

1 UNITED STATES OF AMERICA  
2 U.S. DEPARTMENT OF ENERGY  
3 BEFORE THE  
4 BONNEVILLE POWER ADMINISTRATION  
5

6 IN THE MATTER OF THE PROPOSED ) BPA DOCKET NO. WP-02  
7 WHOLESALE POWER RATE )  
8 ADJUSTMENT PROCEEDING OF THE )  
9 BONNEVILLE POWER )  
10 ADMINISTRATION )  
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14 INITIAL BRIEF  
15 OF THE  
16 COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION  
17 AND  
18 THE YAKAMA NATION  
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Exhibit: WP-02-B-CR/YA-01

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11 INITIAL BRIEF  
12 OF THE  
13 COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION  
14 AND  
15 THE YAKAMA NATION  
16

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17 **INTRODUCTION**

18 The Columbia River Inter-Tribal Fish Commission ("CRITFC") and Yakama Nation  
19 submit this brief on behalf of CRITFC's member tribes and the Yakama Nation (collectively  
20 CR/YA) pursuant to the Procedures Governing Bonneville Power Administration Rate Hearings,  
21 51 Fed. Reg. 7,611 (1986), and the Special Rules of Practice governing these proceedings. WP-  
22 02-O-01. This brief describes CRITFC's and the Yakama Nation's factual, policy, and legal  
23 positions with respect to the Bonneville Power Administration's ("BPA's") Initial Proposal WP-  
24 02. This brief supports and incorporates by reference many of the arguments made by the Upper  
25 Columbia United Tribes (UCUT) in their initial brief WP-02-B-UC-01, the Northwest Energy  
26 Coalition and Save Our *Wild* Salmon in their initial brief WP-02-B-NA-01, and the Oregon  
27 Public Utility Commission in their initial brief WP-02-B-OP-01.

INITIAL BRIEF OF THE COLUMBIA RIVER  
INTER-TRIBAL FISH COMMISSION AND YAKAMA NATION

WP-02-B-CR/YA-01

1 **I. STATEMENT OF THE CASE**

2 **A. Background and Summary**

3 The wholesale power rates established in this proceeding will determine whether there are  
4 adequate funds for the overall federal effort to recover Columbia River salmon runs to  
5 sustainable, harvestable levels. Such levels are necessary to support the treaty reserved fishing  
6 rights of the Yakama Nation and the other member Tribes of the Columbia River Inter-Tribal  
7 Fish Commission. This proceeding will limit financial capabilities of the Bonneville Power  
8 Administration to finance the recovery of Columbia River salmon runs to the extent such runs  
9 have been impacted by the development and operation of the Federal Columbia River Power  
10 System.

11 CRITFC and Yakama contend that Bonneville's rate proposal does not provide sufficient  
12 funds to meet Bonneville's total system costs including obligations under treaties with Columbia  
13 River Indian tribes and other Federal law. Bonneville has not included the appropriate costs in  
14 its revenue requirements. Therefore, it will face two untenable alternatives. Bonneville will  
15 either defer needed fish and wildlife restoration or it will not have sufficient funds to assure  
16 timely repayment of the debt associated with the Federal Columbia River Power System  
17 (FCRPS). Neither of these alternatives is acceptable public policy. Neither will further the  
18 Federal government's obligations under the Treaties or Bonneville's obligations under §  
19 7(a)(2)(A) & (B) of the Northwest Power Act, and other Federal laws.

20 Our goal in this proceeding is to convince Bonneville to raise its rates and strengthen its  
21 risk mitigation measures to ensure that all of its costs, including the costs associated with its  
22 Treaty and trust obligations and other Federal laws are met while assuring repayment of its debt

1 to the Treasury pursuant to 16 U.S.C. 839e(a)(2) (A)&(B). Bonneville also needs to include  
2 funds in its rate proposal to provide transmission services to new tribal utilities in a non-  
3 discriminatory manner.

4 We believe that Bonneville can raise its rates several mills per kWh, still be 25 percent  
5 below the market cost of power and achieve these goals. This would improve Bonneville's  
6 ability to fund needed fish and wildlife restoration and cultural resource protection. It would  
7 remove the inequitable policy that discriminates against new tribal utilities. Moreover, it would  
8 position Bonneville to remain competitive in the next rate period and significantly improve the  
9 chances that Bonneville will be able to make full and timely payments on its debt to the Federal  
10 Treasury to repay the investment in the FCRPS.

11  
12 **1) The Treaty Rights of the Columbia River Tribes**

13 Since time immemorial, the Columbia River and its tributaries were viewed by the  
14 Columbia River Basin tribes as "a great table where all the Indians came to partake." *Seufert*  
15 *Brothers Co. v. United States*, 249 U.S. 194, 197 (1919). More than a century after the  
16 Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm  
17 Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Indian  
18 Nation, and the Nez Perce Tribe signed the treaties which created their reservations, the tribes'  
19 place at the table has been subordinated to energy production and other non-Indian land and  
20 water development. Today, the Columbia River treaty tribes struggle for a very small fraction of

1 their reserved fishing rights.<sup>1</sup> The treaties -- the supreme law of the land under the United States  
2 Constitution -- promised more.

3 The Columbia River treaty tribes reserved the right to fish at all usual and accustomed  
4 fishing stations "in common with" the citizens of the United States. The fishing right means  
5 more than the right of Indians to hang a net in an empty river. *Washington v. Washington State*  
6 *Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 679 (1979). Columbia River  
7 runs of sockeye, steelhead, coho, and spring, summer, and fall chinook salmon have declined  
8 drastically since the mid-1800's.<sup>2</sup> Where once the Columbia produced annual runs of at least 10-  
9 16 million salmon, its runs are now diminished to tens of thousands. *See generally*,  
10 *Confederated Tribes and Bands of the Yakima Indian Nation v. Northwest Power Planning*  
11 *Council*, 35 F.3d 1371, 1375-79 (9<sup>th</sup> Cir. 1994) (describing the effects of the development and  
12 operation of the Federal Columbia River Power System upon the Basin's anadromous fishery  
13 resources)(hereinafter cited as *Yakima Nation*).<sup>3</sup> The devastation of fish runs has been inimical  
14 to Indian treaties and the United States' trust responsibilities to tribes.

## 15 2) Fish and Wildlife Related Financial Commitments

16

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<sup>1</sup> The Northwest Power Planning Council offered a conservative estimate that in the early 1800s a population of 50,000 to 62,000 Columbia Basin aboriginal peoples caught approximately 5 to 6 million fish annually, almost 97 fish per individual. COMPILATION OF INFORMATION ON SALMON AND STEELHEAD LOSSES IN THE COLUMBIA RIVER BASIN at 74. In 1990, the Yakima Nation, Umatilla Confederated Tribes, Warm Springs and Nez Perce Tribe, whose members number approximately 16,000, took only 77,000 fish, or under five fish per person. TECHNICAL ADVISORY COMMITTEE, 1991 ALL SPECIES REVIEW COLUMBIA RIVER FISH MANAGEMENT PLAN (May 10, 1991).

<sup>2</sup> A run is the annual return of adult salmon and steelhead trout. Total runs include those fish that are harvested prior to reaching any dams. *See Generally*, U.S. COMPTROLLER GENERAL, HYDROELECTRIC DAMS: ISSUES SURROUNDING COLUMBIA RIVER BASIN JUVENILE FISH BYPASSES, H.R. Rep. No. 90-180, at 8 (1990).

<sup>3</sup> Since publication of the opinion and the sources cited therein, Columbia River salmon stocks have continued to decline.

1           The Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of  
2 the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama  
3 Indian Nation, and the Nez Perce Tribe have adopted a salmon recovery plan entitled: *Wy-Kan-*  
4 *Ush-Mi Wa-Kit-Wit*, the *Spirit of the Salmon*. This comprehensive plan describes the actions that  
5 must be taken to restore fish and wildlife and make progress toward meeting the tribes' Treaty  
6 rights.

7           The Bonneville Power Administration provides significant financial capability for  
8 Columbia River salmon recovery. Given the overwhelming impacts of the Federal Columbia  
9 River Power System on the Basin's salmon,<sup>4</sup> this is appropriate. As discussed below, salmon  
10 stocks throughout the Columbia Basin are now listed under the Endangered Species Act.  
11 Recovery strategies are in development by the National Marine Fisheries Service, Bonneville  
12 Power Administration, U.S. Fish and Wildlife Service, Army Corps of Engineers and others.  
13 During Bonneville's next rate period, federal salmon recovery strategies will be implemented.  
14 Substantial portions of their costs will be allocated to Bonneville as required by federal law. 16  
15 USC 839b(h)(8)(B), 839b(h)(10)(C). Bonneville's rate proposal will determine its revenues  
16 through 2006—a critical period for salmon restoration. This rate case also needs to position  
17 Bonneville to be able to fund fish and wildlife restoration actions after 2006 when many of the  
18 costs of the measures being contemplated by the Federal agencies will have to be paid.

19           Unfortunately, the Bonneville Rate Proposal has opted for a pledge to hold rates at their  
20 current levels over the concerns of salmon or fulfilling federal treaty obligations. Like the

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<sup>4</sup> Eighty percent of the loss of salmon from these former runs sizes is attributable hydropower development and operation. *Id.* at 1376 citing Endangered and Threatened Species; Proposed Endangered Status for Snake River Sockeye Salmon 56 Fed. Reg. 14,055, 14,058 (1991).

1 Northwest Power Planning Council in 1992, Bonneville has “sacrific[ed] the Act's fish and  
2 wildlife goals for what is, in essence, the lowest common denominator acceptable to power  
3 interests and DSIs.” *Yakima Nation*, at 1395.

4  
5 **B. Standard of Review**

6 **1) Northwest Power Act**

7 Standards for approval of Bonneville's rates are set forth in the Northwest Power Act. 16  
8 U.S.C. 839e. Standards of review for Bonneville’s rate proposal by the Federal Energy  
9 Regulatory Commission (FERC) are established in Section 7(a)(2) of the Northwest Power Act.  
10 16 U.S.C. 839e(a)(2). FERC is authorized to confirm and approve power rates after a finding  
11 that such rates (1) are sufficient to assure repayment in the Federal Columbia River Power  
12 System (FCRPS) after first meeting the Administrator’s other costs and (2) that such rates are  
13 based upon the Administrator’s total system costs. *See Central Lincoln Peoples’ Utility District*  
14 *v. Johnson*, 735 F.2d 1101, 1110 (9<sup>th</sup> Cir. 1984).

15 Under the Northwest Power Act, measures to protect, mitigate, and conserve fish and  
16 wildlife damaged by the hydroelectric development and operations in the Columbia River Basin  
17 are to be paid by the Bonneville Power Administration. 16 U.S.C. 839b(h)(8), 839b(h)(10).  
18 These costs are appropriately part of Bonneville’s total system costs.

19 In addition, BPA must generally comply with other federal law in setting rates. “All  
20 purposes of the Northwest Power Act, together with the provisions of other laws applicable to  
21 the Federal Columbia River Power System are all intended to be construed in a consistent  
22 manner. Such Purposes are also intended to be construed in a manner consistent with applicable  
23 environmental laws.” 16 U.S.C. 839. Section 7(a)(1) of the Northwest Power Act, 16 U.S.C.

1 839e(a)(1), requires that rates be “established in accordance with sections 9 and 10 of the Federal  
2 Columbia River Transmission System Act (16 U.S.C. 838) [16 U.S.C. 838g and 838h], section 5  
3 of the Flood Control Act of 1944 [16 U.S.C.825s], and the provisions of this chapter.”

4 Bonneville’s rates are final for purposes of review by the United States Court of Appeals,  
5 Ninth Circuit after they are approved by FERC. 16 U.S.C. 839f(e)(1)(G); 16 U.S.C.  
6 839f(e)(4)(D). The Ninth Circuit may at that time review rates for matters of law both inside and  
7 outside of FERC’s authority. *CEC v. Johnson* 767 f.2d 631, 633 (9<sup>th</sup> Cir. 1985). Rate  
8 determinations will be reviewed by the Ninth Circuit to determine whether they are supported by  
9 substantial evidence in the rule making record. *Central Lincoln People’s Utility District v.*  
10 *Johnson*, 735 F. 2d at 1115.

## 11 **2) Bonneville’s Fiduciary Responsibilities**

12 Bonneville’s fiduciary responsibilities to the tribes’ and their treaty secured interests  
13 dictate that a higher standard of care must be exercised in this proceeding as it affects these tribal  
14 interests. Bonneville, like the federal government and its agencies, is subject to the United  
15 States' fiduciary responsibilities to tribes. *See e.g., Pyramid Lake Paiute Tribe of Indians v. United*  
16 *States Department of the Navy*, 898 F.2d 1401, 1411 (9th Cir. 1991); *Covello Indian Community v.*  
17 *FERC*, 895 F.2d 581, 584 (9th Cir. 1990); *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981), *cert.*  
18 *denied*, 454 U.S. 1081 (1981). All federal actions and the implementation of federal statutory  
19 schemes affecting Indian people, land or resources must be "judged by the most exacting  
20 fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). *See also*  
21 *United States v. Mason*, 412 U.S. 391, 398 (1973). The federal government, as “fiduciary” of  
22 tribal resources, must act with good faith and utter loyalty to the best interests of the Indians. *See*

1 *Nevada v. U.S.*, 463 U.S. 110 (1983). If a statute or agreement requires federal action on behalf  
2 of tribal interests, the trust responsibility is specific and the courts generally impose a fiduciary  
3 duty on the agency to act with a high degree of care and responsibility. *U.S. v. Mitchell*, 463  
4 U.S. 206 (1983); *Assiniboine & Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F. 2d  
5 782 (9<sup>th</sup> Cir. 1986); *Pawnee v. U.S.*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032  
6 (1988). This brief will demonstrate that Bonneville has not met its fiduciary responsibilities in  
7 this rate case.

8 **II. BONNEVILLE'S PROPOSAL DOES NOT COVER TOTAL SYSTEM COSTS**  
9 **AND DOES NOT ASSURE REPAYMENT OF TREASURY.**

10  
11 Bonneville's rate proposal will determine its revenues through 2006. Yet, this rate  
12 decision will be made before the Federal government makes major fish and wildlife decisions.  
13 These fish and wildlife decisions will determine whether the Federal government fulfills  
14 commitments made to Columbia Basin Indian tribes in Treaties signed in 1855, as well as  
15 obligations under numerous Federal laws. These decisions will almost undoubtedly increase  
16 Bonneville's costs. Bonneville can increase its rates to include these added costs. Instead,  
17 Bonneville's Proposal has relied on a flawed analysis that assumes that many of these costs will  
18 not materialize. Irrespective of Bonneville's assumptions, the reality is that decisions that will be  
19 made over the next year are very likely to add significant costs for fish and wildlife restoration to  
20 Bonneville's total system costs. Bonneville will have to address these costs whether it has  
21 included them in its Proposal or not. By not adequately addressing these costs in its Proposal,  
22 Bonneville increases the risks that it will not be able to cover all of its costs or assure timely  
23 repayment to the Treasury.

1 Bonneville claims that it has addressed the risk that added fish and wildlife costs will  
2 increase its Total System Costs and has included several contingencies in its Proposal. We will  
3 demonstrate in this brief that Bonneville has significantly underestimated the risks that it faces  
4 and has not included sufficient costs in its revenue requirements to meet its future Total System  
5 Costs while assuring timely repayment to the Treasury.

6  
7 **A. Bonneville has inappropriately applied its 1993 standard for assurance of**  
8 **Treasury Repayment.**  
9

10 Bonneville's Proposal has adopted the 1993 Bonneville policy of a 77 per cent Treasury  
11 Payment Probability over a ten-year period. Bonneville's application of that policy in this  
12 Proposal adds considerable risk to Bonneville's ability to collect appropriate funds. Bonneville  
13 has not adequately addressed this risk. CRITFC and the Yakama Nation are mindful of the  
14 Hearing Officer's Order on Initial Briefs, WP-02-O-18, encouraging litigants to be succinct and  
15 avoid redundancy. We also wish to heed the request to avoid the duplication of identical  
16 positions and the waste of resources. For these reasons, CRITFC and the Yakama Nation hereby  
17 incorporate by reference the analysis and arguments of the Northwest Energy Coalition and Save  
18 Our *Wild* Salmon and the Oregon Public Utility Commission, WP-02-B-NA-01 and WP-02-B-  
19 OP-01 respectively, concerning Bonneville's treatment of the 1993 standard for assurance of  
20 Treasury repayment.

21  
22  
23 **B. Bonneville's Proposal has underestimated the risk that it will not cover the**  
24 **Total System Costs and therefore the Proposal is unlikely to meet its costs**  
25 **and does not assure Treasury repayment.**  
26

1 Bonneville must adequately establish rates to recover its costs and expenses incurred by  
2 the Administrator pursuant to the Northwest Power Act and other provisions of law. 16 U.S.C.  
3 839e(a)(1).<sup>5</sup> Because Bonneville's total system costs are subject to future events, inherent in  
4 these costs are risks that must be quantified and addressed in Bonneville's rates. It is  
5 Bonneville's responsibility to quantify the risks involved in developing costs for which complete  
6 accuracy is not possible based on substantial evidence. The mitigation of risks associated with  
7 uncertainty in its future revenue requirement involves a large component of Bonneville's Rate  
8 Proposal. Risk mitigation must be developed to provide for rates that are based on the  
9 Administrator's total system costs. 16 U.S.C. 839e(a)(2)(B).

10 Unfortunately, Bonneville has failed to accurately account for costs in the proposal that  
11 will be required to address the fish and wildlife losses caused by the development and operation  
12 of the federal hydropower system. Among other things, Bonneville inappropriately gave equal  
13 weight to 13 fish and wildlife alternatives developed to explore the range of future costs  
14 Bonneville might face. Bonneville's weighting approach did not adequately address relevant  
15 information. For example, for each of the alternatives that involved the breaching of dams,  
16 Bonneville assumed only a ten percent probability that the dams would be breached on the  
17 schedule being assumed by the Corps of Engineers and NMFS. Bonneville assumed a 90 percent  
18 probability that these restoration options would be delayed—even though delay significantly  
19 increases the probability of extinction and significantly reduces the probability that salmon and  
20 steelhead will be restored to meet Treaty and trust obligations. (BPA response to CR-BPA:027,

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<sup>5</sup> The House Committee on Interstate and Foreign Commerce stated: The third purpose [of the Act's fish and wildlife provisions] is that the BPA customers and the consumers of those customers will continue to pay all of the costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements. These costs include those related to fish and wildlife. H.R.No.Rep. 96-976, pt. I, 96th Cong., 2d Sess., at 49.

1 WP-02-E-CR/YA-02, Attachment 1). Such assumptions underestimate the probabilities that  
2 Bonneville will be exposed to a higher range of fish and wildlife costs than those considered in  
3 the Bonneville testimony.

4 **Issue: Is Bonneville’s Proposal consistent with the federal government’s obligations to**  
5 **protect and restore Columbia Basin fish and wildlife?**

6  
7 As discussed in the following subsections, Bonneville must comply with other federal  
8 laws in developing and setting rates. The Northwest Power Act provides that all laws applicable  
9 to the Federal Columbia River Power System are to be construed in a consistent manner and in a  
10 manner consistent with applicable environmental laws. 16 U.S.C. 839. Where federal and  
11 environmental laws affect the Federal Columbia River Power System, Bonneville must consider  
12 the affects of those laws on setting rates and whether those rates are based on the Administrator's  
13 total system costs. 16 U.S.C. 839e(a)(2)(B). Bonneville has erred by assuming a low probability  
14 for fish and wildlife alternatives that are most likely to comply with applicable federal and  
15 environmental laws, discussed below. This and other assumptions place additional risk that has  
16 not been adequately addressed in the Proposal. This risk undermines Bonneville's ability to  
17 repay Treasury and fully fund fish and wildlife measures necessary to comply with federal law.  
18 Where Bonneville's Proposal does not adequately deal with these risks, the proposed rates are  
19 deficient and are not based on the Administrator's total system costs, 16 U.S.C. 839e(a)(2)(B),  
20 and will not assure repayment of the federal investment. 16 U.S.C. 839e(a)(2)(A).

21

22 **1) Bonneville’s revenue requirements and risk analysis do not adequately**  
23 **address the Clean Water Act**

24

1 The Clean Water Act requires states and tribes to set water quality standards for the  
2 waters within their jurisdictions to protect water quality and the fisheries that depend on it. 33  
3 U.S.C. 1313. These federally-approved water quality standards are the fundamental building  
4 blocks of the Clean Water Act’s pollution-protection system.

5 Section 313 of the Clean Water Act provides, in relevant part, that:

6  
7 (a) Each department, agency, or instrumentality of the . . . Federal  
8 Government, (1) having jurisdiction over any property or facility . . .  
9 shall be subject to, and comply with, all Federal, State, interstate, and  
10 local requirements . . . respecting the control and abatement of water  
11 pollution in the same manner, and to the same extent as any  
12 nongovernmental entity. 33 U.S.C. 1323(a).<sup>6</sup>  
13

14 The Environmental Protection Agency has found that “the water quality standards for  
15 maximum water temperature and the total dissolved gas standard are commonly exceeded, often  
16 by a substantial amount”...at the Corps of Engineers’ dams on the Snake and Columbia Rivers.<sup>7</sup>  
17 These dams constitute significant portions of the system generation of the Federal Columbia  
18 River Power System. The EPA has also said that “it is imperative that appropriate measures be  
19 implemented as soon as possible to reduce the likelihood that levels of total dissolved gas will  
20 exceed the legally established water quality standards of 110% and that water temperature

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<sup>6</sup> Congress wanted federal facilities to comply with all aspects of the Clean Water Act. “The Committee, after hearing of numerous examples of flagrant violation of pollution controls is determined that the Federal facilities shall be a model for the Nation and that unless exempted by the President, they shall be required to meet all requirements as if they were private citizens.” H.R. Report No. 92-911 (March 11, 1972), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1 at 805. After the passage of the 1972 amendments to the Clean Water Act, President Carter issued an Executive Order charging the head of each executive agency with responsibility “for compliance with applicable pollution control standards.” Executive Order 12088, 43 Fed. Reg. 47,707 (Oct. 13, 1978). This Executive Order also directs each federal agency to promptly respond whenever a state notifies it of a pollution control standard violation, and to devise a plan that includes an implementation schedule “for coming into compliance as soon as practicable.”

<sup>7</sup> Letter to Brigadier General Robert H. Griffith, Commander North Pacific Division of the Corps of Engineers from Chuck Clark, Regional Administrator, EPA, Tom Fitzsimmons, Director of the Washington Department of Ecology, and Langdon Marsh, Director of the Oregon Department of Environmental Quality dated December 9, 1997.

1 exceed the standard of 68 degrees F for mainstem Columbia/Lower Snake River."<sup>8</sup> Most of  
2 these Clean Water Act measures on the Corps of Engineers' dams would be repaid by  
3 Bonneville.

4 Bonneville should have assumed that all of the fish and wildlife funding alternatives  
5 would include sufficient measures to meet the Clean Water Act standards. Instead, Bonneville  
6 assumed that only three of the 13 alternatives would include Clean Water Act measures to  
7 comply with dissolved gas standards. Only two of the 13 alternatives are likely to meet the  
8 Clean Water Act temperature standards. In essence Bonneville has based its estimates of total  
9 system costs assuming a high probability that the Federal Columbia River Power System will not  
10 be brought into compliance with the Clean Water Act. This is inconsistent with the requirements  
11 of the Clean Water Act and the Northwest Power Act. The assumptions understated the costs  
12 facing Bonneville and therefore result in proposed rates that are unlikely to be sufficient to meet  
13 Bonneville's future costs and assure repayment of the FCRPS.

14 **2) Bonneville's revenue requirements and risk analysis do not adequately**  
15 **address the Endangered Species Act.**  
16

17 The current status of the Columbia River and Snake River salmon stocks is well known.  
18 Many stocks are listed as threatened or endangered under the Endangered Species Act (ESA) and  
19 their numbers continue to plummet. Most of the unlisted stocks are also in rapid decline and  
20 many will soon join those already listed for protection under the ESA.

21 The Endangered Species Act, 16 U.S.C. 1531-1543, protects species listed as either  
22 endangered or threatened and imposes substantive duties on Bonneville. Bonneville must ensure  
23 that its activities, including power sales, are not likely to (1) jeopardize the continued existence

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<sup>8</sup> *Ibid.*

1 of listed species or (2) adversely modify the critical habitat of such species. The ESA also  
2 prohibits Federal agencies from “taking” (e.g. harming) any endangered species. Bonneville  
3 will have responsibilities in implementing a recovery plan to recover listed salmon and steelhead  
4 in the Columbia and Snake rivers.

5 Bonneville's inadequate analysis of the risk it faces due to its failure to consider ESA  
6 compliance in the equal weighting of fish and wildlife alternatives is evident in their testimony.  
7 In data response CR-BPA:027, Bonneville admitted, "the probabilistic weighting of the 13 Fish  
8 and Wildlife alternatives was not based on any biological rationale." WP-02-CR/YA-02,  
9 attachment 1. Tribal testimony pointed out that "the assumptions tend to underestimate the  
10 probabilities that Bonneville will be exposed to a higher fish and wildlife costs than considered  
11 in the Bonneville testimony." WP-02-CR/YA-02, page 1, lines 21-23. In rebuttal CR/YA  
12 testimony further demonstrates why Bonneville's equal weighting of fish and wildlife  
13 alternatives will not satisfy federal laws. *See* WP-02-CR/YA-05, page 18, line 21 through page  
14 20, line 21.

15 [T]he higher cost alternatives are more likely to be implemented because they are more  
16 likely to result in survival and recovery of salmon stocks listed under the ESA, whereas  
17 the lower cost alternatives are unlikely to result in survival and recovery. By assigning  
18 an equal weight to these options, Bonneville underestimates its potential fish and wildlife  
19 cost exposure, since fish and wildlife options that are unlikely to meet survival and  
20 recovery receive the same weight as those that would meet survival and recovery.  
21 Therefore, Bonneville's approach increases the risks to Bonneville and Treasury.

22  
23 WP-02-CR/YA-05, page 19, line 13 through 20. The rebuttal also points out that,  
24 "independently peer reviewed biological analyses from PATH (the Plan for Analyzing and  
25 Testing Hypothesis) indicate [the lower cost alternatives] would be unlikely to meet Endangered  
26 Species Act recovery..." WP-02-CR/YA-05, page 20, line 7 through 10.

1 Federal, state, and tribal scientists have analyzed the ability of various alternatives to  
2 meet the standards set by National Marine Fisheries Service (NMFS) in implementing the ESA.  
3 The PATH analysis showed that the alternatives that leave the dams in place had a low  
4 probability of meeting NMFS salmon recovery and survival standards. Nevertheless, Bonneville  
5 gave a weight of approximately 2 percent to alternatives 8u and 13u, alternatives that stress a  
6 natural river ecosystem (*see* WP-02-E-CR/YA-01, Attachment 1), and 98 percent to alternatives  
7 that had low probabilities of meeting the NMFS survival and recovery standard. Recently, in its  
8 anadromous fish appendix (*see* Appendix A: Anadromous Fish, Lower Snake River Juvenile  
9 Salmon Migration Feasibility Report/Environmental Impact Statement at  
10 <http://www.nwfsc.noaa.gov/afis/index.html>), the National Marine Fisheries Service concluded  
11 that breaching of the four snake river dams provided the highest probability of recovery for listed  
12 stocks. *See* the Executive Summary of PATH FY98 Final Report, page 9. Bonneville's  
13 assumptions understate the likelihood of the costs that it will face as the Federal government  
14 takes steps to comply with the Endangered Species Act.

15 **3) Bonneville's revenue requirements and risk analysis do not adequately**  
16 **address the Fish and Wildlife Coordination Act.**  
17

18 The Coordination Act requires Federal agencies to consult with appropriate Federal and  
19 state fish and wildlife agencies whenever the Federal agencies propose water resources projects.  
20 16 U.S.C. 661, and 662(b). The Act requires development of a report (FWCAR) by the U.S.  
21 Fish and Wildlife Service for the purpose of determining the means and measures that should be  
22 adopted to prevent the loss or damage of wildlife resources whenever any waters of the United  
23 States are to be controlled or modified by a federal agency. The Act requires Federal agencies to

1 give “full consideration” to the fish and wildlife managers, but the final decision rests with the  
2 implementing Federal agency. 16 U.S.C. 662(b).

3 The U.S. Fish and Wildlife Service recently completed a Coordination Act Report on the  
4 effects of breaching the Snake River dams on fish and wildlife. The report concludes:

5 The Natural River Drawdown Alternative would improve migration  
6 conditions for anadromous salmonids and other migratory fish through  
7 the area of the four lower Snake River dams, restore riverine habitat and  
8 spawning habitat for fall chinook salmon, and improve water quality.  
9 Returning the lower Snake River to a free-flowing river would benefit  
10 most resident fish native to the area, while species introduced to the  
11 system and that have capitalized on the reservoir habitat would decrease  
12 in abundance. Other non-native species that typically do well in river  
13 environments, such as smallmouth bass and channel catfish, would likely  
14 either increase or not be greatly affected. Overall, sportfishing in the  
15 study area would be enhanced. With the restoration of a functioning  
16 riparian zone and floodplain, habitat critical for many wildlife species  
17 would develop and be maintained in the long term.

18  
19 While breaching the lower Snake River dams would have some short-  
20 term adverse impacts to fish and wildlife resources, the long-term  
21 benefits would far outweigh the potential impacts. Also, some of the  
22 potential adverse impacts could be mitigated. The FWCAR includes  
23 several mitigation, monitoring, and enhancement recommendations.  
24 These would help ensure that adverse impacts are avoided, minimized,  
25 and compensated and that conditions are monitored to facilitate adaptive  
26 management. Fish and Wildlife Coordination Act Report, December  
27 1999, page M ES-13.

28  
29 A copy of the draft of this report was completed in the summer of 1999 in time for  
30 Bonneville's consideration in this rate case. CRITFC and the Yakama Nation did not have  
31 access to a copy of this report until December 1999 and therefore could not raise it in our  
32 testimony. Bonneville’s rate proposal should take into account the conclusions of this report and  
33 give significantly higher weight to Alternatives 8u and 13u and less weight to the non-natural  
34 river alternatives. Instead, Bonneville gave approximately two percent weight to 8u and 13u,

1 and 98 percent weight to alternatives that are inconsistent with the findings of the Coordination  
2 Act Report or that delay the natural river option. This is inconsistent with the Fish and Wildlife  
3 Coordination Act. Bonneville has clearly not given full consideration to the results of the  
4 Coordination Act Report. Bonneville's assumptions result in rates that are too low to repay all of  
5 Bonneville's future costs, and reduce the assurances that Bonneville will be able to fully repay  
6 the FCRPS.

7 **4) Bonneville's revenue requirements and risk analysis do not adequately**  
8 **address the Northwest Power Act.**  
9

10 In 1980, Congress enacted the Northwest Power Act, 16 U.S.C. 839-839h, and in so  
11 doing, acknowledged "that no longer should fish and wildlife be given a secondary status.  
12 *Yakima Nation*, 35 F.3d 1371 at 1377, *citing* 126 Cong. Rec. H10681 (1980) (Rep. Dingell).

13 The [Act] marked an important shift in federal policy. Continually declining fish runs  
14 had revealed the failures of previous legislative efforts requiring that "equal  
15 consideration" be given to fish and wildlife affected by resource exploitation. The [Act]  
16 ensured the "equitable treatment" of fish and wildlife; it marked the shift of the burden of  
17 uncertainty - of proving specific harm to salmon from particular activities - from the  
18 salmon to the hydropower system, or so was its intent. In doing so, it created a new  
19 obligation on the region and various Federal agencies to protect, mitigate, and enhance  
20 fish and wildlife.

21  
22 *Id.* at 1377-78 (citation omitted, emphasis added).  
23

24 The Act placed a premium on prompt action, allowing decisions to be made on the best  
25 available scientific knowledge. It also limited the role of economic considerations in decision-  
26 making. Most importantly, however, the Act acknowledged fish and wildlife as an irreplaceable  
27 finite resource.

28 Bonneville has specific obligations to implement the Columbia River Basin Fish and  
29 Wildlife Program developed by the Northwest Power Planning Council:

1 The Administrator shall use the Bonneville Power Administration Fund and  
2 the authorities available to the Administrator under this Act to protect,  
3 mitigate, and enhance fish and wildlife to the extent affected by the  
4 development and operation of any hydroelectric project of the Columbia  
5 River and its tributaries in a manner consistent with the plan, if in existence,  
6 the program adopted by the Council under this subsection, and the purposes  
7 of this [Act].  
8

9 16 U.S.C. 839b(h)(10)(A). In addition, the Act requires:  
10

11 The Administrator and other Federal agencies responsible for the managing,  
12 operating, or regulating Federal or non-Federal hydroelectric facilities  
13 located on the Columbia River or its tributaries shall—exercise such  
14 responsibilities, taking into account at each relevant stage of decision making  
15 processes to the fullest extent practicable, the program adopted by the  
16 Council pursuant to this subsection.  
17

18 16 U.S.C. 839b(h)(11)(A).  
19

20 The current Columbia River Basin Fish and Wildlife Program was adopted by the  
21 Council in 1994, with resident fish and wildlife amendments in 1995. That Program calls for  
22 drawdowns at the four Lower Snake River dams, and John Day Dam on a schedule that called  
23 for implementing these measures before 2000. It also calls for additional flows, significant  
24 habitat restoration, and hatchery reforms.

25 Bonneville’s rate proposal does not include sufficient funds to implement the Program.  
26 This is inconsistent with the Program. WP-02-E-CR/YA-05 page 2, line 21 through page 3, line  
27 9. It is inconsistent with 16 U.S.C. 839b(h)(10)(A). Bonneville’s probabilistically-weighted  
28 approach gave equal weight to 12 alternatives that were inconsistent with the Council’s Program  
29 and one alternative that was somewhat similar to the Council’s Program. This approach does not  
30 take the Program into account at each relevant stage of decision making to the maximum extent  
31 practicable as required by the Act. These assumptions underestimate the costs facing

1 Bonneville. As a result, Bonneville’s proposed rates are not sufficient to meet its likely future  
2 costs and assure repayment of its debt to the Treasury for the FCRPS.

3 **5) Bonneville can accommodate both its treaty responsibilities and other**  
4 **Federal obligations by a small rate increase.**  
5

6 While Bonneville may have competing federally mandated obligations in this process, it  
7 may not waiver from its trust responsibility to the tribes in order to more fully accommodate  
8 those conflicting non-tribal needs or interests. Bonneville, as an agency of the United States, has  
9 a clear and distinct treaty-based obligation to preserve and ensure that Columbia River salmon  
10 are available to support the tribes’ fisheries. *See Confederated Tribes of the Umatilla Indian*  
11 *Reservation v. Callaway*, No. 72-211 (D.Or. August 17, 1973)(consent decree). In *Callaway*, the  
12 court ordered the Department of the Interior and the Army Corps of Engineers to manage and  
13 operate the Federal Columbia River Power System's peak power operations in a manner that did  
14 not "impair or destroy" the tribe's treaty fishing rights. The Administrator also has a fiduciary  
15 duty to protect and preserve the tribes’ fisheries. In an analogous context, the federal courts have  
16 expressed this duty in certain and definite terms.

17 The Secretary has a fiduciary duty to preserve and protect the Pyramid Lake fishery.  
18 *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256 (D.D.C. 1972). This court  
19 referred approvingly to the duty in *Truckee-Carson Irrigation Dist.*, 742 F.2d at 532, and  
20 has read the obligation to extend to any federal government action. *Nance v. EPA*, 645  
21 F.2d 701, 711, (9<sup>th</sup> Cir.), *cert. denied*, 454 U.S. 1081, 102 S.Ct. 635, 70 L.Ed.2d 615  
22 (1981). While most cases holding the government to this duty have involved Indian  
23 property rights, the government's trustee obligations apparently are not limited to  
24 property. *Morton v. Ruiz*, 415 U.S. 199, 236, 94 S.Ct. 1055, 1075, 99 L.Ed.2d 270  
25 (1974); Cohen's Handbook of Federal Indian Law at 225-28 (1982 ed.)  
26  
27 *Pyramid Lake Paiute Tribe v. Dept. of Navy*, 898 F.2d 1410, 1420 (9<sup>th</sup> Cir. 1990) (emphasis  
28 added).

1 In carrying out its trust responsibility, Bonneville's actions are subject to scrutiny under  
2 the most exacting fiduciary standards:

3 In carrying out its treaty obligations with the Indian tribes the Government is something  
4 more than mere contracting party. Under a humane and self-imposed policy which has  
5 found expression in many acts of Congress and numerous decisions of this Court, it has  
6 charged itself with moral obligations of the highest responsibility and trust. Its conduct,  
7 as disclosed in the acts of those who represent it in dealings with the Indians, should  
8 therefore be judged by the most exacting fiduciary standards.  
9

10 *Seminole Nation v. U.S.*, 316 U.S. 286, 296, 297 (1942) (emphasis added). Bonneville, as an  
11 agency of the United States, has an enhanced duty to ensure complete fair dealing in its actions  
12 regarding the tribes herein.

13 Since the Department of the Interior had an obligation to safeguard the property of the  
14 Navajos when they were dealing with third parties, it is clear that an even greater duty  
15 existed when the Department itself entered into transactions with the Indians.

16  
17 *Navajo Tribe of Indians v U.S.*, 364 F.2d 320, 323 (1966).

18  
19 The Nez Perce, Umatilla, Warm Springs, and Yakama tribes have adopted a  
20 comprehensive salmon recovery plan entitled *Wy-Kan-Ush-Mi Wa-Kish-Wit, the Spirit of the*  
21 *Salmon*. A copy of that plan is available through the Commission's website, [www.critfc.org](http://www.critfc.org).  
22 That plan identifies the actions that are necessary to make progress toward achieving the treaty  
23 and trust responsibilities under the Treaties of 1855. Among the alternatives considered by  
24 Bonneville, alternative 13u identified in WP-02-E-CR/YA-01 Attachment 1 is the most similar  
25 to the tribal plan. WP-02-CR/YA-02, page 6, line 1 through 8. Bonneville's approach gave a  
26 very low probability—less than one percent—to the alternative that would implement *Wy-Kan-*  
27 *Ush-Mi Wa-Kish-Wit* on a schedule that might provide any chance of an improved Treaty fishery  
28 within the next generation of tribal members (Alternative 13u). Bonneville's approach also gives  
29 low weight—less than one percent—to the alternative most likely to achieve survival and

1 recovery of Snake River spring/summer chinook listed under the ESA and meet Bonneville's  
2 Treaty and trust obligations (Alternative 8u). Bonneville's assumption is clearly inconsistent  
3 with federal Treaty and tribal trust obligations. It is also inconsistent with Bonneville's stated  
4 policy of keeping the options open.

5 The science on what is needed to meet the tribes' Treaty rights is very clear. Biological  
6 analysis conducted by staff from the National Marine Fisheries Service, the U.S. Fish and  
7 Wildlife Service, Bonneville, the Corps of Engineers, other Federal agencies, and state and tribal  
8 fishery managers shows that the alternatives Bonneville considered have significantly different  
9 probabilities of restoring listed salmon and steelhead in the Snake River.

10 Independently peer reviewed biological analyses from PATH (the Plan for Analyzing and  
11 Testing Hypotheses) indicate that such alternatives would be unlikely to meet  
12 Endangered Species Act recovery standards for listed Snake River spring/summer and  
13 fall chinook stocks. They would also be unlikely to insure sustainable harvests or, in  
14 light of recent information on adult returns, sustainable populations... Alternatives that  
15 involve breaching, e.g. alternatives 7-13, provide a significantly higher likelihood of  
16 recovery based on this same analysis and, hence, sustainable harvest for tribal fisheries.

17  
18 WP-02-E-CR/YA-05, page 20, line 7 through 21. Cross-examination of Bonneville's witnesses  
19 indicated that Bonneville is well aware of the Treaty Tribes' position regarding alternative 13u.

20 See Cross Examination of Revenue Requirements Study Panel BPA-39, page 501, line 10  
21 through page 502, line 2. Alternative 13u, if chosen, would put Bonneville's Treasury Payment  
22 Probability at about 65% which would violate Fish and Wildlife Funding Principle #3 (WP-02-  
23 E-BPA-02A, page 355) assuming there were no other changes to Bonneville's Proposal. Cross  
24 Examination of Revenue Requirements Study Panel BPA-39, page 502, lines 3 through 13.

25 Furthermore, there is a high likelihood that a Treasury Payment Probability of 65% would mean  
26 that, under the current Proposal, Bonneville would not be able to fully fund the fish and wildlife

1 measures. This would be a violation of Fish and Wildlife Funding Principle #1 and a violation of  
2 the tribes' treaty rights. Because the Proposal, as it exists, fails to address this fact and because  
3 the Proposal does not address the risk that alternative 13u is the most likely to provide for fish  
4 and wildlife recovery, the Proposal is deficient and should be changed to comply with Principles  
5 #1 and #3 and with the tribes' treaty rights.

6 Bonneville has also told Columbia Basin tribes that based on policy decisions it does not  
7 want to raise its rates from the levels it set in 1996. The rates proposed by Bonneville in this rate  
8 case will be 35 percent below the projected cost of market priced electricity. *See* WP-02-E-  
9 CR/YA-01, including attachment 6. Keeping rates artificially low means more risk for the  
10 Treasury, fish and wildlife restoration, and tribal rights. Yet Bonneville has told tribes that its  
11 policy decisions will not foreclose fish and wildlife decisions.

12 Bonneville's analysis, under its preferred rate schedule, shows that if BPA pays for the  
13 higher cost fish and wildlife measures identified by the tribes and other fisheries managers, it  
14 would significantly reduce Bonneville's chances of repaying the federal treasury and could mean  
15 a large rate increase in 2007. The tribes are concerned that these factors will make it more  
16 difficult to get support for fish and wildlife restoration. It will be significantly more difficult to  
17 get Congressional support for regional plans to restore fish and wildlife if it means a higher  
18 chance that the Northwest will not pay its debt to the Treasury. The challenge of securing  
19 Congressional support for the Northwest to defer Treasury payments to fund fish and wildlife  
20 restoration will be even more difficult given that the consumers in the Northwest have paid  
21 electricity rates that are significantly below the national average.

1 Bonneville has created a Catch 22. Bonneville says that it will fund its fish and wildlife  
2 obligations, but creates a strategy that will make it very difficult to get the necessary support and  
3 approval for fish and wildlife restoration. This is inconsistent with Bonneville's trust  
4 responsibilities to the Columbia Basin Indian tribes.

5 In the exercise of its trust responsibility in this rate case, Bonneville may not simply  
6 make a "judgment call" in hopes of reaching a compromise between its trust responsibilities and  
7 other duties in an attempt to reach a temporary accommodation.

8 Furthermore, while the Secretary's good faith is not in question, his approach to the  
9 difficult problem confronting him misconceived the legal requirements that should have  
10 governed his action. A "judgment call" was simply not legally permissible. The  
11 Secretary's duty was not to determine a basis for allocating water between the District  
12 and the Tribe in a manner that hopefully everyone could live with for the year ahead.  
13 This suit was pending and the Tribe had asserted well-founded rights. **The burden**  
14 **rested on the Secretary to justify any diversion of water from the Tribe with**  
15 **precision. It was not his function to attempt an accommodation.**

16 In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his  
17 power, that all water not obligated by the court decree or contract with the District goes  
18 to Pyramid Lake.

19  
20 *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256 (1973) (emphasis added). While  
21 *Pyramid Lake v. Morton* is a district court opinion, it is cited with approval and as authority by  
22 the Ninth Circuit in the case of *Pyramid Lake Paiute Tribe v. Navy, supra*.

23 Accordingly, the law is clear-- Bonneville has a trust responsibility to protect the treaty  
24 fishing rights, to do so by the most exacting fiduciary standard, and to make certain it does not  
25 dilute tribal rights by accommodating other interests to tribal detriment.

26 What does all this mean for purposes of this rate case? The thrust of these cases is rather  
27 simple-- Bonneville must, at each stage of this proceeding, insure that the steps it proposes to  
28 take are, within the entire parameter of its authority, the ones that best meet tribes' interests while

1 fairly addressing Bonneville's other obligations. The tribes do not assert that Bonneville must  
2 raise rates to non-competitive levels, or take similar measures in this rate case in order to meet  
3 tribes' needs. Instead, the tribes ask only that Bonneville take reasonable and readily available  
4 steps to adjust its rates to decrease the risks that tribal fishery proposals will not be met and that  
5 the Treasury Payment Probability is not compromised. There is a simple roadmap for  
6 Bonneville to follow to a suitable and legally defensible solution.

7 In the *Pyramid Lake v. Morton* case cited above, the Secretary of Interior, much like  
8 Bonneville here, faced a problem of allocation of resources between the tribe and other  
9 competing interests. One of the major problems there was a dilapidated irrigation system that  
10 caused wastage of water, thereby decreasing the water available to all parties. In that case the  
11 Secretary of Interior, instead of addressing the real problem-- fixing the irrigation system and  
12 monitoring water use-- refused to change operations and tried to divide the water to meet the  
13 competing interests. The Court's discussion of how those issues should have been resolved is  
14 instructive here:

15 In addition, the evidence conclusively showed that the regulation is within the District,  
16 causing substantial and wholly unnecessary diversion of water from the Truckee River to  
17 the obvious detriment of the Tribe. It was amply demonstrated that water could be  
18 conserved for Pyramid Lake without offending existing decrees or contractual rights of  
19 the District through better management which would prevent unnecessary waste. The  
20 amount of exposed water can be reduced to limit evaporation. Better management will  
21 lessen seepage and overflow; users can be assessed for water taken; techniques exist for  
22 measuring water more efficiently at headgates; land not entitled to water under the  
23 decrees and contract with the District can be prevented from taking the water; and by the  
24 mere employment of a few individuals the system can be so policed that it will function  
25 on a basis consistent with modern water control practices. All of this can be  
26 accomplished in spite of the fact that the District has an antiquated system. Failure to  
27 take appropriate steps, under the circumstances, by the regulation constitutes agency  
28 action unlawfully withheld and unreasonably delayed when viewed in the light of the  
29 Secretary's trust responsibilities to the Tribe. 5 U.S.C. 706(1).

1 Under the contract between the Secretary and the District the Secretary has the  
2 right to require the District to conduct its affairs in a non-wasteful manner but no such  
3 action was taken or is contemplated in the regulation. The operations of the District are  
4 not tightly controlled and water is taken practically on demand without necessary  
5 safeguards to prevent improper and wasteful use. This failure to act must be given  
6 particular emphasis since the proof showed that the Secretary has not in the past enforced  
7 his prior yearly regulations affecting the District and has acquiesced in excessive water  
8 deliveries to the farms.

9  
10 *Pyramid Lake v. Morton* at 257, 258 (emphasis added).

11  
12 The Court in *Pyramid Lake* told the United States, acting there through the Secretary of  
13 Interior, that it must take reasonable, although perhaps unpopular, actions to accommodate both  
14 the needs of the long time irrigators and the demand of the tribal fishery in Pyramid Lake for  
15 additional waters. Here, Bonneville, in the exercise of its trust responsibility has the opportunity  
16 and the duty to accommodate the needs of the tribal fishery and its responsibilities under the Act  
17 to develop power rates. Bonneville cannot simply make a judgement call to balance the desires  
18 of its customers against the treaty secured interests of the tribes.

19 The evidence presented both by Bonneville and the tribes reflects that Bonneville may  
20 accommodate tribal needs, best illustrated by fish and wildlife alternative 13u, its Treasury  
21 Payment Probability concerns, and the need for a competitive power rate, by a small increase in  
22 its rates. Such an increase will not destroy a competitive rate structure, as the proposed tribal  
23 rate increase still leaves Bonneville's rates at a level 25 percent below existing market rates. As  
24 the unrebutted evidence reflects, this can be accomplished and the ends of Bonneville's trust  
25 responsibilities adequately fulfilled. While there will be some rate increase to Bonneville's rate  
26 payers, rates remain significantly below market price. The risks to funding shortfalls for fishery  
27 and Treasury needs are significantly reduced, and Bonneville has held itself to the exacting  
28 fiduciary standards which are required in this proceeding.

1           When Columbia Basin tribes suggested that Bonneville could cover all the fish and  
2 wildlife options and still have rates that were 25 per cent below the market projections for  
3 electricity we were told that Bonneville could not raise rates. Bonneville's policy against raising  
4 rates is counter to Bonneville's trust and fiduciary responsibilities. This policy decision by  
5 Bonneville would mean that either Bonneville would not be able to fund the restoration measures  
6 identified by CRITFC and the Yakama Nation as necessary to restore fish and wildlife to meet  
7 obligations under the Treaties of 1855, or that Bonneville would substantially lower its ability to  
8 repay the Treasury. Either of these outcomes is contrary to 16 U.S.C. 839e(a)(2), contrary to  
9 Bonneville's treaty and trust obligations, and contrary to good public policy.

10           Bonneville's approach to fish and wildlife funding was not based on science. It was not  
11 based on which alternatives had the best chance of meeting obligations under Treaties and trust  
12 responsibilities. It was not based on which alternative had the best chance of meeting other  
13 obligations under federal laws such as the Clean Water Act, the Endangered Species Act, or the  
14 Northwest Power Act.

15           The natural river option has costs that Bonneville should prepare for. The failure to  
16 appropriately address these costs in this rate proposal violates Bonneville's Treaty and tribal trust  
17 obligations.

18 **Summary: BPA's proposal does not comply with federal laws and treaties. BPA must**  
19 **reanalyze its Proposal in terms of risk to comply with federal laws and treaties. Bonneville**  
20 **should give significantly higher weight to the costs associated with fish and wildlife**  
21 **alternatives that meet its obligations under Treaties and Federal laws.**  
22

23           **C. Bonneville is not meeting Fish and Wildlife Funding Principles #1 and #3,**  
24 **while elevating Fish and Wildlife Funding Principle number #5 to a status**  
25 **unsupported by law.**  
26

1 **Issue: Can Bonneville meet all of its Fish and Wildlife Funding Principles?**  
2

3 Fish funding principle #1 (WP-02-E-BPA-02A, page 355) states: “Bonneville will meet  
4 all of its fish and wildlife funding obligations once they have been established, including its trust  
5 and treaty responsibilities.” Yet, Bonneville has assumed a low probability for the fish and  
6 wildlife alternatives that are most likely to meet treaty and trust obligations and the  
7 responsibilities under the Endangered Species Act, the Clean Water Act, the Northwest Power  
8 Act, and the Fish and Wildlife Coordination Act. Under the Northwest Power Act, Bonneville is  
9 obligated to set its rates in a manner consistent with these laws, 16 U.S.C. 839 and 839e(a)(1).  
10 Principle #1 is firmly based in the statute. Despite Bonneville's assurances otherwise,  
11 Bonneville's unwillingness to accept the reality of these obligations is apparent from the specific  
12 terms of its Proposal in this proceeding. Bonneville is only willing to accept its fish and wildlife  
13 obligations as long as it does not have to assure a high probability of repaying Treasury.

14 Principle #3, which states that “Bonneville will demonstrate a high probability of  
15 Treasury payment in full and on time over the 5-year period,” (WP-02-E-BPA-02A, page 355)  
16 also has a firm basis in the Northwest Power Act, particularly its requirement that Bonneville's  
17 rates are "sufficient to assure repayment in the Federal Columbia River Power System (FCRPS)  
18 after first meeting the Administrator’s other costs" 16 U.S.C. 839e(a)(2)(A). Bonneville’s  
19 Treasury Payment Probability (TPP) goal is 88 percent. If a decision was made this year to  
20 implement alternative 13u (the alternative that is similar to the tribal restoration plan),  
21 Bonneville’s TPP probability would reduce to 65 percent. WP-02-E-CR/YA-01, Attachment 1.  
22 This analysis assumes that all of the Bonneville contingencies, e.g. CRAC, FCCF would be fully  
23 used and the TPP probability nevertheless would be 65 percent. The measure of success for

1 achieving principle #3 is an 88 percent probability of fully paying the Treasury over the rate  
2 period. WP-02-E-BPA-02A, page 355. Bonneville's own analysis clearly indicates that for the  
3 higher cost fish and wildlife alternatives, the probability of repaying the Treasury is reduced to  
4 very low levels.

5 Bonneville will not be able to meet both principles #1 and #3 for scenarios that address  
6 treaty and trust responsibilities under the current rate proposal. See WP-02-E-CR/YA-02 and  
7 related attachments. However, with regard to principle #5, which pledges that Bonneville will  
8 not raise rates, Bonneville's support is steadfast. See WP-02-BPA-08, page 7. Principle #5,  
9 however, finds no basis in federal law. Nothing in the Northwest Power Act or other federal law  
10 specifically requires Bonneville to maintain its rates at current levels. Rather, Bonneville's rates  
11 are to be established and reviewed under a number of statutory tests, but none of them require  
12 that Bonneville not raise its rates. Even the "sound business" requirement of section 7(a)(1) does  
13 not mandate that Bonneville maintain its current rate, especially where maintaining the current  
14 rate is likely to jeopardize Bonneville's financial future after 2006, as discussed *infra*.

15 **Summary: Bonneville cannot meet Principles #1 and #3 under the current Proposal.**  
16 **Bonneville's inability to meet Principles #1 and #3, is exacerbated by Bonneville's rate**  
17 **pledge under Principle #5, which has no statutory basis.**

18  
19

20 **D. Bonneville's analysis has ignored important information on higher fish and**  
21 **wildlife costs and the risks facing Bonneville.**

22

23 **1) A memorandum by EPA, NMFS, USFWS, and Treasury indicates that costs**  
24 **and risks will be higher than Bonneville assumed.**

25

26 **Issue: Should BPA ignore relevant information from other Federal agencies in analyzing its**  
27 **risks?**

28

1 Bonneville's schedule for this rate case is not synchronized with key fish and wildlife  
2 decisions that will affect fish and wildlife costs for both 2002-2006 and 2007-2011. There have  
3 been several efforts to develop estimates of these costs. Federal, state, and tribal governments  
4 worked in 1998 through the Three Sovereigns Process to develop estimates for a range of  
5 alternatives facing the region. See WP-02-E-CR/YA-02, Attachment 3, page 5 for a description  
6 of the Three Sovereigns process.

7 More recently, senior staff at the Environmental Protection Agency, National Marine  
8 Fisheries Service, and U.S. Fish and Wildlife Service, and Treasury developed estimates of the  
9 fish and wildlife restoration alternatives that were under active consideration. WP-02-E-CR/YA-  
10 02 Attachment 3 is a memorandum dated May 11, 1999 from Danny Consenstein, the Columbia  
11 Basin Coordinator for the National Marine Fisheries Service, Bill Shake, the Assistant Regional  
12 Director for the Columbia Basin at the United States Fish and Wildlife Service, Mary Lou  
13 Soscia, the Columbia Basin Coordinator for the Environmental Protection Agency, and Paula  
14 Farrell, as senior staff person at the Department of the Treasury to Lee Johnson, Bonneville  
15 Power Administration.

16 The memorandum describes two alternatives. The first is a natural river option that  
17 would breach the four Snake River dams. The second is an experimental management  
18 alternative that provides for an aggressive stream of investments in fish and wildlife recovery  
19 measures during the interim period while the region and Congress consider Snake River dam  
20 removal. The costs for both alternatives that are identified in the attachment are significantly  
21 higher than the amounts assumed by Bonneville in the rate case analysis, especially during 2002-  
22 2006.

1 The May 11<sup>th</sup> memorandum includes an attachment that provides information on the  
2 costs of meeting the Clean Water Act, the costs of modifying dams to natural river conditions,  
3 and the costs of additional habitat, hatchery, and hydro actions that fall into the Bonneville  
4 reimbursable and capital cost categories. These cost estimates are more current than those used  
5 in Bonneville’s probabilistic assessment of future fish and wildlife costs. The average costs for  
6 2002-2006 ranged from \$658 to \$783 million per year—significantly higher than the  
7 probabilistically-weighted cost of \$520 million used by Bonneville.

8 On the basis of this information, the authors of the memorandum express concern about  
9 Bonneville’s ability to collect sufficient revenues to cover their fish and wildlife costs. CRITFC  
10 and the Yakama Nation share their concerns. The memorandum states on page one:

- 11 “Our concerns fall into three areas:  
12  
13 1. Based on recent information, we believe the fish and wildlife  
14 restorations costs will be higher than previously estimated.  
15  
16 2. We are concerned that funding these higher fish and wildlife costs will  
17 reduce BPA’s probability of meeting its Treasury Payments, reduce  
18 BPA’s reserve, and result in a large rate increase in 2007  
19  
20 3. These problems will make it much more difficult to build support for needed  
21 restoration efforts.”  
22

23 In cross-examination, CRITFC and the Yakama Nation asked Bonneville staff why they  
24 had not used the more recent and reliable information provided in the May 11<sup>th</sup> material. Cross  
25 examination of Revenue Requirements Study Panel BPA-39, page 496, line 10 through 18.  
26 Bonneville staff replied that they did not consider the material an official communication  
27 because the e-mail copy was not signed. Cross examination of Revenue Requirements Study  
28 Panel BPA-39, page 496, line 19 through 21. CRITFC and the Yakama Nation provided signed

1 letters from two of the authors that explained that the Federal staff had been communicating by  
2 e-mail in all of their communication and therefore the documents were not signed, but they did  
3 represent the work of the authors. CR/YA Answer to Motions to Strike, WP-02-M-\_\_\_, page 13,  
4 line 4 through 19, attachments 1, 2, and 3. CRITFC and the Yakama Nation find it incredible  
5 that Bonneville ignored such important information in the development of its rate case. The only  
6 plausible explanation is that Bonneville did not want to receive any information that showed that  
7 its fish and wildlife restoration costs would be higher than Bonneville projected. Bonneville's  
8 action has no basis in the record. It is both inconsistent with Bonneville's trust and fiduciary  
9 responsibilities to Columbia Basin Indian tribes and bad public policy.

10 Bonneville has countered that a memorandum from Will Stelle superceded the  
11 memorandum from the Environmental Protection Agency, NMFS, U.S. Fish and Wildlife  
12 Service, and Treasury staff. WP-02-E-CR/YA-02 attachment 4. The Stelle memorandum  
13 Bonneville cites does not say that it supercedes the May 11<sup>th</sup> material. In fact, the Stelle  
14 memorandum raises a number of issues of concern that support and reinforce the May 11<sup>th</sup>  
15 material. The memorandum states that "BPA's financial obligations for fish and wildlife and  
16 environmental mitigation for the FCRPS are likely to increase substantially through the next rate  
17 period." The memorandum states that "Important disagreements about the projected fish and  
18 wildlife and environmental costs exist despite best efforts to reduce them. This uncertainty  
19 argues for an appropriately risk averse approach with flexibility to make adjustments where  
20 warranted." The memorandum also states: "As we have discussed at length in the federal caucus  
21 and elsewhere, it is likely that additional measures will be necessary across the range of hydro,  
22 harvest, habitat, and hatchery impacts." It also states that "Fish and wildlife costs also may be

1 much higher in the period after 2006, depending on the long-term alternative chosen. It is very  
2 difficult, however, to pin down with accuracy the likely range of these out-year costs, thus  
3 creating the need to plan in the face of substantial uncertainty. Finally, the memorandum states:

4 While there are remaining questions about the adequacy of these tools,  
5 NMFS recommends proceeding with the rate package as a whole at this  
6 time. In light of the uncertainties mentioned above, NMFS further  
7 recommends BPA consider strengthening its proposed contingencies,  
8 such as the cost recovery adjustment clause, during the rate case and prior  
9 to a final decision. With respect to the post-2006 costs, there are many  
10 policy questions about the best financial strategies for BPA to pursue  
11 long term; we prefer to acknowledge this as something for BPA and the  
12 financial agencies to consider, and to be prepared to support whatever  
13 solutions are reached at that level.  
14

15 This memorandum from Will Stelle does nothing to reduce our concerns. *See* WP-02-E-CR/YA-  
16 02, Attachment 4. In fact, where the Stelle memorandum calls for strengthening the proposed  
17 contingencies, Bonneville's Proposal actually weakened several of the contingencies, including  
18 reducing the Planned Net Revenues for Risk, reducing the projected average ending reserve, and  
19 reducing the threshold for a "dividend distribution" to Bonneville's customers.

20 Bonneville has provided analysis in response to data request NA-BPA:004 (WP-02-E-  
21 CR/YA-01, Attachment 1) that includes a table entitled *Approximate 2002-2006 and 2007-2011*  
22 *Impacts of 13 (18) F&W Alternatives* that shows that a number of the higher cost fish and  
23 wildlife alternatives would result in low probabilities of meeting Bonneville's Treasury  
24 payments. For example, the alternatives that assume the current schedule for the four Snake  
25 River Dams to Natural River and the Snake River and John Day to Natural River plus the Clean  
26 Water Act measures have Treasury Payment Probabilities (TPPs) of 76 percent and 65 percent  
27 respectively based on the analysis provided by Bonneville. These estimates were based on  
28 preliminary information involving costs and potential contingencies. It appears that the TPP for

1 the Snake River and John Day to Natural River plus the Clean Water Act measures alternatives  
2 may actually be lower than the material provided by Bonneville based on the costs and  
3 contingencies in the actual Bonneville rate proposal. Bonneville’s ToolKit Model produced a  
4 TPP of 62 percent for alternative 13u.<sup>9</sup> Using Bonneville’s own model, it appears that if  
5 Bonneville’s total system costs included the costs of measures needed to meet Treaty and trust  
6 obligations, it could not assure timely repayment of its debt to the Treasury. *See* WP-02-E-  
7 CR/YA-01, Attachment 2.

8 **Summary: Bonneville must reanalyze its proposal to address the costs and risk identified in**  
9 **the May 11, 1999 memorandum.**

10  
11 **2) Assumptions about the CBFWA direct budget under the NWPFA are**  
12 **incorrect and place additional risk that Bonneville's Rates are not**  
13 **sufficient to meet costs.**

14  
15 **Issue: Should Bonneville use the CBFWA budget number as a high estimate?**

16 This brief has already described the fact that Bonneville has significantly underestimated  
17 the likely costs of future fish and wildlife costs because of policy decisions made by the agency.  
18 This section describes a mistake in estimating the costs of the direct fish and wildlife program.  
19 The direct program includes expenses paid directly by Bonneville to restore habitat, design and  
20 construct hatcheries, and fund research, coordination, and other restoration activities.

21 Bonneville used an arbitrary weighting approach for its estimated direct fish and wildlife  
22 program costs, which Bonneville has not mitigated in its risk mitigation package. Bonneville  
23 currently provides direct funding for approximately \$100 million in fish and wildlife annually.  
24 In developing the estimates for the direct program, Bonneville assumed that the \$179 million

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<sup>9</sup> Alternative 13u is the closest alternative to *Wy-Kan-Ush-Mi Wa-Kish-Wit*. This is the plan developed by CRITFC and the Yakama Nation that has the best chance of meeting Treaty and trust responsibilities.

1 budget developed by Columbia Basin Fish and Wildlife Authority (CBFWA)<sup>10</sup> was the “high”  
2 and that Bonneville’s estimate of the current funding (adjusted for inflation) was the “low’ and  
3 there was an equal likelihood of any cost within this range. Equal weighting essentially  
4 produced an average of \$139 million per year. The approach Bonneville used for the direct  
5 program was different than the probabilistic weighting for reimbursable, capital, and operations  
6 costs.

7 The CBFWA’s ten-year budget (WP-02-E-CR/YA-02, Attachment 2) was estimated by  
8 the fish and wildlife managers to implement the Northwest Power Planning Council’s Columbia  
9 River Basin Fish and Wildlife Program developed pursuant to 16 U.S.C. 839b(h), the Biological  
10 Opinions developed by NMFS under the Endangered Species Act, and implementation of the  
11 subbasin habitat plans in *Wy-Kan-Ush-Mi Wa-Kish-Wit*. CBFWA worked with federal, state,  
12 and tribal fisheries managers, the Northwest Power Planning Council, and Bonneville to develop  
13 the best possible estimate of the future costs (2002-2012) for fish and wildlife restoration. All of  
14 the assumptions, including the costs per subbasin for habitat, and monitoring and evaluation  
15 were clearly detailed in the budget.

16 Bonneville had an opportunity to review the CBFWA budget as it was being developed.  
17 Bonneville offered no suggestions to improve it. As stated in CR/YA testimony, Bonneville also  
18 never provided any rationale for treating the CBFWA budget as the “high” budget. WP-02-E-  
19 CR/YA-04, page 2, line 22 through page 3, line 5. No rebuttal to this testimony was offered by

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<sup>10</sup> The members of the Columbia Basin Fish and Wildlife Authority are the regions’ tribes, federal, and state fish and wildlife managers: the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, the Yakama Nation, the Nez Perce Tribe, the Kootenai Tribe of Idaho, the Shoshone-Bannock Tribes of Fort Hall, the Confederated Tribes of the Colville Reservation, the Shoshone-Paiute Tribes of Duck Valley Reservation, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Kalispel Tribe, the Spokane Tribe of Indians, the U.S. Fish & Wildlife Service, the National Marine Fisheries

1 Bonneville. The CBFWA direct budget of \$179 million per year was intended as a “best  
2 estimate” of the costs, not as the “high” estimate. Bonneville should not have used this as a high  
3 estimate in developing its revenue requirement. Using the CBFWA budget, as appropriate to the  
4 assumptions upon which it was based, would have increased the revenue requirements by \$40  
5 million per year. Even if Bonneville had treated the weighting of the direct budget the same as  
6 the other components of the budget it would have increased the base revenue to \$175 million per  
7 year—this is \$35 million more than Bonneville’s flawed assumption.

8 Bonneville further erred when it did not incorporate the improved cost estimates  
9 contained in the May 11, 1999 memorandum from staff at EPA, NMFS, and USFWS. *See* WP-  
10 02-E-CR/YA-02, Attachment 3. That budget had average direct costs for 2002-2006 that ranged  
11 from \$192 to \$325 million per year. In unrebutted CR/YA testimony, witness Giese, a staff  
12 member of CBFWA stated that these budgets “were much more realistic than the estimates that  
13 CBFWA had prepared six months earlier.” *See* WP-02-E-CR/YA-04, page, line 6 through 15.  
14 These estimates are \$53 to \$186 million higher than Bonneville assumed. Therefore, Bonneville  
15 has significantly underestimated the revenue requirements and has not set its rates to recover its  
16 total system costs.

17 To adequately address the actual cost risks that Bonneville faces it should use the “more  
18 realistic” estimate of the direct costs that average \$325 million per year over the 2002-2006 rate  
19 period that were included in the May 11, 1999 memorandum as its most likely direct costs. It  
20 should also do a risk assessment that assumes that the direct costs could be 20 percent higher

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Service, the Oregon Department of Fish & Wildlife, the Idaho Department of Fish & Game, and the Washington  
Department of Fish & Wildlife.

INITIAL BRIEF OF THE COLUMBIA RIVER  
INTER-TRIBAL FISH COMMISSION AND YAKAMA NATION

WP-02-B-CR/YA-01

Columbia River Inter-Tribal Fish Commission  
729 N.E. Oregon Street, Suite 200  
Portland, Oregon 97232  
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1 than the \$325 million figure to account for the fact that actual costs could be higher than the  
2 estimate. Bonneville should adjust its revenue requirements and PNRR accordingly.

3 **Summary: BPA should reanalyze its revenue requirement to include “more realistic”**  
4 **estimates of its direct costs that average \$325 million over the 2002-2006 rate period.**  
5 **Bonneville should also reanalyze its risk analysis by assuming that the direct costs could be**  
6 **as high as an average of \$390 million. This is 20 percent higher than the estimate in the**  
7 **May 11<sup>th</sup> memorandum for an aggressive habitat, hatchery, and harvest effort.**  
8

9 **3) Cultural resources costs are not adequately included in total system costs.**

10 **Issue: Should Bonneville include \$10.5 million per year in budget for cultural resources?**  
11

12 Bonneville must include a revenue requirement for cultural resources which is adequate  
13 to meet federal law and its fiduciary trust obligation to act with a high degree of care and  
14 responsibility to the Indian tribes of the region. CRITFC and Yakama Nation hereby incorporate  
15 by reference the arguments and evidence put forward by the Upper Columbia United Tribes in its  
16 initial brief regarding BPA’s legal obligation to include increased funding for cultural resources  
17 in its revenue requirements study.

18 **Summary: Bonneville must include a revenue requirement for cultural resources which is**  
19 **adequate to meet federal law and its fiduciary trust obligation to act with a high degree of**  
20 **care and responsibility to the Indian tribes of the region.**  
21

22  
23 **E. Bonneville’s estimate of starting reserves is inconsistent with the Fish and**  
24 **Wildlife Memorandum of Agreement.**  
25

26 **Issue: Should BPA include \$227 million of MOA money in 2001 starting reserves?**  
27

28 Bonneville has assumed starting reserves in 2002 of approximately \$685 million. This  
29 amount inappropriately includes \$227 million in unspent funds under The Memorandum of  
30 Agreement Concerning the Bonneville Power Administration’s Financial Commitments for

1 Columbia River Basin Fish and Wildlife Costs signed by the Secretaries of the Departments of  
2 Army, Commerce, Energy and Interior. WP-02-E-CR/YA-02, page 8, line 11 through 15.<sup>11</sup>

3 CRITFC and the Yakama Nation actively participated in negotiating the MOA with the  
4 signatory federal agencies, the Office of Management and Budget, Department of the Treasury,  
5 Council on Environmental Quality and the Northwest Power Planning Council. There was a  
6 clear understanding among the negotiators that any of the funds that the Administration  
7 committed to use to restore fish and wildlife through 2001 that were not actually expended by the  
8 end of the MOA would remain available for fish and wildlife restoration. These funds would be  
9 over and above future funding levels needed for fish and wildlife restoration.

10 Bonneville acknowledges that “Pursuant to the terms of the MOA, the unexpended  
11 amount that remains after the close of the Fiscal Year 2001 ‘will not be re-programmed for any  
12 non-fish and wildlife use, but will remain available for expenditure for the benefit of fish and  
13 wildlife.’” WP-02-E-CR/YA-02, Attachment 12, BPA response to data request CR-BPA:007.  
14 In the same response, Bonneville acknowledges that “The ‘carry-forward balance has the effect  
15 of increasing the cash reserve level assumed for the beginning of FY 2002.” Bonneville claims  
16 in its rebuttal testimony that it has not double counted the MOA carry forward. BPA-40 pp. 18-  
17 19. But Bonneville's rebuttal<sup>12</sup> does not change the fact that the MOA carry forward is included  
18 in Bonneville's reserves and it does not change the fact that Bonneville relies on its reserves for

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<sup>11</sup> A copy of this agreement may be found at <http://www.efw.bpa.gov/EW/FISCAL/moa.html>.

<sup>12</sup> Bonneville evidently asserts that the fish and wildlife funding it has proposed for the period 2002-2006 will be composed in part of the fish and wildlife MOA carry over funds. This is inconsistent with the intent of the MOA negotiators. Moreover, this position is doubly disadvantageous to the affected fish and wildlife, since not only do the benefits of the fish and wildlife mitigation commitments not occur in the period from 1996-2001 in which they were intended to occur, but it is Bonneville's position that these benefits will take the place of measures during the 2002-2006 period. Bonneville's Proposal makes the commitments in the MOA illusory.

1 mitigation of the full range of financial risks that face Bonneville, not just fish and wildlife.

2 This is contrary to the express terms of the MOA:

3 At the beginning of each fiscal year a cumulative total of all previous carry over and  
4 carry under amounts shall be calculated by category. Also included in the carry forward  
5 balance shall be the net effect of any interest credits and interest charges. In determining  
6 the interest credits or charges for the direct program category, the calculation of the carry  
7 forward balance shall be based on accrual accounting.... Any funds remaining in these  
8 accounts after close of Fiscal Year 2001 will not be re-programmed for any non-fish and  
9 wildlife use, but will remain available for expenditure for the benefit of fish and wildlife.

10

11 MOA section VIII. h. (emphasis added). Bonneville's Proposal reprograms fish and wildlife

12 funds under the MOA reserved for the benefit of fish and wildlife for purposes other than fish

13 and wildlife, e.g. risk mitigation for adverse market or weather conditions.

14 Bonneville has counted the unexpended fish and wildlife funding as part of the reserves.

15 It has also counted these reserves as one of the contingencies to cover the full range of

16 uncertainties facing Bonneville. Bonneville is double counting these funds. The Columbia Basin

17 Fish and Wildlife Authority (CBFWA) budgets developed for fish and wildlife were assumed to

18 be in addition to the funds committed in the MOA. The other uncertainties (e.g. water, markets,

19 WPPSS, etc.) were also independent of the MOA funds. Therefore, there is an even higher

20 probability that Bonneville would not be able to fully repay the Treasury if it had accounted for

21 the unexpended MOA funds correctly. *See* WP-02-E-CR/YA-02 page 8, line 11 through page 9,

22 line 12.

23 In addition, Bonneville has inadequately accounted for the risk that the MOA funds

24 could be reallocated among categories and expended either before the rate case ends or during

25 the rate period. Bonneville has changed its analysis to include reallocation of a tiny fraction of

1 MOA funds. WP-02-E-BPA-39, page 23, line 25 through page 24, line 6. However, CR/YA  
2 rebuttal testimony outlines numerous activities that Bonneville has not yet funded.

3 In FY 1997, the fish and wildlife managers identified approximately \$70 million of  
4 meritorious fish and wildlife projects, which the fish and wildlife managers did not  
5 recommend for implementation due to lack of funding available from the Direct Budget  
6 category. In each year since, the fish and wildlife managers have identified substantial  
7 numbers of meritorious projects for which no funding was recommended due to budget  
8 limitations. Furthermore, in FY 97 and each subsequent year, CBFWA has identified  
9 about \$150 million needed to fund core projects to implement the F&W Program. In  
10 addition, Bonneville has ended up obligating less than the \$127 million available under  
11 the MOA each year. This has added to the annual carry forward. The carry forward  
12 balance for the direct budget category arises because Bonneville has chosen to under-  
13 fund its fish & wildlife responsibilities each year, not because it is over collecting  
14 revenues.

15  
16 WP-02-E-CR/YA-05, page 22, line 9 through 20. Bonneville's decision to not reallocate MOA  
17 funds is indefensible given the terms of the MOA and the condition of the salmon stocks.

18 Bonneville's position to consider the risk that the MOA funds will be reallocated to be *de*  
19 *minus* merely shows that Bonneville is unwilling to act in good faith when it comes to fish and  
20 wildlife issues.

21 Bonneville has also contended that it cannot reallocate the MOA funds until a regional  
22 plan has been adopted.

23 Q. Did Bonneville do any analysis showing that a regional plan would have to be in  
24 place before funds would be reallocated among the MOA categories?

25 A. (Ms. Lefler) As I understand it, it was not an analytical process; it was that the  
26 Administrator has made it clear that a regional plan is pivotal to deciding how these  
27 funds would be spent and would be hesitant to agree to reallocation unless a plan  
28 were agreed upon. Cross examination of Risk Mitigation Study Panel BPA-40, page  
29 720-21.

30  
31 Bonneville unlawfully disregards the Columbia River Basin Fish and Wildlife Program that was  
32 adopted in 1994. Bonneville cannot carry out its duties under the Act by developing a different  
33 plan or by waiting for a new Program from the Council, which Bonneville apparently hopes may

1 be better suited to its pledge to hold rates at their current level.<sup>13</sup> Bonneville must take the  
2 current Program into account at each relevant stage of Administrator's decision making processes  
3 to the fullest extent practicable. 16 U.S.C. 839b(h)(11)(A).

4

5 **Summary: CRITFC and the Yakama Nation recommend that Bonneville reduce its**  
6 **starting reserve by \$227 million to avoid double counting the unexpended MOA funds.**  
7 **This recommendation would allow Bonneville to more accurately analyze the risk and**  
8 **uncertainties that it faces.**

9

10

11

**F. Bonneville's risk mitigation strategies are not adequate.**

12

13

14

**1) The Dividend Distribution Clause will increase the risk that Bonneville will not pay all of its costs while assuring repayment to the Treasury.**

15

**Issue: Should the Dividend Distribution Clause be changed?**

16

CRITFC and the Yakama Nation oppose the Dividend Distribution (DDC) provisions

17

Bonneville has proposed. We believe it is essential for Bonneville to be able to build a reserve

18

that is sufficient to meet its future fish and wildlife obligations while keeping its rates

19

competitive and fully repaying the Treasury. This strategy has the best chance of meeting

20

Bonneville's obligations under Treaties and Federal laws, including meeting its total system

21

costs and assuring repayment to the Treasury.

22

If Bonneville retains the DDC, it should increase the trigger to \$1.6 billion. Based on the

23

analysis supplied by CRITFC and the Yakama Nation, this amount appears to be sufficient to

24

meet Bonneville's future obligations while remaining competitive with projected market rates.

---

<sup>13</sup> Bonneville has offered no evidence in this proceeding that a new Program will be within the range of fish and wildlife costs it has analyzed. Based upon the "high degree of deference to be given to the fishery managers" in developing the Program through their recommendations, *Yakima Nation*, 35 F. 3d 1371 at 1388, it is likely that a new Program will reflect the one of the two alternatives in the May 11 memorandum. Moreover, as identified in the

1 We oppose the Public Power Council's proposal to reduce the Administrator's discretion  
2 in implementing the Dividend Distribution Clause. PPC would make the dividend automatic  
3 when reserves reached a certain level. PPC's suggestion would mean that Bonneville would  
4 have to implement the dividend distribution and reduce its reserves even if Bonneville knew that  
5 it faced significant additional costs in the future. This would reduce Bonneville's ability to meet  
6 its costs, reduce Bonneville's ability to meet its obligations under Federal law, and reduce the  
7 assurance that Bonneville would be able to fully repay its debt on the FCRPS.

8 **Summary: We oppose the DDC. If Bonneville decides to retain this provision the trigger**  
9 **should be \$1.6 billion. The Administrator should retain discretion to review future costs**  
10 **before implementing the DDC.**

11  
12 **2) Bonneville has overestimated the probability that the Cost Recovery**  
13 **Adjustment Clause will address the risks it faces.**

14  
15 **Issue: Has Bonneville assumed too high a probability that Cost Recovery Adjustment**  
16 **Clause will cover the uncertainties it facts?**

17  
18 Bonneville also relies on a Cost Recovery Adjustment Clause (CRAC) as a risk  
19 mitigation contingency. Bonneville has developed rate adjustment mechanisms in previous rate  
20 strategies, however, Bonneville has never implemented a rate adjustment, yet inappropriately  
21 assumes a one hundred percent probability of successfully triggering CRAC. Instead, Bonneville  
22 has worked to reduce other costs so a rate adjustment would not be triggered. Many of the costs  
23 Bonneville has reduced have delayed the implementation of fish and wildlife restoration  
24 measures. The un rebutted CRITFC and Yakama Nation testimony in WP-02-E-CR/YA-02 page  
25 10, line 11 through page 11, line 4 provides an example of Bonneville's past efforts to reduce  
26 measures to protect salmon in order to avoid an interim rate adjustment. Such reductions would

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testimony of Mr. Giese (WP-02-E-CR/YA-04), the May 11 memorandum represents an improved estimate of  
implementing the costs of the current Program.

INITIAL BRIEF OF THE COLUMBIA RIVER  
INTER-TRIBAL FISH COMMISSION AND YAKAMA NATION

WP-02-B-CR/YA-01

Columbia River Inter-Tribal Fish Commission  
729 N.E. Oregon Street, Suite 200  
Portland, Oregon 97232  
(503) 238-0667

1 be inconsistent with Principle #1 and several federal laws. Further, we herein incorporate by  
2 reference the Northwest Energy Coalition's argument regarding Bonneville's asymmetrical and  
3 inequitable treatment of cost recovery and dividend distribution mechanisms.

4 **Summary: There is less than 100% probability that CRAC will trigger. Bonneville should**  
5 **change its risk analysis to assume a range of probabilities that it can successfully**  
6 **implement a CRAC. The probabilities should range from zero to 100 percent.**

7  
8 **3) Bonneville's Planned Net Revenues for Risk are not sufficient to address the**  
9 **risk it faces.**

10  
11 **Issue: Has Bonneville set the Planned Net Revenues for Risk high enough to meet the risks**  
12 **it faces?**

13  
14 Some of Bonneville's contingencies to address uncertainties have been weakened since  
15 the initial discussion between Bonneville and Columbia Basin tribes in the summer of 1999. For  
16 example, when Bonneville met in a government-to-government meeting with Columbia Basin  
17 Indian tribes it originally proposed to collect Planned Net Revenues for Risk (PNRR) totaling  
18 \$170 million per year.<sup>14</sup> That amount has been reduced in this rate case to \$127 million. At the  
19 same meeting Bonneville showed analysis that its contingencies would produce average ending  
20 reserves of \$1.4 billion in 2006.<sup>15</sup> This was especially important to Indian tribes given the fact  
21 that the fish and wildlife restoration measures will be much higher in the 2007 to 2011 period.  
22 Bonneville's latest calculation of ending reserves is \$900 million. WP-02-E-BPA-39, page 12,  
23 line 18 through 21. This is not an adequate ending reserve and is inconsistent with Bonneville's  
24 representations to the tribes.

25 **Summary: The PNRR should be recalculated based on the other remedies recommended in**  
26 **this brief.**

27  
28

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<sup>14</sup> This assurance is also reflected in the Stelle memorandum, discussed *supra*.

<sup>15</sup> These levels were also the basis of the Stelle memorandum, discussed *supra*.

1 **G. Bonneville underestimates the risk of Treasury deferrals between 2002-2006.**

2 **Issue: BPA's proposal doesn't account for substantial risk in the rate period due to**  
3 **multiple deferrals.**

4  
5 By focusing its analysis on the number of times Bonneville projects that it will  
6 successfully meet its Treasury payments, Bonneville understates its ability to assure repayment of  
7 the Federal Columbia River Power System. In response to data request CR-BPA:014 (WP-02-E-  
8 CR/YA-01, Attachment 8), Bonneville states that "there were a total of 384 5-year rate periods  
9 simulated in the ToolKit model in which there was more than one deferral." Testimony by the  
10 Public Utility Commission of Oregon indicates that 61 percent of the cases where Bonneville has  
11 deferrals, it misses full Treasury payment more than once. See WP-02-E-OP-1, page 4, lines 7  
12 through line 11. In fact, the total number of years where there are missed Treasury payments  
13 totals 859, according to Bonneville's Toolkit analysis. There is a clear difference in risk to the  
14 Treasury and risks to the successful implementation of fish and wildlife restoration between  
15 missing one Treasury payment and missing several. Clearly, missing Treasury payments two,  
16 three, or four times during the rate period would be far more serious than a single deferral. Yet  
17 Bonneville's analysis treats multiple deferrals the same as a single miss. This clearly understates  
18 the risk to Treasury. This approach also creates a political problem for funding higher cost fish  
19 and wildlife restoration efforts to meet Bonneville Treaty and trust obligations.

20 Analysis of Bonneville's multiple Treasury deferrals is covered in greater detail by the  
21 Northwest Energy Coalition and Save Our *Wild* Salmon and the Oregon Public Utility  
22 Commission, WP-02-B-NA-01 and WP-02-B-OP-01 respectively. CRITFC and the Yakama  
23 Nation hereby incorporate by reference the analysis and arguments of these two parties on this

1 matter in order to comply with the Hearing Officer's Order on Initial Briefs, WP-02-O-18,  
2 encouraging litigants to avoid redundancy and avoid duplication of identical positions.

3 CRITFC and the Yakama Nation recommend that Bonneville modify its TPP  
4 methodology to account for the risks to Treasury of multiple deferrals during the rate period.

5 **Summary: Bonneville should change its methodology to account for the higher risks**  
6 **associated with multiple deferral to the Treasury. This will change TPP. It is bad policy to**  
7 **ignore this risk.**

8

9 **H. Bonneville's Proposal does not address future risks after 2007.**

10 **Issues: Does Bonneville's Proposal position Bonneville to meet its Treaty and legal**  
11 **obligations and its requirements under 16 U.S.C. 839e(a)(2) (A)&(B) over the long-term?**  
12 **Should Bonneville analyze these risks and address them in this Proposal?**

13

14 **1) Bonneville has not addressed Fish Funding Principle #4.**

15 Principle #4 (WP-02-E-BPA-02A, page 355) states that: "Given the range of potential  
16 fish and wildlife costs, Bonneville will design rates and contracts which will position Bonneville  
17 to achieve similarly high Treasury payment probability for the post-2006 period by building  
18 financial reserves levels and through other mechanisms." In the response to data request number  
19 CR-BPA:043 (WP-02-E-CR/YA-01, Attachment 3), Bonneville states: "BPA has not adopted  
20 specific quantitative criteria for the satisfaction of FFP#4. BPA's models and data needed for  
21 calculating TPP have not been updated for the post-2006 period, and BPA cannot calculate a  
22 post-2006 TPP. BPA has not set specific ending reserves targets for 2006." In the response to  
23 request number NA-BPA:004 (WP-02-E-CR/YA-01, Attachment 1), Bonneville states: "BPA  
24 does not have quantitative tools for calculating TPP for the post-2006 period." Bonneville has  
25 asserted that it has met principle #4 without any analysis.

1                   **2) Bonneville cannot meet Principle #4 and its treaty and trust obligations.**

2                   It also appears that when Bonneville wants to analyze future conditions it does have the  
3 quantitative tools to do it. Bonneville’s direct testimony at WP-02-E-BPA-02A, page 366 argues  
4 that it has fulfilled Principle #4. The only exception, according to Bonneville would be if the  
5 Alternatives that are similar to the tribal recovery plans were implemented. According to  
6 Bonneville’s own analysis, *Wy-Kan-Ush-Mi Wa-Kish-Wit* would result in Bonneville rates in  
7 2007 that are 5 mills above the Northwest Power Planning Council’s projections for the market  
8 rate of power. If Clean Water Act costs were included Bonneville’s costs would be 6-11 mills  
9 above the market rate. Therefore, Bonneville appears to be saying that their rate scheme meets  
10 the principles as long as they do not have to fulfill Treaty and trust obligations, and meet the  
11 Clean Water Act.

12                   **3) Analysis by others shows Bonneville’s Proposal does not position it to meet**  
13 **future costs and assure repayment to Treasury.**

14  
15                   There are other ways to analyze Bonneville’s ability to meet Principle #4. WP-02-E-  
16 CR/YA-01, Attachment 4 (*see [www.nwppc.org](http://www.nwppc.org)*) is the results section from a report by the  
17 Northwest Power Planning Council (NPPC) entitled: *Analysis of the Bonneville Power*  
18 *Administration’s Potential Future Costs and Revenues*. The report concludes that a reserve  
19 could help Bonneville remain competitive in the face of higher costs or lower markets. Tribal  
20 consultants ran the NPPC Strandsim Model used in the report to estimate the size of a reserve  
21 that might be needed to cover the Snake River and John Day Dams to Natural River plus the  
22 Clean Water Act costs alternative. It appears that Bonneville could stay competitive in a  
23 medium market in the 2007 to 2011 rate period if it entered the period with \$1.6 billion in  
24 reserves. In this case the Present Value benefits to the Northwest were \$2.2 billion compared to

1 purchasing power at market rates. WP-02-E-CR/YA-01, Attachment 5. Bonneville would need  
2 a larger reserve to stay competitive in a market similar to the low market estimated by the  
3 Council. Unfortunately, Bonneville's latest revision to its rate proposal actually lowers the  
4 average ending reserve in 2006 to \$900 million. Based on this analysis Bonneville is not  
5 meeting Principle #4.

6 The Northwest Energy Coalition and Save Our *Wild* Salmon provide another analytical  
7 approach to determining whether Bonneville has met Principle #4 in their brief. WP-02-E-NA-  
8 01, page 7, line 20 through page 16, line 27. NWECA's analysis shows that Bonneville's  
9 probability that it can maintain rates after 2006 that are less than market rates is less than 88  
10 percent. In cross-examination, Bonneville's expert witness, Dr. Byrne Lovell, testified that to  
11 meet a TPP that is equivalent to the 1993 rate policy, Bonneville must be able to set rates during  
12 2006-2011 sufficient to meet the TPP goal. Cross examination of Risk Mitigation Study Panel  
13 BPA-40, page 709, line 5-22. Bonneville would not be able to set rates that are above market  
14 rates.

15 Therefore, based on the analysis cited above we believe it was possible for Bonneville to  
16 conduct some analysis of its ability to meet Fish Funding Principle #4. This analysis would have  
17 shown that Bonneville's rate proposal does not position Bonneville to maintain similarly high  
18 Treasury Payment Probabilities after 2006 by building reserves or other mechanisms.

19 **4) Fish Funding Principle #4 is critical to fulfilling treaty and trust obligations,**  
20 **federal laws, meeting Bonneville's costs, and assuring Treasury repayment.**

21 Fulfilling Principle #4 is critical to addressing Bonneville's total system costs and the  
22 uncertainties it faces. Fishery managers agree that fish and wildlife costs will increase  
23 significantly after 2006. See WP-02-E-CR/YA-02, page 4, lines 14 through 23, and page 4 lines  
24

1 28 through page 5, line 12. A significant portion of this added cost will be paying the long-term  
2 debt service on fish and wildlife protection measures that are implemented during the 2002-2006  
3 rate period. This fact is often lost on some parties that argue that Bonneville cannot include costs  
4 in this rate period to prepare Bonneville for the next rate period. This argument ignores the fact  
5 that Bonneville needs reserves and cannot enter any rate period with no reserves. It also ignores  
6 the fact that decisions made during this rate period will result in significant costs that will have to  
7 be paid in the next rate period. A successful company that knew it would have costs in the future  
8 would start saving some money (especially if their product was 35 percent below the market  
9 price) to pay the future costs of fish and wildlife restoration decisions that will be made during  
10 this rate period. Therefore, Bonneville should increase its rates during 2002-2006 to cover its  
11 costs, including the expected costs of fish and wildlife restoration that may carry over into the  
12 next rate case.

13 **Summary: Bonneville has not met Fish Funding Principle #4. There are ways to analyze**  
14 **Bonneville's future risks. Bonneville should conduct this analysis and incorporate the**  
15 **results in this Proposal. An ending reserve of \$1.6 billion would allow Bonneville to cover**  
16 **the future costs of decisions made in the current rate period, remain competitive, and**  
17 **assure Treasury repayment for the FCRPS.**  
18  
19

20 **III. BONNEVILLE HAS NOT INCLUDED ADEQUATE FUNDS TO SERVE NEW**  
21 **TRIBAL UTILITIES.**  
22

23 **Issue: Should BPA include new preference customers in General Transfer Agreements?**

24 **A. Bonneville's rate proposal discriminates against tribal utilities.**

25 **1) Failure to provide funding for General Transfer Agreements, or similar**  
26 **power delivery provisions for new preference customers while providing**  
27 **funding for such power delivery for existing preference customers is contrary**  
28 **to federal law.**  
29

1 BPA’s GTA proposals will allow preference customers and DSI customers who have  
2 historically been served by General Transfer Agreements (GTAs) to avoid pancaked  
3 transmission rates when serving their loads with federal or non-Federal power.<sup>16</sup> CRITFC and  
4 the Yakama Nation contend that failure to include a revenue requirement sufficient to pay for  
5 new preference customers’ GTAs, or similar power delivery provisions (hereinafter GTAs<sup>17</sup>),  
6 while providing a revenue requirement for GTAs for existing preference customers results in a  
7 rates that are contrary to law and Bonneville policy. CRITFC and the Yakama Nation propose  
8 that GTAs be extended for new customers.

9 The BPA proposal is contrary to the following laws:

- 10 1) They are not “uniform” or “equitable” as required by Sections 5(a) and 6 of the  
11 Bonneville Project Act, Section 6 of the Preference Act, and Sections 9 and 10 of the  
12 Transmission System Act,
- 13 2) They act as a disincentive for formation of new preference entities as contravenes the  
14 intention and history of Section 5(a) of the Northwest Power Act.
- 15 3) They contravene the requirement of Section 6(k) of the Northwest Power Act  
16 requiring the Administrator to insure that benefits shall be distributed equitably  
17 consistent with the obligations to particular customer classes;  
18

19 CRITFC and the Yakama Nation filed testimony regarding the effect of this policy on  
20 new tribal utilities that may be formed. The Yakima Nation’s utility’s pancaked costs and  
21 control area costs would range from \$1.75 million to \$2.75 million, and these costs have the  
22 potential to erase any real cost benefits what would accrue to ratepayers of the Yakima Nation

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<sup>16</sup> Our arguments apply to both Power Business Line’s (PBL’s) proposal to provide wheeling of federal power, and Transmission Business Line’s (TBL’s) proposal to provide wheeling of non-Federal power.

<sup>17</sup> Because the General Transfer Agreements were entered into prior to FERC’s open access orders, they may not be able to be duplicated at this time. Further, such agreements require the approval of both BPA and the owner of third-party transmission. However, other methods exist to make sure the same benefit is provided equally within all customer classes. BPA can acquire open access transmission on behalf of new customers. The method of delivery is not the point of this discussion, it is the benefit received by the customer for the rate paid that is at issue.

1 utility which would buy power from BPA at the PF rate. WP-02-E-CR/YA-01, Page 8, Line 1  
2 (Sheets). It will be difficult to create a new public utility if the costs are too high. WP-02-E-  
3 CR/YA-01, Page 7, Line 18.

4 The GTA policy in this rate proceeding is derived from the Subscription Process  
5 undertaken by BPA. During the Subscription Process, it was clear that issues affecting rate case  
6 studies were open for further discussion in the rate case. The Federal Register Notice  
7 announcing the 2002 Proposed Wholesale Power Rate Adjustment makes clear that the issue of  
8 the GTA expenses is within the scope of the rate case. *See* 64 Fed. Reg.44,318 at 44,323.  
9 Therefore, the Rebuttal Testimony of the Northwest Requirements Utilities (NRU), which was  
10 the only rebuttal filed by any party to the CRITFC/Yakima testimony, is not persuasive. NRU  
11 states that the Subscription Record of Decision “and other documents” state that third party  
12 wheeling costs will not be rolled into the revenue requirement for service outside of existing  
13 territories or for new utilities, WP-02-E-NI-05, Page 24, Line 11 (Saven). An error in law made  
14 in the subscription process does not make an error in law in the rate case also appropriate.

15 Other customers have arguments similar to ours. We incorporate by reference the section  
16 of the brief by the Upper Columbia United Tribes dealing with the legal requirements of  
17 Bonneville to provide nondiscriminatory rates. We summarize and elaborate on the legal  
18 arguments in the UCUT brief below. The Direct Service Industries agree that the GTA rate does  
19 not provide a “level playing field” WP-02-E-DS/AL/VN-06 Page 25, line 18, and is “blatantly  
20 discriminatory” WP-02-E-DS/AL/VN-06 Page 26, line 17.

21 The following paragraphs summarize the errors in law arising from the proposal.

1                   **a) Uniform rates are required by statute.**

2                   BPA organic statutes have numerous references to “uniform” and “equitable” rates. The  
3                   GTA rate in the current rate proposal is designed to apply differently to similarly situated  
4                   preference customers. *See* Section 5(a) of the Bonneville Project Act, 16 U.S.C. 832d(a),  
5                   Section 6 of the Bonneville Project Act, 16 U.S.C. 832e, Section 6 of the Preference Act, 16  
6                   U.S.C. 837e, and Section 10 of the Federal Columbia River Transmission System Act, 16 U.S.C.  
7                   838h. The rate is therefore not uniform or equitable.

8                   There are numerous policy reasons for the uniformity and equity of rates. For example,  
9                   uniform rates protect one category of customer from subsidizing another category of customer.  
10                  BPA has admitted on cross examination that under the proposal new customers will be paying  
11                  for the cost of the existing customers’ GTA service, *Cross Examination of GTA Panel*, January  
12                  25, 2000, Page 469, as well as paying for their own transmission. These types of subsidies are  
13                  simply unfair.

14                  BPA was asked on cross examination for their justification for the distinction between  
15                  new and existing customers. The justification does not provide any reasonable or overriding  
16                  explanation for the distinction between new and existing preference customers. BPA “didn’t feel  
17                  that we could expose ourselves to an open-ended blank check for who knows how many other  
18                  customers that might want the same service.” *Cross Examination of GTA Panel*, January 25,  
19                  2000, Page 468. BPA did however feel they could expose themselves to check writing for  
20                  existing customers. While CRITFC and the Yakama Nation are in favor of cutting costs, we do  
21                  not believe this should be done at the expense of fairness or in violation of federal law.

1                   **b) Rates should not provide a disincentive for formation of new preference**  
2                   **customers.**

3  
4           The most recent act of law defining preference rights of public body and cooperative  
5 customers, the Pacific Northwest Electric Power Planning and Conservation Act (Northwest  
6 Power Act), 16 U.S.C. 839 et seq, also addresses the issue of fairness between new and existing  
7 preference customers. Section 5(a) of that act reiterates that the preference and priority  
8 provisions of previous acts are still applicable. This is important because in passing the new  
9 legislation, Congress had the opportunity to distinguish between new and existing preference  
10 customers. Congress chose to leave the definition of public preference customers the same as it  
11 had been under earlier acts therefore guaranteed the rights of even new preference customers<sup>18</sup>.

12           Requiring new preference customers to pay costs not paid by existing customers, as well  
13 as to subsidize existing customer costs places them in the position of foregoing their preference  
14 status due to economic disadvantage. Such a policy is contrary to Sections 2(b) of the  
15 Bonneville Project Act, 16 U.S.C. 832a(b), which requires BPA to “encourage the widest  
16 possible use of all electric energy that can be generated and marketed and to provide reasonable  
17 outlets therefore, and to prevent the monopolization thereof by limited groups.” It is also

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<sup>18</sup> In “Preference Is Not A Four Letter Word” by J. Laurence Cable and Tamara L. Townsend, presented to Law Seminar International’s Fourth Annual Conference on Buying and Selling Electricity in the West, Seattle, Washington, January 14-15, 1999, the following statements are made regarding the passage of the Northwest Power Act (herein Regional Act).

Another preference topic which received substantial attention was whether new preference customers would be treated equally with existing preference customers. Once again, both APPA and NRECA expressed concerns about whether the Regional Act would prevent the formation of new preferred customers in the Northwest. The solution adopted was to leave the definition of public preference the same as had been the case under the Project Act. Specifically, all preference rights of the Project Act were preserved in the new legislation. This meant that new preferred customers could form and would be accorded equal treatment with such customers that existed on the date the Regional Act was passed. New preferred customers could not limit the contractual rights of existing customers during the term of the power sales agreements with existing customers. However, new preferred customers would be entitled to equal treatment with existing preferred customers as power became available to serve the loads of new

1 contrary to Section 6 of the Bonneville Project Act, 16 U.S.C. 832e, which requires that rate  
2 schedules “shall be fixed and established with a view to encouraging the widest possible  
3 diversified use of electric energy”.

4 Section 7(a)(1) of the Northwest Power Act, which establishes our most recent rates  
5 directives states that rates be established in accordance with Section 9 of the Transmission  
6 Act, 16 U.S.C. 838g. This statute requires BPA to encourage “the widest possible diversified use  
7 of electric power at the lowest possible rates to consumers consistent with sound business  
8 principles.” Establishing rates with a disincentive for formation of new preference customers is  
9 contrary to law and public policy.

10 In its testimony, PNGC states that “BPA’s proposal for treatment of third party wheeling  
11 costs helps the evolving wholesale market to be available to all of BPA’s preference customers,  
12 not just those directly connected to BPA’s grid. In fact the proposal lessens distortions of the  
13 market and helps achieve FERC’s goal of a freely moving, open-to-all, power market over a  
14 large geographic area.” WP-02-E-PN-12, Page 12, line 12.

15 **c) Benefits should be distributed equitably among particular customer**  
16 **classes.**

17  
18 Section 6(k) of the Northwest Power Act, 16 U.S.C. 839d(k) requires the Administrator  
19 to insure that benefits shall be distributed equitably consistent with the obligations to particular  
20 customer classes. Such a mandate is inconsistent with discriminatory treatment of new  
21 preference customers in favor of existing preference customers with regard to GTA service.  
22 CRITFC and the Yakama Nation consider it more reasonable that the Administrator would

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preferred customers. New preferred customers would take precedent over non-preferred customers and

1 provide GTA service for new customers but not for existing customers since the existing  
2 customers have had the use of BPA power and transmission for all these years when the new  
3 customers have not had the benefits of federal power. To provide equity over time is another  
4 manner of resolving this issue.

5 **B. Bonneville’s General Transfer Agreement policy is contrary to Bonneville**  
6 **and Department of Energy policy.**  
7

8 Bonneville’s Tribal Policy states that “BPA will seek mutually beneficial business  
9 partnerships with Tribal governments through its various programs, pursuant to its authorities.” In  
10 this rate case Bonneville has proposed a policy on GTA’s that will discourage the formation of  
11 new tribal utilities. For example, as discussed above, the policy will add \$1.75 to \$2.75 million  
12 per year to a Yakama Nation Utility, if the Tribal Council decides to form one. This added cost  
13 may make formation of a tribal utility uneconomic and infeasible. The GTA policy clearly does  
14 not promote beneficial business partnerships with tribes.

15 The Department of Energy has also been working to promote the formation of new tribal  
16 utilities. The Department has developed a program to provide technical assistance to tribes in the  
17 formation of new utilities. The GTA policy frustrates this program of the Department of Energy.

18 **C. Recommended remedy for General Transfer Agreements.**

19 CRITFC and the Yakama Nation recommend that Bonneville increase its revenue  
20 requirements by approximately \$5 million per year to cover the cost of paying for the General  
21 Transfer Agreements of new public utilities, including new tribal utilities. We do not support the  
22 alternative remedy suggested by UCUT that all GTAs cost be eliminated from Bonneville’s  
23 revenue requirements. Eliminating all GTA payments would likely foreclose the formation of

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would enjoy the same rate or price rights as those accorded existing customers. [footnotes redacted].  
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1 new tribal utilities and would do nothing to address the fact that most tribal utilities have not had  
2 the benefits of the FCRPS, including GTA benefits, but Columbia Basin Indian tribes have borne  
3 the greatest costs of the FCRPS. These adverse effects include: the loss of productive salmon  
4 runs that sustained Indian people and are essential to the culture and religion of the tribes, and  
5 the inundation of tribal lands by the Federal reservoirs.

6 **Summary: Bonneville should include the costs of paying the GTAs, or equivalent**  
7 **mechanisms in its revenue requirements. Bonneville’s current approach in this Proposal is**  
8 **inequitable, and inconsistent with Federal laws and policies, or Treaty and trust**  
9 **obligations.**

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12 **IV. BONNEVILLE'S CHARACTERIZATION OF TRIBAL CONSULTATIONS IN**  
13 **THE FEDERAL REGISTER NOTICE WAS INACCURATE AND MISLEADING**

14

15 The Federal Register Notice states that the Fish and Wildlife Funding Principles were  
16 developed “in consultation” with a number of parties in the Northwest, including the Columbia  
17 Basin Tribes. *See* 64 Fed. Reg. 44,318, at 44321. WP-02-E-CR/YA-02, Attachment 6 contains a  
18 definition for consultation developed by the Confederated Tribes of the Umatilla Reservation.  
19 Based on this definition, the process described by Bonneville was clearly not consultation with  
20 the tribes. Letters from a number of Columbia Basin Tribes reinforce the conclusion that these  
21 Fish Funding Principles do not have the support of the tribes and do not meet treaty and trust  
22 obligations. WP-02-E-CR/YA-02, Attachments 7 through 12 show that in the opinion of these  
23 tribes, Bonneville’s rate proposal does not address the concerns of the tribes.

24 **V. REMEDIES**

25 For the reasons stated above, CRITFC on behalf of its members and the Yakama Nation  
26 urge the Administrator to adopt the following recommendations:

27

1           **A. Bonneville should revise its revenue requirements to address its obligations**  
2           **under Treaties with Columbia Basin Indian tribes, Federal laws, and the Fish**  
3           **and Wildlife Funding Memorandum of Agreement.**

4  
5  
6           **1) Reduce starting reserves.**

7           CRITFC and the Yakama Nation recommend that Bonneville remove \$227 million of  
8 unexpended MOA funds from the starting reserve.

9           **2) Increase fish and wildlife costs.**

10          CRITFC and the Yakama Nation also recommend that Bonneville include an additional  
11 \$397 million in its revenue requirements to deal with risks not adequately addressed in the  
12 Proposal. This additional amount would be sufficient to cover an alternative 13u and the  
13 accelerated habitat, hatchery, and harvest actions identified in the May 11<sup>th</sup> memorandum.

14          **3) Increase cultural resources costs.**

15          CRITFC and the Yakama Nation also recommend that Bonneville add \$10.5 million per  
16 year for cultural resources expenses.

17          **4) Increase costs for serving new utilities, including tribal utilities.**

18          CRITFC and the Yakama Nation recommend that Bonneville increase its revenue  
19 requirements by approximately \$5 million per year to cover the cost of paying for the General  
20 Transfer Agreements of new public utilities, including new tribal utilities.

21          **B. Bonneville should revise its risk analysis and strengthen its contingencies.**

22               **1) Address the added risk in the EPA, NMFS, USFWS, Treasury**  
23               **memorandum.**

24  
25          Bonneville should incorporate the risks in the May 11, 1999 memorandum in its risk  
26 analysis. Bonneville should use the direct cost estimate of \$325 million as an average over the

1 2002-2006 rate period as the most likely estimate and conduct analysis assuming direct costs  
2 could be as high as \$390 million per year during the period.

3 **2) Eliminate or revise the Dividend Distribution Clause.**

4 CRITFC and the Yakama Nation oppose the dividend distribution system proposed by  
5 Bonneville. We believe it would be better to leave surplus funds in a reserve to meet  
6 Bonneville's costs, improve Bonneville's assurance of repaying the Treasury, and positioning  
7 Bonneville to be competitive in the future. If Bonneville does not eliminate the dividend  
8 provision the trigger should be set at \$1.6 billion and we would support the Administrator's  
9 discretion in examining future costs and other risks as part of a decision on whether to trigger the  
10 dividend distribution.

11 **3) Analyze the probability that CRAC will not be implemented.**

12 Bonneville should change its risk analysis to assume a range of probabilities that it can  
13 successfully implement a CRAC. The probabilities should range from zero to 100 percent with  
14 equal weighting within the range.

15 **4) Recalculate PNRR.**

16 Given the uncertainty Bonneville faces, the contingencies should be strengthened to  
17 ensure that Bonneville can meet its total system cost and repay its debts to Treasury. For  
18 example, the Planned Net Revenue for Risk should be recalculated based on the  
19 recommendations above.

20 **C. These remedies will improve Bonneville's ability to meet its costs, assure**  
21 **repayment to the Treasury, and improve its competitiveness.**

22  
23 The policies in Bonneville's rate proposal keep rates for customers about 35 percent  
24 below market rates during 2002-2006. The costs assumed in these rates do not fully cover the

1 likely costs to restore fish and wildlife under the Endangered Species Act and Treaties with  
2 Columbia Basin Indian tribes or Federal laws. By setting its rates too low to cover its costs  
3 Bonneville will make it difficult to cover its total system costs and assure repayment of its debt  
4 to the Treasury. We are concerned that Bonneville's policy will mean that fish and wildlife  
5 restoration will not be implemented. Under Bonneville's rate proposal it will be forced to defer  
6 fish and wildlife restoration or to reduce the probability of repaying the Treasury for the debt  
7 associated with the Federal Columbia River Power System. We are further concerned that if the  
8 choice facing Congress is either deferring Treasury payments or fully funding fish and wildlife  
9 restoration then fulfillment of our Treaty rights will be at risk.

10 Bonneville has a responsibility to meet its Treaty and trust obligations and  
11 responsibilities under Federal law. Those responsibilities have associated costs that should be  
12 included in Bonneville's total system costs for the purpose of setting rates.

13 The material provided by Bonneville in response to data request number NA-BPA:004  
14 (*see* WP-02-E-CR/YA-01, Attachment 1) includes a table entitled: Very Approximate Impacts  
15 on BPA Rates of 13 (18) F&W Alternatives. The table shows that Bonneville would need to  
16 raise its rates to 22.7 to 25.3 mills/kWh during the 2002-2006 rate period to cover the alternative  
17 that includes Clean Water Costs and the four Snake River Dams and John Day Dam to natural  
18 river. Bonneville estimates that the market price of power will average approximately 32 mills  
19 per kWh during the rate period (please see WP-02-E-CR/YA-01, Attachment 6).

20 Based on analysis provided by Bonneville, we believe the changes we have  
21 recommended would result in an average wholesale rate of approximately 25 mills/kWh. This  
22 rate would still be well below the market rate of electricity. It would allow Bonneville to meet

1 all of its costs and assure full repayment of the FCRPS pursuant to 16 U.S.C. 839e(a)(2)  
2 (A)&(B).

3 Raising rates would have several other advantages for meeting Bonneville's requirements  
4 under the standards required by Federal law in 16 U.S.C. 839e(a)(2). Higher rates during 2002-  
5 2006 would put Bonneville in a better financial position to cover the other uncertainties it faces.  
6 Higher rates would potentially build a reserve that could position Bonneville to pay the total  
7 system costs associated with the added repayment obligations during 2007-2011 of the fish and  
8 wildlife restoration measures implemented during 2002-2006. Such a reserve would also  
9 increase the probability that Bonneville could keep its rates below future market rates in the  
10 2007-2011 period. Finally, increasing rates now to meet the likely total system costs Bonneville  
11 will face would also reduce the size of the rate increase in 2007 to cover higher costs, including  
12 fish and wildlife restoration costs. Please see CRITFC and Yakama Nation testimony WP-02-E-  
13 CR/YA-02 page 9, lines 18 through page 10, line 5.

14 Avoiding rate shock would make Bonneville more competitive and more likely to be  
15 able to meet its total system costs and assure repayment of debt associated with the Federal  
16 Columbia River Power System. For all these reasons, CRITFC and the Yakama Nation  
17 recommend that Bonneville adopt the remedies we have recommended.

## 18 **VI. CONCLUSION**

19 For the reasons contained in this brief, CRITFC and the Yakama Nation respectfully  
20 request Bonneville modify its Proposal to address our concerns and incorporate the remedies we  
21 have recommended.

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DATED February 28, 2000

Respectfully submitted,

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Tim Weaver  
Attorney for the Yakama Nation

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Kenneth Johnston  
Attorney for the Columbia River  
Inter-Tribal Fish Commission