible outcome for the people – and the fish and wildlife – of the Northwest.

Sincerely,

Stephen J. Wright
Administrator and Chief Executive Officer

Enclosure