

BP-22 Rate Proceeding

ADMINISTRATOR'S FINAL RECORD OF DECISION

BP-22-A-02

July 2021



ADMINISTRATOR'S PREFACE

Maintaining agility is critical to enable the Bonneville Power Administration (BPA) to be competitive in the evolving marketplace and is central to our mission, to our strategy, and to the Northwest's clean energy future. Today I am adopting rates based on a settlement agreement that supports BPA's competitiveness and meets its statutory obligations, while acknowledging the need for sustainable capital funding and debt-management approaches.

This settlement would not have been possible without the collaborative approach of rate case parties who presented proposals and worked with BPA staff to develop widely accepted settlement terms on controversial issues. Most significantly, the settlement agreement will provide revenue financing to strengthen BPA's financial health while limiting the amount to \$40 million per year for power rates and \$40 million per year for transmission rates.

The effect of the settlement on power rates is remarkable in that it is one of the only times in BPA's history when the average power rate will decrease compared to current levels. The average power rate decrease is 2.5 percent. Notably, this means our annual 10-year rate trajectory is less than 2 percent, which is in line with historical inflation rates. This demonstrates the effectiveness of our cost discipline and continued efforts to bend the cost curve.

For transmission rates, the settlement results in a weighted average transmission rate increase of 6.1 percent relative to current rates, which is roughly half the weighted average increase cited in the BP-22 Initial Proposal.

Revenue financing is a tool BPA included in the BP-22 Initial Proposal as a way to fund capital work and reduce outstanding debt. The settlement reduces the amount of revenue financing, relative to the Initial Proposal, in recognition of the near-term financial impacts of the pandemic on communities served by BPA's utility customers. The settlement also commits us to holding a public process on BPA's long-term financial health, including access-to-capital issues, sustainable capital funding approaches and debt management.

Another important topic in this rate case – one that also impacts BPA's competitiveness – is the Western Energy Imbalance Market (Western EIM). The final rate proposal includes rate allocations and rate schedule provisions that position BPA to be able to participate in the Western EIM during the BP-22 rate period. These rate proposals are an essential step toward preparing BPA and its customers for potential Western EIM participation. I will make a final decision about joining the Western EIM later this summer after we complete our fifth and final phase of the Western EIM decision process. No matter my decision on the Western EIM, the strides we have made through this rate case to enable BPA's EIM participation reflect our ongoing commitment to modernizing systems and processes to maximize the value of the region's federal power and transmission assets.

I greatly appreciate the time and effort that all parties devoted to the BP-22 proceeding and settlement discussions. I also want to thank our Federal partners, Energy Northwest, and other regional partners for their continued support of BPA's cost-management goals, as

well as the BPA workforce, for their collaborative spirit, stewardship, and commitment to our agency's mission.

I look forward to working together with our customers and strategic partners to help strengthen the region's economic prosperity and environmental sustainability through this next rate period and beyond.

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Appendix A: Settlement Agreement For Rates For Fiscal Years 2022-23

Under separate cover:

Appendix B: 2022 Power Rate Schedules and General Rate Schedule Provisions
(BP-22-A-02-AP01)

Appendix C: 2022 Transmission, Ancillary, and Control Area Service Rate Schedules
and General Rate Schedule Provisions (BP-22-A-02-AP02)

COMMONLY USED ACRONYMS AND SHORT FORMS

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

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

inc	increase, increment, or incremental
IOU	investor-owned utility
IP	Industrial Firm Power
IPR	Integrated Program Review
IR	Integration of Resources
IRD	Irrigation Rate Discount
IRM	Irrigation Rate Mitigation
IRPL	Incremental Rate Pressure Limiter
IS	Southern Intertie
kcfs	thousand cubic feet per second
KSI	key strategic initiative
kW	kilowatt
kWh	kilowatthour
LAP	Load Aggregation Point
LDD	Low Density Discount
LGIA	Large Generator Interconnection Agreement
LLH	Light Load Hour(s)
LMP	Locational Marginal Price
LPP	Large Project Program
LT	long term
LTF	Long-term Firm
Maf	million acre-feet
Mid-C	Mid-Columbia
MMBtu	million British thermal units
MNR	Modified Net Revenue
MRNR	Minimum Required Net Revenue
MW	megawatt
MWh	megawatthour
NCP	Non-Coincidental Peak
NEPA	National Environmental Policy Act
NERC	North American Electric Reliability Corporation
NFB	National Marine Fisheries Service (NMFS) Federal Columbia River Power System (FCRPS) Biological Opinion (BiOp)
NLSL	New Large Single Load
NMFS	National Marine Fisheries Service
NOAA Fisheries	National Oceanographic and Atmospheric Administration Fisheries
NOB	Nevada-Oregon border
NORM	Non-Operating Risk Model (computer model)
NP-15	North of Path 15
NPCC	Northwest Power and Conservation Council
NPV	net present value
NR	New Resource Firm Power
NRFS	NR Resource Flattening Service

NRU	Northwest Requirements Utilities
NT	Network Integration
NTSA	Non-Treaty Storage Agreement
NUG	non-utility generation
NWPA	Northwest Power Act/Pacific Northwest Electric Power Planning and Conservation Act
NWPP	Northwest Power Pool
O&M	operations and maintenance
OATI	Open Access Technology International, Inc.
OATT	Open Access Transmission Tariff
OCBR	Operational Controls for Balancing Reserves
OS	Oversupply
OY	operating year (August through July)
PDCI	Pacific DC Intertie
PF	Priority Firm Power
PFp	Priority Firm Public
PFx	Priority Firm Exchange
PMA	Power Marketing Administration
PNCA	Pacific Northwest Coordination Agreement
PNRR	Planned Net Revenues for Risk
PNW	Pacific Northwest
POD	Point of Delivery
POI	Point of Integration or Point of Interconnection
POR	point of receipt
PPC	Public Power Council
PRSC	Participating Resource Scheduling Coordinator
PS	Power Services
PSC	power sales contract
PSW	Pacific Southwest
PTP	Point-to-Point
PUD	public or people's utility district
RAM	Rate Analysis Model (computer model)
RBC	Reliability-based control
RCD	Regional Cooperation Debt
RD	Regional Dialogue
RDC	Reserves Distribution Clause
REC	Renewable Energy Certificate
Reclamation	U.S. Bureau of Reclamation
REP	Residential Exchange Program
REPSIA	REP Settlement Implementation Agreement
RevSim	Revenue Simulation Model
RFA	Revenue Forecast Application (database)
RHWM	Rate Period High Water Mark
ROD	Record of Decision

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

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PARTY ABBREVIATIONS AND JOINT PARTY DESIGNATION CODES

Party Abbreviations

AC	Avista Corporation
AR	Avangrid Renewables, LLC
AW	Alliance of Western Energy Consumers
BC	Benton County Public Utility District No. 1
BR	Brookfield Renewable Trading and Marketing LP
CP	Calpine Corporation
ED	EDP Renewables North America LLC
FR	Franklin County Public Utility District No. 1
ID	Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United
IN	Invenergy LLC
IP	Idaho Power Company
JP01	NI, RN
JP02	EW, SN
JP03	AR, AC, PC, and PS
JP04	AC, PC, IP, PS, and PG
LA	Los Angeles Department of Water and Power
MS	M-S-R Public Power Agency
NE	NorthWestern Corporation
NI	Northwest & Intermountain Power Producers Coalition
NR	Northwest Requirements Utilities
NS	NewSun Energy Transmission Company LLC
NW	Northwest Irrigation Utilities
PC	PacifiCorp
PG	Portland General Electric Company
PN	Pacific Northwest Generating Cooperative
PP	Public Power Council
PS	Puget Sound Energy, Inc.
PX	Powerex Corporation
RN	Renewable Northwest
SE	City of Seattle
SH	Shell Energy
SN	Snohomish County Public Utility District No. 1
TA	City of Tacoma
TC	TransAlta Energy Marketing (U.S.)
UE	Umatilla Electric Cooperative
WG	Western Public Agencies Group *

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

Joint Party Designation Codes

Party Code	Joint Party	Joint Party Members
JP01	Joint Party 1	Northwest & Intermountain Power Producers Coalition (NI) Renewable Northwest (RN)
JP02	Joint Party 2	Eugene Water & Electric Board (part of WPAG) Snohomish County Public Utility District No. 1 (SN)
JP03	Joint Party 3	Avangrid Renewables, LLC (AR) Avista Corporation (AC) PacifiCorp (PC) Puget Sound Energy, Inc. (PS)
JP04	Joint Party 4	Avista Corporation (AC) PacifiCorp (PC) Idaho Power Company (IP) Puget Sound Energy, Inc. (PS) Portland General Electric Company (PG)

1.0 GENERAL TOPICS

1.1 Introduction

This Final Record of Decision (ROD) contains the decisions of the Administrator of the Bonneville Power Administration (BPA) based on the record compiled in this proceeding with respect to the adoption of Power, Transmission, and Ancillary and Control Area Service rates for the two-year rate period of October 1, 2021, through September 30, 2023 (fiscal years (FY) 2022–2023). The rate schedules and General Rate Schedule Provisions (GRSPs) established in this proceeding will replace existing rate schedules and GRSPs that expire on September 30, 2021.

The BP-22 rate proceeding has included an evidentiary hearing, submission of written briefs by the parties, and publication of a Draft ROD. This Final ROD provides background information, addresses the issues raised in the parties' briefs, responds to participant comments submitted during the public comment period, and summarizes BPA's assessment of the potential environmental effects of implementation of the FY 2022-2023 rates consistent with the National Environmental Policy Act (NEPA).

1.2 Procedural History

1.2.1 Workshops Prior to the BP-22 Rate Proceeding

Beginning in the fall of 2019, BPA sponsored a series of public workshops and other meetings to discuss certain topics related to power and transmission rates before the start of the BP-22 rate proceeding and the release of BPA's Initial Proposal. BPA designed the workshops to allow its Staff and interested parties to develop a common understanding of specific topics, generate ideas, and discuss alternative proposals.

In 2019, BPA held workshops on October 23, November 19, and December 12. In 2020, BPA held workshops on January 28, February 25, March 17, April 10 and 28, May 19, June 23 and 24, July 28, 29 and 30, August 25 and 26, September 29, October 7, and November 4 and 12.

Customers led workshops on the following dates in 2020: January 15, February 18, March 11, May 13, June 10, July 15, August 12, and September 1 and 9.

1.2.2 BP-22 Rate Proceeding

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

[RulesProcedure/Pages/default.aspx](#). The Rules of Procedure implement the Section 7(i) requirements.

On December 1, 2020, BPA published notice of the BP-22 rate proceeding in the Federal Register. “Fiscal Year (FY) 2022–2023 Proposed Power and Transmission Rate Adjustments[,] Public Hearing and Opportunities for Public Review and Comment,” 85 Fed. Reg. 77,189 (Dec. 1, 2020). The rate proceeding began with a prehearing conference on December 7, 2020. After the prehearing conference, the Hearing Officer issued orders establishing the schedule for the rate proceeding, special rules of practice, and granted petitions to intervene.

BPA’s Initial Proposal for FY 2022-23 power and transmission rates was supported by Staff’s studies and written testimony issued on December 7, 2020. A Clarification session for questions about the Initial Proposal was held on December 17, 2020. BPA Staff filed supplemental testimony on December 18, 2020; no party requested clarification regarding this additional testimony. The parties filed direct testimony on February 3, 2021. Clarification of parties’ direct testimonies was held on February 9, 2021. BPA Staff and the parties filed rebuttal testimony on March 16, 2021. The litigants did not elect clarification of the rebuttal testimony.

BPA Staff and the parties elected not to conduct cross-examination, and the hearing scheduled for April 8 and 9, 2021, was cancelled.

On April 7, 2021, BPA received settlement proposals from multiple parties and subsequently held settlement conferences on April 14, 20, and 28, 2021. The settlement discussions resulted in a proposed Settlement Agreement for Rates for Fiscal Years 2022-23 (Settlement), which BPA Staff filed with the Hearing Officer on April 29, 2021. The Settlement is attached as Appendix A and described in more detail in Chapter 2 of this Final ROD. The Hearing Officer established a deadline of May 5, 2021, for any party to file an objection to the Settlement and identify any issues that the party intended to contest. Order Modifying Procedural Schedule and Establishing Deadline for Objections to Settlement, BP-22-HOO-17, at 1. Any party that did not file an objection would waive its right to contest the Settlement in Initial Briefs.

Although most parties did not file objections in response to the Hearing Officer’s order, Brookfield Renewable Trading and Marketing LP (Brookfield), Idaho Power Company, NewSun Energy Transmission Company LLC, NorthWestern Corporation, and a joint party consisting of Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United (collectively, the Environmental Parties) all submitted timely filings objecting to or stating concerns with some aspect of the Settlement. Objection of Brookfield Renewable Trading and Marketing LP to BP-22 Settlement Agreement, BP-22-M-BR-04; Answer and Limited Objection to the Motion of BPA to Modify Procedural Schedule and Establish Deadline for Objections to the Settlement Agreement of Idaho Power Company, BP-22-M-IP-02; Objection to Settlement of NewSun Energy Transmission Company, LLC, BP-22-M-NS-01; NorthWestern Corporation’s Limited Exception to Section 3 of the Settlement Agreement, BP-22-M-NE-02; Notice of Objection to Settlement

Proposal, BP-22-M-ID-04. Given the limited number and scope of the objections, Staff moved forward with recommending adoption of the Settlement despite the opposition.

Brookfield and the Environmental Parties filed initial briefs on May 11, 2021. None of the parties requested oral argument before the Administrator, and oral argument that had been scheduled for May 18, 2021, was cancelled. The Draft ROD was issued on June 25, 2021. The Environmental Parties filed a brief on exceptions on July 9, 2021.

Certain parties to this proceeding consolidated for the purpose of filing joint testimony or briefs on one or more issues. *See* Rules of Procedure § 1010.7. The rate case clerk assigned each joint party an alphanumeric designation (JP01, JP02, JP03, and JP04). For convenience, a list of the joint parties appears in the list of Party Abbreviations and Joint Party Designation Codes included at the beginning of this Final ROD. *See also* Document Numbering System and Pre-Marking of Exhibits and Briefs, BP-22-H00-02.

BPA received four written comments during the participant¹ comment period, which began with the publication of the Federal Register notice on December 1, 2020, and ended March 1, 2021. Participant comments are part of the record upon which the Administrator bases the decisions; they are summarized and addressed in Chapter 5. Participant comments may be viewed on BPA's website at <https://publiccomments.bpa.gov/CommentList.aspx?ID=405>.

1.2.3 Waiver of Issues by Failure to Raise in Briefs

Pursuant to Section 1010.17(f) of the Rules of Procedure, arguments not raised in parties' briefs are deemed to be waived. Under this provision, a party's brief must specifically address the legal or factual dispute at issue. Blanket statements that seek to preserve every issue raised in testimony will not preserve any matter at issue.

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

1.3 Legal Guidelines Governing Establishment of Rates

1.3.1 Statutory Guidelines

Section 7(a)(1) of the Northwest Power Act directs the Administrator to establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. 16 U.S.C. § 839e(a)(1). Rates are to be set to recover, in accordance with sound business principles, the costs associated with

¹ For interested persons who are not eligible or do not wish to become parties to the formal evidentiary hearings, BPA's Rules of Procedure provide opportunities to participate in the ratemaking process through submission of comments as "participants." *See* Rules of Procedure § 1010.8. No party may submit comments as a participant, and comments so submitted will not be included in the record. *Id.* § 1010.8(d).

the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (FCRPS) (including irrigation costs required to be paid by power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator under the Northwest Power Act and other provisions of law. *Id.* Section 7 of the Northwest Power Act also contains rate directives describing how rates for individual customer groups are established.

Section 7(a)(1) of the Northwest Power Act reaffirms the applicability of Section 5 of the Flood Control Act of 1944 (Flood Control Act), which directs that the Secretary of Energy shall transmit and dispose of electric power and energy in such manner as to encourage the most widespread use of power at the lowest possible rates to consumers consistent with sound business principles. 16 U.S.C. § 839e(a)(1); *see also* 16 U.S.C. § 825s. Section 5 of the Flood Control Act provides that rate schedules shall be drawn having regard to the recovery of the cost of producing and transmitting electric energy, including the amortization of the Federal investment over a reasonable number of years. 16 U.S.C. § 825s.

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

1.3.2 The Broad Ratemaking Discretion Vested in the Administrator

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

The United States Court of Appeals for the Ninth Circuit has recognized the Administrator’s ratemaking discretion. *Cent. Lincoln Peoples’ Util. Dist. v. Johnson*, 735 F.2d 1101, 1120-29 (9th Cir. 1984) (“Because BPA helped draft and must administer the Northwest Power Act, we give substantial deference to BPA’s statutory interpretation”); *PacificCorp v. FERC*,

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

1.4 Federal Energy Regulatory Commission Confirmation and Approval of Rates

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

1.4.1 Standard of Commission Review

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

1.5 Related Topics and Processes

This section includes a discussion of topics and processes separate and distinct from this rate proceeding that provide information and policy context to the proceeding, including program cost estimates developed in the Integrated Program Review 1 (IPR 1), Integrated Program Review 2 (IPR 2), the 2012 Residential Exchange Program Settlement Agreement (2012 REP Settlement), and the Rate Period High Water Mark (RHW) Process. Issues

related to those processes are outside the scope of the BP-22 rate proceeding. 85 Fed. Reg. at 77,190-91 (Dec. 1, 2020).

1.5.1 Spending Review

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

In June 2020, BPA held a series of public workshops to review the proposed program expense and capital spending to be the basis for power and transmission rates in the BP-22 rate proceeding. This combined process provided opportunities for the public to review and comment on power, transmission, and agency service expense programs, and included detailed review of asset strategies and associated capital spending levels.

In October 2020, BPA issued a Closeout Report for the IPR 1 (IPR 1 Closeout Report), in which BPA responded to public comments. In the report, BPA established the program expense and capital spending level estimates that were used in the BP-22 Initial Proposal to establish the proposed power and transmission rates. A few days before issuance of the IPR 1 Closeout Report, BPA and other action agencies issued the Final Record of Decision on the Columbia River System Operations (CRSO) Environmental Impact Statement (EIS) and associated Endangered Species Act (ESA) consultations (*available at* <https://www.nwd.usace.army.mil/CRSO/>). In light of this decision, BPA committed in the IPR 1 Closeout Report to "conduct a second IPR [IPR 2] in the early part of 2021 and [to] provide more details in the upcoming months." IPR 1 Closeout Report at i, *available at* <https://www.bpa.gov/Finance/FinancialPublicProcesses/IPR/2020IPR/20201019-BP22-Final%20Close-out.pdf>. Following publication of the IPR 1 Closeout Report, stakeholders also asked for further discussion of the Transmission direct capital program and facilities spending. On February 12, BPA notified regional parties of the commencement of IPR 2 and announced a workshop for March 2, 2021. At that workshop, BPA addressed its capital spending and execution plan for the Transmission and facilities asset categories and the impacts of the CRSO EIS and associated ESA consultations. Following the March 2 workshop, BPA opened a three-week comment period. On April 27, 2021, BPA issued the IPR 2 Closeout Report, in which BPA reduced its projected Transmission capital spending and confirmed that its fish and wildlife spending estimates from the IPR 1 Closeout Report remained sufficient to meet its environmental obligations for the rate period. IPR 2 Closeout Report, *available at* <https://www.bpa.gov/Finance/FinancialPublicProcesses/IPR/2020IPR/20210430-IPR%20Cose-Out-Letter-Report.pdf>.

1.5.2 2012 Residential Exchange Program Settlement Agreement

On July 26, 2011, the Administrator executed the 2012 REP Settlement, which resolved longstanding litigation over BPA's implementation of the Residential Exchange Program under Section 5(c) of the Northwest Power Act, 16 U.S.C. § 839c(c), through 2028. The Administrator's findings regarding the legal, factual, and policy challenges to the 2012 REP

Settlement are thoroughly explained in the REP-12 Record of Decision (REP-12 ROD). The 2012 REP Settlement and the Administrator's decision in the REP-12 ROD to sign the settlement were upheld by the Ninth Circuit Court of Appeals in *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939 (9th Cir. 2013).

1.5.3 Rate Period High Water Mark Process

BPA has established FY 2022–2023 RHWMs for customers with Contract High Water Mark (CHWM) contracts. In the RHWM Process, which preceded the BP-22 rate proceeding and concluded in September 2020, BPA established the maximum planned amount of power a customer is eligible to purchase at Priority Firm Tier 1 rates during the rate period, the Above-RHWM Load for each customer, the System Shaped Load for each customer, the Tier 1 System Firm Critical Output, RHWM Augmentation, the Rate Period Tier 1 System Capability (RT1SC), and the monthly/diurnal shape of RT1SC. The RHWM Process provided customers an opportunity to review, comment, and challenge BPA's RHWM determinations. The RHWMs and related outputs of the RHWM Process are combined with the rate case load forecast to develop billing determinants and for other ratemaking purposes.

1.5.4 Energy Imbalance Market

Since 2018, BPA has been exploring with regional stakeholders whether to join the California Independent System Operator (CAISO) Energy Imbalance Market (EIM). Mantifel *et al.*, BP-22-E-BPA-30, at 5. The EIM is an intra-hour (or real-time) centralized energy market used to economically dispatch participating resources to balance supply, transfers between Balancing Authority Areas (BAAs) (interchange), and load across the market's footprint. *Id.* at 2. For balancing authorities in the EIM (EIM entities), the EIM is integrated into the Energy Imbalance and Generation Imbalance services provided by the EIM entities under their respective Open Access Transmission Tariffs (OATTs). Imbalance in the EIM is settled using Locational Marginal Pricing (LMP).

To decide whether to join the EIM, BPA developed a five-phase process, described in detail in the Administrator's Record of Decision, Energy Imbalance Market Policy at 29–36 (Sept. 2019) (EIM Policy ROD), available at <https://www.bpa.gov/news/pubs/RecordsofDecision/rod-20190926-Energy-Imbalance-Market-Policy.pdf>. Phase I was an exploration and education phase for both BPA and its stakeholders. Mantifel *et al.*, BP-22-E-BPA-30, at 5. Phase II picked up where Phase I left off and continued to flesh out the policies and positions from Phase I, considered the business case for joining the EIM, and commenced a formal policy development process with stakeholders. *Id.* Phase III continued the policy development process, establishing BPA's initial position on EIM issues that would be decided in the BP-22 rate case and a separate, concurrent proceeding (TC-22) addressing the terms and conditions of transmission service in BPA's OATT. *Id.* at 6. Phase III also addressed four discrete issues that were not included in the BP-22 or TC-22 proceedings. *Id.* In Phase IV, BPA developed and proposed the rate schedules, cost allocations, and non-rate Tariff terms necessary to position BPA to participate in the EIM

by its target date, which is March of 2022. Phase V is the final step, during which BPA will make its final decision on whether to join the EIM. *Id.*

The rates in this BP-22 rate proceeding will be in effect from October 1, 2021, through September 30, 2023. As such, the rates developed in this BP-22 proceeding (Phase IV) must address the rate schedule language, cost allocations, and other matters related to the EIM to position BPA for EIM participation if the Administrator decides to join in Phase V. To do that, BPA developed EIM-related proposals on the functionalization of EIM startup costs (Mace *et al.*, BP-22-E-BPA-31), the allocation of EIM Charge Codes among transmission users (Pleger *et al.*, BP-22-E-BPA-32), and the allocation and estimation of EIM Charges and Credits in Power rates (Traetow *et al.*, BP-22-E-BPA-33). As explained in Chapter 2, those proposals have been adopted as part of the Settlement.

2.0 SETTLEMENT

Almost all parties in the BP-22 rate proceeding agreed not to oppose the settlement of issues reflected in the Settlement Agreement for Rates for Fiscal Years 2022-23. Appendix A; *see* Motion of Bonneville Power Administration to Modify Procedural Schedule and Establish Deadline for Objections to Settlement Agreement, BP-22-M-BPA-02; Order Modifying Procedural Schedule and Establishing Deadline for Objections to Settlement Agreement, BP-22-HOO-17. The Settlement was structured to require parties to file any objections on the record by a deadline or waive the right to object; it also provided non-opposing parties with the opportunity to withdraw in the event an objection was filed. Two parties, discussed below, filed objections to the Settlement and briefs stating their positions; however, no party withdrew from the Settlement as a result of the objections. The terms of the Settlement, the wide range of parties that do not object, and the rest of the record provide support for the adoption of all Power and Transmission rates at issue in this proceeding. Brookfield and the Environmental Parties (Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United) submitted briefs opposing specific aspects of the Settlement. As discussed in Issue 2.1, BPA is adopting the Settlement for the purpose of establishing rates for the FY 2022–23 rate period. The arguments of Brookfield and the Environmental Parties are noted briefly in Issue 2.1 and are addressed in detail in Chapters 3 and 4, respectively, of this Final ROD.

Issue 2.1

Whether BPA should adopt the Settlement.

Parties' Positions

Most of the parties in the BP-22 rate proceeding do not oppose adoption of the Settlement. Only two parties filed briefs opposing the Settlement.

Brookfield opposes the Settlement on the basis of the treatment of the Short Distance Discount (SDD) for Point-to-Point (PTP) transmission service on the network. Brookfield Br., BP-22-B-BR-01, at 2.

The Environmental Parties maintain that the rates under the Settlement would not provide “equitable treatment” for fish and wildlife. Environmental Parties Br., BP-22-B-ID-01, at 1; Environmental Parties Br. Ex., BP-22-R-ID-01, at 1

NorthWestern Energy, Idaho Power, and NewSun Energy Transmission submitted filings in response to the Hearing Officer’s order to specify that they did not “assent” to the terms of the Settlement, as provided in Section 3 of the agreement. NorthWestern Corporation’s Limited Exception to Section 3 of the Settlement Agreement, BP-22-M-NE-02, at 1; Answer and Limited Objection to the Motion of BPA to Modify Procedural Schedule and Establish Deadline for Objections to the Settlement Agreement of Idaho Power Company, BP-22-M-IP-02, at 1-2; Objection to Settlement of NewSun Energy Transmission Company, LLC, BP-22-M-NS-01, at 1. These parties did not file initial briefs on their positions.

BPA Staff's Position

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

Evaluation of Positions

BPA appreciates the time and effort that all parties in the BP-22 proceeding devoted to the settlement discussions. As described in Chapter 1, the development of the Settlement occurred as a result of keenly focused discussions among the litigants in a relatively short period of time. Achieving a settlement among almost all parties in a compressed timeframe, while many participants were working remotely, would not be achievable without a collaborative approach from all involved.

The settlement discussions followed the development of an extensive record through the submission of testimony and other evidence regarding a number of controversial issues in this proceeding. The Settlement includes terms explicitly addressing most of the controversial issues, including Power and Transmission revenue financing, Transmission losses, EIM costs and benefits, balancing services, and the Transmission utility delivery charge. Appendix A (Settlement), Attachment 1, §§ 1-6. Other issues are settled consistent with Staff's Initial Proposal, as modified by any changes in Staff's rebuttal testimony. *Id.* § 7. The Settlement also includes a number of commitments about future public processes for additional discussion of issues raised by the parties in this proceeding. *Id.* §§ 1-4, 6.

As part of the terms of the Settlement, parties that did not file an objection on the record cannot contest adoption of the agreement in the BP-22 Proceeding, or other forums, or the implementation of the Settlement pursuant to its terms, through the end of FY 2023. Given the number of contested issues reflected in the extensive evidentiary record in this proceeding, the Settlement has helped eliminate the need for most parties to submit briefs on most of the issues, and it will avoid the potential for further dispute about those issues before FERC or the Ninth Circuit Court of Appeals. BPA places significant weight on the benefits of adopting an outcome that reflects a compromise and at least some degree of consensus among most parties. *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (it "hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation.").

In addition to helping narrow the scope of and eliminate the potential for further dispute about certain contested issues in this proceeding, the Settlement also helps set the stage for discussion of those issues in the future. The public process commitments provide assurance that BPA Staff and stakeholders will have a forum for collaborative discussion of issues that may have been the subject of compromise in the Settlement. The benefit associated with the continuation of discussion of certain issues outside of the confines of the rate case process provides additional justification for adoption of the Settlement despite the objections.

BPA acknowledges that the Settlement does not enjoy unanimous support from all parties, but the limited and relatively discrete objections raised by Brookfield and the

Environmental Parties provide an insufficient basis to reject a reasonable and negotiated outcome for rates and other issues. Chapters 3 and 4 of this Final ROD address Brookfield's and the Environmental Parties' specific arguments in detail. The record in this proceeding demonstrates that the proposed rates under the Settlement satisfy the statutory directives that apply to BPA ratemaking, and the Settlement provides a reasonable basis for the adoption of those rates for the FY 2022-23 rate period. *See Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 967 (9th Cir. 2013) ("So long as the Settlement complies with the relevant statutory authority . . . BPA does not need its customers to unanimously agree to the rates it sets in accordance with the Settlement.").

Decision

The Settlement is adopted for the purpose of establishing BPA rates for the FY 2022-23 rate period.

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3.0 TRANSMISSION RATES SHORT-DISTANCE DISCOUNT

The Short Distance Discount (SDD) provides a reduction to certain rates for transmission service on the Network segment when the reservation or designated network resource for the service uses less than 75 circuit miles of the Federal Columbia River Transmission System (FCRTS). 2022 Transmission, Ancillary, and Control Area Service Rate Schedules and GRSPs, BP-22-E-BPA-11, NT-22, § IV.D, PTP-22, § IV.F. Under the Settlement, BPA Staff proposes to retain the SDD in its current (BP-20) form with certain clarifying revisions Staff recommended in rebuttal testimony. Fredrickson *et al.*, BP-22-E-BPA-44, at 3. Brookfield Renewable Trading and Marketing LP opposes this aspect of the Settlement and has proposed changes to the way that BPA treats “redirects” of PTP reservations under the SDD. Greenleaf, BP-22-E-BR-01; Brookfield Br., BP-22-B-BR-01.

Issue 3.1

Whether BPA should change the way it applies the SDD when there are redirects of PTP reservations.

Parties’ Positions

Brookfield requests the Hearing Officer to decline the Settlement and instead order BPA to adopt revisions to the rate schedule language that would change the way the SDD applies to redirects of PTP service.² Brookfield Br., BP-22-B-BR-01, at 2.

BPA Staff’s Position

Consistent with the proposed Settlement, BPA Staff recommends adopting the clarifying revisions to the PTP rate schedule that Staff proposed in rebuttal testimony. Fredrickson *et al.*, BP-22-E-BPA-44, at 3.

Evaluation of Positions

Brookfield asks the Hearing Officer to order BPA to include Brookfield’s recommended language in the SDD rate and to develop a more efficient billing mechanism for the SDD. Brookfield Br., BP-22-B-BR-01, at 9-10. Pursuant to BPA’s Rules of Procedure, the Hearing Officer “is responsible for conducting the proceeding, managing the development of the Record, and resolving procedural matters.” Rules of Procedure § 1010.3(a). The Hearing Officer only recommends a decision in a proceeding “revising or establishing terms and conditions of general applicability for transmission service . . . pursuant to Section 212(i)(2)(A) of the Federal Power Act . . .” *Id.* §§ 1010.1(a)(2), 1010.3(a). In a rate proceeding under Section 7(i) of the Northwest Power Act, the Hearing Officer cannot recommend a decision or outcome to the Administrator.

² Brookfield refers to BPA’s Tariff in its initial brief, but BPA does not include rates in its Tariff. To the extent that Brookfield would like to propose tariff language, the appropriate forum would be a future proceeding to change the terms and conditions of BPA’s Tariff.

For a customer with a PTP reservation that uses less than 75 circuit miles of the FCRTS, the SDD effectively reduces the rate the customer pays for its service. See 2022 Transmission, Ancillary, and Control Area Service Rate Schedules and GRSPs, BP-22-E-BPA-11, PTP-22, § IV.F. BPA adopted the SDD to create an incentive for customers to choose generation close to load and to discourage the construction of alternative facilities over short distances. Fredrickson *et al.*, BP-22-E-BPA-44, at 2.

Under BPA's Open Access Transmission Tariff (OATT), a customer has the option to request to "redirect" a PTP reservation from the original contract point of receipt or delivery to a different point on the system. BPA OATT, TC-20-A-03, Appendix 1, Attachment 2, § 22.1. If a customer receives the SDD on a PTP transmission reservation and then elects to redirect that reservation for all or a portion of a month, the customer loses the SDD for that month. 2022 Transmission, Ancillary, and Control Area Service Rate Schedules and GRSPs, BP-22-E-BPA-11, PTP-22, § IV.F. If the SDD is removed for a month, the customer is charged the regular rate for service.

Brookfield recommends revisions to the proposed PTP-22 rate schedule language that would change the existing SDD by eliminating only the portion of the discount that corresponds to the amount of capacity and duration of a redirect or redirects during the month. Brookfield Br., BP-22-B-BR-01, at 2, 9. Brookfield asserts several arguments in support of its recommendation: (1) removal of the SDD for the entire month creates disparate treatment between customers; (2) removal of the SDD results in a rate other than the "lowest possible rate"; (3) removal of the SDD creates a barrier to redirecting reservations; and (4) lack of the ability to implement its proposal should not impede BPA from adopting Brookfield's recommended language. *Id.* at 5, 7, 11, 16–18.

To Brookfield's point about disparate treatment and undue discrimination, those are not standards that apply to BPA ratemaking under the Northwest Power Act. Administrator's Final Record of Decision, BP-12-A-02, at 203-05; Administrator's Final Record of Decision, BP-18-A-04, at 174. Chapter 1 of this Final ROD describes the statutory standards that govern BPA ratemaking and Commission review of BPA's rates, and the Commission has approved BPA's transmission rates under those standards many times since the SDD was adopted. See, e.g., *Bonneville Power Admin.*, 154 FERC ¶ 61,077 (2016); *Bonneville Power Admin.*, 162 FERC ¶ 61,248 (2018); *Bonneville Power Admin.*, FERC Docket No. EF19-5, Order Confirming and Approving Rates on a Final Basis (Apr. 17, 2020). In addition, the provision requiring removal of the SDD in the event of redirects has been expressly enforced in the Ninth Circuit Court of Appeals. See *PacifiCorp v. U.S. Dep't of Energy*, 772 F. App'x 570 (9th Cir. 2019) (affirming BPA's decision to recoup SDDs that had mistakenly been applied in months in which redirects occurred). BPA assigns significant weight to these previous approvals, especially when considering whether to adopt a Settlement that is both unopposed by a majority of the parties and largely maintains the SDD in its current form.

Even if Brookfield was correct about the applicability of the disparate treatment and undue discrimination standards, simply having a difference between rates that customers are charged does not create undue discrimination. Indeed, if it did, the SDD would be

problematic on its face because it grants a discount solely on the basis of the customer's use of the system in terms of circuit-mile distance.

Brookfield compares the rate for a customer that redirects a reservation during a portion of the month to the rate for a customer that leaves its reservation unchanged. Brookfield Br., BP-22-B-BR-01, at 2. When a customer redirects a PTP transmission reservation that receives the SDD in the short term, it is no longer using the path on which the discount was based. A redirected reservation no longer serves the original purposes for which the SDD was developed: to discourage customers from building around BPA's system and to incent location of generation close to load. Fredrickson *et al.*, BP-22-E-BPA-44, at 4. The treatment of the redirect may be different, but it is not unduly discriminatory because it continues to be based upon the customer's use of the transmission system and the purposes of the SDD. In addition, as described below, implementation of the SDD in the manner that Brookfield suggests is impractical in terms of the BPA systems used to administer the discount.

Brookfield maintains that removal of the SDD results in a rate other than the "lowest possible rate," which, Brookfield argues, is a statutory requirement. Brookfield Br., BP-22-B-BR-01, at 7. Brookfield is incorrect in its interpretation of the "lowest possible rates" language in BPA's statutes. The statutory requirement is that BPA set its rates "with a view to encouraging . . . the lowest possible rates to consumers . . ." 16 U.S.C. § 838g. The Ninth Circuit Court of Appeals has determined that this statutory requirement is not a "statutory command that the prices charged to consumers always be the lowest possible." *Cal. Energy Comm'n v. Bonneville Power Admin.*, 909 F.2d 1298, 1308 (9th Cir. 1990). In addition, the "lowest possible rates" standard applies to BPA's rates as a whole and not particular rates (or rate discounts) in isolation. See 16 U.S.C. §§ 825s, 838g; Administrator's Final Record of Decision, BP-20-A-03, at 46.

Rather than a question of whether the application of the SDD to redirects results in the "lowest possible rates," the crux of the issue that Brookfield raises is a matter of rate design and cost allocation. BPA has broad discretion with respect to design and allocation of costs in transmission rates. *Cent. Lincoln Peoples' Util. Dist. v. Johnson*, 735 F.2d 1101, 1115 (9th Cir. 1984); *Pac. Power & Light v. Bonneville Power Admin.*, 499 F. Supp. 672 (9th Cir. 1986). If BPA were to expand its application of the SDD as Brookfield suggests, it would likely increase the costs shifted between customers that receive the SDD and those that do not. The total costs that BPA recovers in its rates remain the same, regardless of the SDD. With the SDD, however, certain customers effectively pay less than the full cost of transmission service. This shifts that portion of costs to the rate for reservations that do not qualify for the SDD. The SDD has been in place for many years in its current form, and BPA is not seeking to expand its applicability, or the associated cost shifts, at this time.

Brookfield suggests that removing the SDD in one-month increments is a barrier to customers' flexibility to request redirects under BPA's OATT. Brookfield Br., BP-22-B-BR-01, at 11. In rebuttal, BPA Staff shared a different perspective: removing the SDD simply results in the customer being charged the same rate for transmission as for all other long-term reserved capacity. Fredrickson *et al.*, BP-22-E-BPA-44, at 5. BPA Staff also

provided data to show that customers with the SDD continue to redirect their reserved capacity. Motion to Admit Responses to Data Requests into Evidence, BP-22-M-BR-03, Att. 1 at 23 (BPA Response to Data Request BR-BPA-30-18). Thus, removing the SDD in one-month increments when customers redirect during the month does not create an unjust or unreasonable barrier to the flexibility to request a redirect.

Lastly, Brookfield argues that BPA Staff should be able to implement its requested changes to the SDD in the BPA billing systems and processes. Brookfield Br., BP-22-B-BR-01, at 16-18. Staff explained in rebuttal testimony that, even if the redirected reservation still uses 75 circuit miles or less of transmission, it is neither practical nor currently possible to automate removing the provision for a portion of the month or removing it for only a portion of a reservation. Fredrickson *et al.*, BP-22-E-BPA-44, at 4-5. BPA Staff indicated that implementing the requested changes would cost more than \$1 million and significant hours of Staff time. *Id.* As described above, the SDD is a discount for transmission service that was adopted to achieve specific policy and business objectives. It is not an industry standard practice, and the particular form of the SDD, including the treatment of redirects, is a matter of rate design that falls within BPA's discretion. Given the significant dedication of resources that would be required to develop and implement the changes that Brookfield suggests, further expansion and modification of this unique discount is not the best use of BPA's limited resources.

Decision

BPA adopts the SDD as proposed in the Initial Proposal with the clarifying language in the rates schedule as recommended by BPA Staff in rebuttal.

4.0 FISH & WILDLIFE ISSUES

4.1 Introduction

BPA's rates are set to recover its projected costs. One component of costs BPA must recover are projected costs for the various programs BPA supports, including actions for fish and wildlife affected by the FCRPS. *See* 16 U.S.C. § 839e(a)(1). BPA publicly shares its estimates of the projected costs for its programmatic spending in the Integrated Program Review (IPR), which is an informal stakeholder process. Mandell *et al.*, BP-22-E-BPA-46, at 3. The IPR process pulls information from various sources to develop a projection of BPA's programmatic costs for the rate period, typically two years. Stakeholders are given the opportunity to submit comments on these projections. At the close of the IPR process, BPA issues a report in which it includes projections of its future programmatic costs. BPA's cost projections from the IPR and other sources are used as the cost inputs for establishing BPA's rates for the rate period.

Although BPA's programmatic cost projections form an important part of determining BPA's rate levels, those projections do not finally decide what BPA will spend during the rate period nor limit the amount of funding for any particular program. BPA ratemaking decisions decide *how* to recover BPA's forecasted costs (*e.g.*, through rate levels, cost allocation, and rate design), not *whether* to incur a cost or *which* costs to incur. The limited role of ratemaking in influencing BPA's cost decisions applies to all of BPA's programmatic costs, including its fish and wildlife spending levels. What BPA decides to actually spend on its fish and wildlife program to meet its obligations is determined in other forums, such as when BPA awards contracts, funds various programs, and implements different actions intended to benefit fish and wildlife. Those decisions are determined outside of BPA's rate proceedings and, significantly, are not ultimately constrained by the cost inputs used in BPA's ratesetting process.

The Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United (collectively, Environmental Parties), challenge BPA's fish and wildlife funding projections, contending BPA's proposed funding levels fail to meet various statutory provisions of the Northwest Power Act. *See generally*, Environmental Parties Br., BP-22-B-ID-01. This section of the Final Record of Decision (ROD) responds to the Environmental Parties' arguments.

4.2 Issues

Issue 4.2.1

Whether the “equitable treatment” mandate of the Northwest Power Act, 16 U.S.C. § 839b(h)(11)(A)(i), applies to BPA’s fish and wildlife mitigation planning budgets or spending.

Parties’ Positions

The Environmental Parties argue that “BPA’s Initial Proposal completely ignored the agency’s ‘equitable treatment’ obligation . . .” Environmental Parties Br., BP-22-B-ID-01,

at 9. The Environmental Parties assert that BPA's equitable treatment obligation extends to its decisions on fish and wildlife funding. *Id.* at 5-6; *see also* Environmental Parties Br. Ex., BP-22-R-ID-01, at 2-12. The Environmental Parties contend that BPA had an obligation to explain how it met equitable treatment under Section 4(h)(11)(A)(i) of the Northwest Power Act when it formulated its fish and wildlife funding for the rate period as well as when it revised its net secondary revenue projection. *Id.* at 13-14, 20. The Environmental Parties contend that BPA's failure to consider equitable treatment at each of these points is a violation of Section 4(h)(11)(A)(i) of the Northwest Power Act.

BPA Staff's Position

This is a legal issue raised in the Environmental Parties' initial brief. *See* Mandell *et al.*, BP-22-E-BPA-46, at 2-3.

Evaluation of Positions

In large part, the Environmental Parties' initial brief relies on a foundational mistaken assumption: that the "equitable treatment" mandate of the Northwest Power Act applies to BPA's funding of fish and wildlife mitigation. *See, e.g.*, Environmental Parties Br., BP-22-B-ID-01, at 17 ("BPA has never provided a reasoned explanation for how its current fish and wildlife funding levels fit into its equitable treatment obligation, likely because BPA appears to have simply ignored its equitable treatment obligation when setting funding levels.") (emphasis omitted).

This conclusory assumption, pervasive throughout Environmental Parties' arguments, is offered without supporting authority or analysis. And it is incorrect. As explained below, the Northwest Power Act's equitable treatment mandate applies to *operations and management* actions as the plain text of the statute and relevant Ninth Circuit case law make clear. Equitable treatment does not apply to BPA's budgeting or expenditures for fish and wildlife mitigation. The Environmental Parties' legally flawed premise as to the meaning and applicability of equitable treatment undercuts each of their positions and arguments that rely on it.

The "equitable treatment" mandate arises from Section 4(h)(11) of the Northwest Power Act, which provides as follows:

(A) The Administrator and other Federal agencies responsible for *managing, operating, or regulating* Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall —

(i) exercise *such responsibilities* consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are *managed and operated*[.]

16 U.S.C. § 839b(h)(11)(A) (emphasis added).³ The emphasized portions of the statutory text, quoted above, are indispensable to an accurate legal interpretation of the equitable treatment mandate; they are also the portions of the mandate that Environmental Parties fail to acknowledge or address.

By its express language, subparagraph 4(h)(11)(A) applies in the context of the BPA and other federal agencies' *management and operation* responsibilities with respect to the federal hydropower system of the Columbia River basin – for instance, system management and operation actions such as project configuration, flow management, spill operations, and water quality management. *See, e.g.,* Columbia River System Operations Final Environmental Impact Statement (CRSO FEIS), at 2-3, *available at* <https://www.nwd.usace.army.mil/CRSO/Final-EIS/#top>; *see also* *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 932-33 (9th Cir. 2003) (listing management and operation actions providing equitable treatment for fish). Further, in establishing the equitable treatment mandate, 4(h)(11)(A)(i) expressly refers back to “such responsibilities” stated in subparagraph 4(h)(11)(A) and ends with a reference to the management and operation of “the system and facilities.” Therefore, the plain text of the statute places the applicability of equitable treatment squarely within the context of system operations and management. *See also* 16 U.S.C. § 839(6) (declaring a congressional purpose for the Northwest Power Act “to protect, mitigate and enhance . . . anadromous fish . . . which are dependent on suitable environmental conditions substantially obtainable from the *management and operation* of the [FCRPS] and other power generating facilities on the Columbia River and its tributaries”) (emphasis added).

The statutory context of the Northwest Power Act supports this interpretation as well. Elsewhere in the statute, Congress used language that clearly implicates BPA's funding of fish and wildlife mitigation, *see, e.g.,* 16 U.S.C. § 839b(h)(10)(A) (establishing standards and limitations for the “use [of] the Bonneville Power Administration *fund*” and “[*e*]xpenditures of the [Bonneville] Administrator”) (emphasis added), but notably omitted any comparable language from the equitable treatment mandate of Section 4(h)(11)(A)(i), which, as explained above, expressly pertains to matters of system operations and management.⁴ Clearly, Congress knows how to draft legislation that applies to an agency's exercise of funding authority when it chooses. Therefore, Congress's decision to omit any comparable

³ The U.S. Congress authorized the U.S. Army Corps of Engineers (Corps) and U.S. Bureau of Reclamation (Reclamation) to construct, operate, and maintain the Columbia River System (CRS) projects to meet multiple specified purposes, including flood risk management (FRM), navigation, hydropower production, irrigation, fish and wildlife conservation, recreation, and municipal and industrial water supply. However, not every project is authorized for all of these purposes. BPA is authorized to market and transmit the power generated by these coordinated system operations.

⁴ BPA notes that while Section 4(h)(10)(A) created the obligation for the Administrator to fund fish and wildlife mitigation consistent with the Northwest Power and Conservation Council's (Council's) Fish and Wildlife Program and the purposes of the Act, Congress did not direct BPA to demonstrate in the rate-setting process that its mitigation funding levels were “consistent with” the Council's program. The Ninth Circuit essentially disposed of this argument in *Golden Nw. Aluminum v. Bonneville Power Admin.*, where it explained that “we understand that the [] rate case was not the forum for making decisions regarding which fish and wildlife alternative to implement . . .” *Golden NW*, 501 F.3d 1037, 1053 (9th Cir. 2007).

language regarding funding considerations from the equitable treatment provision in Section 4(h)(11)(A) must bear significance. *See SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (“[T]he use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.”).

Ninth Circuit case law further supports the construction that the equitable treatment provision applies to operations and management actions only. Indeed, the Ninth Circuit has not interpreted the equitable treatment mandate to apply to BPA’s funding of fish and wildlife mitigation in the way the Environmental Parties assert that it does. In *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520 (9th Cir. 1997), the court considered the equitable treatment mandate in the context of decisions pertaining to system operations (namely, allocation of water between power marketing and fish and wildlife purposes). The court found that BPA’s application of equitable treatment “*on a system-wide basis* is a reasonable reading of the Northwest Power Act.” *Id.* at 1533 (emphasis added). The court went on to establish the rule that, “[w]hile each power marketing action that affects *the system* implicates the equitable treatment provision, BPA may properly exercise its obligation by insuring equitable treatment for fish *on a system-wide basis.*” *Id.* at 1533-34 (emphasis added); *see also id.* at 1534 (considering equitable treatment in the context of system operations: “BPA need not undertake an equitable treatment analysis for every discrete *power marketing* decision”) (emphasis added). Thus, the Ninth Circuit has concluded that BPA “may properly exercise” its equitable treatment obligation through a balancing of system operations and management actions, and without regard to expenditures for fish and wildlife mitigation under a separate provision of the Northwest Power Act. Later, in *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924 (9th Cir. 2003), the Ninth Circuit again considered equitable treatment in the context of system operations and concluded that BPA provided a reasonable explanation of its fulfillment of the equitable treatment on a system-wide basis.

BPA’s interpretation of Section 4(h)(11)(A) also comports with the legislative history of the Northwest Power Act, where Representative Dingell described the objective of 4(h)(11)(A) as “insur[ing] that the *capabilities of each power project* are fully utilized to *provide operations* that are compatible with the purposes of this legislation and . . . treat[ing] fish and wildlife as a coequal partner with *other uses in the management and operation of the hydro projects* of the region.” 126 Cong. Rec. 31,435 (1980) (emphasis added). Although this statement was made in the context of Representative Dingell’s clarification that Section 4(h)(11)(A) applies to FERC as well, it offers contextual evidence of the types of actions that Congress intended to subject to the equitable treatment provision – that is, actions within the capabilities of the hydro projects themselves.

In short, the plain text of the equitable treatment provision, its context in the Northwest Power Act, and relevant case law all show that the mandate applies only to, and can be adequately fulfilled by, system operations and management actions. Therefore, the Environmental Parties’ presumption that the mandate extends to expenditures for fish and wildlife is not supported in law. *See also* Columbia River System Operations Environmental Impact Statement (CRSO EIS) ROD § 5.5.1, available at <https://www.nwd.usace.army.mil/CRSO/> (“The equitable treatment provision of the Act specifically applies to the co-lead

agencies' responsibilities for (1) 'managing [and] operating' (2) the federal dam and reservoir projects themselves, including the CRS."); CRSO FEIS, § 5.2.1 at 5-6 ("Equitable treatment in CRS management and operations does not create an obligation on [BPA] to allocate mitigation funds proportionately among entities, regions, or fish and wildlife resources.").⁵ The Environmental Parties' arguments that incorporate this legally flawed premise fail.

In their Brief on Exceptions, the Environmental Parties dispute BPA's interpretation of Section 4(h)(11)(A) of the Northwest Power Act, and ask the agency to part ways with its longstanding interpretation. BPA's interpretation of Section 4(h)(11)(A) is reflected in its Ninth Circuit briefing as early as 1993 in *Nw. Env'tl. Def. Ctr.* BPA affirmed its interpretation as recently as September 2020 in the CRSO EIS ROD.⁶ Environmental Parties Br. Ex., BP-22-R-ID-01, at 3-12. BPA is not persuaded that the Environmental Parties' reading of the relevant statutory provisions is more plausible than its own, or that BPA's interpretation suffers from the defects that the Environmental Parties claim. Therefore, and for the reasons explained further below, BPA will not abandon its reasonable interpretation of Section 4(h)(11)(A).

In essence, the Environmental Parties argue that there is no plausible explanation for including BPA in Section 4(h)(11)(A)⁷ unless that provision's terms apply, implicitly, to BPA's separate fish and wildlife funding responsibilities under Section 4(h)(10)(A).⁸ To reach this conclusion, the Environmental Parties rely on an attenuated chain of contextual arguments, while failing to reckon with the plain text of Section 4(h)(11)(A), which BPA has discussed above at length. See *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("any question of statutory interpretation . . . begins with the plain language of the statute."); *Venezuela Gallardo v. Barr*, 968 F.3d 1053, 1063-64 (9th Cir. 2020) (examining relevant statutory context to resolve ambiguity *after* considering the text of the disputed statutory

⁵ Throughout this Final ROD, BPA references documents it produced in other forums. Since these documents are relevant to the arguments the Environmental Parties have raised, they are hereby incorporated into the record of this proceeding. See 16 U.S.C. § 839e(i)(5).

⁶ See CRSO EIS ROD § 5.5.1, available at <https://www.nwd.usace.army.mil/CRSO/> ("The equitable treatment provision of the Act specifically applies to the co-lead agencies' responsibilities for (1) 'managing [and] operating' (2) the federal dam and reservoir projects themselves, including the CRS."); CRSO FEIS, § 5.2.1 at 5-6 ("Equitable treatment in CRS management and operations does not create an obligation on [BPA] to allocate mitigation funds proportionately among entities, regions, or fish and wildlife resources.").

⁷ 16 U.S.C. § 839b(h)(11)(A) ("The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall – (i) [provide equitable treatment for fish and wildlife, and] (ii) [take into account the Council's program].").

⁸ 16 U.S.C. § 839b(h)(10)(A) ("The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this chapter and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this chapter.").

provision); *see also Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (“[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances.”) (internal quotation omitted).

Specifically, the Environmental Parties argue that BPA’s interpretation of Section 4(h)(11)(A), as applying only to BPA’s system management and operations responsibilities, is “fundamental[ly] flaw[ed]” because it “eliminates any independent obligation BPA has to provide equitable treatment as well as any independent obligation to ‘tak[e] into account . . . to the fullest extent practicable’ the Council’s fish and wildlife program.” Environmental Parties Br. Ex., BP-22-R-ID-01, at 3. This is because, the Environmental Parties claim, BPA does not have the “sole power . . . to make decisions about ‘project configurations, flow management, spill operations, and water quality management,’ as those decisions are made by the [Corps] and [Reclamation].” *Id.* Therefore, according to the Environmental Parties, Section 4(h)(11)(A)’s reference to “the Administrator” would be needless verbiage unless that provision of the statute is interpreted as extending to BPA’s separate duty to protect, mitigate, and enhance fish and wildlife through the expenditure of funds authorized by Section 4(h)(10)(A). The Environmental Parties’ reasoning and conclusion are both incorrect.

First, to be clear, the non-exhaustive list of examples of management and operations actions that BPA included in the Draft ROD (*e.g.*, “system management and operation actions such as project configuration, flow management, spill operations, and water quality management . . .”) was not meant to imply the exclusion of BPA’s power marketing actions, which BPA very much considers to be subject to Section 4(h)(11)(A). *See generally Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520 (9th Cir. 1997); *Confederated Tribes*, 342 F.3d 924 (9th Cir. 2003).

Second, the Environmental Parties’ argument suffers from a self-defeating, internal inconsistency in their Brief on Exceptions. The Environmental Parties argue that BPA’s fish and wildlife funding responsibility under Section 4(h)(10)(A) *must* be subject to the provisions of Section 4(h)(11)(A) or the latter would not create “any independent obligation” for BPA. *See* Environmental Parties Br. Ex., BP-22-R-ID-01, at 3. But the Environmental Parties later claim that the term “managing” in Section 4(h)(11)(A) *includes* power marketing, a function that BPA is “clearly empowered to perform.” *Id.* at 10-11. Indeed, there can be no dispute that BPA – a power marketing administration – is the *only one* of the federal entities involved in management of the Columbia River System authorized and responsible for marketing the power it produces. *See, e.g.*, 16 U.S.C. § 832a. Therefore, the Environmental Parties’ own interpretation of “managing” shows that Section 4(h)(11)(A) creates independent obligations for BPA with respect to its power marketing responsibilities. As such, the supposed “fundamental flaw” in BPA’s interpretation of Section 4(h)(11)(A) evaporates, and with it goes the Environmental Parties’ conclusion as to the alleged necessity of sweeping BPA’s fish and wildlife funding into the scope of Section 4(h)(11)(A).

Nonetheless, the Environmental Parties proceed to offer extensive argument for their contention that BPA does not “operate” the federal project facilities or the system.

Environmental Parties Br. Ex., BP-22-R-ID-01, at 4-8. This contention lacks merit and is irrelevant. BPA acknowledges that it is dependent on the Corps and Reclamation to ultimately implement real-time operations at the projects, and in this way those agencies are their operators in-fact; but the statute does not compel as narrow a reading as the Environmental Parties take with respect to the meaning of “operating” in the context of Section 4(h)(11)(A). Indeed, as the following context and examples demonstrate, the implementation of BPA’s power marketing responsibilities, through joint planning with the Corps and Reclamation and real-time coordination among projects, as a practical matter, results in a range of operations at the project facilities, or within the system. That practical effect is adequate to bring those actions within the ambit of Section 4(h)(11)(A). Both case law and the Environmental Parties’ actions support this point.

First, case law confirms BPA has a role under the “operations” and “management” of the FCRPS for purposes of “equitable treatment.” The Ninth Circuit has heard two equitable treatment challenges to BPA power marketing actions – including declaring a power emergency that involved curtailing fish mitigation operations at the dams. *See generally Confederated Tribes*, 342 F.3d 924; *Nw. Env’tl. Def. Ctr.*, 117 F.3d 1520. In both cases, the court found legally reviewable obligations for BPA under “equitable treatment” even though neither BPA’s ratemaking nor funding was at issue. Also, importantly, the court did not view BPA’s obligations under “equitable treatment” as tied to a finding that they sprung from an “independent obligation” that applied solely to BPA. *See Environmental Parties Br. Ex.*, BP-22-R-ID-01, at 3.

Second, the Environmental Parties’ own actions show that they generally agree that BPA has a role in the operations of the FCRPS. Two of the Environmental Parties petitioned the Ninth Circuit to review BPA’s reliance on the July 24, 2020, Biological Opinion on Columbia River System operations issued by NOAA Fisheries in deciding along with the Corps and Reclamation to operate the system following the selected alternative in the CRSO EIS.⁹ That litigation follows an earlier case in which one of the Environmental Parties, Idaho Conservation League, challenged BPA in the Ninth Circuit, individually, for a decision concerning Albeni Falls Dam operations in 2012.¹⁰ Having twice sued BPA with respect to

⁹ Petition for Review ¶ 10 (9th Cir. No. 20-73761) (Dec. 12, 2020). NOAA Fisheries issued the Biological Opinion “for the ongoing operation and maintenance of the Columbia River System (CRS) and associated non-operational measures to offset adverse effects to listed species. The three Federal Action Agencies with responsibility for operating the CRS are the Bonneville Power Administration (BPA), the U.S. Army Corps of Engineers (Corps), and the U.S. Bureau of Reclamation (BOR).” ENDANGERED SPECIES ACT SECTION 7(A)(2) BIOLOGICAL OPINION AND MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT ESSENTIAL FISH HABITAT RESPONSE FOR THE CONTINUED OPERATION AND MAINTENANCE OF THE COLUMBIA RIVER SYSTEM at 1. (July 24, 2020).

¹⁰ *See Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1174 (9th Cir. 2016) (“Operated by the Army Corps of Engineers (Corps), the Albeni Falls Dam helps provide power to the Pacific Northwest. The Bonneville Power Administration (BPA) is charged with marketing the power generated from the dam. In 2011, the agencies decided to change how they operated the dam during the winter months. . . .”) (emphasis added). Operations stemming from BPA’s power marketing decisions have been the subject of several other court cases as well. *See, e.g., Nw. Env’tl. Def. Ctr.*, 117 F.3d at 1520 (considering, as a matter of equitable treatment, the issue of BPA’s allocation of water between power marketing and fish purposes); *Confederated*

the agency's role in facility operations and their effects, the credibility of present arguments seeking to recast the nature of BPA's authorities, and the cases interpreting them, is diminished. BPA notes, as well, that despite their direct testimony in this rate case, acknowledging the "large role" BPA has in determining system operations, Cutter, BP-22-E-ID-01, at 3, the Environmental Parties' Brief on Exceptions significantly downplays its characterization of BPA's role. They attempt to relegate it to mere "consulting" and question "what power [BPA] has" with respect to system operations. See Environmental Parties Br. Ex., BP-22-R-ID-01, at 3, 5; Environmental Parties' Comments on IPR2 at 2 (Mar. 24, 2021), available at <https://publiccomments.bpa.gov/CommentList.aspx?ID=408> (noting "plans for operating the Federal Columbia River Power System developed by BPA and its partner agencies").

In any event, it is indeed the case, both as a practical matter and by congressional design, that BPA's exercise of its power marketing or other responsibilities—including the curtailment of power generation operations and making short-term power purchases to facilitate increased flows to improve fish habitat and spill to improve fish survival at dams, as discussed below—must result in operations at the projects. For example, the Bonneville Project Act states: "The Secretary of the Army shall schedule the operations of . . . the Bonneville project in accordance with the requirements of the [Bonneville] administrator." 16 U.S.C. § 832a(a). The CRSO FEIS expands on this dynamic: "Some requirements are established by Congress when a project is authorized, while others are established by the agencies based on operating experience. Within these operating limits, Bonneville schedules and dispatches power." CRSO FEIS § 1.4.1.

With the preceding context in mind, BPA turns now to the specifics of the Environmental Parties' substantive arguments in their interpretation of Section 4(h)(11)(A). The crux of the Environmental Parties' interpretation of Section 4(h)(11)(A) amounts to a suggestion that it *might have been* unnecessary for Congress to include a specific reference to the BPA Administrator *if* Section 4(h)(11)(A) did not extend to BPA's fish and wildlife mitigation expenditure authority, because Congress could have elected to omit the specific reference to BPA in such case. Environmental Parties Br. Ex., BP-22-R-ID-01, at 3-4, 7-8 (suggesting BPA's interpretation of Section 4(h)(11)(A) would render reference to the Administrator as "mere surplusage"). Similarly, the Environmental Parties also suggest that Section 4(h)(11)(A) must apply to fish and wildlife funding because if it does not, Congress might have chosen to express Section 4(h)(11)(A)'s mandates "in simpler terms" by excluding reference to the BPA Administrator. *Id.* at n.22.¹¹

Tribes, 342 F.3d at 928, 933 (challenging BPA declaration of power emergencies affecting the system).

¹¹ The Environmental Parties apply these same arguments with respect to Section 4(h)(11)(A)(ii). See Environmental Parties Br. Ex., BP-22-R-ID-01, at 9 ("Under BPA's view, the only 'decisionmaking processes' to which § 4(h)(11)(A)(ii) applies are decisions concerning matters 'such as project configuration, flow management, spill operations, and water quality management.' But, again, BPA lacks the legal authority to make such decisions on its own; it is thus highly unlikely that Congress would have explicitly mentioned 'the Administrator' in § 4(h)(11)(A) given that it could have achieved the same result by excluding such a mention."). BPA's responses here suffice for that argument as well.

To the first point, the mere fact that Congress might have chosen a different way to identify which agencies are subject to Section 4(h)(11)(A) does not mean that the language it ultimately chose includes any “surplusage.” To the contrary, the language Congress chose does exactly what it needs to do: identify the agencies to which the statutory provision applies, including BPA. And as to their second point, BPA questions the Environmental Parties’ apparent assumption that an alternative phrasing with slightly fewer words is necessarily “simpler,” particularly when the words to be omitted clearly specify one of the entities charged with adhering to the statutory provision. That Congress elected one of several drafting options capable of conveying the same intent does not mean the one it ultimately chose is overly complex. Moreover, this component of the Environmental Parties’ argument relies on their interpretation of alternative phrasing that Congress did *not* enact. BPA sees little value in exploring this hypothetical further.

The Environmental Parties also emphasize Congress’s delineation between the Corps’ and Reclamation’s operations responsibilities and BPA’s for power marketing, citing several pieces of legislation that establish those agencies’ operations roles. *See* Environmental Parties Br. Ex., BP-22-R-ID-01, at 5-6. BPA does not dispute this division of responsibilities that the Environmental Parties highlight; but it does nothing to support their contention that there was no need for Congress to “single out” BPA in Section 4(h)(11)(A) other than to have its provisions apply to BPA’s fish and wildlife funding. To the contrary, there was good reason to “single out” BPA. Had Congress *omitted* the BPA Administrator from Section 4(h)(11)(A), there may well have been confusion as to whether Congress intended that provision to apply to any power marketing actions that BPA might be authorized to undertake. In this instance, then, by singling out BPA in Section 4(h)(11)(A), Congress’s intent can reasonably be understood as acknowledgment of certain power marketing actions as integral to dam operations and system management (given their practical effect, as explained above), and expressing the intent that such actions be subject to the requirements of Section 4(h)(11)(A).

The Environmental Parties’ Brief on Exceptions next argues that BPA’s interpretation of Section 4(h)(11)(A) creates an “odd result” with respect to Section 4(h)(8)(A) of the Northwest Power Act, a principle that applies to the Council in the preparation of its Fish and Wildlife Program. Environmental Parties Br. Ex., BP-22-R-ID-01, at 9. Their argument is this: Section 4(h)(8)(A) contemplates that the Council’s program would include “[e]nhancement measures . . . as a means of achieving offsite protection and mitigation” *Id.* at 8. And because a substantial portion of the Council’s program involves such offsite enhancement as habitat protection and improvements, hatchery production, and the like – which would fall outside the scope of activities subject to Section 4(h)(11)(A) under BPA’s interpretation of the provision – the effect of BPA’s interpretation is an illogical exclusion of enhancement activities from the purview of Section 4(h)(11)(A) despite that provision’s use of the phrase “enhance.” *Id.* at 8-9.

However, the Environmental Parties’ argument here utterly ignores that management and operation of the facilities and the hydro system can and do provide for off-site enhancement away from the projects, particularly with regard to habitat. Indeed, one of the congressional purposes of the Northwest Power Act is “to protect, mitigate, and

enhance fish and wildlife, including related spawning grounds and habitat, . . . particularly anadromous fish . . . which are dependent on suitable environmental conditions *substantially obtainable from the management and operation of the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.*” 16 U.S.C § 839(6) (emphasis added); *see also* Interior Report at 54 H.R. Rep. No. 96-976, pt. II, at 54 (Sept. 16, 1980) (explaining that the bill becoming the Northwest Power Act would also include critical amendments to the Transmission System Act (codified at 16 U.S.C. § 838(i)(b)(6)), ensuring that BPA could support operations to benefit fish by making short-term power purchases to offset power losses from fish operations: “Section 8(a) amends the Federal Columbia River Transmission System Act to permit BPA to use the BPA Fund to make short term power purchases to enable BPA to meet its obligation under the fish and wildlife provisions of this bill (*e.g.*, to buy power to replace power generating capability that may be lost through a spill for fish passage purposes at a Federal dam.)”).

This reality bears out through system operation and management actions, including those reflected in the CRSO EIS ROD and associated biological opinions, such as the Hanford Reach Fall Chinook Protection Agreement¹² to ensure sufficient flows for redds from the spawning period through emergence and rearing (*see* Biological Assessment of Effects of the Operations and Maintenance of the Federal Columbia River System on ESA-Listed Species, (Jan. 2020, at 2-31, 2-46, A-13) *available at* https://www.salmonrecovery.gov/doc/default-source/FCRPS-BiOp/2020-01-23_crs-final-ba-with-appendices.pdf?sfvrsn=2); cooling water released from Dworshak to benefit downstream fish during summer heat (*see id.* at 2-46); flows to protect chum spawning below Bonneville Dam (*see id.* at 2-46, 2-47) and altering reservoir elevations to enable tributary access or reduce avian predation on salmonids (*see id.* at 2-57, 2-117); etc. Furthermore, in *Confederated Tribes*, the Ninth Circuit cited similar examples, including BPA’s power marketing actions to avoid power emergency operations (that would curtail planned fish operations) and, again, using water from Dworshak for downstream cooling. 342 F.3d at 932. Moreover, some such operations- or management-based enhancement actions are reflected in the Council’s Program. *See generally* Northwest Power and Conservation Council, Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program (2003), *available at* <https://www.nwcouncil.org/fish-and-wildlife/previous-programs/2003-mainstem-amendments-to-the-columbia-river-basin-fish-and-wildlife-program>.

Next the Environmental Parties claim that BPA’s interpretation of Section 4(h)(11)(A)(ii) is “implausible in context.” Environmental Parties Br. Ex., BP-22-R-ID-01, at 10. They argue that because Section 4(h)(11)(A)(ii) includes the duty for BPA to take the Council’s program into account to the fullest extent practical, and because the Council’s program contains extensive non-operational measures for fish and wildlife mitigation (*i.e.*, of the sort that BPA implements through off-site fish and wildlife projects it funds), it is “highly

¹² [https://www.grantpud.org/templates/galaxy/images/images/Downloads/ResourceCommittees/OtherLicenses/Hanford Reach Protection Program Executed Agreement 4-5-04.pdf](https://www.grantpud.org/templates/galaxy/images/images/Downloads/ResourceCommittees/OtherLicenses/Hanford%20Reach%20Protection%20Program%20Executed%20Agreement%204-5-04.pdf)

implausible” that Congress would assign BPA a primary role in implementing the Council program and then “limit[] the influence of the Council program on BPA to a relatively narrow set of decisions that do not implicate a huge swath of the program.” *Id.* at 9-10. This result, the Environmental Parties allege, would “frustrate” the overall statutory scheme. *Id.* That may well be the case, if not for Section 4(h)(10)(A). That provision creates a unique responsibility applicable only to BPA and requires the agency to fund fish and wildlife mitigation “*in a manner consistent with*” the Council’s program. *See* 16 U.S.C. § 839b(h)(A). BPA’s interpretation of the two sections reasonably relies on the guidance in the Council’s entire program for both the funding of fish and wildlife mitigation “in a manner consistent with” the program as well as providing equitable treatment by “taking into account” the program in the management and operation of the dams. BPA’s interpretation does nothing to “frustrate” the statutory scheme, nor does it lead to the “implausible” result the Environmental Parties claim.

Finally, the Environmental Parties propose a construction of the term “managing,” in Section 4(h)(11)(A), as including both BPA’s duty to market power and its duty to fund fish and wildlife mitigation under Section 4(h)(10)(A). *Id.* at 10-11. Because there seems to be no dispute that BPA’s power marketing responsibilities are subject to the equitable treatment provision of Section 4(h)(11)(A) (*see, e.g., Nw. Env’tl. Def. Ctr.*, 117 F.3d at 1533; *see* Environmental Parties Br. Ex., BP-22-R-ID-01, at 10), BPA has only to consider whether its fish and wildlife funding is subject to Section 4(h)(11)(A)’s provisions, as the Environmental Parties claim. Resolution of this question does not require BPA to decide on a definition of the statutory term and it is unnecessary to do so at this time. Instead, in light of the rationale that the Environmental Parties provide, BPA only needs to consider the narrow issue presented in this Issue 4.2.1.

Other than a general observation that “management” is a “broad term,” the Environmental Parties identify two reasons that BPA’s fish and wildlife mitigation should be considered “managing”: (1) funding of fish and wildlife mitigation is clearly within BPA’s power to implement under Section 4(h)(10)(A), and (2) doing so is “integral to the legal, effective functioning of the hydropower system.” *See* Environmental Parties Br. Ex., BP-22-R-ID-01, at 10-11. The first point is too broad to be dispositive, as BPA has numerous ancillary responsibilities that are not subject to the equitable treatment mandate or Section 4(h)(11)(A). *See, e.g.,* 16 U.S.C. § 838b. The second point lacks any supporting analysis or authority. As such, it is a dubious basis for BPA to depart from the interpretation of Section 4(h)(11)(A) it has adhered to for decades and that is supported by the extensive analysis and authority discussed in this section. But more importantly, the Environmental Parties’ second point creates inconsistencies with applicable Ninth Circuit case law that has guided BPA over those years.

The Ninth Circuit says that BPA’s equitable treatment mandate is “independent” of its duty to take the Council’s program into account to the fullest extent practicable. *See Nw. Env’tl. Def. Ctr.*, 117 F.3d at 1532.¹³ The Environmental Parties’ interpretation of “managing”—

¹³ As discussed in further detail below (*infra* Sec. 4.2.3), the court has emphasized the independent nature of the equitable treatment mandate to support the holding that “a federal agency could not satisfy its equitable

contrary to Ninth Circuit jurisprudence—would make BPA’s equitable treatment compliance *dependent* on its duties with respect to the Council’s program, particularly the duty to protect, mitigate, and enhance fish and wildlife in a manner consistent with the Council’s Program under Section 4(h)(10)(A). And if the Section 4(h)(11)(A)(ii) duty to take the Council Program into account is independent of its adjacent statutory mandate under Section 4(h)(11)(A)(i) to provide equitable treatment, it follows all-the-more that BPA’s duty to fund fish and wildlife mitigation, consistent with the Council’s Program, under a separate paragraph of the statute, Section 4(h)(10)(A) (and the funding BPA budgets to implement it), is likewise independent of the equitable treatment provision.

And finally, if “managing” means “funding,” then under the Environmental Parties’ construction of the Northwest Power Act the equitable treatment mandate becomes another standard for reviewing Bonneville’s compliance with Section 4(h)(10)(A). In practice, the subject of the court’s focus when considering equitable treatment has been power marketing and system operation actions, not budgets or funding levels. BPA finds no basis for accepting the Environmental Parties’ interpretation of Section 4(h)(11)(A).

The Environmental Parties also claim that their interpretation of “managing” is appropriate because it gives “independent meaning” to the term, while BPA’s interpretation “essentially construes ‘operating’ and ‘managing’ to mean the same thing,” contrary to established rules of statutory construction. Environmental Parties Br. Ex., BP-22-R-ID-01, at 11. This is not so. BPA does not take the position that “operation” and “management” are interchangeable, and indeed does not even attempt to define either of those terms or classify its power marketing responsibilities as one or the other. It would be impractical (and senseless) to do so here; in all likelihood, the practical effect of BPA’s power marketing decisions may well implicate either “operations” or “management,” depending on the nature of each discrete action, or perhaps neither. The Environmental Parties also explain that the term “managing” was not used in pre-Northwest Power Act legislation describing the Corps’ or Reclamation’s responsibilities for the projects (to “operate” and “maintain”) and therefore, Congress’s addition of “managing” must signify an intent to sweep BPA’s fish and wildlife mitigation funding into the meaning of that term. *Id.* at 5-6. However, this choice as easily can be interpreted as an intent to bring BPA’s power marketing actions within the scope of Section 4(h)(11)(A)’s duties, as discussed above.

BPA’s interpretation as to the applicable scope of Section 4(h)(11)(A) remains as initially explained above. Sections 4(h)(10)(A) and 4(h)(11)(A) plainly create two distinct mandates. *See Nw. Env’tl. Def. Ctr.*, 117 F.2d at 1532; Cutter, BP-22-E-ID-01, at 3 (acknowledging both BPA’s role in system operations, and also its separate responsibility to fund mitigation of fish and wildlife affected by federal hydropower development and operation under 16 U.S.C. § 839b(h)(10)(A)). The former, by its express plain language,

treatment responsibilities under paragraph (i) simply by adopting the Council’s program under paragraph (ii). *See Nw. Env’tl. Def. Ctr.*, 117 F.3d at 1532. And while the Court later held that reliance on the Council Program for equitable treatment compliance was not improper, it did not hold that doing so was necessary. *See Confederated Tribes*, 342 F.3d at 934 (accepting non-Council program actions as supporting BPA’s compliance with the equitable treatment mandate).

plainly controls the funding and expenditures for the fish and wildlife mitigation projects with which the Environmental Parties are concerned. *See* Environmental Parties Br. Ex., BP-22-R-ID-01, at n.130 (“The Environmental Parties are focused on BPA’s funding of its ‘direct’ fish and wildlife program, the Lower Snake River Compensation Plan, and other non-operational mitigation and enhancement measures and projects.”). The latter, again by its express plain language, concerns management and operation of “hydroelectric facilities.”

To collapse one provision into the other when the two are codified apart¹⁴ and use distinct language¹⁵ relating to different methods of fish and wildlife protection, would require an assumption “that Congress chose a surprisingly indirect route to convey” the intent espoused by the Environmental Parties. *See Landgraf v. USI Film Products*, 511 U.S. 244, 262 (1994); *see also Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (“Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances.”) (internal quotation omitted). BPA doubts that is the case here. Had it intended to, Congress could have effected that end, by much simpler means: either by (1) importing equitable treatment language into Section 4(h)(10)(A) and thus clearly applying the requirement of fish and wildlife funding, or (2) including language concerning funding or expenditures for fish and wildlife mitigation in Section 4(h)(11)(A), with the same result. Congress did neither here.

This leads to BPA’s final point: in disputing BPA’s interpretation as to the applicability of Section 4(h)(11)(A), the Environmental Parties’ Brief on Exceptions builds an argument around supposed “implausible” results and legislative drafting alternatives. Environmental Parties Br. Ex., BP-22-R-ID-01, at 10. But in their attempt to avoid a result they dislike, they reject the simplest reading of the statute and ultimately fail to reckon with its plain text or the applicable Ninth Circuit case law that BPA discusses above. In sum, BPA is not persuaded by the arguments the Environmental Parties have raised, and has addressed those arguments in detail over the preceding pages. Therefore, BPA finds no basis to depart from its initial interpretation as to the non-applicability of Section 4(h)(11)(A)’s equitable treatment mandate to fish and wildlife mitigation expenditures.

That is not to say that there is *no* context in which BPA considers equitable treatment. The CRSO EIS and associated ROD show BPA’s consideration of and compliance with equitable

¹⁴ The Environmental Parties cite *United States v. Morton*, 467 U.S. 822 (1984) and *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011) for the proposition that statutory provisions must be analyzed in context. BPA agrees that context is critical, but notes that those cases dealt with the meaning of disputed statutory terms where their ambiguity was resolved by examining immediately adjacent language in the same sentence of the statute. Here, the Environmental Parties essentially package as a “context” argument their contention that one paragraph of the Northwest Power Act includes another, despite the lack of a direct textual connection between the two.

¹⁵ *See Ariz. Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1250 (9th Cir. 2007) (“[A] court must presume that Congress intended a different meaning when it uses different words in connection with the same subject . . .”).

treatment in selecting system operations and management actions for power marketing.¹⁶ Thus, BPA did not ignore its duty to consider equitable treatment in its system operations and power marketing decisions. Nonetheless, the decision made in the CRSO EIS ROD is currently being challenged in multiple judicial forums (*e.g.*, U.S. District Court for the District of Oregon and the U.S. Court of Appeals for the Ninth Circuit), including by some of the Environmental Parties, and equitable treatment claims have been raised in those challenges.¹⁷ There is, therefore, no compelling reason to raise those challenges again here because this is not the appropriate forum, and those challenges will be decided by the appropriate proceedings.

Decision

The “equitable treatment” provision of the Northwest Power Act Section 4(h)(11)(A)(i) applies to BPA’s system operation and management actions, but does not apply to its fish and wildlife mitigation planning budgets or spending.

Issue 4.2.2

Whether a final rate determination, including adoption of a proposed settlement, significantly affects fish and wildlife such that BPA must demonstrate that a final rate determination provides for equitable treatment of fish and wildlife under the Northwest Power Act.

Parties’ Positions

The Environmental Parties argue that “BPA’s final rate determination in this rate case qualifies as a ‘final decision that significantly impacts fish and wildlife,’ requiring the agency to ‘demonstrate compliance with the equitable treatment mandate’ at this time.” Environmental Parties Br., BP-22-B-ID-01, at 13. They contend that BPA’s rate determination implements BPA’s “intermediate or preliminary” decisions from the Integrated Program Review (IPR) and the Strategic Plan, and that “together” these decisions “trigger[] BPA’s obligation to demonstrate compliance with the equitable

¹⁶ Several examples demonstrating BPA’s consideration and fulfillment of its equitable treatment responsibility in the context of the CRSO EIS include, but are not limited to, the following: (1) the purpose and need statement for the EIS, *see* CRSO FEIS § 1.2 (“Comply with environmental laws . . . including those specifically addressing the CRS such as requirements under the Northwest Power Act ‘to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated.’”); (2) *Id.* § 2.4.2.1 at 2-33 (discussing decades of overhauls to system operations, management, and configuration, including the results of such actions, as providing equitable treatment for fish); (3) *Id.* § 5.2.1 (“[T]he entire CRSO EIS process is an exercise in providing equitable treatment on a system-wide basis by using alternatives and analysis that balance the various system purposes, including fish and wildlife, power, navigation, flood risk management, and the other authorized purposes of the CRS”); (4) *See generally* CRSO FEIS, Appendix T; and (5) CRSO EIS ROD § 5.5.1 (summarizing adherence to equitable treatment).

¹⁷ Idaho Rivers joined *Nat’l Wildlife Fed’n v. Nat’l Marine Fish. Serv.*, 01-640-SI (D. Or.), in the U.S. District Court for the District of Oregon, where BPA is not a party. Idaho Rivers and Idaho Conservation League joined *American Rivers v. Bonneville Power Admin.* (Nos. 20-73761, 20-78762, 20-73775) in the U.S. Court of Appeals for the Ninth Circuit.

treatment mandate. *Id.* at 16; *see also* Environmental Parties Br. Ex., BP-22-R-ID-01, at 12-21.

BPA Staff's Position

Whether the “equitable treatment” in Section 4(h)(11)(A)(i) of the Northwest Power Act applies to BPA’s ratemaking decisions is a legal issue. *See* Mandell *et al.*, BP-22-E-BPA-46, at 2. Nevertheless, as Staff explained in that testimony, BPA’s power rates are set to recover the costs of BPA’s environmental obligations, including the costs of fish and wildlife mitigation and operational measures developed in agency decision documents that direct system operations and management, such as the CRSO EIS and associated Endangered Species Act (ESA) consultations. *Id.* Whether these costs or operations are sufficient to meet BPA’s environmental obligations – including equitable treatment – “are determined in other forums” *Id.*

Evaluation of Positions

In asserting that BPA must demonstrate equitable treatment of fish and wildlife at the time of a final rate determination, the Environmental Parties cite *Confederated Tribes* for the proposition that BPA’s “duty to demonstrate compliance with the [equitable treatment] mandate matures only when BPA makes a final decision that significantly impacts fish and wildlife.” Environmental Parties Br., BP-22-B-ID-01, at 17 (citing *Confederated Tribes*, 342 F.3d at 931), 20. Here, the significant impact on fish and wildlife alleged by the Environmental Parties relates to the level of funding available for expenditure on fish and wildlife mitigation actions. *See, e.g., id.* at 15-16, 22 (proposing that a “boost” in fish and wildlife funding is needed to satisfy equitable treatment); *id.* at 18-19 (focusing on alleged potential impact of *funding levels* on fish and wildlife as trigger for equitable treatment in a final rate determination); *id.* at 20 (linking projected spending for fish and wildlife mitigation with the equitable treatment mandate).

The Environmental Parties’ focus on fish and wildlife funding levels, in their contention that a final rate determination creates an obligation to demonstrate equitable treatment, incorporates the same foundational legal flaw explained in Issue 4.2.1, above – that is, the mistaken assumption that equitable treatment applies to programmatic fish and wildlife mitigation spending. Thus, as an initial matter, the Environmental Parties’ reliance on this flawed premise is fatal to their assertion that equitable treatment must be demonstrated in a final rate determination because the mandate simply does not apply to funding. (In a variation on their primary position, the Environmental Parties also assert that “intermediate” or “preliminary” “decisions” relating to fish and wildlife spending levels stemming from IPR or BPA’s Strategic Plan, “taken together” with a final rate determination, have a significant impact on fish and wildlife and therefore trigger an obligation to demonstrate equitable treatment in BPA’s rate case. *Id.* at 16-17. This assertion fails for its reliance on the same mistaken assumption noted above. (There are additional problems with the Environmental Parties’ arguments as to the reviewability of IPR and the Strategic Plan, which BPA explains and addresses separately in Issue 4.2.4.)

Furthermore, a final rate determination does not satisfy the Ninth Circuit’s test for when the duty to demonstrate equitable treatment arises because BPA’s ratemaking decisions

have no significant impact on fish and wildlife. *See Confederated Tribes*, 342 F.3d at 931 (“duty to demonstrate compliance with the [equitable treatment] mandate matures only when BPA makes a final decision that significantly impacts fish and wildlife.”). A basic understanding of the nature and context of BPA’s ratemaking function illustrates this point.

BPA ratemaking is designed to do one thing: recover costs. The reason for this narrow function of ratemaking is not “arcanelly compartmentalized procedures” as alleged by the Environmental Parties, *Environmental Parties Br.*, BP-22-B-ID-01, at 2, but instead is based in logical statutory construction. Section 7(a)(1) of the Northwest Power Act establishes BPA’s foundational statutory obligation to set its rates to recover its costs:

The Administrator shall establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Such rates shall be established and, as appropriate, revised to recover, in accordance with sound business principles, the cost associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this chapter and other provisions of law. Such rates shall be established in accordance with sections 9 and 10 of the Federal Columbia River Transmission System Act (16 U.S.C. 838) [16 U.S.C. 838g and 838h], section 5 of the Flood Control Act of 1944 [16 U.S.C. 825s], and the provisions of this chapter.

16 U.S.C. § 839e(a)(1).

The statute plainly shows BPA’s cost recovery obligation encompasses costs directly related to power production (acquisition, conservation, and transmission of electric power, and the amortization of the Federal investment) as well as the Administrator’s other “costs and expenses” imposed “pursuant to this chapter and other provisions of law,” including expenditures for fish and wildlife mitigation. Section 7(a)(2) provides additional factors the Federal Energy Regulatory Commission (FERC) is to review in affirming BPA’s rates – and (as discussed further below) the provision of equitable treatment is not among them. Importantly, nothing in Section 7(a)(1) or (a)(2) suggests that BPA must decide how it will meet its other legal obligations when establishing its rates. To the contrary, Section 7(a)(1) presumes the costs flowing into rates reflect those obligations, thus leaving the focus of ratemaking to “establishing” rates to “recover” those costs “in accordance with sound business principles.” This sequencing of events makes sense because BPA cannot make the statutory showings required by Section 7(a)(1) and 7(a)(2) unless and until it has already projected its costs. *See Golden Nw. Aluminum v. Bonneville Power Admin.*, 501 F.3d 1037, 1052–53 (9th Cir. 2007) (explaining that BPA’s recovery of costs through rates requires that BPA first develop a realistic projection of its costs) (*Golden NW*).

The context of these Northwest Power Act provisions, governing FERC’s review of BPA’s rates, further demonstrates that BPA rate determinations do not implicate the equitable treatment mandate. If BPA’s final rate decisions trigger BPA’s obligation to consider

equitable treatment, as asserted by the Environmental Parties (*see* Environmental Parties Br., BP-22-B-ID-01, at 16–20), it follows that FERC would also have to consider equitable treatment when making its findings on BPA’s rates under Northwest Power Act Section 7(a)(2), 16 U.S.C. § 839e(a)(2). But nothing in the Northwest Power Act, its legislative history, or indeed, 40 years of implementation suggests that FERC should consider equitable treatment in approving BPA’s rates. More importantly, such an outcome would, without a statutory basis, expand Congress’s narrow prescription for FERC’s review of BPA’s rates in Section 7(a) of the Northwest Power Act, *see* 16 U.S.C. § 839e(a)(1)-(2), wherein Congress made no mention of equitable treatment as within FERC’s authority to review. *See also Cent. Lincoln Peoples’ Util. Dist. v. Johnson*, 735 F.2d 1101, 1115 (9th Cir. 1984) (“In light of the far more detailed rate directives to BPA that the Act contains, the congressional intent to avoid rate-making delay is served only if the substantive scope of FERC review has been limited.”). The legislative history of the Northwest Power Act helps confirm Congress’s intent with respect to FERC’s role as it relates to equitable treatment in Section 4(h)(11)(i)(A). As it applies to FERC, “equitable treatment” was intended to be *supplemental* to FERC’s existing obligations to consider fish and wildlife in the context of its regulatory function in reviewing non-federal hydropower licensing under Section 10 of the Federal Power Act: “This provision does not replace other provisions of law such as FERC’s Section 10 of the Federal Power Act, but supplements it.” H. Rep. No. 97-976, pt. 1 at 57 (1980). There is, unsurprisingly, no mention anywhere in the Northwest Power Act or its legislative history of equitable treatment being a component of FERC’s other review authorities, such as its review of BPA’s rates.

In short, ratemaking establishes *how* BPA will recover its forecasted costs through rate allocations, rate design, and rate levels; ratemaking does not determine *whether* to incur a cost, or *which* costs to incur. *See Golden NW*, 501 F.3d at 1053 (acknowledging that BPA’s “rate case was not the forum for making decisions regarding which fish and wildlife alternative to implement”). All programmatic cost obligations – whether they be BPA staffing costs, energy efficiency costs, capital project costs, or funding for fish and wildlife mitigation expenditures – flow from inputs arising outside of the rate case. The point of the rate-setting process is not to question or second-guess these assumptions, but to recover these costs through rates set in accordance with “sound business principles.”¹⁸ *See* 16 U.S.C. § 839e(a)(1). Therefore, in the context of programmatic costs, BPA’s ratemaking decisions do not disrupt or opine on the underlying programs or actions. And while the general projection of these costs are incorporated into BPA’s rates, neither the projections themselves nor BPA’s rate case process in any way controls or determines what BPA’s *actual* costs will be throughout the rate period. Similarly, and crucially here, a final rate determination does not in any way plan or select for system operations and management actions, or alter such actions once they have been planned through other processes, *see*

¹⁸ BPA is aware of *Golden NW*’s implication that changed circumstances or new evidence could make reconsideration of BPA’s cost assumptions appropriate in certain instances. *See Golden NW*, 501 F.3d at 1051. However, as explained in Issue 4.2.3, BPA finds no such circumstances or evidence in the current rate proceedings.

Mandell *et al.*, BP-22-E-BPA-46, at 4; it merely sets rates to recover the projected costs of such actions.

The preceding overview of BPA's ratemaking function shows that, while the actions or programs forming the basis for BPA's projected costs might have an effect on fish and wildlife, the mere *recovery* of such costs through a final rate determination does not. But the Environmental Parties misconstrue the essential nature of ratemaking, conflating recovery of costs with implementation of actions. A final ratemaking determination does not, as the Environmental Parties suggest, "implement[]" the programs or actions that make up the costs underlying BPA's rates. Environmental Parties Br., BP-22-B-ID-01, at 18; *see also id.* at 19 (claiming that a BPA rate decision "puts into effect" earlier funding "decisions"). A decision to recover costs does not, indeed *could not*, implement actions or expenditures (whether for fish and wildlife or other programmatic initiatives) that invariably require further planning, studies, contracting, permitting, partnership coordination, environmental compliance work, subsequent decisions or a host of other factors to actually execute.

Because BPA does not decide which fish and wildlife mitigation actions to fund in the ratemaking process, and because a final rate determination neither implements such actions nor prescribes system operations and management, a rate determination is not an action that "significantly impacts fish and wildlife." The Environmental Parties, therefore, are forced to fall back on speculation, asserting that BPA's rate decisions *might* significantly affect fish and wildlife. "[I]f the rates . . . are too low, BPA runs the risk of not recovering its true costs, putting at risk its ability to meet its legal obligations to fish and wildlife." Environmental Parties Br., BP-22-B-ID-01, at 18. This speculative concern, however, suffers from a number of critical flaws.

First, the threshold trigger for equitable treatment to apply requires more than the *possibility* of an impact on fish and wildlife. As *Confederated Tribes* shows, the mandate matures with a final decision that actually impacts fish and wildlife – not the mere *possibility* of an impact. *See Confederated Tribes*, 342 F.3d at 931 ("the mandate matures only when BPA makes a final decision that significantly *impacts* fish and wildlife") (emphasis added). *Nw. Env'tl Def. Ctr.* illustrates this principle. In that case, the court declined to review whether BPA met its equitable treatment responsibilities regarding the allocation of water between fish and power purposes before BPA allocated it: "The court's role is not to dictate in advance how BPA is to exercise its obligations under the Northwest Power Act. Our role is to review BPA's *actions, once made*, to determine whether it has provided equitable treatment." 117 F.3d at 1533 (emphasis added). In other words, the possibility that BPA *might* allocate more water to power, which *might* in turn impact fish, was inadequate to support an equitable treatment challenge. In addition, the court's opinion in *Nw. Env'tl. Def. Ctr.* examined the fish and wildlife impacts alleged to trigger BPA's duty to demonstrate equitable treatment and found it important that "BPA's environmental assessment shows, and petitioners do not present evidence to the contrary, that the [non-treaty storage agreements being challenged] will not significantly impact the fish *population* of the river . . ." *Id.* at 1534 (emphasis added). Environmental Parties here

fail to present evidence that BPA's adoption of a final rate decision will affect any fish populations.

To be sure, during their participation in the BP-22 rate case, the Environmental Parties have generally asserted an overall decline or imperiled status of certain Snake River salmon and steelhead species, *see* Environmental Parties Br., BP-22-B-ID-01, at 2, n.8, but they fail to present evidence connecting that decline to the pending rate determination or the settlement to which they object. In fact, they do not make that claim. At most, they offer conclusory speculation that *if* rates are set too low, BPA puts at risk its ability to meet its legal obligations to fish and wildlife. *Id.* at 18. But they fail to offer evidence that this will actually be the case, or that BPA's rate mitigation provisions will be inadequate to recover BPA's costs. *See* Issue 4.2.3 (discussing the various, vague assertions as to the adequacy of BPA's fish and wildlife budgets and projected costs that the Environmental Parties have proffered in the course of this rate case and other recent processes).

Second, simply because BPA does not forecast a new or different cost, or a cost projection turns out not to be accurate, does not mean BPA *cannot* pay for that cost if it is legally due. BPA's spending for its actual obligations is not ultimately constrained by its rate case cost estimates. The Environmental Parties observe that "funding levels, once determined during IPR and factored into the revenue requirement underlying BPA's rates, are substantially adhered to." Environmental Parties Br., BP-22-B-ID-01, at 19. While this observation may be generally accurate as a matter of practice, nothing prevents BPA from deviating from its cost estimates or projected spending levels to ensure that its actual obligations, for fish and wildlife or otherwise, are met during a rate period.¹⁹ In practice, as new obligations or unexpected circumstances arise, or as old programs are phased out, BPA's costs and spending levels will fluctuate naturally in response. And if BPA had incorrectly estimated the cost of an obligation, BPA would nonetheless comply with such obligation and take any number of actions to ensure that it could cover the financial cost of doing so, including cost-saving actions such as reducing or reprioritizing discretionary spending, or relying on its risk mitigation measures (Cost Recovery Adjustment Clauses (CRACs), Financial Reserves Policy Surcharge, repurposing revenue financing, etc.).

Third, there is no evidence in this rate proceeding to suggest BPA will be in a position that runs the risk of under-recovering its costs because of its fish and wildlife projections. BPA has met the requirement of a "realistic projection" of costs based on information "available at the time rates were set." *See Golden NW*, 501 F.3d at 1053. BPA has already conducted *two* processes to assess the sufficiency of its fish and wildlife spending. The first IPR

¹⁹ The Environmental Parties' initial brief cites BPA's 2020 Annual Report, which states that "BPA's IPR cost expenditures for the year are \$1.7 billion, which is 97% of the rate case expectation," to support their contention that IPR funding levels are substantially adhered to – in effect, a spending cap. *Id.* at n.99. However, the Environmental Parties did not consider a simple alternative: that IPR's projected expenditures turned out to be fairly close to what was required. In addition, BPA's expenditures came within 97% of rate case expectation in the *aggregate*; there were individual cost categories that were both above and below rate case expectations. *See* Q4 Quarterly Business Review Technical Workshop, at 4, 6 (November 19, 2020) available at <https://www.bpa.gov/Finance/FinancialPublicProcesses/QuarterlyBusinessReview/qbrdocs/FY20%20QBR%20Tech%20Workshop%20presentation%201.25.pdf>.

process (IPR 1) concluded at the end of September 2020, leading to the fish and wildlife spending levels used in the Initial Proposal for setting BPA's power rates. A few days before issuance of the IPR 1 Closeout Report, BPA and other agencies issued the CRSO EIS ROD, which included actions BPA agreed to fund to benefit fish and wildlife affected by CRS operations. See CRSO EIS ROD, Attachment 1 (Mitigation Action Plan).²⁰ The CRSO EIS evaluated the costs of these actions. See CRSO FEIS §§ 3.19, 7.7.21 & Appendix Q. BPA held a second IPR process (IPR 2) to consider, among other matters, whether revisions to the projected costs of its fish and wildlife obligations were needed. See Mandell *et al.*, BP-22-E-BPA-46, at 3; see also IPR 2 Letter to the Region, available at <https://www.bpa.gov/Finance/FinancialPublicProcesses/IPR/Pages/IPR-2020.aspx>. In the IPR 2 Closeout Report issued in April 2021 – three months before the publication of this BP-22 Final ROD – BPA confirmed that it found no reason projections in IPR 1 would not be sufficient to meet the agency's various environmental obligations over the BP-22 rate period. See IPR 2 Closeout Report at 4, 8-11, available at <https://www.bpa.gov/Finance/FinancialPublicProcesses/IPR/Pages/IPR-2020.aspx>. Thus, BPA's fish and wildlife funding is based on a realistic projection using the best available information from IPR 1 and informed by the CRSO EIS ROD. And there is no evidence in the record of this case to contradict that BPA's cost estimates are based on the best available data. See Issue 4.2.3 (considering and addressing the Environmental Parties' various assertions as to the need for higher fish and wildlife cost estimates in BPA's projections).

Fourth, even if BPA's projections were in error, BPA has additional measures built into its rates to ensure BPA's costs are recovered. As described in BPA Staff's rebuttal testimony, BPA has six lines of risk mitigation to ensure its costs are recovered in the event of a new or different fish and wildlife cost obligation, including (1) financial reserves; (2) Financial Reserve Policy (FRP) Surcharge; (3) Cost Recovery Adjustment Clause (CRAC); (4) the \$40 million in revenue financing (which could be repurposed to ensure BPA's financial reserves are not depleted); (5) access to a \$750 million U.S. Treasury Note; and (6) the commencement of a new Section 7(i) process to revise rates as needed. Mandell *et al.*, BP-22-E-BPA-46, at 9-10. These risk mitigation measures, coupled with BPA's use of the most recent data on its fish and wildlife projections, leave no room for the Environmental Parties' assertion that BPA's current rates significantly impact fish and wildlife because they "run[] the risk of not recovering its true costs, putting at risk its ability to meet its legal obligation to fish and wildlife." See Environmental Parties Br., BP-22-B-ID-01, at 18.

In its Brief on Exceptions, the Environmental Parties contend that BPA's description of its ratemaking process, and its emphasis on the process' cost recovery purpose, is "beside the point" with respect to whether a final rate determination must demonstrate equitable treatment. Environmental Parties Br. Ex., BP-22-R-ID-01, at 13. Instead, the Environmental Parties argue that the "string of decisions culminating in this rate case

²⁰ The Mitigation Action Plan identifies the actions BPA committed to fund as part of the CRSO EIS and associated ESA consultations. This includes actions such as funding the USFWS with annual operations and maintenance funding for the Lower Snake River Compensation Plan (LSRCP) in accordance with BPA's direct funding agreement with USFWS and any future renewals, as well as other hatchery, habitat, and research, monitoring and evaluation actions.

includes decisions about how much to spend on fish and wildlife mitigation and enhancement measures, and that the set of decisions must be viewed as a unified whole when assessing whether the ‘final decision’ at issue – the rate determination – has a substantial effect on fish and wildlife.” *Id.* at 14.

BPA disagrees. As noted above, BPA’s obligation to demonstrate its compliance with the equitable treatment mandate arises “when BPA makes a final decision that significantly impacts fish and wildlife.” *Confederated Tribes*, 342 F.3d at 931. Thus, the questions BPA must consider to determine whether equitable treatment is implicated in the final rate determination are (1) *what* final decisions is BPA making as part of its final rate determinations; and (2) whether *those* decisions “significantly impact fish and wildlife.”

The final decision that BPA is making in this proceeding is limited to the level of its power and transmission rates. *See, e.g.*, Fiscal Year (FY) 2022-2023 Proposed Power and Transmission Rate Adjustments[,], Public Hearing and Opportunities for Public Review and Comment,” 85 Fed. Reg. 77,189 (Dec. 1, 2020) (“[BPA] is initiating a rate proceeding under the Northwest Power Planning and Conservation Act (Northwest Power Act) to establish power, transmission, and ancillary and control area services rates for the period from October 1, 2021, through September 30, 2023.”). Supporting that decision is, of course, data inputs from a variety of sources, including funding projections for planned fish and wildlife budgets, and those projections are informed by other agency policies or objectives. But at the end of the day, the only “decision” that is being made in the final rate determination related to BPA’s fish and wildlife funding is that rates are set on “realistic” projections of those obligations and that those obligations are based on information “available at the time the rates were set,” *see Golden NW*, 501 F.3d at 1053, and supported by substantial evidence. *Id.* at 1051; 16 U.S.C. § 839f(e)(2). As discussed extensively above, they are. Setting rates to recover costs in the final rate determination is, thus, not “beside the point” – it is the whole point of the final rate determination. And, importantly, setting rates to recover those projected costs does not “significantly impact fish and wildlife” because all BPA is doing in ratemaking is figuring out how to pay for what it expects to spend – not determining what ultimately to spend.

The Environmental Parties, nevertheless, contend more is being decided here with regards to BPA’s fish and wildlife projections. Pointing to the Administrative Procedure Act and case law, the Environmental Parties characterize the Strategic Plan, which provided general policy direction in the IPR projections for all of BPA’s program areas, as “preliminary, procedural, or intermediate agency actions or rulings not directly reviewable [but] subject to review on the review of the final agency action.” *Environmental Parties Br. Ex., BP-22-R-ID-01*, at 14. In other words, BPA’s final rate determination is doing more than just setting rates and recovering costs. It is implementing policies that limit, in the Environmental Parties’ view, BPA’s fish and wildlife funding. Once the Strategic Plan and IPR decisions are taken into account, they contend, the impact of the final rate determination is much broader, and results in a “significant impact” on fish and wildlife that implicate “equitable treatment.”

Several problems arise from the Environmental Parties' multi-level, culminating impact theory. First, the Environmental Parties' argument presumes that the Strategic Plan and IPR projections become reviewable within the final rate determination. As explained below in Issue 4.2.4, they do not.

Second, even if the Strategic Plan and IPR were in some way "reviewable" within the final rate determination, that still leaves the question of whether this "string of decisions" has a "significant impact" on fish and wildlife. The crucial "decision" that the Environmental Parties contend is being implemented through the final rate determination is BPA's goal in the Strategic Plan to "manage fish and wildlife program costs at or below inflation, inclusive of new obligations and commitments." Strategic Plan at 39; Environmental Parties Br. Ex., BP-22-R-ID-01, at 18. But even with the application of this goal to the projections in this case, the Environmental Parties have failed to show that the final rate determination "significantly affect" fish and wildlife. To the contrary, BPA has already shown that its rates will recover its projected fish and wildlife costs *even if* its Strategic Plan goals are implemented. In other words, the record in this case shows BPA can do both: it can recover all of its currently known fish and wildlife mitigation costs (consistent with substantial evidence) *and* maintain its fish and wildlife funding at or below the rate of inflation. In doing so, BPA is not shirking its obligations, but balancing objectives. As an agency tasked with operating in accordance with sound business principles, BPA's cost-control objectives related to all programmatic spending do not equate to giving short shrift to fish and wildlife mitigation and enhancement responsibilities. Rather, maintaining financial health enables the agency to repay the Federal investment with cost-competitive rates while enabling BPA to provide funding for extensive programs for fish, wildlife, habitat mitigation and restoration programs based on decisions developed with broad and frequent public involvement.

The Environmental Parties' brief does not outright dispute BPA's current funding levels as insufficient *per se*. Rather, they rely on an unbounded premise that availability of additional funding would ensure additional benefits for fish and wildlife, and thus by constraining fish and wildlife funding to an inflation budget level, BPA must have a "significant effect" on fish and wildlife. Environmental Parties Br. Ex., BP-22-R-ID-01, at 15. As support, the Environmental Parties point to materials from other forums that they contend show needs for additional fish and wildlife funding. *Id.* at 15-16. These requests, according to the Environmental Parties, are merely the "tip of the iceberg," as they cite even more requests for funding. *Id.* at 16-17. The Environmental Parties assert there can be "no serious dispute that BPA's decision to keep fish and wildlife funding flat during BP-22 will have a 'significant impact' on fish and wildlife." *Id.* at 17.

The Environmental Parties' reference to other funding needs is also flawed in that they implicitly attribute each of the funding requests as solely BPA's responsibility. That is incorrect. To the extent these funding obligations arise within a current mitigation funding mandate that is BPA's direct responsibility, those obligations have been included in the proposed budget and rates. BPA is prepared to meet the costs of those obligations, as described earlier, through its current projections. The Environmental Parties' assertion that there are additional needs for fish and wildlife does not establish that BPA is legally

responsible for meeting those needs. Indeed, before claiming BPA must pay more, the Environmental Parties must show how the obligations they discuss are attributable to BPA's funding obligations. They have not done this.

The Environmental Parties' argument also leads to a nonsensical result. In essence, following the Environmental Parties' contention that "more money always equals greater benefits to fish," every funding projection BPA makes with regard to fish and wildlife will trigger "equitable treatment." So long as BPA projects a limit to its fish and wildlife funding, there will always be additional examples of projects that BPA could fund. The Environmental Parties' argument would result in a constant increase in fish and wildlife budgets, because there will always be some stakeholder in some forum requesting additional funds. There is absolutely no support in the Northwest Power Act or its legislative history that Congress intended to impose on BPA such an unbounded funding obligation – or that such funding demands be addressed as a matter of "equitable treatment" in the final rate determination.

The Environmental Parties take their position one step further and assert that "any final rate determination has a 'significant effect' on fish and wildlife, because funding levels for fish and wildlife mitigation efforts obviously have a significant effect on fish and wildlife." Environmental Parties Br. Ex., BP-22-R-ID-01, at 15. To accept this interpretation is to revise congressionally created ratemaking criteria. That BPA cannot do. As described above, BPA's Northwest Power Act Section 7 rate proceedings along with the several substantive, congressionally defined ratesetting and cost allocation requirements included in Section 7 are what governs this proceeding. There is no basis for BPA to add an entirely new evaluation standard unstated in Section 7, one that BPA, FERC, and the courts have allegedly missed for the better part of 40 years.

The Environmental Parties' brief even appears to admit that, by themselves, BPA's rate determinations have no significant effects on fish and wildlife: "[o]nce the scope of analysis is broadened to include earlier non-final actions, it seems clear that any final rate determination has a 'significant effect' on fish and wildlife, because funding levels for fish and wildlife mitigation efforts obviously have a significant effect on fish and wildlife." *Id.* at 15 (emphasis omitted). That is to say, the Environmental Parties have conceded that the final rate determination does not have significant impacts on fish and wildlife unless the scope of BPA's decision is broadened to include the underlying policy goals and agency-level statements from other forums. But even including these other policy goals and statements, there is no need to conduct the "equitable treatment" review. In the end, all BPA is doing here is recovering its known costs through its rates which, as described above, BPA has done.

Finally, the Environmental Parties contend that, even if an "ordinary rate case" does not require demonstration of compliance with equitable treatment, this rate case does because of the large impact the projected secondary revenue *could* have if BPA elected to increase fish and wildlife funding. *Id.* at 21. BPA will address the main parts of the Environmental Parties' argument in Issue 4.2.3. Here, however, BPA notes that by allocating secondary revenue in a manner that benefits power rates BPA is not choosing power benefits over fish

and wildlife. BPA is simply following its ratemaking directives. Section 7(g) of the Northwest Power Act directs that BPA must “equitably allocate to power rates . . . all cost and benefits not otherwise allocated under this section, including. . . the sale of or inability to sell excess electric power.” 16 U.S.C. § 839e(g). In other words, Congress knew there would be both booms and busts with BPA’s sales of secondary power. The benefits and burdens of those forecasts were directed to be allocated to power rates, which BPA has done here. In the face of this plain direction, BPA cannot agree with the Environmental Parties’ view that Congress hid inside the Northwest Power Act an inchoate allocation of secondary revenue to fish and wildlife funding that springs to life through “equitable treatment” only when BPA’s secondary revenues significantly increase.

As a general matter, BPA finds it sensible to demonstrate its adherence to the equitable treatment requirement in the context of decisions in which the mandate squarely arises – that is, decisions involving system operations and management actions with a significant effect on fish and wildlife. For example, the CRSO EIS and associated ROD, whose associated costs over the BP-22 rate period serve as cost inputs in the BP-22 rate case, documents BPA’s consideration of and compliance with the equitable treatment mandate.²¹ Indeed, BPA provided extensive analysis and description of how the CRSO EIS selected alternative provides equitable treatment. Nothing in the BP-22 rate case or proposed settlement changes the actions BPA agreed to fund in the CRSO EIS ROD; to the contrary, the rate case simply sets rates to allow recovery of those costs. And, as described earlier, the Environmental Parties are well aware that the CRSO EIS ROD is a logical context for demonstrating equitable treatment compliance, given that two of the Environmental Parties are party to current legal challenges to this decision in U.S. District Court for the District of Oregon and in the U.S. Court of Appeals for the Ninth Circuit, where their co-plaintiffs or co-petitioners raise specific equitable treatment claims.²²

Decision

BPA’s final rate determination does not significantly affect fish and wildlife such that BPA must demonstrate equitable treatment of fish and wildlife under the Northwest Power Act.

Issue 4.2.3

Whether a projected increase in net secondary revenue constitutes a changed circumstance that would require BPA to reconsider its fish and wildlife funding levels in order to satisfy its Northwest Power Act obligations to fish and wildlife.

Parties’ Positions

The Environmental Parties argue that a forecasted increase in net secondary revenue constitutes a changed circumstance that obliges BPA to reassess its statutory responsibilities for fish and wildlife, specifically the equitable treatment obligation and the requirement to take into account the Northwest Power and Conservation Council’s

²¹ See *supra* note 16.

²² See *supra* note 17.

(Council's) fish and wildlife program. Environmental Parties Br., BP-22-B-ID-01, at 12-15; Environmental Parties Br. Ex., BP-22-R-ID-01, at 21-29.

BPA Staff's Position

In the ratemaking process, BPA Staff assumes that fish and wildlife budgets are developed to be sufficient to fund activities that meet BPA's statutory requirements. Mandell *et al.*, BP-22-E-BPA-46, at 5. The IPR process examines and establishes BPA's fish and wildlife projected spending levels to provide appropriate funding for mitigation activities for the rate period. *Id.* When BPA was developing rate case proposals in light of the new estimates for its surplus sales (*i.e.*, net secondary sales or net secondary revenue), the spending levels for fish and wildlife were already projected to be sufficient to meet BPA's obligations in the IPR process. *Id.* The fact that estimates of net secondary sales came in above anticipated levels did not change the assumption that the funding levels for fish and wildlife were sufficient. *Id.* Additionally, in the event of significant increases in fish and wildlife costs, BPA has risk mechanisms and other tools in place to protect against financial harm in the event of unforeseen cost increases. *Id.* at 9-10. These include financial reserves, the FRP Surcharge, CRACs, debt-financing options, and the option to institute Section 7(i) proceedings to develop rates. *Id.*

Evaluation of Positions

The Environmental Parties contend that, even if BPA's estimates of fish and wildlife funding had met its statutory obligations, those estimates are no longer valid in light of the new increase in net secondary revenues projected to occur during the BP-22 rate period. Environmental Parties Br., BP-22-B-ID-01, at 3, 9, 12-14, 20. Leaning heavily on *Golden NW*, the Environmental Parties assert that this projected increase constitutes a momentous changed circumstance or new information that would require BPA to reconsider its fish and wildlife funding levels for purposes of providing equitable treatment and taking into account the Council's Fish and Wildlife Program. *Id.* at 11-12, 14, 18. The relevant facts at hand are readily and meaningfully distinguishable from those in *Golden NW*, and the new information or changed circumstance that Environmental Parties refer to here present no analogous consequences or bases for reconsideration of BPA's fish and wildlife costs as were present in *Golden NW*.

First, BPA notes that the *Golden NW* court decision did not reach the merits of the equitable treatment challenge in that case. See 501 F.3d at 1053. Instead, the court considered whether BPA's fish and wildlife cost projections were supported by substantial evidence in light of evidence presented during the rate proceedings suggesting that such costs were outdated. *Id.* at 1049-53. In deciding the cost projections were not supported by substantial evidence, the court reasoned that the problem lay with BPA's reliance on cost estimates that were several years old and an assumption that each of 13 different fish and wildlife funding alternatives was equally likely to be implemented. *Id.* at 1051. The court faulted BPA for not updating its fish and wildlife costs because of new obligations that had accrued since BPA performed its original estimation of its costs. *Id.* at 1052 (noting that "[b]y the time of the supplemental WP-02 proceeding in late 2000 and early 2001, . . . [a]t least three new developments underscored the need for new cost projections."). The key

issue in *Golden NW*, then, was not *what* BPA's fish costs should be, but *whether* BPA's projection of those costs was based on sound evidence for rate-setting purposes.

Importantly, the plaintiffs in *Golden NW* provided *evidence* to support their assertion that BPA's fish and wildlife cost were unrealistically low. For example, the court found the following evidence persuasive: (1) a "Staff Report" prepared by the Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS) including calculations of "refined cost estimates"; (2) tribal fish and wildlife manager testimony that the cost of BPA's ESA requirements would cause BPA's ability to repay the U.S. Treasury to fall below an acceptable level; (3) power market conditions that would preclude system operations required for ESA compliance; (4) testimony indicating that BPA would bear most of the cost of the Corps' compliance with Clean Water Act requirements under a district court ruling; and (5) new projections from fisheries managers indicating that the cost of BPA's compliance with the ESA under a new biological opinion made BPA's overall fish and wildlife costs estimates more than \$300 million per year too low. *See id.* at 1051-52. The court also found significant the fact that most of this evidence came from expert fish and wildlife managers. *Id.* at 1051.

The present circumstances in the BP-22 rate case are vastly different from those in *Golden NW*. First, the fish and wildlife cost estimates in the BP-22 rate case derive not from a range of uncertain alternatives, but from updated information, such as the Selected Alternative in the CRSO EIS ROD. The CRSO EIS ROD incorporates the most recent costs associated with implementing certain non-operational conservation measures intended to benefit species listed under the ESA and consulted upon under the ESA, which were, in turn, rolled into BPA's BP-22 power rates. As BPA Staff explained:

The CRSO EIS also provided operational assumptions used in the BP-22 initial proposal rate case modeling, including estimated spill volumes at each project that produce a certain level of total dissolved gas throughout the year. The Biological Opinions (BiOps) provided the rate case assumption of including periodic off-season surface spill in October, November, and March at the four lower Snake River projects and McNary Dam for downstream passage of adult steelhead and bull trout.

Mandell *et al.*, BP-22-E-BPA-46, at 4.

Moreover, the Mitigation Action Plan attached to the CRSO EIS ROD includes several actions BPA agreed to fund as part of the 2020 NMFS Columbia River System Biological Opinion (BiOp) and the 2020 USFWS Columbia River System BiOp. *See* CRSO EIS ROD, Attachment 1.

Second, unlike the stale cost estimates at issue in *Golden NW* (that were almost three years old by the time of the final rate determination), the CRSO EIS cost estimates used here were published at the end of September 2020 – only 10 months ago – and have been reconsidered and affirmed as recently as April 2021 for veracity as inputs in the rate case. *See* IPR Closeout Report, BP-22-M-IE-02-AT04, at 13; IPR 2 Closeout Report at 4; *see also* IPR 2 Workshop Presentation, BP-22-M-ID-02-AT03, at 44.

Third, while the Environmental Parties make general, bare assertions that BPA's fish and wildlife funding levels *may* be too low, they do not offer the sort of support for their contention analogous to the evidence that expert fish and wildlife managers proffered in the rate proceedings leading up to *Golden NW* (i.e., actual calculations of refined cost estimates, evidence that proposed rates will compromise ability to implement compliance actions). To the extent the Environmental Parties have raised concerns with BPA's cost estimates or fish and wildlife funding levels, BPA has directly addressed them in the IPR 2 Closeout letter. Those responses included the following explanations: (1) concerns over whether BPA's IPR estimates include compliance costs under the Clean Water Act were highly speculative because "neither the Corps nor Reclamation have identified any additional separate costs associated with the state of Washington's Section 401 certification, nor does the commenter identify any such costs"; (2) claims that BPA's fish and wildlife spending failed to meet its equitable treatment obligation with its IPR cost estimates were legally unsound, and in any event, unsupported because the commenter "provides no basis for their claim that BPA's current level of F&W funding is inadequate . . . [n]or . . . what amount of Bonneville funding would be needed to meet the obligations the commenter believes are being violated;" and (3) discussion about BPA's discretionary direct funding authority for the Lower Snake River Compensation Plan (LSRCP) costs, the extent of annual operation and maintenance expense costs expected to be recovered in the BP-22 rate period, and how BPA would cover the power-share of congressional appropriations for LSRCP capital work through repayments to the U.S. Treasury. IPR 2 Closeout Report at 9-11. *See also* P.L. 94-587 § 102, 90 Stat. 2917, 2921 (Oct. 22, 1976) (authorizing the Corps to construct the LSRCP hatchery facilities in 1976 as part of a Water Resources Development Act); Water Resource Development Act of 1986, P.L. 99-662, § 856, 100 Stat. 4082 (Nov. 17, 1986) (transferring jurisdiction of the LSRCP hatchery facilities, along with their operation and maintenance, to the U.S. Fish and Wildlife Service pursuant to the Chief of Engineers' recommendation in the Lower Snake River Fish And Wildlife Compensation Plan, Washington And Idaho Special Report, at 2-3 (Mar. 6, 1985)).

Thus, the BP-22 rate case proceedings are in a fundamentally different factual posture from those at issue in *Golden NW*. Nonetheless, the Environmental Parties attempt to portray BPA's projected *increase* in net secondary sales as the type of "changed circumstance" addressed in *Golden NW*, and based on that "changed circumstance," argue BPA must reassess (1) its equitable treatment of fish and wildlife; and (2) its funding commitments for the Council's fish and wildlife program. Environmental Parties Br., BP-22-B-ID-01, at 12-14. BPA addresses each of these arguments below.

Equitable Treatment

The Environmental Parties offer three reasons why a forecasted increase in net secondary revenue requires BPA to reassess whether it is providing equitable treatment. First, the Environmental Parties contend that a final rate determination is a final decision that significantly impacts fish and wildlife because it affords BPA the opportunity to devote a portion of projected surplus revenue to fish and wildlife spending. Second, the Environmental Parties argue that BPA must consider equitable treatment in deciding what

to do with projected revenue increases in this rate case. Environmental Parties Br., BP-22-B-ID-01, at 13. Finally, the Environmental Parties claim that “because the secondary surplus revenue forecast calls into question whether assumed fish and wildlife funding levels provide “equitable treatment,” it necessarily casts doubt on the reasonableness of BPA’s cost projections, raising the risk that BPA may underestimate its costs,” Environmental Parties Br., BP-22-B-ID-01, at 13-14, and suggest it is unreasonable to assume fish and wildlife funding from IPR provides equitable treatment. *Id.* at 14. (BPA notes that this last position begs the question by assuming that both projected revenues and fish and wildlife funding levels are relevant to fulfilling the equitable treatment mandate, and, based on those assumptions, concludes that the cost projections for complying with the mandate may be unreasonably low.)

All three of the Environmental Parties’ reasons fail for their reliance on the legally flawed premise that equitable treatment applies to rates or funding levels, as discussed in the evaluations of the previous issues.

In addition, as to the Environmental Parties’ first point, final rate decisions do not significantly affect fish and wildlife, as already discussed. Their second point belies relevant case law, which establishes that each power marketing decision does not have to show equitable treatment so long as on balance BPA shows equitable treatment on a system-wide basis. *See Nw. Env’tl. Def. Ctr.*, 117 F.3d at 1534 (“BPA need not undertake an equitable treatment analysis for every discrete power marketing decision . . .”). Thus, even if equitable treatment applied to ratemaking or fish and wildlife funding decisions, it would not apply to each financial decision, such as what to do with a portion of projected surplus revenues.

For the Environmental Parties’ third reason, even if additional revenue may be available to expend on fish and wildlife, this in no way affects the underlying mitigation costs that rates are set to recover; nor would such additional revenue affect the separate, independent nature of the equitable treatment mandate. These last points deserve elaboration.

The Environmental Parties suggest that the change in projected net secondary revenue requires BPA to adjust its projected costs accordingly to provide for equitable treatment. Environmental Parties Br., BP-22-B-ID-01, at 14. Under *Golden NW* the key inquiry was whether the projected *costs* were supported by substantial evidence available at the time rates were set; the Court found, in part, that BPA failed to consider changed circumstances as to those *costs*. But here, the Environmental Parties point to a projected *revenue* increase as the relevant changed circumstance and in doing so have not established any basis to question the underlying costs or whether the proposed rates adequately recover them. Instead, the Environmental Parties suggest:

[I]n light of the large secondary surplus revenue forecast, it is no longer reasonable to assume that the level of fish and wildlife funding from IPR provides equitable treatment, so BPA must revisit that assumption and then adjust the projected costs accordingly. A failure to do so will violate BPA’s duty to reasonably estimate its costs at the time it sets rates.

Id. at 14 (footnote omitted).

Even setting aside the faulty notion that equitable treatment is dependent on fish and wildlife funding levels, there is a striking disconnect in the Environmental Parties' argument here. That is, the Environmental Parties seemingly conflate *revenue* and *cost*, essentially suggesting, without support, that a change in revenue must also somehow effect a change in independent, underlying costs.

Similarly, the Environmental Parties seem to be under the mistaken impression that a change in revenue somehow changes the nature of the equitable treatment mandate, or even is relevant to what the mandate substantively requires. This argument likely stems from the Environmental Parties' misunderstanding of equitable treatment as relating to funding levels. In any event, tethering BPA's legal obligation under equitable treatment to its financial performance would be contrary to the Ninth Circuit's description of equitable treatment as an "independent" mandate. *Nw. Env'tl. Def. Ctr.*, 117 F.3d at 1532. Following the Environmental Parties' logic, if BPA's obligation to fish and wildlife *expands* during years when BPA's revenue exceeds expectation, should it not also *contract* when BPA's revenue projections fall short? If that were the case, BPA's obligation to fish and wildlife would be in constant flux. And while BPA is *projected* to see a healthy level of surplus revenue over this rate period, in eight of the past 13 years BPA's projected surplus revenues have been lower than the rate case forecast, with some deficits exceeding \$100 million. *See Fisher et al.*, BP-22-E-BPA-35, at 21. Tying BPA's obligation to provide equitable treatment to BPA's revenue projection would, thus, introduce a wholly new and unnecessary level of uncertainty as to the very nature of the equitable treatment responsibility.

The Environmental Parties also offer the misplaced suggestion that equitable treatment of fish and wildlife requires "even more" than full implementation of the Council's fish and wildlife program. Environmental Parties Br., BP-22-B-ID-01, at 21 (claiming that BPA is "clearly out of compliance with the equitable treatment obligation" if flat fish and wildlife budgets threaten BPA's ability to "fully implement" the Council's program). The Council's program applies to three federal agencies in addition to BPA and, therefore, is beyond BPA's sole responsibility to implement. *See Pub. Util. Dist. No. 1 of Douglas Cnty. v. Bonneville Power Admin.*, 947 F.2d 386, 389 (9th Cir. 1991). But more importantly, the Environmental Parties' suggestion that fully implementing the Council's program is a necessary condition for equitable treatment misses the point of the applicable case law. True, in *Nw. Env'tl. Def. Ctr.*, the court recited its earlier holding that "BPA's responsibilities to protect fish and wildlife do not end even with complete adoption of the Council's Program." 117 F.3d at 1532. But the court did not hold that full implementation of the program is *necessary* for equitable treatment. In fact, the court went on to explain that because equitable treatment is an "independent" obligation, "a federal agency could not satisfy its equitable treatment responsibilities under paragraph (i) simply by adopting the Council's program under paragraph (ii). [Therefore,] *if the Council's Program fails* to ensure adequate fish survival, BPA would be required to take additional measures under paragraph (ii)." *Id.* (emphasis added, citations omitted).

In short, BPA could not rely solely on full adoption of a deficient Council Program to fulfill its separate equitable treatment responsibility. In *Confederated Tribes*, the court clarified

further: “While we held that relying on the Council’s program is not *sufficient* to satisfy the equitable treatment mandate, we did not hold that reliance on the program was improper.” 342 F.3d at 934 (emphasis added). Nor did the court find the Council’s program *necessary* for equitable treatment. As such, even if BPA does not fully fund or fully implement the Council’s program, that fact alone does not establish non-compliance with the independent equitable treatment mandate pertaining to system operations and management.

Finally, as explained in the evaluation of Issue 4.2.2, the function of BPA ratemaking is not to adjust projected costs. Indeed, there is hardly a basis to do so, absent a showing of relevant new information or materially changed circumstances, which is not present here. *See* Issue 4.2.2 (considering and addressing the Environmental Parties’ various assertions as to the need for higher fish and wildlife cost estimates in BPA’s projections).

An increase in projected net secondary revenue is not a changed circumstance that would require BPA to reassess its fish and wildlife spending levels for purposes of equitable treatment.

Council Program

The Environmental Parties also argue that the projected increase in net secondary revenue requires BPA to reconsider its fish and wildlife spending levels in order to fulfill its responsibility, under 16 U.S.C. § 839b(h)(11)(A)(ii), to take the Council’s Fish and Wildlife Program into account at each relevant stage of decision-making and to the fullest extent practicable. Environmental Parties Br., BP-22-B-ID-01, at 14. As an initial matter, BPA notes that, like “equitable treatment,” the requirement to take the Council’s Program into account also arises under the umbrella of paragraph 4(h)(11)(A). Specifically:

(A) The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall —

...

(ii) 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 under this subsection.

16 U.S.C. § 839b(h)(11)(A) (emphasis added).

This paragraph applies in the context of BPA’s *management* and *operation* responsibilities with respect to the federal hydropower system of the Columbia River basin – that is, to the power marketing actions of the system. *See* Issue 4.2.1.

In their brief, the Environmental Parties appear to concede that BPA has already taken into account the Council’s Fish and Wildlife Program in their claim that BPA must take the Program into account “*again*.” *See* Environmental Parties Br., BP-22-B-ID-01, at 14 (emphasis added). BPA agrees that it has already taken into account the relevant operations and management provisions of the Council’s Program. *See* CRSO EIS ROD § 5.5.2 (describing how BPA has taken the Council’s Program into account during the

CRSO EIS process).²³ However, BPA disagrees that the ratemaking process is a “relevant stage of decision-making” in the exercise of system operation and management responsibilities such that a renewed look at fish and wildlife spending levels or the Council’s Program would be necessary or appropriate within the rate case or as a result of a projected increase in net secondary revenue.

First, the rate case is not a “relevant” stage of decision-making under Section 4(h)(11)(A)(ii) of the Northwest Power Act. As explained in the evaluation of Issues 4.2.1 and 4.2.2, and contrary to the Environmental Parties’ assertion that it is a “stage at which BPA has discretion to *take actions* that will affect fish and wildlife,” Environmental Parties Br., BP-22-B-ID-01, at 14 (emphasis added), a rate case is simply a process conducted by BPA to set rates to recover costs and does not itself undertake or prescribe system operations and management actions or otherwise make decisions affecting fish and wildlife. And as explained in the evaluation of Issue 4.2.2, costs included for recovery through rates flow from inputs arising outside of the rate case. The purpose of the rate case is not to re-evaluate or second-guess those inputs, absent compelling evidence showing a need.

The Environmental Parties rely on *Nat’l Wildlife Fed’n v. FERC*, 801 F.2d 1505 (9th Cir. 1986) to support their contention that BPA’s ratemaking process is a “relevant stage of decision-making” under 16 U.S.C. § 839b(h)(11)(A)(ii). The FERC permitting process was at issue in that case, and the court emphasized that “issuance of preliminary permits and the formulation of their articles are of central importance in [FERC’s] process of licensing.” *Nat’l Wildlife Fed’n v. FERC*, 801 F.2d at 1514. In contrast, as explained in the evaluation of Issue 4.2.1, BPA’s ratemaking is focused on cost recovery. Nothing in BPA’s ratemaking process deals with the development or planning of fish and wildlife mitigation actions; rather, it focuses on recovering costs. Therefore, unlike a FERC permitting process where mitigation can be prescribed, there would be no point in considering the Council’s program *again* in setting BPA’s rates.

In addition, as with the equitable treatment mandate, BPA finds it sensible and appropriate to address consideration of the Council’s Program in the context of decisions relating more directly to fish and wildlife actions, rather than in a process that merely recovers the costs of such actions. *See, e.g.*, CRSO EIS ROD § 5.5.2.

Furthermore, the Environmental Parties fail to explain why an anticipated increase in revenue requires reconsideration of fish and wildlife costs in order to satisfy BPA’s duty to

²³ Indeed, over time the Council amended into its program the operations BPA proposed and adopted through its ESA Section 7(a)(2) consultations. By 2013, the Ninth Circuit was able to observe that, “the [Council’s] 2009 Program did not include plans of detailed hydrosystem operations for fish and wildlife because the federal agencies . . . had already produced detailed plans for the operations of each facility intended to improve conditions for fish and wildlife affected by the hydrosystem.” *Nw. Res. Info. Ctr. v. Nw. Power Planning Council*, 730 F.3d 1008, 1014 (9th Cir. 2013) (*NRIC*). The operations in the CRSO EIS ROD Selected Alternative and associated ESA consultations expand on prior CRS operations that the Council had adopted in its Fish and Wildlife Program. In that way, BPA has taken the Council’s Program into account as called for in Section 4(h)(11)(A)(ii). *See* CRSO EIS ROD § 5.5.2 at 51 (describing the Council’s frequent endorsement of CRS management and operation actions from biological opinions and various implementation agreements).

take the Council's program into account. The Environmental Parties disagree with BPA's current fish and wildlife funding levels and advocate for increased fish and wildlife funding in the context of the Council's Program. See Environmental Parties Br., BP-22-B-ID-01, at 14-15, 21. But, to support their argument, Environmental Parties would need to show that rates are inadequate to cover BPA's projected costs or that BPA's cost estimates are too low to fulfill the agency's compliance obligations.²⁴ The Environmental Parties have shown neither here. As explained above and in the evaluation of Issue 4.2.2, they offer only conclusory speculation on the adequacy of fish cost estimates, and nothing in the way of reports, analysis, or calculations, comparable to those that were dispositive in *Golden NW*, that might prompt (or even allow) BPA to revisit its fish cost estimates yet again, after having done so as recently as IPR 2. The vague evidence that the Environmental Parties have posited has been considered and addressed; it would defy prudent business practice to accept such speculation and vague assertions of unconfirmed responsibilities as an appropriate basis for revisiting, let alone revising, projected costs.

In attempting to support their allegation of a shortfall in BPA's mitigation funding with respect to the Council's Program, the Environmental Parties cite portions of the 2020 Addendum to the Council's Program. See, e.g., Environmental Parties Br., BP-22-B-ID-01, at nn.77& 86.²⁵ The Environmental Parties miss the Council's broader view as to the costs that may be associated with new Program provisions: the Council said it "is confident that most, if not all, of the additional needs identified in the 2014 program, and reflected in this addendum, may be met within an overall program-management and cost-management approach that prevents program costs from rising above the rate of inflation." NW Power and Conservation Council, 2020 Addendum to the 2014 Columbia River Basin Fish and Wildlife Program, Findings on Recommendations at 45 (Oct. 2020), *available at* <https://www.nwcouncil.org/sites/default/files/2020-9.pdf>. And specifically with regard to the additional mitigation expenditures proposed in the Upper Columbia, the Council noted that "[t]hose additional expenditures can be balanced over time by judicious management of their ramp-up and finding further program efficiencies that do not affect substantive work." *Id.* The Council did not say BPA's costs were likely to be higher than forecast or that implementing the new work would require BPA to increase its overall funding for fish and wildlife mitigation, or that it recommended all the work be done in the coming rate period. See *id.* at 39 (suggesting that an effort to increase mitigation should begin over the next five years). Thus, the Council's Fish and Wildlife Program provisions cited by the Environmental Parties do not establish that BPA's likely costs for fish and wildlife mitigation will be higher than projected during the BP-22 rate period.

Additionally, while *Golden NW* has little in common with this rate proceeding, *NRIC* is instructive. In *NRIC*, the court rejected a challenge to the Council's newly finalized

²⁴ As mentioned above, BPA has several risk mechanisms in place to ensure cost recovery in the event of unexpected cost increases. These include: financial reserves, the FRP Surcharge, CRACs, debt financing options, and the option to institute Section 7(i) proceedings to develop rates, among other options.

²⁵ BPA provided written comments on (and continues to question) certain recommendations for amendment of the Council's program and the draft program, available on the Council's website at <https://www.nwcouncil.org/fw/program/2020addendum>.

Sixth NW Power Plan where the petitioner alleged that the Council failed to give fish and wildlife “due consideration” when it did not independently consider and give significant weight to the needs of anadromous fish when formulating the power plan. 730 F.3d at 1015-18. The petitioner argued that incorporating the recently completed 2009 Columbia River Basin Fish and Wildlife Program into the power plan fell short of the Council’s responsibility to consider fish and wildlife needs in the power planning process. Instead, the petitioner argued that if, through the power planning process, the Council learns of “capacity for further fish and wildlife enhancements,” then it “must consider whether such enhancements would serve the [Northwest] Power Act’s goal of furthering fish and wildlife interests” *Id.* at 1015-16. The petitioner emphasized that because the power planning process revealed the region had a greater capacity for energy conservation than previously thought, that could in turn lead to more capacity for fish and wildlife mitigation than the 2009 Fish and Wildlife Program had considered. The court nevertheless rejected the petition because nothing in the Northwest Power Act required the Council to consider new fish and wildlife measures in the process of adopting a power plan. *Id.* at 1018.

Here, too, the Environmental Parties claim in the rate case that BPA must consider greater spending levels for fish mitigation in light of surplus power revenue forecasts increasing unexpectedly. And like the petitioner in *NRIC*, they cannot cite a statutory mandate requiring BPA to consider additional fish mitigation during the ratemaking process, particularly when BPA has already considered the Council Program, as the Environmental Parties acknowledge. Following *NRIC*, BPA rejects the contention that, to satisfy its responsibility to take the Council Program into account, it must consider additional spending for fish and wildlife when surplus sales revenue forecasts increase unexpectedly during a rate proceeding.

Brief on Exceptions

In their Brief on Exceptions, the Environmental Parties continue to insist that BPA “must revisit its projected fish and wildlife spending levels in light of the unexpectedly large secondary surplus revenue forecast.” Environmental Parties Br. Ex., BP-22-R-ID-01, at 21. In arguing their position, they attack two points BPA made above. One, BPA’s argument that the Environmental Parties, unlike the petitioners in *Golden NW*, have not shown that projected funding levels for fish and wildlife mitigation efforts are inadequate. To this the Environmental Parties’ argument in its simplest form “is that the projected secondary revenue forecast is so large” that it is “unjustifiable” for BPA to continue to adhere to IPR spending levels. *Id.* at 23. The other issue they address is BPA’s argument that the cost projections incorporated into this rate case, unlike the fish and wildlife cost estimates at issue in *Golden NW*, are not stale and no evidence on the record provides a reasonable basis or need to revisit those projections. The Environmental Parties response to this is that the estimates are no longer reliable “because they were developed before BPA realized that it was facing a huge secondary surplus revenue boon.” *Id.* at 24 (emphasis omitted).

With both of these arguments, the Environmental Parties mistake either the nature of surplus revenue, or the necessary timing of the forecast in the ratemaking process. Each

point merits explanation, because each undermines the foundation for the Environmental Parties' objections to BPA's rates decision.

In their Brief on Exceptions, the Environmental Parties appear to misunderstand the first of BPA's arguments noted above when they claim that "the nature of the equitable treatment mandate is such that a particular level of funding that is legally 'adequate' may become legally 'inadequate' thanks to changed circumstances." *Id.* at 23. This is effectively the same argument from their Initial Brief, claiming that the projected secondary revenue is "so large" that it "changed the landscape" (or the "equitable treatment 'denominator'"), requiring that BPA's planned funding levels be "revisited" for equitable treatment. *See id.* at 23-25; Environmental Parties Br., BP-22-B-ID-01, at 13 ("the secondary surplus revenue forecast changes the landscape: the equitable treatment mandate requires BPA to treat fish equitably on the whole, and that whole now includes a huge surplus that BPA could devote (at least in part) to fish and wildlife.") (internal quotation and citations omitted). The Environmental Parties' argument again hinges on the notion that the surplus power revenue forecast constitutes a "changed circumstance" that allegedly undermines the reliability of BPA's cost estimates. Environmental Parties Br. Ex., BP-22-R-ID-01, at 24.

BPA has already discussed that the "changed circumstance" theory stems from *Golden NW*, which was concerned with the adequacy of BPA's cost recovery in rates, independent of expected secondary revenue. *Supra* Issue 4.2.2.

To further emphasize what BPA states in Issue 4.2.5, in Direct Testimony, BPA's financial staff addressed the nature of the secondary revenue forecast and its unpredictability.

That forecast is more than \$100 million per year more than it was in the last rate period. While this reflects the results of our traditional application of our models, we recognize that *this increase in secondary revenue is only a forecast. Markets can change and BPA's inventory – which relies on water and snow pack – can change dramatically from year to year. Such a large increase in secondary revenue, then, gives us some pause.*

Fisher *et al.*, BP-22-E-BPA-15, at 22 (emphasis added).

Moreover, the reason the forecast caused staff to "pause" was because BPA's standard deviation from its forecast to the actual amount of surplus sales has averaged "about \$125 million to \$180 million, depending on the rate period, with \$180 million representing the standard deviation consistent with the BP-22 Initial Proposal. Fisher *et al.*, BP-22-E-BPA-35, at 22; *see also id.* at Attachment 2 (Data Response MS-BPA-30-118).

The nature of secondary revenues is that they are unpredictable, and that unpredictability arises from causes beyond BPA's control. Such volatility and uncertainty would not seem to be an ideal way to support an ongoing mitigation program. Indeed, it would be a poor business practice to base program budgets on projections of a volatile and historically difficult-to-predict revenue stream – which is why BPA does not do that for *any* of its spending programs – a practical (but potentially costly) consideration the Environmental Parties overlook.

The Environmental Parties lack the caution BPA's staff exhibited in the face of the unknown. The Environmental Parties' arguments, and their proposed solution, assume the revenues will materialize as forecast. They fail to appreciate the risk or potential consequences of planning to fund new fixed costs – in this case setting aside revenues for their proposed new or expanded mitigation actions – with an uncertain stream of funds. And the \$100 million increase in forecasted surplus revenues – that the Environmental Parties call a “new” and “substantial,” landscape-changing, “huge expected boon in secondary surplus revenue” – falls well below the average standard deviation of a \$125 million to \$180 million difference between the forecast and actuals.

Ultimately, the Environmental Parties' proposal ignores the balancing of purposes that the Northwest Power Act mandates when they tip the scale so heavily for fish without regard to ensuring the region has an adequate, efficient, economical, reliable power supply. *See e.g.*, 16 U.S.C. § 839(2); *see also NRIC v. Nw. Power Council*, 35 F.3d at 1378 (“the Act states that fish and wildlife protection measures cannot jeopardize “an adequate, efficient, economical, and reliable power supply”). BPA cannot ignore the risk posed by the uncertainty of secondary revenue forecasts nor the Northwest Power Act mandate to balance the needs of fish and power.

Despite the varied descriptions Environmental Parties use to describe the surplus revenue forecast, they miss its essence. It is a forecast. It comes with a \$125 million to \$180 million standard deviation. It is not money in the bank; it may be a boon – or a bust. And while the forecast exceeded untested assumptions based on prior rate cases, it was not new information related to actual costs, legal obligations, or flaws in analysis that could lead BPA to revisit its rates proposal or change its planned spending level for any of its programs.

The drivers behind the timing of the secondary revenue forecast also undermine the Environmental Parties' arguments for a new cost analysis. The logical sequencing of the rate design process is crucial context. Secondary revenues derive from the sale of power available *after* all other FCRPS operation mandates and related agreements have been met. It is what is left over, it is not firm – it is “secondary.” Therefore, the secondary revenue forecast can come only after BPA decides on its other operations, including those operations identified to mitigate for the effects of the Selected Alternative in the CRSO EIS ROD. BPA knew it could not have reliable secondary surplus sales revenue forecast until *after* it executed the CRSO EIS ROD. That is because prior to completion of the CRSO EIS ROD and choosing the Selected Alternative, BPA did not know what mitigation actions it would agree to take, or their estimated costs.²⁶ Any estimate prior to completing either of those steps would be preliminary at best and need to be subject to revision. As BPA staff told Environmental Parties in response to a data request, “[p]rior to developing the updated

²⁶ In footnote 93 of their Brief on Exception, Environmental Parties raise a point that BPA here clarifies: funding levels were not decided in the CRSO FEIS or ROD. Environmental Parties Br. Ex., BP-22-R-ID-01, at 24 n.93. Rather, the ROD memorialized the decision regarding which operation, structural and mitigation actions Co-Lead Agencies would implement, after the agencies examined the alternatives and compared their effects and costs in the CRSO FEIS.

secondary market forecast, BPA Staff and many stakeholders *assumed* secondary revenue would be at or below levels included in BP-20 rates [and] . . . believe[d] a 2-4 percent rate increase would likely be needed to recover BPA's costs in BP-22." Motion to Admit Data Responses into Evidence, BP-22-M-ID-01, Attachment, Data Response ID-BPA-30-9 (emphasis added). In reality, the secondary revenue forecasts were not "new" within the context of BP-22 rate development; they were simply *the* secondary revenue forecasts for BP-22 period. Indeed, BPA did not base its fish and wildlife funding projections developed in the IPRs on any expectation of secondary revenues because cost projections are developed before any rate proposals begin. Therefore, the secondary revenue forecast cannot represent a "changed circumstance" with respect to fish and wildlife funding because there was no established secondary "forecast" at the time BPA developed the fish and wildlife funding projections.

Thus, where the Environmental Parties see the secondary revenue forecast as a landscape-changing realization effecting a change in circumstances, BPA sees a reasonably timed, logical step in the rate development process. The difference between the secondary revenues BPA staff assumed prior to making a forecast, and the actual forecast, is in no meaningful way a "new" or "changed circumstance." Obtaining forecast results that exceed preliminary, untested assumptions, yet fall well below the average standard deviation between forecast and actuals, does not by itself justify revisiting the proposed rates or the settlement.

Intertwined with their main arguments on Section 4.2.3 of the Draft ROD, the Environmental Parties restate and recast several other points originating in their Initial Brief.

First, they say the rate case offers BPA the opportunity to use its "discretion at this time to act in a way to further implement the Council's program." Environmental Parties Br. Ex., BP-22-R-ID-01, at 26. Then they say BPA should revisit its cost projections because the agency has "broad authority to establish rates in conformity with its conflicting obligations" *Id.* What these pleas omit is the need to fulfill a statutory mandate through the exercise of discretion. The Environmental Parties do not (and cannot) tie these proffered exercises of discretion to a legally enforceable need to do so. *See Confederated Tribes*, 342 F.3d at 933 (citing *NEDC*, 117 F.3d at 1533-34 (concluding it was premature to consider whether BPA violated the equitable treatment mandate in refusing to dedicate a portion of water for fish when the vast majority of BPA's share of the water was unallocated)). A failure to exercise discretion in the absence of a statutory mandate is not actionable. For judicial review of an agency's failure to act under the Administrative Procedure Act, a petitioner must at least show "agency recalcitrance . . . in the face of clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility." *Id.* at 930 (citing *Mont. Wilderness Ass'n, Inc. v. U.S. Forest Serv.*, 314 F.3d 1146, 1150 (9th Cir. 2003) (internal quotation marks and citation omitted)).

In another respect, the Environmental Parties mischaracterize BPA's position to make their point: "BPA contends that it need not take the Council's fish and wildlife program into account, when *deciding what to do with the large secondary surplus revenue forecast.*"

Environmental Parties Br. Ex., BP-22-R-ID-01, at 25 (emphasis added). To the contrary, as BPA has explained above, that “decision” is not even at hand or being made in this rate case. Indeed, what can be done with secondary revenues necessarily depends on whether they are ever in hand – something not known at this time. This is why the settlement provision addressing their potential future use is conditional, and why BPA is not premising *any* program’s budgets on them.

In addition, the Environmental Parties rely on a prevailing theme throughout their Brief, but particularly here: when BPA can do more, it must do more – regardless of the “what.” Environmental Parties continue to decry how “it is unfathomable to think that BPA is doing all it can to implement the program.” *Id.* at 28. To remedy this situation, they “have suggested several specific ways that increased funding could help improve implementation of the Council’s program.” *Id.* at 27 (emphasis omitted). Indeed, the Environmental Parties’ lodestar still appears to be whether BPA’s proposed fish and wildlife funding levels and rates are adequate to “fully implement” or “better implement” the Council’s program.

As explained above, this simply is not the function of the rate case – the decision at hand – which is to recover costs, not decide what costs to incur. *See Supra* Issue 4.2.2.

In their Brief on Exceptions, the Environmental Parties reiterate that BPA could (and in their view “must”) do more to benefit fish. In support of their argument, they highlight a quote from a presentation that the Nez Perce Tribe made to the Council in July 2021. Environmental Parties Br. Ex., BP-22-R-ID-01, at 16-17. The presentation cited, however, is not a prescription, project, or proposal for any particular mitigation action from the Council, or cost to BPA. *Id.* And given its focus on overall status of the species, which is affected by numerous factors and the responsibility of many entities, this is not an appropriate indicator of the extent of BPA’s responsibility to mitigate, and therefore to recover, costs for doing so.²⁷

With regard to increased mitigation costs arising from ongoing litigation, the situation remains as generally described above in Section 4.2.3: Environmental Parties cannot say when a court would rule, what it would rule, how that would affect BPA and its ratepayers, or whether any costs related to the ruling would fall within the BP-22 rate period.

The other new actions Environmental Parties submit in their Brief on Exceptions all suffer the same shortcomings. *See* Environmental Parties Br. Ex., BP-22-R-ID-01, at 15-17, 28-29. Whether toxic clean-ups, northern pike suppression, or fish screens on irrigation diversions, the Environmental Parties fail in the first instance to show that BPA *must* fund

²⁷ In their footnote 115, the Environmental Parties observe that the Council did not assess whether any particular amount of BPA funding is sufficient to meet program goals and the Northwest Power Act. Environmental Parties Br. Ex., BP-22-R-ID-01, at 28 n.115. BPA has discussed such matters often in the appropriate forums, such as the CRSO EIS and comments on the Council’s 2014 Program and 2020 Addendum. In sum, the program guides four agencies, not just BPA. And the Council has adopted goals and objectives that go beyond the mandates of the Northwest Power Act or any obligations BPA has under its organic statutes. The decline of fish stocks, the failure to meet the program goals and objectives, or room to improve program implementation offer little insight into the appropriate size of BPA’s funding levels, the effectiveness of BPA’s mitigation efforts, or the need for the agency to increase either one.

them to comply with the law. Even if BPA may eventually incur these costs, the Environmental Parties provided no evidence of whether the costs would accrue during the course of the BP-22 rate period or that BPA could not cover them within the existing proposed budget and rate structure. Considered individually or taken together, these areas of speculative future increased costs continue to fall short of providing substantial evidence that BPA will likely need to do more to fulfill its statutory mitigation mandates during the rate period. They do not justify revisiting the proposed rate settlement.

Decision

BPA's projected increase in net secondary revenue does not constitute a "changed circumstance" that would require BPA to reconsider its fish and wildlife funding levels in order to satisfy its Northwest Power Act obligations to fish and wildlife.

Issue 4.2.4

Whether BPA's policy objectives outlined in the Strategic Plan and cost projections from the IPR process become reviewable decisions when BPA issues its final rate determinations.

Parties' Position

The Environmental Parties argue that "[t]his rate proceeding is the final step in a series of actions culminating in a 'final rate determination . . .'" Environmental Parties Br., BP-22-B-ID-01, at 3. They argue that "BPA's discretionary policy decisions in this rate proceeding are also guided by the results of earlier processes." *Id.* at 4. In particular, they argue that BPA's Initial Proposal to hold power rates flat is "heavily influenced by" the "long-term objectives and goals" found in the 2018–2023 Strategic Plan. *Id.* The Environmental Parties argue that while BPA assumes costs "consistent with those developed during the [IPR] process," it should have updated fish and wildlife spending levels in light of the increased net secondary revenue forecast. *Id.* at 3, 5. The Environmental Parties acknowledge that BPA conducted an IPR 2 process in March and April 2021 and considered certain fish and wildlife funding issues during the IPR 2 process. *Id.* at 5 n.28. The Environmental Parties argue that judicial review of BPA's Strategic Plan, its most recent IPR process, and other intermediate decisions feeding into this rate case will be available as part of the review of BPA's final rate determination. *Id.* at 18.

In their Brief on Exceptions, the Environmental Parties argue that BPA has "utterly misunderstood" their argument. Environmental Parties Br. Ex., BP-22-R-ID-01, at 29. The Environmental Parties contend that they are not asserting that IPR or the Strategic Plan are final actions or become so with the final rate determination. *Id.* at 30. Instead, the Environmental Parties contend "the point made by the Environmental Parties is that the Strategic Plan and IPR process are reviewable as part of the review of BPA's final rate determination insofar as they fed into that rate determination." *Id.*

BPA Staff's Position

This is a legal issue raised in the Environmental Parties' initial brief.

Evaluation of Positions

Foundational to the Environmental Parties' argument is the view that BPA's Strategic Plan and projected funding levels in IPR become final agency actions by virtue of the Administrator's decision on BP-22 rates. The Environmental Parties assert that the Strategic Plan and IPR are "intermediate decisions" that become final and reviewable with the underlying rates, and as such, are subject to BPA's fish and wildlife legal obligations, such as "equitable treatment." *Id.* As explained below, this view is flawed because BPA's Strategic Plan and IPRs are not final, reviewable agency actions and BPA's final rate determinations in this case do not convert them into such actions.

Strategic Plan

The Environmental Parties argue that BPA's Strategic Plan is a "final" decision that will become reviewable with the final rate determination. *Id.* For support, they cite *Industrial Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638 (9th Cir. 2005) (*ICNU*). *Id.* at 17-18. The Court in *ICNU* relied on the oft-cited Supreme Court case of *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997), in which the Supreme Court set forth a two-part test for determining whether an agency action is final:

First, the action must mark the 'consummation' of the agency's decision making process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which legal consequences will flow.

117 S. Ct.at 1168 (citations omitted). The *ICNU* court further explained that "[t]he core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *ICNU*, 408 F.3d at 646 (citations omitted). The court also described the type of factors that indicate the agency's decision is final: "whether the [action] amounts to a definitive statement of the agency's position, whether the [action] has a direct and immediate effect on the day-to-day operations of the party seeking review, and whether immediate compliance [with the terms] is expected." *Id.* (citations omitted).

Applying these factors to BPA's Strategic Plan shows that it is not a final agency action under *Bennett v. Spear* or *ICNU*. As the Environmental Parties acknowledge in their brief, BPA's Strategic Plan includes "long-term objectives and goals." Environmental Parties Br., BP-22-B-ID-01, at 4. Regarding fish and wildlife costs, BPA's 2018–2023 Strategic Plan sets out a high-level strategy for BPA to "continue to be deliberate about controlling Fish and Wildlife Program costs, consistent with sound business principles and in the context of BPA's competitive position, while assuring that fish and wildlife receives equitable treatment with the other purposes of the system, as required by the Northwest Power Act." Strategic Plan, BP-22-M-ID-02-AT01, at 41. To do this, BPA expressed a general intent to operate within existing budgets adjusted by inflation. *Id.* It is important to note that this general objective applies to *all* of BPA's future budgets – not just fish and wildlife. *See* Strategic Plan, BP-22-M-ID-02-AT01, at 12. But, even more, this aspirational goal is not a final call on what BPA actually must spend to meet its various fish and wildlife obligations.

If BPA must take actions to meet its fish and wildlife responsibilities, nothing in the Strategic Plan precludes BPA from doing so.

Moreover, the Strategic Plan itself has no legal effect on day-to-day operations. No costs are established in the plan nor are any specific measures adopted or rejected. The Strategic Plan simply provides overarching policy guidance that, by its own terms, would be evaluated and subject to additional review in appropriate forums. *See id.* at 61. The Strategic Plan fails both prongs of the *Bennett v. Spear* test for finality. First, it is a general announcement of agency priorities that does not determine any final policy decisions (such as the rates adopted in this proceeding). Second, it includes high-level goals that do not determine rights or obligations from which legal consequences will flow.

Lastly, the non-final nature of the Strategic Plan does not change when BPA issues its final rate determinations. The Strategic Plan is a general statement of policy. To that end, there is nothing in the record that demonstrates BPA has abandoned its ratemaking discretion in favor of executing the Strategic Plan through its rate decisions. The Environmental Parties claim BPA's rate proposals include features mentioned in the Strategic Plan, such as "revenue financing" and "debt management." Environmental Parties Br., BP-22-B-ID-01, at 4. But these observations are of little legal import. The Strategic Plan describes many different general objectives for BPA to pursue. BPA's rate decisions to employ "revenue financing" while "holding rates flat" in this case arose from the specific facts and issues presented in the record, *see Fisher et al.*, BP-22-E-BPA-15, at 2–3, and not because of blind adherence to implementing the Strategic Plan.²⁸ The Strategic Plan is not a final, reviewable agency decision and no decision BPA has made in the final rates determination has changed that.

Integrated Program Review

The Environmental Parties next raise a number of non-specific challenges that BPA's fish and wildlife cost projections are too low or otherwise not sufficient to meet BPA's obligations. Environmental Parties Br., BP-22-B-ID-01, at 16-18. In support of their arguments, the Environmental Parties assert that BPA's projections of fish and wildlife funding from the IPR are intermediate decisions that become "final" decisions with the final rate determination. *Id.* at 18. This challenge is most properly viewed as a collateral attack on the decisions made by the agencies in the CRSO EIS process. *See* Issue 4.2.1. Nevertheless, insofar as the Environmental Parties argue that the fish and wildlife costs that BPA projects in the IPR process are challengeable as part of the BP-22 decision, their view is incorrect. Specifically, the Environmental Parties misconstrue the IPR process, BPA's budgeting process, and applicable law.

²⁸ The Environmental Parties also claim that BPA's fish and wildlife funding projections from IPR stem "in large part" from the Strategic Plan. *See* Environmental Parties Br., BP-22-B-ID-01, at 4. This issue is subsumed in the discussion of the non-finality of BPA's IPR projections. BPA's IPR funding projections are non-final and unreviewable, just as general policy guidance stemming from the Strategic Plan that is used to inform the development of those projections is equally non-final and unreviewable.

First, the IPR processes are not “intermediate” decisions on BPA’s spending levels on any program nor do they fix any funding obligations. As described in Section 1.2.1 of this Final ROD, IPR is designed to provide an orderly and transparent process where BPA can receive stakeholder feedback on its projections of various programmatic costs for the two-year period covered by BPA’s ratemaking. Importantly, IPR does not end the spending estimate process, and it is fully understood and stated in IPR that these projections may change. The Closeout Report BPA issues at the end of the IPR process is clear about the limited ratemaking purpose of the projections: “The projected program levels described in this close-out letter and report reflect BPA’s estimate of the appropriate spending levels, i.e., costs, to assume in establishing new power and transmission rates.” IPR Closeout Report, BP-22-M-ID-02-AT04, at 13; *see also* IPR 2 Closeout Report at 12. The transitory nature of these estimates is directly addressed in BPA’s IPR Closeout Report: “This close-out of the IPR process does not complete BPA’s decision-making process on spending levels. Adjustments to BPA’s spending projections may occur after the conclusion of the IPR.” IPR Closeout Report, BP-22-M-ID-02-AT04, at 13. The changeable nature of these programs underlie the reason these spending decisions are discussed in the informal IPR stakeholder process and expressly excluded from the scope of BPA’s Section 7(i) formal administrative proceeding: “Bonneville’s projections of its program costs and spending levels are not determined in rate proceedings.” 85 Fed. Reg. 77,189, 77,190 (Dec. 1, 2020). Simply put, there is no need to litigate in the rate case something that will be finally determined in other processes.

Second, the Environmental Parties’ argument misses that BPA’s *budgeting* process is not complete through IPR. BPA’s IPR projections are, ultimately, budget recommendations. Those recommendations are informed by various processes and sources, such as the Bureau, Corps and the public comment process from IPR. They also change through BPA’s detailed quarterly and annual budgeting processes that necessarily fluctuate based on changing business conditions and other factors. Furthermore, the BPA Administrator submits an annual budget to Congress, 16 U.S.C. § 838i(b), and those budget estimates are included in the federal budget, where they are subject to further review by the U.S. Department of Energy, the President, and the Congress. Changes may occur during any one of these reviews. *See, e.g.*, Government Corporate Control Act, 31 U.S.C. § 9103 (under which BPA submits a “business-type budget” to the President, and the President then “shall submit the budget . . . (as changed by the President)” as part of the annual Federal budget submission to Congress.) In short, the projections used in ratemaking are not “definitive”; rather, they are one step in the budgeting process.

Third, and most importantly, the Environmental Parties’ contentions also fail as a matter of law. Legally, BPA’s funding proposals from IPR are not final decisions nor do they become final when BPA sets rates. Agency funding recommendations are not final agency decisions. As the U.S. Court of Appeals for the D.C. Circuit has explained, “[an] agency’s proposal to Congress, developed to secure the funds, may serve as a useful planning document, but it is not a ‘rule’ – that is, ‘an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.’” *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 20 (D.C. Cir. 2006)

(citing 5 U.S.C. § 551(4); *Indep. Equip. Dealers Ass'n*, 372 F.3d 420, 428 (D.C. Cir. 2004)). The U.S. Supreme Court has also found that agency proposals to Congress or recommendations on how to allocate broad appropriations are not reviewable final agency actions. *See, e.g., Dalton v. Spencer*, 511 U.S. 462, 468-71 (1994) (holding that recommendations of Defense Base Closure and Realignment Commission were not reviewable as final agency actions); *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (citing *Heckler v. Cheney*, 470 U.S. 821, 831 (1995)) (“[A]n agency’s allocation of funds from a lump-sum appropriation requires ‘a complicated balancing of a number of factors which are peculiarly within its own expertise’: whether its ‘resources are best spent’ on one program or another; whether it ‘is likely to succeed’ in fulfilling its statutory mandate; whether a particular program ‘best fits the agency’s overall policies’; and, ‘indeed, whether the agency has enough resources’ to fund a program ‘at all.’”).

Thus, BPA’s budget recommendations from IPR do not become “final” with the final rate determinations. As described above in Issue 4.2.2, ratemaking is designed to recover projected or estimated costs. Recovering these projected costs in rates does not, indeed *could not*, implement actions or expenditures (whether for fish and wildlife or other programmatic initiatives) that invariably require further planning, studies, contracting, permitting, partnership coordination, environmental compliance work, subsequent decisions or a host of other factors to actually execute.

Ninth Circuit case law confirms that BPA’s final rate determinations do not need to be accompanied by final decisions on its fish and wildlife funding. In *Golden NW*, the Court concurred with BPA that its rate case was “not the forum for making decisions regarding which fish and wildlife alternative[s] to implement . . .” 501 F.3d at 1053. Instead, what BPA must provide in its rate case (and which was lacking in *Golden NW*) is a “realistic projection of fish and wildlife costs that accurately reflected the information available at the time the rates were set and the cost recovery mechanisms adopted.” *Id.* The court acknowledged the limited and non-final nature of BPA’s funding projections that are incorporated into the rate case: they are (1) estimates that are not final and may change as programs are actually selected; and (2) based on information available at the time the rates were set, but that may change because of new facts. That is all BPA is required to include in rates and that is all BPA has done here with its projections from IPR. Moreover, just as the court in *Golden NW* found that BPA’s rates need not be based on final, reviewable funding decisions, BPA’s use of projected costs in ratemaking does not *create* final, reviewable funding decisions.

The Environmental Parties, however, contend that “as a practical matter” BPA “substantially adhere[s]” to these projections, and therefore, they must be viewed as “final.” *Environmental Parties Br.*, BP-22-B-ID-01, at 19–20. While BPA certainly may attempt to operate within its projections, those attempts in no way make its projections any more final. Indeed, to the extent BPA’s actual ability to achieve its projections is a measure of the “finality” of its funding recommendations, the record would strongly suggest that BPA’s projections are anything but binding. Consider BPA’s transmission capital budget. As noted by several parties in the rate proceeding, BPA’s projected IPR budgets for transmission capital spending exceeded the actual execution of transmission projects over

several rate periods. *See, e.g.,* Kester *et al.*, BP-22-E-JP03-01, at 12; Arthur, BP-22-E-MS-01, at 26–27, 31. BPA acknowledges this gap as well: “BPA acknowledges that actual capital spending historically has been lower than what has been forecast in the Capital in Review or IPR processes.” Fredrickson *et al.*, BP-22-E-BPA-36, at 31. In each prior rate period, BPA developed a projection of its expected capital programs in IPR. Nonetheless, for a variety of reasons, those projections did not match actual expenditures. This gap exists because BPA did not decide in IPR or the final rate decision which transmission projects it would pursue during the rate period. The IPR projection was only an estimate of the funding needs for the next rate period; that estimate could, of course, change for any number of reasons.

Furthermore, while BPA’s cost estimates are based upon existing or anticipated obligations, they do not create such obligations nor do they have any binding legal effect on those obligations. Said another way, BPA’s inclusion of a program in its forecast of costs for rate purposes in no way decides that such program will be pursued. Similarly, if a cost item was not included in BPA’s projected funding levels, that omission in no way prohibits BPA from funding that particular measure during the rate period. To that end, the rate case contains no findings of exactly which programs and projects will be funded by the revenues recovered in rates, a point the Environmental Parties readily acknowledge. *See* Environmental Parties Br., BP-22-B-ID-01, at 22 (“BPA need not and should not decide during this rate case what specific measures should receive additional funding, and it need not even decide at this time what precise amount of funding is needed to satisfy its ‘equitable treatment’ obligation.”). BPA’s funding projections are general in nature to reflect the reality that BPA is not finally deciding what programs to pursue or how it will meet its various obligations over the rate period. That flexibility is needed to enable the Administrator to adjust his spending levels as projects are delayed, postponed or canceled, priorities shift, or to respond to new projects or obligations. BPA builds into rate projections certain allowances for these fluctuations, and has robust risk mechanisms to manage large changes in spending and revenues. *See* Mandell *et al.*, BP-22-E-BPA-46, at 7, 9-10 (identifying six risk mitigation features available to ensure BPA recovers its costs).

In summary, BPA’s projections of its funding for fish and wildlife in the IPR process is not “the consummation of the agency’s decision making” on the level of funding for fish and wildlife. As explained above, they are estimates that are subject to change. For ratemaking purposes, the IPR process provides an estimate of costs “to assume in establishing new power and transmission rates,” based on realistic projections using the best available information at the time rates are set. IPR Closeout Report, BP-22-M-ID-02-AT04, at 13; *see Golden NW*, 501 F.3d at 1053. The Environmental Parties attempt to recast the IPR process as more than budget recommendations is both factually and legally misplaced.

Furthermore, applying the same logic discussed in Issues 4.2.2 and 4.2.3, inclusion of these projections in the final rates determinations does not convert these recommendations into final decisions that must be reviewed under “equitable treatment” or any other fish and wildlife requirements of the Northwest Power Act. Neither the Strategic Plan nor the IPR are final or reviewable BPA decisions, and nothing BPA has decided in this rate case has converted them into such decisions.

In their Brief on Exceptions, the Environmental Parties argue that BPA has “utterly misunderstood” their argument. Environmental Parties Br. Ex., BP-22-R-ID-01, at 29. The Environmental Parties contend that they are not asserting that IPR or the Strategic Plan are final actions or become so with the final rate determination. *Id.* at 30. Instead, the Environmental Parties contend “the point made by the Environmental Parties is that the Strategic Plan and IPR process are reviewable as part of the review of BPA’s final rate determination insofar as they fed into that rate determination.” *Id.* But this argument remains unpersuasive.

It is clear from the Environmental Parties’ briefs that they seek to challenge the underlying rationale that BPA used in developing its proposal for the BP-22 rate period. As they explain: “BPA at some point made a decision to hold fish and wildlife funding levels flat during the BP-22 rate period, and that decision – though non-final at the time it was made – is reviewable as part of the review of the final rate determination.” *Id.* at 31 (emphasis omitted). This description shows that their challenge is not to the substance of the evidence informing the projections for the BP-22 rate period, which is contained in the various rate studies included in the BP-22 record. Rather, the essence of Environmental Parties’ complaint lies with alleged intermediate “decisions” behind the projections BPA is using in this rate case. *See Confederated Tribes*, 342 F.3d at 929 (expressing suspicion as to the true nature of petitioners’ challenge and whether it amounted to challenge of earlier decisions). The Environmental Parties contend BPA’s funding decision (and the incremental decisions leading to those projections) must be reviewable because “otherwise, BPA would be able to completely insulate its programmatic funding decisions from ‘equitable treatment’ scrutiny simply by making those decisions in non-final forums – precisely what [the Administrative Procedure Act] § 704 is meant to keep agencies from doing.” Environmental Parties Br. Ex., BP-22-R-ID-01, at 15.

The flaw in the Environmental Parties’ argument is that it presumes *all* agency inputs to the ratesetting process are reviewable.²⁹ The Environmental Parties are correct that under the Administrative Procedure Act “[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.” 5 U.S.C. § 704. However, Section 704 *presumes* that the “preliminary, procedural, or intermediate” agency action or rule *is* reviewable at some point, though not *directly* reviewable when first made. This is where the Environmental Parties’ argument fails. BPA’s Strategic Plan and fish and wildlife cost projections in the IPRs are not independently

²⁹ In an effort to *find* a forum to review BPA’s funding decisions, the Environmental Parties contend that the rate case is an “appropriate occasion” to raise BPA’s compliance with “equitable treatment” for fish and wildlife funding because it covers the rate period as opposed to “shorter time periods.” Environmental Parties Br. Ex., BP-22-R-ID-01, at 20. Even if the equitable treatment requirement applied to BPA fish and wildlife funding decisions, which BPA strongly disputes, there is no reason that “equitable treatment” would need to be shown in BPA’s rate cases as part of the final rate determination. BPA has discretion to demonstrate equitable treatment in a manner that allows for meaningful review. *See Confederated Tribes*, 342 F.3d at 931-32.

reviewable decisions and they do not become reviewable as part of the final BP-22 ratesetting action.

Courts “have long recognized that the term [agency action] is not so all-encompassing as to authorize [them] to exercise ‘judicial review over everything done by an administrative agency.’” *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (quoting *Hearst Radio, Inc. v. FCC*, 167 F.2d 255, 277 (D.C. Cir. 1948)). They have expressly recognized several types of pre-decisional steps taken by an agency in anticipation of agency action that are not reviewable, even under the umbrella of a final decision. *See Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19-20 (D.C. Cir. 2006). For example: preparing proposals, conducting studies, consulting with interested parties, making budget requests, and other such activities “that comprise the common business of managing government programs” are well beyond the scope of judicial review. *Id.* at 20. Importantly, while expenditure assessments and budget proposals “may serve as [] useful planning document[s],” they do not fall within the scope of § 704. *Id.* For example, when analyzing whether the Bureau of Land Management’s Budget Initiative to request additional funding for the Wild Horse and Burro Program was reviewable, the court concluded that “[t]he individual roundups might qualify; the Bureau’s budget proposal does not.” *Id.* The court explained:

Judicial review of such budget initiatives would wreak havoc with the normal operations of agencies and the executive branch. Agencies propose all kinds of programs in the budget process, and they are not the only actors in that process. The President decides which agency budget requests to forward to Congress.

Id. at 20 (citing *Judicial Watch v. Dep’t of Energy*, 412 F.3d 125, 129-30 (D.C. Cir. 2005)).

BPA’s proposed programmatic spending levels in IPR are just that: planned spending levels used to inform BPA’s budget proposal, where BPA is not the only actor in the process.

Moreover, BPA has flexibility in developing spending projections like other Federal agencies, and its budget is ultimately determined by Congress. As explained earlier, it is well established that “[an] agency’s proposal to Congress, developed to secure the funds, may serve as a useful planning document, but it is not a ‘rule’ – that is, ‘an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.’” *Id.* (citing 5 U.S.C. § 551(4); *Indep. Equip. Dealers Ass’n*, 372 F.3d at 428). BPA acknowledges that its IPR process, wherein it shares its funding projections with stakeholders, is uniquely transparent for a Federal agency. But simply because BPA engages in that informal process, and uses those projections to recover the costs of the Federal investment, does not somehow create a new line of law that takes non-reviewable budget submissions of a Federal agency and converts them into reviewable “interim” agency decisions that become part of the final rate determination.

The Environmental Parties rely on three cases in support of the idea that BPA’s Strategic Plan and IPR projections must be reviewable at the time of a final rate determination: *Jama v. Dep’t of Homeland Sec.*, 760 F.3d 490, 497 (6th Cir. 2014); *Ohio Forestry Ass’n, Inc. v.*

Sierra Club, 523 U.S. 726, 734 (1998); *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 645–47 (9th Cir. 2005) (hereinafter *ICNU*). From here, they claim that the intermediate decisions that led to BPA's projections are reviewable even though they were “non-final decisions leading up to the rate case” Environmental Parties Br. Ex., BP-22-R-ID-01, at 14.

The *Jama* case is distinguishable because an intermediate determination in an immigration adjudication designed to ensure due process and individuals' rights is not analogous to the vastly different scenario at issue here – broad policy objectives described in the Strategic Plan and budget submittals prepared in the IPR process to provide the public with transparency regarding projected agency spending levels.

The *Ohio Forestry* case supports BPA's position rather than the Environmental Parties' position, insofar as the Environmental Parties can point to no concrete injury that they will suffer based on BPA's use of IPR spending levels as projections in rates, or indeed from what the rates ultimately established. In *Ohio Forestry*, the U.S. Supreme Court dismissed challenges to principles established in an overall forest management plan because the *Sierra Club* could not demonstrate an injury because no implementation of the plan had occurred. The Court acknowledged that challenges to the plan may be appropriate when the plan was implemented and if there was concrete injury stemming from the Plan, such as when a permit approval authorized the cutting of trees or a decision closed a section of forest to certain activities. The *Sierra Club* had generally alleged that the plan made “logging more likely in that it [was] a logging precondition.” The Court rejected this alleged injury because the plan “[did] not give anyone a legal right to cut trees, nor [did] it abolish anyone's legal authority to object to trees being cut.” 523 U.S. at 730, 733. Similarly, BPA's Strategic Plan announced overall general policy direction and goals for all the agency's programs, and the IPR planning budgets did not guarantee or disallow any actual implementation of particular actions.

Like the *Sierra Club* in *Ohio Forestry*, the Environmental Parties cannot point to any specific injury resulting from the use of IPR funding projections in the ratesetting process, or their incorporation in rates. Instead, they rely on generalized assertions that an increase in BPA funding of fish and wildlife mitigation and enhancement activities is warranted because the current projections “threaten[] to negatively affect fish.” Environmental Parties Br. Ex., BP-22-R-ID-01, at 15. More on point here, like the complainants in *Fund for Animals*, the Environmental Parties are also unable to demonstrate a cognizable injury based on proposed agency funding levels. As the court in *Fund for Animals* explained, “[w]hen the Bureau sought funding from Congress, it did not harm or affect the plaintiffs in this case; and they were not harmed or affected when Congress appropriated the \$9 million.” 460 F.3d at 20. Indeed, the court observed that, “there is ‘considerable legal distance’ between the appropriation of funds to implement a gather ‘strategy’ and the actual removal of wild horses and burros.” *Id.* at 22 (citing *Ohio Forestry Ass'n*, 523 U.S. at 730). As discussed above in Section 4.2.2, the Environmental Parties cannot demonstrate a concrete injury based on alleged significant impacts to fish and wildlife that could be caused by the use of IPR planning budgets in the ratesetting process, or which could be caused by the rates themselves. The Environmental Parties attempt to establish such an injury by

pointing to mitigation measures that the agency could adopt in forums where actions that more directly affect fish populations in the river have been decided. *See* Environmental Parties Br. Ex., BP-22-R-ID-01, at 15-16.

Finally, in *ICNU*, the Court found that challenges to BPA's implementation of the Safety-Net Cost Recovery Adjustment Clause (SN CRAC) were premature until FERC had reviewed and approved BPA's final rates. In *ICNU*, customers could not establish injury from the application of adjusted rates as a result of the SN CRAC because the rates had not yet been finalized. The court explained that although the SN CRAC was a "predicate act for rate readjustment, the trigger determination itself has no final consequences." 408 F.3d at 647. The court dismissed the case for lack of jurisdiction because FERC had not provided final approval for rates. *Id.* Contrary to the Environmental Parties' reading (Environmental Parties Br. Ex., BP-22-R-ID-01, at 14), the case stands for the sole proposition that BPA rates must be approved by FERC before they are challengeable as "final agency actions." *Id.* at 644. The Ninth Circuit did not "reach a decision on any other issue raised by the parties," including whether the SN CRAC determination would be reviewable as part of a final rate determination. *Id.* at 647.

Ninth Circuit jurisprudence already supports the distinction in the context of BPA's fish and wildlife expenditures as inputs to the rate case rather than decisions available for judicial review as part of a final rate determination. In *Golden NW*, the court treated BPA's fish and wildlife cost projections as "facts" that the agency relied on to make its final decision, rather than any kind of "preliminary, procedural, or intermediate agency action or ruling" by itself. 501 F.3d at 1052; 5 U.S.C. § 704.

The Environmental Parties also try to show that the final effect of BPA's decision to hold its fish and wildlife funding at or below inflation is supported by its actual practice. Environmental Parties Br. Ex., BP-22-R-ID-01, at 18-20, 32. The Environmental Parties present tables comparing BPA's fish and wildlife funding projections and its actual spending. *Id.* at 19-20. Two points can be drawn from these charts. First, one table shows BPA frequently manages its budgets within its projections. (Indeed, it would be cause for concern were that not the case.) Among its many statutory duties, BPA is required to operate consistent with sound business principles. *See* 16 U.S.C. § 839e(a)(1); *Pac. Nw. Generating Co-op. v. Bonneville Power Admin.*, 596 F.3d 1065, 1073 (9th Cir. 2010). Planning budgets based on known commitments and obligations, and then adhering to this, reflects a sound business practice. Showing that BPA routinely spends within its projected budget is unremarkable and hardly cause for throwing out current budget projections and starting anew.

Second, the evidence presented in the Environmental Parties' arguments support BPA's original point – that BPA's projections do not establish how much BPA will actually spend on fish and wildlife. In all of the charts provided by the Environmental Parties, BPA's spending is lower than the projections. In one sense, then, BPA has consistently *overstated* its projected fish and wildlife spending to ensure that adequate funding is available. As BPA has maintained all along, decisions outside of the rate case decide which programs to pursue, which to postpone, and ultimately which to commit BPA funds to fish and wildlife.

The Environmental Parties' tables show that BPA's view is the correct one. The actual funding of programs is where the decisions are made; not in the general projections for ratemaking.

Moreover, if the Environmental Parties were correct that *any* input into a ratemaking decision becomes reviewable with the final rate determination, there would be virtually *no* issue, decision, policy, contract, or action that would fall outside of BPA's rate determinations. BPA must recover its "total system costs," 16 U.S.C. § 839e(a)(2)(B), in rates and, as such, virtually everything BPA does can in some way be traced to an assumption used in ratemaking. Administering the Northwest Power Act Section 7(i) rate case for the areas identified by Congress in Section 7 is already complex enough. Turning the final rate determination into a referendum on every underlying policy, statement, or position that "fed into" that decision would make the rate proceeding an unworkable, jumbled administrative nightmare. Mercifully, there is no indication in Section 7 or any other law that BPA must go here. All that BPA must decide in its final rate determinations is how to recover its cost obligations with appropriate allocation across ratepayer classes in accordance with the requirements of Section 7, which BPA has done.

In summary, the non-final policy goals of the Strategic Plan and the projections developed in IPR are not reviewable. Further, as mentioned in Issue 4.2.2, since these documents are non-reviewable, they similarly cannot form the basis of an alleged "string of decisions" that culminate in a "significant impact" on fish and wildlife as part of the final rate determination, as contended by the Environmental Parties.

Decision

BPA's policy objectives outlined in the Strategic Plan and cost projections from the Integrated Program Review processes do not become reviewable decisions when BPA issues its final rate determinations.

Issue 4.2.5

Whether BPA should reject the Settlement and agree to the Environmental Parties' requested action to commit a "substantial portion" of the projected net secondary revenue increase to fish and wildlife funding.

Parties' Positions

The Environmental Parties argue that the Administrator "should reject the Settlement Proposal and commit to increased funding for measures to protect, mitigate, and enhance fish and wildlife." Environmental Parties Br., BP-22-B-ID-01, at 22. Or, in an alternative, the Environmental Parties contend BPA should devote a "substantial portion" of the projected increase in net secondary revenue to fund fish and wildlife programs. *Id.* at 3, 10, 15, 17, 22. In its Brief on Exceptions, the Environmental Parties reiterate their position that the settlement must be rejected, but add that they are not requesting specific outcomes, but have identified "procedural" errors BPA must correct before proceeding with its final rate determinations. Environmental Parties Br. Ex., BP-22-R-ID-01, at 32-34.

BPA Staff's Position

BPA fish and wildlife funding projections are not decided in BPA's ratemaking proceedings, but are evaluated in other processes, such as IPR. Mandell *et al.*, BP-22-E-BPA-46, at 3. Nevertheless, BPA's funding projections for its fish and wildlife projects have been reviewed and are based on the best available information. *Id.*; see also IPR 2 Closeout Report at 4, 11.

Evaluation of Positions

The Environmental Parties propose a remedy for perceived defects in BPA's legal compliance through this rate case. In doing so, the Environmental Parties assert that the "unexpected surge in surplus revenue [gives] BPA a 'unique' opportunity to shore up its financial position through revenue financing, [and] also presents an opportunity for fish and wildlife. BPA has a statutory duty to take advantage of that opportunity." Environmental Parties Br., BP-22-B-ID-01, at 16. Paradoxically, elsewhere in their brief, the Environmental Parties concede that "BPA has discretion to use surplus revenue for various purposes, including bolstering its financial health." *Id.* at 13. By not considering using the projected increase in revenue for additional fish and wildlife funding, the Environmental Parties contend BPA is violating the Administrative Procedure Act and ignoring an "important aspect" of the decision before it. *Id.*; see also *id.* at 8.

BPA has already addressed above the reasons it does not, as a matter of law, have an obligation to revisit its fish and wildlife funding projections in this case under equitable treatment or other provisions of the Northwest Power Act. That discussion also applies to BPA's decision to adopt the Settlement discussed in Section 2 of this Final ROD.

More generally, BPA understands the Environmental Parties position as asserting that, even if BPA does not have a legal obligation under the Northwest Power Act to reconsider its fish and wildlife projections, BPA nonetheless should have reassessed those funding levels before adopting the Settlement. To that end, the Environmental Parties oppose the Settlement because it allegedly forecloses other uses for the projected increase in revenue, such as increased projected fish and wildlife funding. See Environmental Parties Br., BP-22-B-ID-01, at 2 ("Whether or not the Settlement Proposal represents a fair compromise between BPA and its customers, it is a compromise that is fundamentally unfair to fish and wildlife."). The Environmental Parties contend BPA can remedy this error by allocating a "substantial portion" of that increase to its fish and wildlife budgets, instead of reserving it all for its customers and future revenue financing. *Id.* at 3, 10, 15, 17.

BPA's proposal for the use of the projected increase in net secondary revenue for the BP-22 rate period, as embodied in the Settlement, is a reasonable and sound business decision that is supported by the record in this case.

First, it is important to understand the nature of the "increase" discussed in BPA's testimony and cited by the Environmental Parties. BPA Staff explained the unique situation it faced in this case was a *projected* increase in net secondary revenue for the BP-22 rate period that could result in a 4.5 percent rate decrease. Fisher *et al.*, BP-22-E-BPA-15, at 2. A large portion of this reduction was fueled by a \$100 million projected increase in revenue

from BPA's net secondary sales, which amounted to a 40 percent increase over the BP-20 forecast. Fisher *et al.*, BP-22-E-BPA-35, at 21. BPA's net secondary sales are a source of great uncertainty and risk in BPA rate forecasts. Large swings in BPA's net secondary sales are common, with the standard deviation varying between \$125 million and \$180 million. *Id.* at 22. Over the past 13 years, BPA has missed its net secondary sales forecast in eight of 13 years. *Id.* In five of those years, actual net secondary sales revenue came in at more than \$100 million *below* projections. *Id.* Those missed projections were offset by BPA through reductions in its financial reserves, requiring BPA to take concerted action to rebuild those reserves. *Id.* at 22. Faced now with a 40 percent increase in what has historically been BPA's largest source of volatility and uncertainty, BPA Staff understandably expressed "caution" with proposing to set rates assuming these increases were certain. *Id.* Thus, BPA Staff looked for other ways to manage this risk while also accounting for these higher projections in its rates.

The proposed solution adopted in the rate case as part of the Settlement was to allow the BP-22 power rates to decline slightly, and use up to \$40 million of the projected net secondary revenue increase to reduce debt issuance through revenue financing. *See* Issue 4.2.2; *see also* Appendix A (Settlement), Attachment 1, § 1.a. Revenue financing simply means paying with current revenues a cost that could otherwise be paid for with long-term debt. Fisher *et al.*, BP-22-E-BPA-15, at 6. BPA identified many benefits of this approach, including reducing borrowing costs, preserving scarce federal borrowing authority, de-leveraging BPA's power business, rate stability, and supporting the agency's credit rating. *See id.* at 8-13; Fisher *et al.*, BP-22-E-BPA-35, at 4. Importantly, this proposal is a *conditional* use of the projected increase in revenues for revenue financing. Fisher *et al.*, BP-22-E-BPA-35, at 22-23. That is, for rate setting, BPA would presume to use \$40 million of the projected net secondary revenue increase for revenue financing, but only to the extent BPA believed it could do so without causing a decline in Power's financial reserves for risk relative to the start of the rate period. *Id.* This approach effectively converts the \$40 million in revenue financing into a liquidity preservation tool that would be employed to fill gaps if and when BPA's projected costs (including cost projections from fish and wildlife funding obligations) or net revenues deviate from forecasts and impact financial reserve levels. *Id.* The Settlement's proposed revenue financing mechanism provides unprecedented risk mitigation for both BPA's costs (including its fish and wildlife costs) and revenues, and therefore, is an eminently sound business decision.

The Environmental Parties contend in their brief that BPA's proposed use of its increase in net secondary revenue presents a binary outcome, in which BPA's customers win and its fish and wildlife interests lose. *See* Environmental Parties Br., BP-22-B-ID-01, at 9 ("rather than going back and reconsidering fish and wildlife spending levels in light of changed circumstances, BPA's Initial Proposal completely ignored the agency's "equitable treatment" obligation, instead treating future net secondary surplus revenues as a pot of money to be used solely for non-fish purposes."). That is inaccurate as the risk mitigation benefits of the Settlement extend to all of BPA's programs, including BPA's fish and wildlife program. Specifically, by protecting BPA cash reserves, BPA is strengthening its ability to pay for fish and wildlife costs that may come in above projected amounts. *See* Issue 4.2.2,

where BPA's risk mitigation measures are discussed. In addition, many of the fish and wildlife programs are part of BPA's capital budget, meaning that BPA generally will consume borrowing authority to finance these costs. *See, e.g.,* Mandell *et al.*, BP-22-E-BPA-46, at 3. Taking actions now to preserve that borrowing authority is a step towards ensuring that BPA can continue to fund its capital programs, including applicable fish and wildlife programs, using cost-effective financing for years to come. In these ways, the Settlement is not divvying up the projected net secondary revenue as a "pot of money to be used solely for non-fish purposes." *See* Environmental Parties Br., BP-22-B-ID-01, at 9. Instead, the Settlement provides broad financial benefits that support BPA's ability to meet its statutory obligations, including its obligations to fund fish and wildlife actions.

Finally, BPA finds unpersuasive the Environmental Parties' argument that BPA should reject the Settlement because it did not take into account the Environmental Parties' alternative funding proposals. The Settlement that BPA proposes to adopt ends significant controversy in the rate case and provides real, tangible benefits through near-term rate relief, support for BPA's rate period cost recovery, and benefits to BPA's long-term financial health. *See* Section 2. The Settlement provides these benefits through specific actions BPA takes in its final rate determinations. *See* Section 2; *see also* Appendix A (Settlement), Attachment 1.

The specificity of the Settlement and its associated benefits stand in stark contrast to the vague and indefinite requests of the Environmental Parties. Throughout its brief, the Environmental Parties demand that BPA commit additional funds for fish and wildlife: "BPA must . . . commit[] a substantial portion of incremental revenue . . . to improve implementation of fish protection, mitigation, and enhancement measures." Environmental Parties Br., BP-22-B-ID-01, at 10; *see also id.* at 15 (noting BPA should "boost funding for measures to 'protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by' the Federal Columbia River Power System"); *id.* at 22 ("[T]he Administrator should reject the Settlement Proposal and commit to increased funding for measures to protect, mitigate, and enhance fish and wildlife."). The Environmental Parties never identify what additional amount BPA must commit. *See id.* Indeed, the Environmental Parties contend that BPA does not need to decide in its final ratemaking decision what amounts are needed to meet its obligations. *See id.* at 22 ("BPA need not and should not decide during this rate case what specific measures should receive additional funding, and it need not even decide at this time what precise amount of funding is needed to satisfy its "equitable treatment" obligation."). Nor have they presented any evidence on the record demonstrating that BPA's funding projection will not meet its fish and wildlife obligations. In the end, BPA is left with the ambiguous request that it reject a broadly supported and principled rate settlement in order to "increase funding" for fish and wildlife to some indefinite level.

Weighing these alternatives, BPA finds that there can be little question that adoption of the Settlement is reasonable and a proper exercise of its ratemaking discretion. In choosing to adopt the Settlement, BPA is guided by the requirement that its decision must not be arbitrary, capricious, an abuse of discretion or otherwise not consistent with the law, *see S. Cal. Edison v. Jura*, 909 F.2d 339, 342 (9th Cir. 1990), and must be supported by evidence

in the ratemaking record. *See* 16 U.S.C. § 839f(e)(2); *see also Cent. Lincoln Peoples' Util. Dist.*, 735 F.2d at 1116. BPA's ratemaking decision must also be made in accordance with "sound business principles." 16 U.S.C. § 839e(a)(1); *see also Public Power Council, Inc., v. Bonneville Power Admin.*, 442 F.3d 1204, 1206 (9th Cir. 2006). BPA finds that its decision to adopt the Settlement, with the immediate near-term and long-term benefits described above, soundly meet these requirements. Further, BPA has considered the Environmental Parties' concerns about equitable treatment, additional funding for Council fish and wildlife programs, the Administrative Procedure Act, as well as their request that BPA, as a matter of its discretion, include an indefinite amount of additional funding for fish and wildlife, and concludes that none of these objections persuade BPA that its decision here is unreasonable or contrary to law.

In its Brief on Exceptions, the Environmental Parties reiterate many of the arguments they make above to support their view that, under the Northwest Power Act and the Administrative Procedure Act, BPA must reject the settlement. Environmental Parties Br. Ex., BP-22-R-ID-01, at 32-33. In addition, though, they now also contend that these errors are "procedural" in nature, and that the flaw in BPA's decision is not in the ultimate "outcome" BPA must reach, but that BPA must "fulfill" these obligations to make a lawful rate determination. *Id.* at 33.

BPA disagrees that the final rate determination, and its decision to adopt the settlement, must be rejected because of alleged procedural violations stemming from the Northwest Power Act and the Administrative Procedure Act. As BPA has explained above, BPA has met all of the requirements prescribed by the Northwest Power Act and the Court to set rates to recover its costs – a point the Environmental Parties have failed to refute. BPA has already explained above what procedures Congress prescribed for BPA to set rates, and those procedures do not include conducting independent analysis in its final rate determinations of either Section 4(h)(11)(A)(i) or (ii). *See* Issues 4.2.1, 4.2.2.

The Environmental Parties' arguments become no more persuasive by recasting them as "procedural." Article III standing criteria³⁰ bear no relevance here. Nor does standing doctrine replace the Ninth Circuit's standard for considering when BPA has to demonstrate whether its actions provided equitable treatment to fish and wildlife: "when BPA makes a final decision that significantly impacts fish and wildlife." *Confederated Tribes*, 342 F.3d at 931. Environmental Parties suggest that they met this standard by presuming that "compliance with the procedural requirements of § 4(h)(11)(A)(ii) *could* lead BPA to increase funding for fish and wildlife mitigation . . . and that such increased funding *could* benefit fish and wildlife." Environmental Parties Br. Ex., BP-22-R-ID-01, at 27-28. This, however, is not a test of Environmental Parties' standing to sue. It is a formal ratemaking process evaluating whether BPA is basing its proposed rates on "substantial evidence." Two "coulds" and a "presumed" do not amount to evidence substantial enough to warrant BPA revisiting its proposed rates.

³⁰ Environmental Parties Br. Ex., BP-22-R-ID-01, at n.112.

The Environmental Parties' procedural argument amounts to an attempt to create a new threshold for litigating Section 4(h)(11)(A) issues because they could not meet the existing standard stated in the plain language of the statute and Ninth Circuit jurisprudence, as explained throughout this chapter. Unable to provide substantial evidence of BPA having triggered that standard, they proffer another – one without any basis whatsoever in the statute itself. For these and the reasons reiterated throughout this Final ROD, BPA rejects the Environmental Parties' procedural argument.

BPA's decision to adopt the settlement as part of the final rate determination is a sound decision, supported by the administrative record, and in accordance with the requirements of the Northwest Power Act and applicable law.

Decision

BPA's decision to adopt the Settlement is a reasonable exercise of BPA's ratemaking discretion. The Settlement ends substantial controversy in the rate proceeding, provides near-term rate relief to its customers, strengthens BPA's cost recovery over the rate period (including cost recovery for BPA's fish and wildlife funding), and supports BPA's long-term financial health. Furthermore, BPA's decision to not revise or otherwise commit a "substantial portion" of the projected net secondary revenue increase to fish and wildlife funding is supportable and sound.

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5.0 PARTICIPANT COMMENTS

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

As described in section 1, the Federal Register notice for this proceeding set a deadline of March 1, 2021, for participant comments. 85 Fed. Reg. 77,189, 77,193 (Dec. 1, 2020). BPA received four comments through the participant comment process. A summary of each of the participant comments, and BPA's responses, are provided below.

Comment BP22200001 – Charles Pace. Participant Pace commented: "Section 839e(i)(2) of the Northwest Power Act requires that expeditious hearings be conducted 'to develop a full and complete record and to receive public comment in the form of written and oral presentation of views, data, questions, and related arguments.['] Subsection (A) requires 'in any hearing . . . any person shall be provided an adequate opportunity . . . to offer refutation or rebuttal of any material submitted by any other person or the Administrator. Thus, the statutory language requires all PERSONS be allowed opportunity to participate in refutation and rebuttal. The [BP-22] rate case schedules established by the administrative hearing officer for both transmission proceeding and power proceedings exclude persons who are 'participants' – not just 'parties' – to offer refutation and rebuttal. Put somewhat differently, the schedules established for the rate proceedings are not in accord with the requirements of law. The fact that BPA has routinely violated section 839e(i)(2) in past hearings going back to at least the advent of 'tiered rates' makes it no less unlawful. In fact, I'd argue BPA's longstanding violations of law make it absolutely imperative that this practice, which excludes participants from refutation and rebuttal by the express provisions of the scheduling order, be discontinued."

Response to Comment BP22200001. Participant Pace suggests that the participant comment deadline does not provide participants with an opportunity to offer refutation and rebuttal and is therefore contrary to the Northwest Power Act. The Act provides the public an opportunity to submit comments related to the proposed rates. 16 U.S.C. § 839e(i). The Administrator has discretion to create the procedural rules for proceedings conducted pursuant to Section 7(i) of the Act.

BPA's Rules of Procedure provide all persons with the opportunity to provide comments as either a "party" or a "participant." Persons wishing to participate in the evidentiary hearing (*e.g.*, to submit direct and rebuttal testimony) and conduct cross examination may petition to intervene as a party. *See* Rules of Procedure § 1010.6. Persons wishing to submit comments without being subject to the duties of a party may submit comments as a participant. *Id.* § 1010.8.

The procedural schedule set the date for participant comments on March 1, 2021, which allowed participants the opportunity to submit comments after all issues had been identified by the litigants in the formal hearing; that is, after BPA filed its Initial Proposal and the parties filed their direct cases (the direct cases respond to BPA's proposal and include any additional affirmative arguments). BPA did not receive any requests to extend the participant comment deadline.

Comment BP22200002 – Scott Coe, Emerald PUD. Participant Coe characterizes the power revenue financing proposal as disturbing and disappointing in that BPA appears to be taking unilateral steps to avoid passing rate benefits on to its customers. Mr. Coe argues that a “revenue financing” charge is not cost-based and should be disallowed in the current rate proceedings. He also maintains that the power revenue financing proposal is the second time recently that BPA has driven up the price of the Regional Dialogue contract products with a non-cost-based pricing component; the first was BPA's Financial Reserves Policy two years ago. Mr. Coe asserts that these two items are not costs, but instead concern financial goals which should have been part of the Regional Dialogue contract agreement. Mr. Coe also questions what might happen if the proposal is adopted and higher net secondary revenues fail to materialize as projected.

Mr. Coe states that it appears that BPA feels it is better equipped to manage customers' dollars and that individual utilities cannot be trusted to make sound investments at the local level. He also argues that this proposal will impact public power's decision-making when it comes to post-2028 contracts.

Response to Comment BP22200002. Chapter 2 of this Final ROD explains that the Administrator is adopting a Settlement that addresses the final proposed rates as well as BPA's agreement to hold workshops on certain topics prior to the BP-24 rate case. The power revenue financing proposal is addressed in the Settlement, and has been reduced from \$95 million per year to \$40 million per year. Settlement, Attachment 1, § 1.a. The Settlement also provides that the average PF Tier 1 effective rate will decrease by up to 2.5 percent depending on the forecast of net secondary revenue. *Id.* Likewise, the public workshops on financial issues that BPA will hold are specified in the Settlement. *Id.* § 1.c. The issues and concerns raised by Mr. Coe can be discussed at these workshops.

PNGC raised a similar concern with regard to the Regional Dialogue (RD) contract agreement. Gray & Mendonca, BP-22-E-PN-01, at 8–10. Staff addressed this concern in its rebuttal testimony where it explained that neither the RD contracts nor the Tiered Rate Methodology (TRM) constrains BPA's ability to either (1) change the way it finances its capital assets, or (2) manage its financial risk. Fisher *et al.*, BP-22-E-BPA-35, at 37-42.

Please note that BPA's Initial Proposal was to forgo revenue financing to the extent that Power financial reserves were expected to decrease for any reason, including net secondary revenue that did not materialize as forecast, relative to start-of-rate-period levels. Staff provided this clarification of its intent in its rebuttal testimony. *Id.* at 19-20.

Comment BP22200003 – Lukas. Participant Lukas stated that the proposed use of \$95 million for revenue financing of capital programs is unacceptable and should be withdrawn. Mr. Lukas states that BPA surprised its customers with an ill-conceived

proposal to replace badly needed rate relief with an effort to cross-subsidize business unit capital activity. Mr. Lukas states that BPA has done little to address long-term access to capital challenges besides seeking more money from its customers. Mr. Lukas believes that the revenue financing proposal violates both the spirit and intent of BPA's contractual obligations to customers to provide power at cost, which includes a net secondary sales credit.

Response to Comment BP22200003. As described in response to the previous comment, the Settlement reduces the amount of proposed power revenue financing to \$40 million per year and provides that the average PF Tier 1 effective rate will decrease by up to 2.5 percent depending on the forecast of net secondary revenue. Staff's testimony in this proceeding fully explained the reasons for revenue financing in power rates, and the workshops that BPA has committed to conduct after the BP-22 proceeding will provide a forum for the discussions related to BPA's financial health objectives, including sustainable debt management and capital funding approaches, which will include discussions regarding future revenue financing and borrowing authority issues, and other financial plan goals.

With regard to the net secondary sales credit included in rates, Staff's proposal included the full expected secondary sales credit in rates the same as it has since the beginning of the RD contracts. The issue at hand was the amount of revenue financing to include in Power rates, not the amount of the secondary sales credit to include in power rates. As stated above, neither the RD contracts nor the TRM constrain BPA's ability to either (1) change the way it finances its capital assets, or (2) manage its financial risk. Fisher *et al.*, BP-22-E-BPA-35, at 37-42.

Comment BP22200004 – Bear Prairie. Participant Prairie strongly encourages BPA to reconsider the power revenue financing proposal and “honor the spirit of the deal that was entered into.” He urges BPA to reflect the higher secondary revenue forecast in the proposed rate levels and provide the rate relief it brings after years of “extreme increases in rates due to poor secondary revenues, and increasing Agency expenses.” Mr. Prairie states that BPA needs to fulfill its contractual commitments by crediting all surplus revenue to the rates. Mr. Prairie believes that these types of actions make it troubling to sign new power sales contracts “if in the good years BPA doesn't flow the surplus back through to the customer through a rate decrease.”

Response to Comment BP22200004. As described above, the amount of power revenue financing in rates under the Settlement has been reduced to \$40 million per year, and the Settlement provides that the average PF Tier 1 effective rate will decrease by up to 2.5 percent depending on the forecast of net secondary revenue.

Also as described above, Staff's proposal included the full expected secondary sales credit in rates the same as it has since the beginning of the RD contracts. The issue at hand was the amount of revenue financing to include in Power rates, not the amount of the secondary sales credit to include in power rates. As stated above, neither the RD contracts nor the TRM constrains BPA's ability to either (1) change the way it finances its capital assets, or (2) manage its financial risk. Fisher *et al.*, BP-22-E-BPA-35, at 37-42.

Lastly, with regard to the spirit of the RD deal, this same concern was brought up by PNGC. Staff addressed this concern extensively in its rebuttal testimony. *Id.* at 36–42.

6.0 NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS

Consistent with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, BPA has assessed the potential environmental effects that could result from implementation of BPA's FY 2022-2023 proposed power, transmission, and ancillary and control area service rate adjustments (BP-22). The NEPA analysis was conducted separately from the formal ratemaking process.

In the Federal Register notice for the BP-22 rate adjustment proposal, BPA provided interested parties the opportunity to submit public comments concerning potential environmental effects of the proposal, which would be considered by BPA's NEPA compliance staff in the NEPA process for the proposal, 85 Fed. Reg. 77,189, 77,193 (2020). No comments concerning NEPA compliance or potential environmental effects to consider in the NEPA process were received before the comment deadline of March 1, 2021.

The decision to adopt the proposed rate adjustments is primarily administrative, strategic and financial in nature. The rate proposal largely continues the same rate construct as in previous years, albeit at adjusted levels as described elsewhere in this Final ROD and with additional measures related to revenue financing. Provisions are also included to allocate charges and credits attributable to Bonneville's possible participation in the Western Energy Imbalance Market (EIM), should the agency decide to join the EIM. All of these aspects of the proposal involve changes to BPA's rates to ensure that there are sufficient revenues to meet BPA's financial obligations and other costs and expenses while using existing generation sources operating within normal limits. Given this, adoption of the rate proposal is not expected to result in reasonably foreseeable environmental effects.

Accordingly, BPA has determined that the BP-22 rate adjustment proposal falls within a class of actions excluded from further NEPA review pursuant to U.S. Department of Energy NEPA regulations, which are applicable to BPA. More specifically, this proposal falls within categorical exclusion B4.3, *Electric power marketing rate changes*, found at 10 C.F.R. § 1021, subpart D, appendix B, which provides for the categorical exclusion from further NEPA review of "[r]ate changes for electric power, power transmission, and other products or services provided by a Power Marketing Administration that are based on a change in revenue requirements if the operations of generation projects would remain within normal operating limits." BPA has prepared a categorical exclusion determination memorandum that documents this categorical exclusion from further NEPA review, which is available at the BPA website:

<https://www.bpa.gov/efw/Analysis/CategoricalExclusions/Pages/2021.aspx>.

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7.0 CONCLUSION

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

BPA has established its rates pursuant to Section 7(i) of the Northwest Power Act. Consistent with NEPA, BPA has evaluated the potential environmental impacts that could result from implementation of the FY 2022–2023 proposed power and transmission rate adjustments.

Based upon the record compiled in this proceeding, the decisions expressed herein, and all requirements of law, I hereby establish the accompanying 2022 Power Rate Schedules and General Rate Schedule Provisions (GRSPs) and the 2022 Transmission, Ancillary, and Control Area Service Rate Schedules and GRSPs as Bonneville Power Administration rates. In accordance with Federal Energy Regulatory Commission requirements, 18 C.F.R. § 300.10(g), I hereby certify that the power and transmission rate schedules and GRSPs adopted herein contain the lowest possible rates consistent with sound business principles and are consistent with other applicable laws.

Issued at Portland, Oregon, this 28th day of July, 2021.

/s/ John L. Hairston

John L. Hairston
Administrator and Chief Executive Officer

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APPENDIX A

Settlement Agreement for Rates for Fiscal Years 2022–23

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SETTLEMENT AGREEMENT FOR RATES FOR FISCAL YEARS 2022-23

Bonneville Power Administration BP-22 Rate Proceeding

This SETTLEMENT AGREEMENT (“Agreement”) is among the Bonneville Power Administration (“Bonneville”) and parties as provided for in section 3 of this Agreement (such parties in the singular, “Party,” in the plural, “Parties”).

Bonneville and the Parties agree to the following:

1. In the BP-22 Rate Proceeding (BP-22 Proceeding), Bonneville staff will file and recommend that the Administrator adopt a proposal (Settlement Proposal) consistent with this Agreement for rates for power, transmission, ancillary and control area services for Fiscal Years (FY) 2022 and 2023. The Settlement Proposal will include only the terms specified in this Agreement and in Attachment 1.
2. This Agreement settles, in accordance with its terms, all issues within the scope of the Settlement Proposal for purposes of the BP-22 Proceeding.
3. Bonneville will notify the Hearing Officer about this Agreement and move the Hearing Officer to (1) require any party in the BP-22 Proceeding that does not sign the Agreement to state any objection to the Settlement Proposal by a date established by the Hearing Officer; and (2) specify that any party in the proceeding that does not state an objection to the Settlement Proposal by such date will waive its rights to preserve any objections to the Settlement Proposal and will be deemed to assent to this Agreement.
4. If, in response to the Hearing Officer’s order made pursuant to section 3, any party to the BP-22 Proceeding states an objection to the Settlement Proposal, Bonneville and any Party to this Agreement will have two business days from the date of the objection to withdraw its assent to the Settlement Proposal. If Bonneville or any Party to this Agreement withdraws its assent to the Settlement Proposal, Bonneville shall promptly schedule a meeting with the Parties to this Agreement to discuss how to proceed and will provide notice and the opportunity to participate to parties to the BP-22 Proceeding.
5. This Agreement will terminate on September 30, 2023, except that, if the BP-22 Proceeding does not result in the adoption of this Agreement, the Agreement will be void *ab initio*.

6. Preservation of Settlement Proposal

- a. The Parties agree not to contest this Agreement in the BP-22 Proceeding, or other forum, or the implementation of this Agreement pursuant to its terms, through the end of FY 2023.
- b. The Parties agree to waive their rights to briefs and oral argument in the BP-22 Proceeding with respect to any issue within the scope of the Settlement Proposal, except in response to issues raised by any party in the proceeding that objects to this Agreement in response to the Hearing Officer's order made pursuant to section 3.
- c. Bonneville and the Parties agree that this Agreement does not constitute consent or agreement in any future Bonneville proceeding, and that they retain all of their rights to take and argue whatever position they believe appropriate as to such matters in such proceedings.
- d. Bonneville and the Parties acknowledge that this Agreement reflects a compromise in their positions with respect to the issues within the scope of the Settlement Proposal, and that acceptance of the settlement does not create or imply any agreement with any position of any other Party. Bonneville and the Parties agree not to assert in any forum that anything in the Settlement Proposal, or that any action taken or not taken with regard to this Agreement by Bonneville or any Party, the Hearing Officer, the Administrator, the Federal Energy Regulatory Commission, or a court, creates or implies: (1) agreement to any particular or individual treatment of costs, expenses, or revenues; (2) agreement to any particular interpretation of Bonneville's statutes; (3) any precedent under any contract or otherwise between Bonneville and any Party; or (4) any basis for supporting any Bonneville rate, general rate schedule provision, or term and condition of transmission service for any period after the end of FY 2023.
- e. Bonneville and the Parties agree that this Agreement establishes no precedent and that Bonneville and the Parties will not be prejudiced or bound thereby in any proceeding, except as specifically provided in this Agreement. The Parties will not be deemed to have approved, accepted, agreed or consented to any concept, theory or principle underlying or supposed to underlie any of the matters provided for in this Agreement.

7. Conduct, statements, and documents disclosed in the negotiation of this Agreement will not be admissible as evidence in the BP-22 Proceeding, any other proceeding, or any other judicial or administrative forum, nor will the fact that the Parties entered into this settlement be cited or used in any future proceedings or Administrator decisions as support for any matters, other than application or enforcement of this Agreement.

8. Reservation of rights

- a. Except as provided in section 6 above, no Party waives any of its rights, under Bonneville's enabling statutes, the Federal Power Act, or other applicable law, to pursue dispute resolution procedures consistent with Bonneville's open access

- transmission tariff or to pursue any claim that a particular charge, methodology, practice, or rate schedule has been improperly implemented.
- b. Bonneville and the Parties reserve the right to respond to any filings, protests, or claims by Bonneville, any Party, or others; however, the Parties will not support a challenge to any rates, terms and conditions, or other matters described in this Agreement.
 - c. No Party agrees or admits that the level of financial reserves resulting from the Transmission Rates, if any, is acceptable or otherwise appropriate, and nothing in this Agreement shall limit, waive, or otherwise alter a Party's right to challenge in future rate proceedings the level of Bonneville's financial reserves.
 - d. No Party agrees or admits that the level of revenue financing included in the Transmission Rates or Power Rates is acceptable or otherwise appropriate, and nothing in this Agreement shall limit, waive, or otherwise alter a Party's right to challenge in future rate proceedings Bonneville's inclusion of revenue financing in rates, the level of any such revenue financing, the application of depreciation to assets funded by revenue financing, or the accounting or other rate treatment of amounts included in rates for revenue financing or debt prepayment.
9. If, because of a ruling issued in response to a legal challenge, Bonneville is required to materially modify or discontinue any of the rates, terms and conditions, or other matters provided in this Agreement, Bonneville may seek, and the other Parties agree to support, or not contest, a stay of enforcement of that ruling until after the end of FY 2023.
10. Attachment 1, Terms for Rate Issues for FY 2022-2023, is made part of this Agreement.
11. Nothing in this Agreement is intended in any way to alter the Administrator's authority and responsibility to periodically review and revise the Administrator's rates and terms and conditions of transmission service or the Parties' rights to challenge such revisions.
12. Notwithstanding section 5 of this Agreement, sections 6, 7, and 8 will survive termination or expiration of this Agreement.
13. This Agreement may be executed in counterparts each of which is an original and all of which, taken together, constitute one and the same instrument.

Bonneville Power Administration

Signature: SUZANNE COOPER Digitally signed by SUZANNE COOPER
Date: 2021.04.29 08:44:44 -07'00'

Signatory: Suzanne B. Cooper

Title: Senior VP, Power Services

Bonneville Power Administration

Signature: RICHARD SHAHEEN Digitally signed by RICHARD SHAHEEN
Date: 2021.04.29 07:55:24 -07'00'

Signatory: Richard L. Shaheen

Title: Senior VP, Trans. Services

Party Name: _____

Signature: _____

Signatory: _____

Title: _____

ATTACHMENTS

Attachment 1 – Terms for Rate Issues for FY 2022-2023

Attachment 1 - Terms for Rate Issues for FY 2022-2023

1. Revenue Financing

- a. Power Revenue Financing.** The amount of proposed power revenue financing will be limited to \$40 million per year. As described in Staff's testimony, such revenue financing would occur only to the extent that Power Services liquidity was not expected to be reduced from fiscal year 2022 start-of-year amounts. Planned Net Revenues for Risk would be added if the average PF Tier 1 effective rate as calculated in the final BP-22 studies would otherwise be below negative 2.5% compared to the current average BP-20 PF Tier 1 rate.
- b. Transmission Revenue Financing.** The amount of proposed transmission revenue financing will be limited to \$40 million per year. All else equal, the proposed reduction of revenue financing would have approximately a 0.5% rate decrease from the BP-22 Initial Proposal. As described in Staff's testimony, such revenue financing would occur only to the extent that Transmission Services liquidity was not expected to be reduced from fiscal year 2022 start-of-year amounts.
- c. Public Process**
 - i. In the fourth quarter of fiscal year 2021, Bonneville plans to commence public workshops as part of a "refresh" of Bonneville's 2018 Financial Plan. The refresh effort will include consideration of, among other things, Bonneville's financial health, including access-to-capital issues, sustainable capital funding approaches, long-term debt management, and other financial objectives. As part of the public process for the refresh effort, Bonneville will include discussion and consideration of issues related to Bonneville's borrowing authority and the use of revenue financing as a source of capital funding.
 - ii. Bonneville will dedicate at least one workshop prior to BP-24 to discuss the accounting and ratemaking treatment of revenue financing.

2. Transmission Losses

- a. Capacity Charge for Delayed Loss Returns.** Bonneville will not adopt a capacity charge for the delayed return of transmission losses.
- b. Financial Loss Returns.** Bonneville will adopt charges for financial returns of transmission losses consistent with Staff's Initial Proposal.
- c. Financial for Inaccuracy Penalty Charge.** Bonneville will adopt a Financial for Inaccuracy Penalty Charge consistent with Staff's Initial Proposal, as modified in Staff's Rebuttal Testimony.

- d. Public Process.** Bonneville will work toward implementing a concurrent loss-return service by the start of the BP-24 rate period or sooner, including development of an implementation plan. The implementation plan will include a timeline for engaging customers through workshops as well as opportunities for customers to provide feedback. The plan will also account for the potential need to make business practice changes according to Bonneville's Business Practice Process. Bonneville will share the implementation plan with customers no later than the end of the first quarter of FY 2022.

3. EIM Costs and Benefits

- a. Allocations.** Bonneville will implement allocations of costs and benefits associated with the Western EIM consistent with Staff's Initial Proposal.
- b. Public Process.** If Bonneville decides to join the Western EIM, Bonneville commits to hold workshops prior to the BP-24 rate case with stakeholders on how Power Services will include EIM benefits in power rates.

4. Balancing Services

- a. Ancillary and Control Area Services Balancing Service Rates - Western EIM Participation.** If Bonneville joins the Western EIM, a discount to balancing services would be provided based on the assumption of a 50% offset in hydro-shift costs and spill costs for non-regulation balancing capacity reserves as calculated through the GARD model.
- b. Dispatchable Energy Resource Balancing Service Rate.** The rate increase will be limited to 50% of the calculated impact in the Final Proposal compared to BP-20, with the excess costs allocated to other ACS rates (VERBS for Wind, VERBS for Solar, and RFR).
- c. Public Process.** Bonneville will dedicate workshops prior to BP-24 to discuss Bonneville's BP-22 balancing services methodology. Such discussion will encompass VER, DER, and load balancing services.

- 5. Transmission Utility Delivery Charge.** The rate increase will be limited to 25%, with the excess costs allocated to the Network segment (NT and PTP rates).

- 6. Eastern Intertie Public Process.** BPA will discuss and address rates and related issues regarding the Eastern Intertie in at least one pre-rate case workshop prior to the BP-24 proceeding, acknowledging the interests of the Montana Intertie parties and BPA transmission customers, and taking into account the projected long-term firm demand for the Eastern Intertie post-2025.

- 7. Other Issues.** All other issues will be addressed consistent with Staff's Initial Proposal, as modified by Staff's rebuttal testimony.

