

# 2003 Safety-Net Cost Recovery Adjustment Clause

## Rebuttal Testimony

SN-03-E-BPA-18 FISH AND WILDLIFE

May 2003



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REBUTTAL TESTIMONY OF  
SARAH MCNARY AND THERESE LAMB  
Witnesses for Bonneville Power Administration

**SUBJECT: FISH AND WILDLIFE**

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1 REBUTTAL TESTIMONY OF  
2 SARAH MCNARY AND THERESE LAMB  
3 Witnesses for Bonneville Power Administration  
4

5 **SUBJECT: FISH AND WILDLIFE**

6 **Section 1. Introduction and Purpose of Testimony**

7 *Q. Please state your name and qualifications.*

8 A. My name is Sarah McNary and my qualifications are contained in SN-03-Q-BPA-30.

9 A. My name is Therese Lamb and my qualifications are contained in SN-03-Q-BPA-29.

10 *Q. What is the purpose of this testimony?*

11 A. The purpose of this testimony is to rebut and address the fish and wildlife issues raised in  
12 the testimony filed by the Columbia River Inter-Tribal Fish Commission, the Yakama  
13 Nation (collectively referred to as CRITFC) and Save Our Wild Salmon and the  
14 Northwest Energy Coalition (collectively referred to as SOS).

15 **Section 2. Fish and Wildlife Cost and Operational Issues**

16 *Q. CRITFC contends the SN CRAC proposal is inadequate to meet the costs of BPA's fish  
17 and wildlife, tribal trust, and environmental responsibilities. CRITFC further contends  
18 fails to adequately address fish and wildlife costs and therefore reduces the probability of  
19 meeting all of its Treasury payments on time and in full, and BPA could use any such  
20 failures as "a justification for eliminating river operations designed to improve the  
21 survival of migrating salmon and steelhead." SN-03-E-CR/YA-01 at 4-6. How do you  
22 respond?*

23 A. The design features of BPA's SN CRAC proposal will meet its fish and wildlife, tribal  
24 trust and environmental obligations. The variable nature of the SN CRAC allows  
25 adjustment in future years if there is a deterioration of BPA's financial position. The real  
26 issue here is that CRITFC does not believe BPA is spending what it believes is necessary

1 to address its fish and wildlife, tribal trust and environmental obligations. As the  
2 Administrator explained in the Federal Register Notice, the expense levels for these  
3 matters are being addressed in other forums and as a consequence are outside the scope  
4 of this proceeding. *Bonneville Power Administration's Proposed Safety-Net Cost*  
5 *Recovery Adjustment Clause Adjustment to 2002 Wholesale Power Rates*, 68 FR 12051  
6 (Mar. 13, 2003). Nonetheless, BPA believes the levels contained in this proposal are  
7 reasonable and fulfill BPA fish and wildlife funding obligations.

8 BPA has the benefit of several recently completed processes and years of actual  
9 implementation experience to guide its program spending levels for fish and wildlife.  
10 The results of these processes, and BPA's funding experience, was not available prior to  
11 the completion of the WP-02 rate case, so a range of alternatives and Fish Funding  
12 Principles were necessary then. Since the completion of ROD for the WP-02 rate  
13 proposal, the NMFS and USFWS have completed biological opinion under the ESA to  
14 cover FCRPS operations, the Council has largely completed its Provincial Reviews  
15 planning for 3 years of measures under the program, and BPA has published reports  
16 (FCRPS Progress Reports by the three Federal Action Agencies) documenting the extent  
17 to which BPA has met its obligations under the ESA. The most recent NMFS findings  
18 for FCRPS operations compliance with the ESA indicates the Action Agencies are on  
19 track implementing over 88 percent of the actions included in the Reasonable and  
20 Prudent Alternative included in the 2000 FCRPS Biological Opinion. NMFS Findings:  
21 Fish Recovery Efforts Off to a Solid Start (July 2002)  
22 [http://www.salmonrecovery.gov/Citizen\\_Update\\_9.pdf](http://www.salmonrecovery.gov/Citizen_Update_9.pdf). BPA expects an equally strong  
23 2003 findings letter from NOAA Fisheries.  
24 <http://www.bpa.gov/corporate/kc/home/nreleases/NewsRelease.cfm?ReleaseNo=355>  
25 BPA fulfilled its share of this ESA obligation using funding levels at or below the levels  
26 assumed in this rate case.

1 As for tribal trust duties CRITFC contends BPA must fund, their argument is  
2 conspicuously silent on what specific actions, or even general classes of actions, BPA is  
3 likely to be obligated to fund. CRITFC has not identified a statute applicable to BPA that  
4 broadens BPA's general trust responsibility to include the requirement to take specific  
5 fish and wildlife mitigation actions on behalf of the tribes. While BPA consistently keeps  
6 its trust responsibility as a Federal agency in mind when making decisions, BPA fulfills  
7 its share of the trust responsibility by fully complying with the laws governing its  
8 activities, such as, but not limited to, the Northwest Power Act (protect and mitigate fish  
9 and wildlife and their habitats, provide equitable treatment), NEPA (impacts of proposed  
10 actions on tribes and trust resources), ESA (protection of trust and treaty resources),  
11 NAGPRA (protection of cultural resources), and the Clean Water Act (water quality).

12 *Q. CRITFC contends in the rates proposal BPA did not consider equitable treatment of fish*  
13 *and wildlife with the other purposes for which the FCRPS is operated. Sheets et al.,*  
14 *SN-03-E-CR/YA-01 at 8. How do you respond?*

15 *A. The Northwest Power and Conservation Council describes equitable treatment as*  
16 *"meet[ing] the needs of salmon with a level of certainty comparable to that accorded the*  
17 *other operational purposes." Council Program, Vol. II., p. 9 (1992). BPA provides*  
18 *equitable treatment on a system-wide basis primarily by implementing the Council's*  
19 *Program, the relevant NMFS and FWS Biological Opinions, and the Basinwide Recovery*  
20 *Strategy. BPA believes it is reasonable to balance power needs and fish and wildlife*  
21 *needs on a system-wide basis.*

22 What CRITFC appears to advocate is isolating fish and wildlife from the rest of  
23 BPA's business such that fish and wildlife funding does not incur the same fluctuations  
24 and uncertainties as our other programs. Unfortunately, BPA's fish and wildlife  
25 obligations are, like the other key elements of its statutory mission, subject to  
26 Congressional and FERC review, Administration policies, energy markets, the weather,

1 ocean conditions, and the economy. BPA has placed its fish and wildlife mission on par  
2 with its other obligations, possibly somewhat above them as evidenced in the steady  
3 funding levels—instead of reductions—compared to other program areas. BPA does not  
4 believe sound business principles support isolating fish and wildlife such that FCRPS  
5 operations and program funding are unaffected regardless of the changes that affect  
6 BPA’s ability to generate revenues.

7 ~~Q.—Because the Council has not established recommendations for 2004–2006, SOS asserts~~  
8 ~~there is no evidence indicating the \$139 million per year for fish and wildlife spending is~~  
9 ~~sufficient to meet BPA’s obligations, therefore BPA should anticipate the need for~~  
10 ~~increased funding levels.—Weiss, SN-03-E-SA-01 at 12. How do you respond?~~

11 ~~A.—BPA believes \$139 million in expense for the Integrated Program for fish and wildlife is~~  
12 ~~a reasonable assumption for purposes of establishing rates.—As previously stated, BPA~~  
13 ~~believes there are sound reasons for assuming these numbers for purposes of this~~  
14 ~~proposal.—BPA has posted lists of the projects it will fund within its estimated expense~~  
15 ~~accrual budget for 2003 and coordinated those lists with the Council and fish and wildlife~~  
16 ~~managers to ensure the expenditures do not exceed \$139 million.—This list includes the~~  
17 ~~actions NOAA Fisheries deemed critical for biological opinion compliance.—The Action~~  
18 ~~Agency review of Biological Opinion implementation progress,~~  
19 ~~<http://www.bpa.gov/corporate/kc/home/nreleases/NewsRelease.cfm?ReleaseNo=355>, and~~  
20 ~~NMFS’ findings letter,~~  
21 ~~<http://www.nwr.noaa.gov/1hydrop/hydroweb/docs/FindingsReport.pdf>, indicate BPA is~~  
22 ~~on track to meet the standards set for the biological opinion 2003 check-in.~~

23 ~~BPA has suggested funding levels for 2004–2006 and asked the Council to review~~  
24 ~~and if possible reduce them.—What BPA awaits from the Council is not a~~  
25 ~~recommendation for annual spending levels but prioritization of recommended projects to~~  
26 ~~be included within the annual funding limits.—The Northwest Power Act, along with other~~

~~substantive statutes, establishes BPA's fish and wildlife obligations, not the program or subbasin planning process of the Council.~~

Q. CRITFC asserts that BPA's spending estimate of \$139 million annually for fish and wildlife expense accruals was "based on calculations it (BPA) prepared for the previous rate case." SN-03-E-CR/YA-01 at 20. How do you respond?

A. The 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, BPA set an annual estimated average target of \$150 million a year of expense dollars (with an annual estimate of \$139 million in accruals) for funding the offsite ESA Mitigation as described in the 2000 FCRPS BiOps and revised Council Program. This amount is 40 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 an annual average of \$139 million in accruals for purposes of setting BPA's revenue requirement. The \$139 million expense accrual amount represents the average of the thirteen modeled alternatives having a range of \$109-\$179 million as identified in the FY 02 - 06 rate period, and as the Administrator noted in his letter to the Council on December 3, 2001, it is equivalent to \$150 million annual planning target.

The \$139 million annual accrual expense estimate for the SN 03 initial proposal is based on four considerations: 1) past modeling of the Fish Funding Principles, 2) BPA commitments made based on those Principles, 3) experience of funding at the \$137 million to \$139 million levels in 2001 and 2002, and 4) current political, economic, and environmental circumstances.

The \$139 million is the average of the high and low ends of the range evaluated in the Principles. The Principles assume the costs have an equal probability of falling anywhere within the current range of \$100M to \$179M. BPA has on several occasions indicated its commitment to fund annual accrual expenses at the \$139 million level.

1 [http://www.efw.bpa.gov/cgi-](http://www.efw.bpa.gov/cgi-bin/FW/Fish_Wildlife_Funding.cgi?ViewMode=ExternalView)  
2 [bin/FW/Fish\\_Wildlife\\_Funding.cgi?ViewMode=ExternalView.](http://www.efw.bpa.gov/cgi-bin/FW/Fish_Wildlife_Funding.cgi?ViewMode=ExternalView)

3 Last year BPA expended approximately \$137 million in expense on the Integrated  
4 Program and plans to expend up to \$139 million this year. Our experience in the past two  
5 years has shown that we can fulfill our fish and wildlife expense obligations at this  
6 funding level. Ongoing funding of many fish and wildlife measures aimed at unlisted  
7 species under the Council's Program, as well as positive findings and reviews assessing  
8 BPA Biological Opinion compliance indicate this funding level is adequate to meet  
9 BPA's obligations. With the agency-wide need to conserve reserves, holding fish and  
10 wildlife expense funding to \$139 million increases the BPA's liquidity. Moreover, with  
11 BPA's customers uniformly opposing any rate increase thru this SN-03 process, it is  
12 politically untenable to further increase fish and wildlife program expenditures when  
13 most all other program areas are taking deep cuts. Finally, in recent years the returns of  
14 anadromous fish has rebounded to levels not seen in some instances for almost a century.

15 ~~Q.—SOS believes BPA has not accounted for the risk to needing additional funding for fish~~  
16 ~~and wildlife when subbasin plans are completed over the next several years.—Weiss,~~  
17 ~~SN-03-E-SA-01 at 12.—How do you respond?~~

18 ~~A.—Subbasin planning is meant to help focus the region's mitigation efforts, not just BPA's,~~  
19 ~~on ecosystem based restoration and recovery activities.—The plans will help focus entities~~  
20 ~~like BPA on where to mitigate and how best to mitigate by prioritizing actions that most~~  
21 ~~effectively and efficiently address factors that limit mitigation and recovery.—The plans~~  
22 ~~will also help identify others responsible for mitigation and their obligations relative to~~  
23 ~~the limiting factors. The plans will provide a basis to help the Council prioritize its~~  
24 ~~funding recommendations to BPA and the other agencies owning or regulating~~  
25 ~~hydroelectric facilities in the basin.—Subbasin planning will not change BPA's legal or~~  
26 ~~funding obligations.—~~

1 ~~Q. SOS believes BPA has not accounted for the risk of needing additional funding for fish~~  
2 ~~and wildlife that NOAA Fisheries may impose during the FCRPS Biological Opinion~~  
3 ~~check-ins scheduled for 2003, 2005, and 2008. Weiss, SN-03-E-SA-01 at 12. How do~~  
4 ~~you respond?~~

5 ~~A. BPA does not believe that it is necessary to account for “additional risk” for the~~  
6 ~~Biological Opinions check-ins. The check-in for 2008 occurs well after the current rate~~  
7 ~~period, and the 2005 check-in is not likely to result in cost increases during the current~~  
8 ~~rate period. If the 2005 check-in results in the need for BPA to increase its expenditures,~~  
9 ~~then those costs may be considered when BPA sets its rates for the post-2006 period. In~~  
10 ~~addition, as of 2002 NMFS was satisfied with the implementation by BPA and the other~~  
11 ~~Action Agencies of 176 out of 199 actions under the Biological Opinion’s Reasonable~~  
12 ~~and Prudent Alternative. See:~~  
13 ~~<http://www.nwr.noaa.gov/1hydrop/hydroweb/docs/FindingsReport.pdf>. The 2003 check-~~  
14 ~~in is largely procedural—to see that the Action Agencies are making appropriate progress~~  
15 ~~in implementing the actions under the Reasonable and Prudent Alternative—so it is~~  
16 ~~unlikely BPA’s obligations will change at that time but may instead result in some~~  
17 ~~reprioritization of work in any areas determined by NOAA Fisheries to require~~  
18 ~~adjustment. If the obligations change as a result of either the 2005 to 2008 or check-ins,~~  
19 ~~BPA would most likely be asked or required to stay the current course in terms of~~  
20 ~~funding while reconsultation takes place.~~

21 ~~Q. CRITFC contends BPA has not provided adequate information to indicate the extent to~~  
22 ~~which BPA funds non-listed fish and wildlife, and that BPA recently stated that \$120~~  
23 ~~million of its \$139 million annual expense budget would be for listed species. Sheets et~~  
24 ~~al., SN-03-E-CR/YA-01 at 23-24. How do you respond?~~

25 ~~A. The Second Annual Report to the Northwest Governors on Expenditures of the~~  
26 ~~Bonneville Power Administration, SN-03-E-CR-01QQ, discusses BPA’s expenditures~~

1 through 2000 generally. There is not a listed versus non-listed species breakdown in the  
2 costs in part because projects often, if not usually, benefit multiple species, especially  
3 when the project is for anadromous fish. (The Council has noted this in its 2000 Program  
4 at page 11. <http://www.nwcouncil.org/library/2000/2000-19/Default.htm>.) The CRITFC  
5 direct testimony essentially acknowledges this fact. SN-03-E-CR/YA-01 page 25, lines  
6 5-8. Because relatively few of the listed species BPA mitigates are resident fish or  
7 wildlife, a good idea of BPA's non-listed species funding for resident fish and wildlife is  
8 in Figure 3. This shows from 1978 through 2000 BPA spent \$127,896,767 on wildlife  
9 and \$131,584,484 on resident fish. As the program moves more to ecosystem-based  
10 mitigation guided by subbasin plans, BPA expects the Council's recommendations to  
11 move somewhat away from species specific projects to suites of projects that focus on  
12 overall ecosystem improvement.

13 As for critical elements in the Council's program to benefit ESA listed species,  
14 (as noted above, the vast majority of projects identified in the Critical Elements list  
15 benefit non-listed as well as listed species) page 12 of SN-03-E-CR-01JJ.pdf indicates  
16 that as of January 18, 2003, BPA and NOAA Fisheries jointly revised that estimate down  
17 to \$107 million for FY 2003, not \$120 million as estimated earlier (both estimates  
18 include \$12 million in BPA Program overhead).

19 The CRITFC assertion that \$120 million (subsequently revised to \$107) of the  
20 \$139 million program will be directed solely to listed species is misleading because it  
21 does not recognize two important facts 1) many actions listed in the Critical Elements list  
22 benefits non-listed as well as listed species; 2) a significant number of projects identified  
23 in the Critical Elements were initiated under the Council's program prior to the 2000  
24 Biological Opinion and were assumed in the Biological Opinion as part of the baseline.

25 Under the revised estimate of \$107 million, there remains for the non-listed  
26 species at least \$32 million, an amount greater than the entire direct program

1 expenditures in any year before 1992—when NMFS made its first anadromous fish  
2 listing in the Basin. <http://www.nwcouncil.org/library/2002/2002-13/Default.htm>  
3 (Figures 1 and 2).

4 In evaluating the effect of the 2000 Biological Opinion on funding levels, it is  
5 important to focus on those new projects initiated since the 2000 Biological Opinion. At  
6 the end of the 1996-2001 Fish Budget MOA, BPA was making available \$100 million  
7 annually for expense projects. The increase the Fish Funding Principles were trying to  
8 anticipate was the increased costs of ESA compliance that would follow with the NMFS  
9 2000 FCRPS Biological Opinion. Raising the annual expenditure accrual by \$39 million  
10 to \$139 million was meant primarily to be the increase necessitated by the Biological  
11 Opinion. Thus, the base program already had sufficiency for non-ESA projects at its  
12 previous \$100 million annual expense level; what was left to cover were largely the  
13 critical projects required under the 2000 Biological Opinion.

14 ~~Q.—SOS believes BPA's fish and wildlife estimates are too low because the Provincial~~  
15 ~~Review project cost estimates, based on subbasin summaries, "represents the best~~  
16 ~~available estimate of Bonneville's fish and wildlife responsibilities that we are aware of."~~  
17 ~~Those estimated budgetary needs remain from more than \$310 million in FY 2003 to~~  
18 ~~approximately \$278 million in FY 2006. Weiss, SN-03-E-SA-01 at 12. How do you~~  
19 ~~respond?~~

20 ~~A.—CRITFC appears to blur the critical distinction between what BPA is authorized to fund~~  
21 ~~for fish and wildlife and what it is required to fund. Broadly speaking, the Provincial~~  
22 ~~Review process focused primarily on what fish and wildlife managers and the Council~~  
23 ~~thought would be beneficial to fish and wildlife for BPA to fund. The Provincial Review~~  
24 ~~was not limited to what BPA is required to fund. The broad suite of projects~~  
25 ~~recommended by fish and wildlife managers and others has never been the basis for~~  
26 ~~defining BPA's obligations. The Council takes those recommendations and submits them~~

1 ~~for review by the Independent Scientific Review Panel. The ISRP reduces the suite of~~  
2 ~~proposals based on scientific and technical merit. The Council then reduces the suite~~  
3 ~~further by focusing its recommendations on the region's priorities and BPA's obligations.~~  
4 ~~In addition, the Council's recommendations consider financial and policy issues. Finally,~~  
5 ~~BPA in some instances reduces the suite of recommendations further to ensure it is~~  
6 ~~meeting its legal obligations and financial constraints. For these reasons, the Provincial~~  
7 ~~Review is not the best estimate of BPA's budgetary needs to fulfill its fish and wildlife~~  
8 ~~obligations.~~

9 *Q. CRITFC and SOS contend that funding mitigation at Provincial Review levels would*  
10 *have “significant benefits to tribal communities” and “improve the health and economies*  
11 *of Indian people” and “have a significant positive impact on rural economies from*  
12 *additional tourism and recreational activity.” Sheets et al., SN-03-E-CRYA-01 at 30-32;*  
13 *Weiss, SN-03-E-SA -01 at 8. How do you respond?*

14 *A. BPA's obligations under the Northwest Power Act are to protect, mitigate, and enhance*  
15 *fish and wildlife and their habitats affected by the FCRPS, and to provide equitable*  
16 *treatment for fish and wildlife for the other purposes for which the system is operated.*  
17 *BPA does not have a mandate to directly assist and improve the health and economies of*  
18 *the Indian people or rural economies, but is well aware of the benefits the tribes and*  
19 *communities receive through BPA fish and wildlife mitigation funding.*

20 *Furthermore, CRITFC provided no means of determining how much additional*  
21 *increase in fish and wildlife populations the region would see as a result of BPA funding*  
22 *being increased to the levels considered by the fish and wildlife managers in the*  
23 *provincial review process. Absent a money-to-fish metric, CRITFC cannot determine the*  
24 *extent of the economic benefit, if any.*

25 *Q. CRITFC contends that because it is very unlikely that other agencies will pay all or even*  
26 *most of the costs of implementing the Biological Opinion and Fish and Wildlife Program,*

1 *and then BPA will ultimately be required to increase its share of funding for them.*

2 *Sheets et al., SN-03-E-CR/YA-01 at 37. How do you respond?*

3 A. This testimony assumes that either BPA is relying upon other entities to fund its  
4 mitigation responsibilities or that if other agencies fail to meet their own requirements  
5 BPA will have to do so for them. As to the first assumption, BPA is not asking or relying  
6 upon other agencies to fund ratepayer responsibilities, so the failure of that funding to  
7 materialize is not germane to this proceeding. As for the second assumption, the NOAA  
8 Fisheries Biological Opinion addresses the operations of the FCRPS. BPA is one of three  
9 Action Agencies tasked with implementing the Biological Opinion to comply with the  
10 ESA. BPA is already implementing or planning to implement those portions of the  
11 Biological Opinion for which it has the obligation or authority to implement. The  
12 Northwest Power Act has a guiding principle that when applied to BPA directs that its  
13 consumers shall bear only the cost of mitigation designed to deal with adverse impacts  
14 caused by the FCRPS. Therefore, BPA should not be called upon to provide additional  
15 funding where other agencies have failed to meet their own obligations.

16 Q. *CRITFC raises a concern that “[b]ased on Bonneville’s historical behavior, the agency*  
17 *will cut fish and wildlife costs and fish river operations to try to avoid the political*  
18 *ramifications of failing to make a Treasury payment. This happened in 2001 and 2003.”*  
19 *Sheets et al., SN-03-E-CR/YA-01 at 39-40. How do you respond?*

20 A. BPA disagrees that it cut fish costs and river operations in 2001 “to avoid the political  
21 ramifications of failing to make a Treasury payment.” Where fish operations were  
22 curtailed, it was for the reasons stated in the Power Emergency Criteria table found on  
23 page B-12 of Appendix B of the Federal Columbia River Power System 2001 Progress  
24 Report. Those reasons all were with the objective of providing a reliable power supply  
25 for the region.

26 In 2003, no operations have been curtailed to the detriment of fish. CRITFC fails

1 to link BPA fish operations decisions in 2001 and 2003 with a fear of political  
2 ramifications.

3 Q. CRITFC and SOS both assert that “[s]ince the Council has not developed cost estimates  
4 through FY06, it is not clear that any reduction that results from one action would  
5 necessarily reduce funding needs through 2006.” Sheets et al., SN-03-E-CR/YA-01 at 44;  
6 Weiss, SN-03-E-SA-01 at 12. How do you respond?

7 A. This assertion may belie a misunderstanding of some fundamental assumptions regarding  
8 roles and responsibilities between the Council and BPA. The Northwest Power Act, the  
9 ESA, and other treaty, statutes, regulations, and executive orders define BPA’s  
10 obligations. To help BPA fulfill its Northwest Power Act obligations, and other over  
11 lapping responsibilities such as those under the ESA, the Council develops a program that  
12 includes recommendations for how to protect, mitigate, and enhance fish and wildlife  
13 affected by the FCRPS. BPA indicates to the Council how much funding is available for  
14 program implementation, and together—along with other interested entities such as  
15 CRITFC and the Yakama Nation—they develop a budget that reflects regional priorities.  
16 Thus the Council guides but does not command BPA. The absence of a Council budget  
17 through 2006 in no way limits BPA’s ability to establish, as it has historically, a limit  
18 within which the Council needs to fit its recommendations. BPA’s request that the  
19 Council seek reductions in program funding below \$139 million in the out years of this  
20 rate period reflects BPA’s role as the setter of its own program levels within which the  
21 Council works.

22 ~~Q. SOS contends BPA has significantly “downgraded” its fish and wildlife and other public~~  
23 ~~purpose responsibilities because BPA has redefined its “obligation” to include only~~  
24 ~~“contracted payments for fish and wildlife expense.” As a result SOS believes the “non-~~  
25 ~~contract” obligations such as hydro operations, and commitments to the tribes, fishery~~  
26 ~~managers and public are no longer considered obligations for BPA. Weiss, SN-03-E-SA~~

1 ~~01 at 6. How do you respond?~~

2 ~~A. SOS either misunderstands or is misrepresenting the matter at issue in the WP-02 Record~~  
3 ~~of Decision. In testimony, SOS references the WP-02 Record of Decision (June 2001) as~~  
4 ~~stating BPA defined its fish and wildlife obligations to include only “contracted payments~~  
5 ~~for fish and wildlife expense.” This quote does not exist in the Record of Decision and~~  
6 ~~the referenced page (4-43) does not even address the issue of defining BPA’s fish and~~  
7 ~~wildlife funding obligations only as contracted for expenses. Moreover, BPA fully~~  
8 ~~recognizes commitments it makes not only in contracts but also in memoranda of~~  
9 ~~understanding and agreement as well as in records of decision under NEPA and other~~  
10 ~~administrative processes.~~

11 ~~Q. SOS contends that BPA’s SN-CRAC proposal does not provide “equitable treatment” for~~  
12 ~~fish because it provides different levels of assurance for meeting its “non-contracted for~~  
13 ~~fish responsibilities” through its decision to prioritize contracted for obligations over~~  
14 ~~those non-contract obligations. Weiss, SN-03-E-SA-01 at 22 and 24.~~

15 ~~A. BPA has taken many substantive actions to ensure that fish and wildlife receive equitable~~  
16 ~~treatment with the other purposes for which the FCRPS is managed. Some equitable~~  
17 ~~treatment actions are direct efforts to improve the environment for fish and wildlife,~~  
18 ~~many of which are system-wide.~~

19 ~~—Vernita Bar Agreement—providing certain flow levels from fall to spring to protect~~  
20 ~~salmon spawning and hatching at Vernita Bar below Priest Rapids Dam.~~

21 ~~—Non-Treaty Storage Fish Agreement—coordinating the use of 4.5 MAF of water~~  
22 ~~storage behind Mica Dam in British Columbia.~~

23 ~~—Managed Wildlife Habitat at Projects—much of the land within and adjacent to Federal~~  
24 ~~project boundaries is designated and managed as wildlife habitat.~~

25 ~~In response to litigation in 1994, NMFS rewrote the 1995 FCRPS Biological Opinion and~~  
26 ~~subsequently issued the 2000 Biological Opinion. Both Biological Opinions have~~

1 ~~resulted in significant and far-reaching changes. As for equitable treatment, the System~~  
2 ~~Operations Review Environmental Impact Statement documented a comprehensive~~  
3 ~~review of operating alternatives and their impacts on all operating purposes, including~~  
4 ~~fish and wildlife. In its SOR Record of Decision BPA adopted the environmentally~~  
5 ~~preferred alternative, operations to comply with the ESA and NMFS's Biological~~  
6 ~~Opinion. This generally resolved conflicts between power and fish in favor of fish and~~  
7 ~~thus provided fish and wildlife equitable treatment with the other purposes for which the~~  
8 ~~FCRPS is operated.~~

9 Q. *SOS contends that adding \$111.5 million/year in additional costs for fish and wildlife and*  
10 *low-income conservation expenses should be met with financial tools to the extent the*  
11 *costs are not covered by rates. Weiss, SN-03-E-SA-01 at 29. How do you respond?*

12 A. As previously described in testimony, BPA believes it is meeting its fish and wildlife as  
13 well as its conservation obligations under the amounts assumed in BPA's rate proposal.  
14 Therefore it is a moot question as to whether these cost are covered by rates or financial  
15 tools.

### 16 **Section 3. Treaty and Tribal Trust Issues**

17 Q. *CRITFC contends BPA did not analyze treaty and tribal trust requirements in its*  
18 *proposal. Sheets et al., SN-03-E-CR/YA-01 at 8. How do you respond?*

19 A. CRITFC have not identified a statute applicable to BPA that broadens BPA's general  
20 trust responsibility to include the requirement to take specific fish and wildlife mitigation  
21 actions on behalf of them. BPA fulfills its share of the trust responsibility by fully  
22 complying with the laws governing its activities. Nor has CRITFC identified any actions  
23 BPA should be taking to ensure the United States is in compliance with its treaties with  
24 the Tribes. None of BPA's rate setting directives call for the type of analysis sought by  
25 CRITFC. Therefore, by setting its rates proposal to meet its obligations under its enabling  
26 acts and other pertinent laws, BPA will also have adequate rate levels to support trust and

1 treaty obligations.

2 *Q. CRITFC contends BPA did not honor several tribal commitments that BPA would keep*  
3 *reserves high enough to fund “the higher fish and wildlife protection measures after*  
4 *2006.” Sheets et al., SN-03-E-CR/YA-01 at 10. How do you respond?*

5 *A. It is unclear in this context what CRITFC means when it writes “the higher fish and*  
6 *wildlife protection measures after 2006.” With near record strong anadromous fish*  
7 *returns of the last several years, the region may finally be beginning to enjoy the benefits*  
8 *of investments by BPA and others in the region to mitigate and recover fish and wildlife.*  
9 *See, e.g., <http://www.critfc.org/text/press/2002apr23.html>. It is not at all clear whether*  
10 *mitigation needs will increase or decrease after this rate period. This is especially true as*  
11 *subbasin plans are completed and they enable the region to identify limiting factors and*  
12 *prioritize mitigation—and mitigation responsibility—accordingly. In some instances, the*  
13 *plans may reveal that the ongoing, expensive measures are not the highest priorities.*  
14 *Moreover, on a procedural note, BPA observes that while the testimony on this question*  
15 *survived motions to strike, the exhibit upon which the testimony is based, SN-03-CR-*  
16 *01T, did not.*

17 **Section 4. Fish and Wildlife Funding Principles**

18 *Q. CRITFC asserts that BPA’s proposal is inconsistent with the Fish and Wildlife Funding*  
19 *Principles. The first principle is not met, CRITFC claims, because failing to meet flow*  
20 *and spill standards in the Biological Opinions does not meet all of BPA’s fish and*  
21 *wildlife obligations, including trust and treaty obligations. Sheets et al., SN-03-E-*  
22 *CR/YA-01 at 38. How do you respond?*

23 *A. BPA disagrees with the assertion that it has not met Principle No. 1 of the Fish and*  
24 *Wildlife Funding Principles with its SN CRAC proposal. Principle No. 1 required BPA*  
25 *to meet its fish and wildlife obligations including its trust and treaty responsibilities in the*  
26 *context of establishing the WP-02 rates. Parts of the package of risk mitigation tools*

1 available to BPA to allow it to meet its all its financial obligations under the WP-02 rates  
2 were the three CRACs. (LB, FB and SN) These CRACs were designed to provide BPA  
3 with the ability to adjust rates to ensure BPA maintains or regains its financial health. By  
4 triggering the SN CRAC, BPA is going a long way to ensuring that it can meet its  
5 financial obligations, including its fish and wildlife obligations. CRITFC claims that  
6 river operations do not meet the flow objectives established under the Biological  
7 Opinion. These concerns raised by CRITFC are directed at the operational objectives  
8 that they disagree with rather than with the particular design of the SN CRAC.

9 *Q. CRITFC believes the second principle, which calls for BPA to consider a full range of*  
10 *fish and wildlife costs, was not met because BPA did not include a range in this*  
11 *proceeding. Sheets et al., SN-03-E-CR/YA-01 at 38-39. How do you respond?*

12 *A. BPA set rates in the WP-02 proceeding to recover the equally weighted costs of the 13*  
13 *Fish and Wildlife Alternatives in Principle No. 2. In the WP-02 proceeding BPA stated,*  
14 *“The 13 Fish and Wildlife Alternatives represent, in the Administration’s judgment and*  
15 *based on extensive regional input, a reasonable range within which the costs of eventual*  
16 *decisions on system reconfiguration and related operations can be expected to fall. The*  
17 *13 Fish and Wildlife Alternatives do not represent all options that currently are being*  
18 *considered, or will be considered, by agencies, tribes, interested parties, and Congress.*  
19 *By the same token, there is no assurance that all 13 of the Alternatives will continue to be*  
20 *considered until a final decision is made. It was well understood at the time the*  
21 *Principles were adopted that cost estimates would continue to evolve as the analysis,*  
22 *planning, and decision process for system reconfiguration and related actions progressed.*  
23 *But the range of costs established by these 13 Fish and Wildlife Alternatives is deemed*  
24 *by the Executive Branch to be sufficiently high and broad for BPA rate setting and*  
25 *Subscription purposes.” DeWolfe, et al. WP-02-E-BPA-13 at 9-10.*

26 BPA believes that given the evolution of the decision making process for system

1 reconfiguration and related actions as well as the analysis and planning that has provided  
2 a great deal more clarity related to the cost and expenses for BPA's fish and wildlife  
3 obligations, the 13 Alternatives are no longer necessary. By raising this issue, CRITFC is  
4 attempting to expand the scope of this proceeding or alternatively fails to understand the  
5 scope of this proceeding. BPA is not setting base rates in this proceeding as in the  
6 WP-02 proceeding where the 13 Alternatives were modeled. Rather this procedure is  
7 BPA's implementation of a risk mitigation tool provided for under the WP-02 Rates. As  
8 a result, the need to model the 13 Alternatives is not necessary.

9 *Q. Does this conclude your testimony?*

10 *A. Yes.*

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