

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)
11

12
13
14 BRIEF ON EXCEPTIONS
15 OF THE
16 COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION
17 AND
18 THE YAKAMA NATION
19
20

21
22 Tim Weaver
23 Cockrill and Weaver, P.S.
24 Yakama Nation
25 316 N. Third Street
26 P.O Box 487
27 Yakima, WA 98907
28 (509) 575-1500
29 Fax: (509) 575-1227
30

31
32 Kenneth Johnston
33 Columbia River Inter-Tribal Fish Commission
34 729 N.E. Oregon Street, suite 200
35 Portland, Oregon 97232
36 (503) 238-0667
37 Fax: (503) 235-4228
38
39
40
41
42

43 April 24, 2000

Exhibit: WP-02-R-CR/YA-01

TABLE OF CONTENTS

1
2
3
4 **I. INTRODUCTION 1**
5 **A. Summary..... 2**
6
7 **II. REVENUE REQUIREMENTS..... 6**
8 **A. Fish and Wildlife and Cultural Resources Expenses..... 6**
9 **B. Clean Water Act..... 7**
10 **C. Endangered Species Act 8**
11 **D. Fish and Wildlife Coordination Act 10**
12 **E. Northwest Power Act..... 11**
13 **F. Cultural Resources..... 12**
14 **G. Summary..... 12**
15
16 **III. IMPLEMENTATION OF THE FISH AND WILDLIFE FUNDING PRINCIPLES... 13**
17 **A. Equal Weighting of the 13 Alternatives 13**
18 **B. Range of Fish and Wildlife Costs 14**
19 **C. Fish and Wildlife Costs and Probabilities 15**
20 **D. Consultation..... 15**
21 **E. Use of Other Fish and Wildlife Alternatives in Risk Analysis..... 16**
22 **F. Fish and Wildlife Obligations 19**
23 **G. Principles Nos. 1 and 3..... 19**
24 **H. Principle No. 4..... 19**
25
26 **IV. RISK ANALYSIS 21**
27 **A. Non-Operating Risk Model..... 21**
28 **1) CRAC Probability..... 21**
29 **2) MOA Carry forward 22**
30 **3) Cost Review 23**
31 **B. Fish and Wildlife Obligations 23**
32 **C. Risk and Environmental Obligations..... 23**
33 **D. Legal and Procedural Issues 23**
34
35 **V. RISK MITIGATION..... 24**
36 **A. Probability of repaying Treasury 24**
37 **1) Northwest Power Act § 7(n)..... 24**
38 **2) Multiple deferrals..... 24**

1 3) **Alternative 13u** 25
2 **B. Cost Recovery Adjustment Clause (CRAC) Design** 26
3 1) **Forward looking CRAC** 26
4 **C. Planned Net Revenue for Risk** 26
5 **D. Dividend Distribution Clause**..... 29
6
7 **VI. TRANSMISSION AND INTER-BUSINESS LINE ISSUES**..... **30**
8 **A. GTA Expense Issues** 30
9
10 **VII.TREATY AND TRUST RESPONSIBILITY** **31**
11 **VIII. CONCLUSION** **34**
12

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

5 IN THE MATTER OF THE PROPOSED) BPA DOCKET NO. WP-02
6 WHOLESALE POWER RATE)
7 ADJUSTMENT PROCEEDING OF THE)
8 BONNEVILLE POWER)
9 ADMINISTRATION)

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

17 **I. 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, and WP-02-O-18. CRITFC and the Yakama Nation take exception to Bonneville's
23 Draft Record of Decision in this rate case, WP-02-A-01 ("DROD").

24 While CR/YA recommends changes to the DROD, to the extent not otherwise noted in
25 this brief on exceptions, wherever contrary to the determinations in Bonneville's DROD and in
26 the following Final Record of Decision ("Final ROD"), CRITFC and the Yakama Nation
27 incorporates by reference all of our other arguments as set forth in our briefs, as well as our
28 direct and rebuttal testimony in this rate case in order to preserve the CR/YA issues raised in

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

WP-02-R-CR/YA-01

Columbia River Inter-Tribal Fish Commission
729 N.E. Oregon Street, Suite 200

1 testimony and in our legal briefs. To the extent the DROD or the Final ROD depart from the
2 recommendations contained in the CR/YA prefiled testimony or briefs in this rate case
3 proceeding, CR/YA reserves the right to raise such issues in subsequent administrative and
4 judicial proceedings.

5 As in the CR/YA Initial Brief, this brief also supports and incorporates by reference
6 arguments made in the briefs on exceptions of the Upper Columbia United Tribes ("UCUT")
7 WP-02-R-UC-01, the Northwest Energy Coalition and Save Our *Wild* Salmon ("NWEC") WP-
8 02-R-NA-01, and the Oregon Public Utility Commission ("OPUC") WP-02-R-OP-01.

9 **A. Summary**

10 The Columbia River Inter-Tribal Fish Commission and Yakama Nation take exception to
11 a number of draft decisions proposed by Bonneville. The issues and concerns raised in our
12 Initial Brief (WP-02-B-CR/YA-01) remain the same. After reviewing the Draft Record of
13 Decision it appears that Bonneville has addressed one of the 34 issues raised in our brief. We do
14 not believe that Bonneville's treatment of the numerous issues we raised in our brief comes
15 anywhere close to addressing Bonneville's Treaty, trust, and fiduciary obligations to our tribes.

16 This brief on exceptions describes our continuing concerns that Bonneville has not set its
17 rates high enough to meet its costs, including its environmental costs, and to assure repayment to
18 the Treasury pursuant to 16 U.S.C. 839e(a)(2) (A)&(B). Given Bonneville's treatment of the
19 extensive work CR/YA put into our Initial Brief, we have kept our discussion of the exceptions
20 short. We incorporate our Initial Brief (WP-02-B-CR/YA-01) by reference. We do not waive
21 any of the technical or legal arguments or issues raised in our Initial Brief. Rather, we have
22 decided to conserve our limited resources for an appeal to the Federal Energy Regulatory

1 Commission where there is independent review of whether Bonneville’s rates are sufficient to
2 meet its costs and assure repayment to the Treasury.

3 We argued in our Initial Brief that Bonneville’s rates are not high enough. We believe
4 that Bonneville has not adequately addressed the risks and costs that it faces. The reality is that
5 these costs will have to be paid whether Bonneville has planned for them or not. The alternative
6 would be failure to meet Bonneville’s obligations under Treaties and Federal laws or to reduce
7 the likelihood that Bonneville will be able to fully repay its debt to the Treasury in a timely
8 manner.

9 The standard of review in the Northwest Power Act is:

10 Rates established under this section shall become effective...upon confirmation
11 and approval by the Federal Energy Regulatory Commission upon a finding by
12 the Commission that such rates are sufficient to assure repayment of the
13 investment in the Federal Columbia River Power System over a reasonable
14 number of years after first meeting the Administrator’s other costs. The rates
15 must also be based on the Administrator’s total system costs.

16 16 U.S.C. 839e(a)(2) (A)&(B).

17
18 More recently, Senator Gorton added an appropriations rider that states that “rates
19 established by the Administrator...shall recover costs for protection, mitigation, and
20 enhancements of fish and wildlife...while preserving the Administrators ability to establish
21 appropriate reserves and maintain a high Treasury payment probability for the subsequent rate
22 period.” 16 U.S.C. 839e(n).

23
24 We believe that FERC will find that these rates are insufficient to meet Bonneville's costs
25 and assure repayment to the Treasury. We also believe that FERC will see that Bonneville has
26 not positioned itself to meet its future costs and assure continued payment to the Treasury. We
27 know that FERC has not had many opportunities to make such a finding. It appears that most of

1 the parties in previous rate cases have tried to argue that the rates were too high and FERC has
2 declined to second guess Bonneville.

3 One of the purposes of our testimony and briefs was to clearly raise these issues to
4 Bonneville. The goal of the remedies we proposed in our Initial Brief was to convince
5 Bonneville to raise its rates and strengthen its risk mitigation measures to ensure that all of its
6 costs, including the costs associated with its Treaty and trust obligations and other Federal laws
7 are met while assuring repayment of its debt to the Treasury pursuant to 16 U.S.C. 839e(a)(2)
8 (A)&(B).

9 We continue to believe that Bonneville can raise its rates several mills per kWh, still be
10 25 percent below the market cost of power, and achieve these goals. This would improve
11 Bonneville's ability to fund needed fish and wildlife restoration and cultural resource protection
12 during 2002 to 2006 and 2007 to 2011. It would also help meet the requirements of the Clean
13 Water Act, the Endangered Species Act, and numerous other laws. Moreover, it would position
14 Bonneville to remain competitive in the 2007-2011 rate period and significantly improve the
15 chances that Bonneville will be able to make full and timely payments on its debt to the Federal
16 Treasury to repay the investment in the FCRPS.

17 We would like to resolve these issues in this proceeding so we do not have to ask FERC
18 to get involved in Bonneville's rates. If Bonneville cannot address our concerns we want the
19 Administrator to understand that we will continue to pursue every opportunity to make sure that
20 the obligations under the Treaties of 1855 are fulfilled.

21 We continue to believe that there are a number of matters that Bonneville has not
22 adequately addressed in its Draft Record of Decision.

1 First, fulfilling the Federal government's obligations under the treaties with our tribes and
2 meeting the requirements of the Clean Water Act, the Endangered Species Act, and other
3 resource protection laws will require substantially greater effort and more money than
4 Bonneville has assumed in its analysis.

5 Our Treaty fishery is less than one percent of the number of salmon our tribes caught
6 above the Snake River dams when our Treaties were signed in 1855. The Treaty fishery below
7 the Snake River dams is only 10 percent of the number of fish our tribes were catching in 1855.

8 The number of salmon and steelhead species on the Endangered Species lists continues to
9 grow. There are now more than a dozen species listed under the ESA that depend on the
10 resources in the Columbia Basin for survival. These species flourished for thousands of years
11 under our management. It has taken less than 150 years for the United States to manage these
12 precious animals into extinction. The United States has been a terrible steward. It must do much
13 more than its current efforts or these animals that are so important to our tribes and to all the
14 citizens of the United States will be gone forever.

15 The Federal dams exceed the gas supersaturation and temperature standards under the
16 Clean Water Act. These are facts that directly affect the survival of salmon, steelhead, lamprey,
17 sturgeon, and other animals. The United States must modify its dams so they comply with the
18 Clean Water Act.

19 Second, under the DROD, Bonneville's proposed rates will be approximately 35 percent
20 below Bonneville's own projections for the market rate for electricity through 2006.

1 Third, all of the responsible alternatives for meeting Bonneville's Treaty and
2 environmental responsibility will cost much more after 2006. Bonneville must position itself to
3 meet these costs and remain competitive.

4 Bonneville cannot ignore these facts simply because there is not a consensus among all of
5 its customers. Bonneville, utilities, and large industries are not sovereign governments. They
6 are not resource managers. They cannot veto the decisions of entities that are sovereigns and
7 resource managers. Lack of a consensus does not eliminate Bonneville's Treaty and trust
8 obligations to the tribes or its responsibility to follow Federal law. In fact, such a lack of
9 consensus heightens Bonneville's obligations to see that the trust responsibility is fulfilled.

10 Given the risks and uncertainty Bonneville faces, the prudent business practice would be
11 to raise rates to where they are only 25 percent below the projected market rate of electricity
12 during the 2002-2006 rate period. This would allow Bonneville to pay the environmental costs it
13 will face. It will assure repayment of Bonneville's debt to the Treasury. It would position
14 Bonneville to meet higher costs after 2006 while remaining competitive with other electricity
15 suppliers. The DROD naively ignores these risks, placing Bonneville in peril of failing to meet
16 its responsibilities and commitments.

17 **II. REVENUE REQUIREMENTS**

18 **A. Fish and Wildlife and Cultural Resources Expenses**

19 CRITFC and the Yakama Nation take exception to Bonneville's draft decision that it has
20 included sufficient funding to meet applicable environmental laws on pages 5-7 through 5-16.
21 Bonneville's citation to the Clinton Administration's judgement that the 13 Fish and Wildlife
22 Alternatives represent a reasonable range does not address the issues we raised in our brief.

1 Implementing the measures that will begin to meet the Clean Water Act, the Endangered Species
2 Act and Treaty and trust obligations to Columbia Basin tribes will reduce the probability of
3 paying Bonneville's debt to the Treasury on time and in full.

4 **B. Clean Water Act**

5 We were surprised that Bonneville cited the *National Wildlife Federation v. U.S. Army*
6 *Corps of Engineers*, Civ. No. 99-442-FR (D.Or.) on page 5-9 without mentioning the recent
7 opinion by Judge Frye. See *National Wildlife Federation v. U.S. Army Corps of Engineers*, 2000
8 WL 351187 (2000 D.Or.). This ruling clearly states the Corps of Engineer's projects are required
9 to meet the Clean Water Act. In fact, Judge Frye succinctly stated,

10 The United States Court of Appeals for the Ninth Circuit has stated that "[u]nder the
11 Clean Water Act, all federal agencies must comply with state water quality standards."
12 *Idaho Sporting Congress*, 137 F.3d at 1153. The plaintiffs are entitled to challenge
13 alleged violations of the state water quality standards pursuant to the Administrative
14 Procedures Act, 5 U.S.C. SS 701-706. *Oregon Natural Resources Council*, 834 F.2d at
15 850-52.

16
17 *National Wildlife Federation*, at 13 (emphasis added). We also believe Bonneville erred when
18 they failed to cite *Pronsolino v. Marcus* regarding the authority of the Environmental Protection
19 Agency to list substandard rivers and to issue total maximum daily loads (TMDLS) for them.

20 See *Pronsolino v. Marcus*, 2000 WL 356305 (N.D. Cal.).¹ These decisions clearly point out
21 virtually certain additional risk of higher costs that Bonneville has failed to plan for.

¹ This case found that the EPA has the power to list waters or issue TMDLs. The Court also found that "once the TMDLs were prepared, they were intended to be applied to point and nonpoint sources differently. As to point sources, the TMDLs were to be taken into account in further restricting effluent under NPDES permits, authorized by Section 301 (b)(1)(C). As to nonpoint sources of pollution, the TMDLs were to be incorporated into the continuing planning process of the states. This conferred a large degree of discretion on the states in how and to what extent to implement the TMDLs for nonpoint sources." 2000 WL 356305, 19 (N.D. Cal.).

1 Bonneville erred on page 5-10 when it suggested that it is not clear whether Bonneville
2 would bear the majority of the costs for CWA compliance. If the Corps is required to modify its
3 dams to meet the Clean Water Act, Bonneville will reimburse those measures pursuant to the
4 allocation formula established by Congress. Any other assumption would require changes in
5 Federal law. Assuming that the law will change so as to reduce Bonneville's obligations is
6 unwarranted. It is also probable that the law might change to increase Bonneville's obligations.
7 Bonneville should plan its rates based upon the payment formulas established under current law.

8 **C. Endangered Species Act**

9 Bonneville erred on page 5-10 when, addressing the CR/YA arguments regarding the
10 Endangered Species Act, it contended that Bonneville does not have “a legal duty to ‘restore’
11 fish and wildlife to historical levels.” Bonneville cites *American Rivers v. FERC* (201 F.3d
12 1186) for the proposition that Bonneville "does not have a legal duty to 'restore' fish and wildlife
13 to historical levels, and courts have indicated that such an obligation on dam owners and
14 operators in the PNW would be unproductive." WP-02-A-01, page 5-10. In the portion that is
15 cited, *American Rivers* stands for the proposition that, when FERC prepares environmental
16 studies during relicensing proceedings involving private hydroelectric projects, the
17 environmental baseline does not have to be based on pre-project conditions. There is no
18 discussion about what dam owners are responsible for in terms of fish restoration. Moreover,
19 the citation has nothing to do with the Endangered Species Act, where Bonneville and the other
20 federal operators of the FCRPS must assure that their actions will not jeopardize the survival and
21 recovery of listed fish and wildlife. Bonneville's misdirected analysis is typical of the DROD
22 and indicates the lack of attention to CR/YA issues. Wild runs in the Columbia Basin currently

1 total about 1/2 million salmon and steelhead. Historic levels are estimated by the Northwest
2 Power Planning Council to have been 11 to 16 million salmon and steelhead returning to the
3 Columbia River. The Council established the hydropower responsibility for these losses at five
4 to seven million returning fish. Our tribal plan, *Wy-Kan-Ush-Mi Wa-Kit-Wit*, the *Spirit of the*
5 *Salmon*, sets an interim goal of 4 million fish. When the United States restores four million
6 salmon we would be happy to discuss Bonneville's further continuing duty.

7 Bonneville argues on page 5-11 it has not had the opportunity to review the Federal
8 studies cited by CRITFC in its Initial Brief. That is surprising as these studies have been
9 extensively reviewed by the Federal Caucus where Bonneville is an active member. These
10 materials are contained or linked to the Federal Caucus web page that is maintained on the
11 Bonneville web page. Bonneville should have reviewed these Federally sponsored studies that
12 are critical to making any informed judgement about the actions needed to restore fish and
13 wildlife and which will affect the output from the federal dams. Bonneville continues to cite the
14 Clinton Administration's judgement as evidence that Bonneville can willfully blind itself to
15 pertinent information to further its prearranged goal to not raise rates. Bonneville should provide
16 evidence that the Clinton Administration has reviewed the more recent scientific information and
17 still supports inclusion of status quo alternatives, and alternatives that do not meet the Clean
18 Water Act in Bonneville's analysis. Bonneville's assertions on these issues are not convincing
19 or supported in the record.

20 On page 5-9 of the DROD, Bonneville states it was well understood that cost estimates
21 would continue to develop. CR/YA does not believe the Fish and Wildlife Principles were
22 developed as a shield against the development of better information. We believe better

1 information makes for better decisions. The two Clean Water Act cases referenced above along
2 with the Fish and Wildlife Coordination Act Report, the Federal Caucus materials, and the treaty
3 and trust responsibilities as outlined by CR/YA indicate with a great deal of certainty that
4 Bonneville faces a high degree of risk that Bonneville has not adequately addressed the higher
5 cost fish and wildlife alternatives.

6 On page 5-11 in the third paragraph, Bonneville states:

7
8 it is inconsistent for CRITFC/Yakama to argue that Bonneville's risk analysis was
9 inadequate because it did not undertake an independent analysis of the probabilistic
10 weighting of the 13 Fish and Wildlife Alternatives developed in the Principles process.
11 Those Alternatives were rigorously discussed in the very extensive public process.
12

13 DROD, WP-02-A-01, page 5-11. CR/YA objects to Bonneville's continued mischaracterization
14 of events and Bonneville's attempts to declare issues are outside the scope set forth in the Federal
15 Register Notice (FRN). During the development of the Principles, CRITFC specifically asked
16 that the 13 alternatives be subjected to a biological rationale. CRITFC's requests were denied by
17 Bonneville. It was only after the public comment period closed that Bonneville addressed how it
18 would use the information regarding the 13 alternatives in its risk analysis; to wit by assuming an
19 equally weighted probability distribution. This does not comport with "rigorous discussion."
20 Then Bonneville further limited the discussion in the FRN scope of the rate case and proudly
21 states they are following the FRN. CR/YA has been nothing but consistent throughout the
22 discussions in the development of the Principles and in the rate case and Bonneville has ignored
23 or refused pertinent information at every stage of the process. This is arbitrary and capricious.

24 **D. Fish and Wildlife Coordination Act**

25 Bonneville erred in its decision that it does not have to take the findings of the
26 Coordination Act Report prepared by the U.S. Fish and Wildlife Service into consideration in

1 setting its rates. We do not need to argue whether Bonneville has a “legal” obligation to consider
2 the findings. It is prudent business practice to be fully aware of additional environmental costs
3 during the next rate period so Bonneville can set its rates to meet those costs and assure Treasury
4 repayment. It is arbitrary and capricious to ignore pertinent information prepared under federal
5 law by a federal agency that has major implications on the future operations of the federal
6 hydrosystem.

7 **E. Northwest Power Act**

8 Bonneville agrees that it must act consistently with the Northwest Power Planning
9 Council's (NWPPC's) program. However, BPA contends that it is not required to implement
10 program measures without considering other ways in which the Council's Program goals can be
11 achieved. “If Bonneville meets the goals of the Program, it need not necessarily fund the
12 specific measures.” See page 5-12. Again, we do not plan to argue the legal issues in a forum
13 where Bonneville is the decision maker, but we find no place in the record where Bonneville
14 states how it plans to meet the Council’s goal of restoring 5 million returning salmon and
15 steelhead to the mouth of the Columbia River. Bonneville has no such alternative and its
16 argument is simply a smoke screen.

17 Bonneville also argues that it has the responsibility to balance the measures in the
18 Council's Program with assurance of an “adequate, efficient, economic, and reliable power
19 supply. The Council’s 1994 Program found that the measures that they called for did in fact
20 meet the Council’s mandate to assure an “adequate, efficient, economic, and reliable power
21 supply.” Bonneville is also required to provide equitable treatment to fish and wildlife in its
22 decision making. 16 U.S.C. 839b(h)(11)(A). Keeping rates 35 percent below the market price of

1 electricity while not providing sufficient funding to avoid the extinction of salmon and steelhead
2 is not equitable treatment nor does it comply with the other provisions of section 4(h) of the Act.

3 **F. Cultural Resources**

4 We take exception to Bonneville's position on funding cultural resource protection. It
5 appears to us that Bonneville is saying that it does not know what its costs will be for protecting
6 cultural resources and that it can cover them using planned net revenues for risk (PNRR). We
7 believe there is sufficient information in the record to make a reasonable estimate of Bonneville's
8 future costs and include them in the base revenue requirements. This approach would be much
9 more likely to enable Bonneville to meet its costs and assure repayment to the Treasury. We
10 support and incorporate by reference the exceptions filed by the Upper Columbia United Tribes
11 on this issue.

12 **G. Summary**

13 For the reasons described above and the issues and evidence in our Initial Brief, we take
14 exception to Bonneville's draft decision. We continue to believe that Bonneville has not set its
15 rates high enough to cover its costs, including the costs of meeting its legal obligations, while
16 assuring repayment to the Treasury. CR/YA have demonstrated over and over that Bonneville's
17 risk analysis is inadequate. Bonneville continues to hide behind the Fish and Wildlife Principles
18 and the FRN (*see* for example DROD WP-02-A-01, pages 5-9,5-11, 5-12, 5-13) every time
19 Bonneville doesn't want to analyze the probabilities inherent in the likely events described by
20 CR/YA and federal agencies cited in our briefs and testimony. This is arbitrary and capricious
21 and will lead to Bonneville's inability to meet its statutory payment obligations under the
22 Northwest Power Act.

1 **III. IMPLEMENTATION OF THE FISH AND WILDLIFE FUNDING PRINCIPLES**

2 **A. Equal Weighting of the 13 Alternatives**

3 We take exception to Bonneville's analysis and draft decision in section 5.4.1. Our brief
4 contains extensive analysis on this issue, which Bonneville has ignored. In addition to not giving
5 appropriate consideration to our analysis, Bonneville inappropriately compares the position of
6 CRITFC and the Yakama Nation with the Public Power Council (PPC). Bonneville argues that
7 since we argued that the 13 alternatives do not have equal biological effects and that only the
8 more expensive alternatives will meet obligations under Treaties and Federal laws and that the
9 PPC argues that the costs are too high, the two comments essentially cancel each other out.
10 Bonneville then argues that since it perceives that there is no consensus on this issue,
11 Bonneville's approach is prudent. Bonneville's reasoning is flawed. Bonneville cannot make
12 such a "judgment call" regarding Treaty rights (See *infra* discussion on trust responsibility).

13 Bonneville's use of the PPC statements on page 5-17 of the DROD is indicative of
14 Bonneville's unwillingness to analyze serious risk it faces. CR/YA offers proof through
15 numerous examples in testimony and briefs and earlier in this brief why costs will be higher than
16 Bonneville has projected. Bonneville uses PPC's statements to counter CR/YA yet PPC offers
17 no proof to back up their allegations. Where Bonneville has statutory obligations to set rates
18 based on total system costs, a rate pledge is superfluous. Bonneville's use of PPC's argument
19 amounts to willful blindness and is arbitrary and capricious.

20 It is not appropriate to treat the views of sovereigns and fishery managers the same as a
21 utility trade association. This clearly violates Bonneville's Treaty, trust, and fiduciary
22 obligations. It is also not appropriate for Bonneville to conclude that there is not clear science on

1 what measures are needed to meet Treaty and fish and wildlife protection obligations.
2 Bonneville may not substitute its judgement for fishery managers. It may not use the excuse that
3 since some utilities which benefit from the dams but have no responsibility to restore fish and
4 wildlife do not support some measures, that the restoration actions are unlikely to be
5 implemented. Such a use inappropriately elevates a special interest over the public interest. It
6 places a commercial interest over the views of sovereigns that are protected by a long-standing
7 Treaty with the United States.

8 Bonneville’s approach underestimates the costs and risks it will face. As a result,
9 Bonneville has not set its rates high enough to meet its costs and assure repayment to the
10 Treasury.

11 **B. Range of Fish and Wildlife Costs**

12 Bonneville has not addressed our issues in this section at page 5-18. We argued in our
13 brief that the range should be much higher to address new information about what will be needed
14 to restore fish and wildlife, meet Treaty obligations, and comply with the Clean Water Act.
15 Bonneville should have addressed our concerns in this section.

16 We support Bonneville’s use of more recent market cost information. To have done
17 otherwise would have ignored the costs and risks facing Bonneville. Yet, we take exception to
18 the fact that Bonneville updated new information on the market price of power during the rate
19 case but ignored new information on the fish and wildlife costs and issues described above and
20 detailed in our brief. We believe this was arbitrary and capricious. The result is that Bonneville
21 failed to set its rates high enough to meet its future costs and assure repayment to the Treasury.

1 **C. Fish and Wildlife Costs and Probabilities**

2 Bonneville erred when it asserts, without any justification, that it was prudent to
3 essentially average the best estimate of future direct costs prepared by the fishery managers (with
4 no dissenting comments from Bonneville) and Bonneville's estimate of a status quo budget
5 adjusted for inflation. WP-02-E-CR/YA-04, WP-02-B-CR/YA-01, pages 33-36. Bonneville's
6 budget was developed without any review or support by fishery managers. To give Bonneville's
7 estimate the same weight as the fishery managers is arbitrary and capricious.

8 Bonneville also ignored evidence provided in our testimony and explained in our Initial
9 Brief that more recent estimates were much higher than the range Bonneville considered. *Id.*
10 Our evidence shows that the fishery managers believe that the more recent estimates are much
11 more realistic. Ignoring this more realistic information was arbitrary and capricious.

12 Bonneville's arbitrary and capricious actions underestimate the costs and risks facing
13 Bonneville. As a result Bonneville has set rates that are not high enough to meet its costs and
14 assure repayment of Bonneville's debt to the Treasury.

15 **D. Consultation.**

16 On page 18-37 of the DROD Bonneville correctly addresses their misuse of the word
17 "consultation" in the FRN. CR/YA appreciates this attempt to correct the record. However, as
18 often happens, there is a lack of internal consistency that comes back to haunt the tribes. On
19 page 5-24 in the last paragraph, the incorrect quotation from the FRN is again used which
20 proliferates the incorrect assumption that the tribes "consulted" on the Fish and Wildlife
21 Principles. By now it must be understood that this is an extremely important distinction to the
22 tribes and carries legal implications. We ask that whenever this FRN quotation is used it be

1 footnoted with Bonneville's explanation as contained on page 18-38 of the DROD of the misuse
2 of the word "consultation."

3 BPA explained that we did not intend to use the strict definition of "consultation" as that
4 term in [sic] defined in BPA's Tribal Policy, but rather a more general definition, since
5 we were seeking input from many parties in addition to the tribes...BPA also expressed
6 regret for any confusion that its use of the word "consultation" may have caused.
7

8 DROD, WP-02-A-01, page 18-38. This is not an issue to be taken lightly as Bonneville assumes
9 that it "may have caused some confusion on the part of the tribes." *Id.*, at 18-39. Many
10 individuals read the FRN, Bonneville's testimony, and parties' briefs from the rate case. In case
11 Bonneville forgets, when members of Congress, the Administration, FERC staff, members of the
12 judiciary and others read the word "consultation" in conjunction with the word "tribes," they will
13 assume the tribes have signed-off on the issue in question. The tribes have not signed-off on the
14 Fish and Wildlife Principles and the tribes would like that position made clear.

15 **E. Use of Other Fish and Wildlife Alternatives in Risk Analysis**

16 We take exception to Bonneville's failure to give adequate attention to a May 11, 1999
17 memorandum prepared by staff at the Environmental Protection Agency, the National Marine
18 Fisheries Service, the U.S. Fish and Wildlife Service, and the Treasury. Our testimony and
19 Initial Brief describes this issue in great detail so we will not repeat our analysis here.

20 It is clear that Bonneville has selectively read a memorandum from Will Stelle in
21 claiming that the Stelle memorandum contradicts the May 11th memorandum. Our brief cites
22 major portions of the Stelle memorandum that support the conclusions of the May 11th
23 memorandum. For example, see WP-02-B-CR/YA-01, page 31, line 10 through page 32, line
24 19. Furthermore, the DROD would have one believe the Stelle memorandum is the final word
25 when it comes to the May 11 memo and Bonneville's responsibilities under various federal laws

1 and treaties. The Stelle memorandum does not speak for nor purport to speak for the
2 Environmental Protection Agency (the agency with expertise in compliance with Clean Water
3 Act measures required at the Corps of Engineers dams), the U.S. Fish and Wildlife Service (the
4 agency charged with producing the Fish and Wildlife Coordination Act Report which came out
5 after the Stelle memorandum and clearly shows the risks CR/YA has consistently addressed), the
6 Office of Management and Budget or the U.S. Treasury (agencies specifically affected by
7 Bonneville's failure to address all system costs). Bonneville's assertions in this matter are
8 misleading and attempt to minimize the legitimate concerns expressed by CR/YA as well as the
9 federal agencies with expertise in these areas.

10 Bonneville apparently did not carefully read our brief when it asserts that we did not
11 provide explanations or citations to support our conclusion that Bonneville has weakened its risk
12 mitigation package since the Stelle memorandum. Bonneville should reread page 42, lines 4
13 through 24 of our brief where we show that Bonneville has reduced its PNRR and more
14 importantly its average ending reserve. These changes make it less likely that the concerns in the
15 Stelle memorandum will be addressed. These changes make it less likely that Bonneville will set
16 its rates high enough to meet its costs, assure repayment to the Treasury, and position Bonneville
17 to be competitive and continue to repay the Treasury in the long-term.

18 Bonneville continues to argue that the May 11th memorandum lacks substance and
19 reliability—apparently because it is unsigned. We provided letters from several of the authors as
20 part of our answers on a Bonneville motion to strike (see WP-02-B-CR/YA-01 page 30, line 28
21 through page 31, line 9). Bonneville also finds it convenient to ignore the Hearing Officer's
22 ruling on the May 11 memo. WP-02-O-14. The Hearing Officer found the May 11 memo was

1 not hearsay and was clearly admissible. Furthermore, the Hearing Officer stated, "the [CR/YA]
2 testimony uses the memo to test the costs and the risk analysis utilized by Bonneville." WP-02-
3 O-14, page 6. This is a complete refutation of Bonneville's statement that the memo is outside
4 the scope of the rate case. It also directly contravenes Bonneville's statement in the DROD that
5 CR/YA's use of the memo be limited to "test or challenge a party's risk analysis," inferring that
6 CR/YA had not done so. WP-02-A-01, page 5-26. Bonneville's tortured reading of the Hearing
7 Officer's ruling is indicative of their treatment of a number of the relevant issues CR/YA has
8 presented. Instead of looking at the relevance in our assertions, Bonneville attempts to sidestep
9 the issue with procedural roadblocks or inaccurate readings of our testimony and briefs. This is
10 counter to the Hearing Officer's ruling, to the spirit of developing a complete record, and will
11 result in Bonneville not collecting enough to meet its statutory requirements. Bonneville's
12 willful blindness to this pertinent information in their risk analysis is arbitrary, capricious, and in
13 violation of law.

14 We take strong exception to Bonneville's decision to ignore information that it does not
15 like. This is not a "reasonable choice in the current business environment" as Bonneville
16 contends. Good businesses do not ignore important information just because it does not conform
17 to what they want to do. We believe Bonneville's treatment of the May 11th memorandum is
18 arbitrary and capricious. Ignoring this information means that Bonneville has not adequately
19 addressed the costs and risks that it faces. It also means that Bonneville has set its rates too low
20 to meet its costs and assure repayment to the Treasury.

1 **F. Fish and Wildlife Obligations**

2 We take exception to Bonneville's inadequate treatment of its obligation to position itself
3 to meet higher environmental costs after 2006 on page 5-28. The result will likely be that
4 Bonneville will not be able to meet its costs and assure repayment to the Treasury in the next rate
5 period. This is not consistent with Fish and Wildlife Funding Principle 4. It is not consistent
6 with Bonneville's Treaty and trust obligations to the tribes.

7 **G. Principles Nos. 1 and 3**

8 We take exception to Bonneville's assertion that it is meeting these two parts of the Fish
9 and Wildlife Funding Principles on page 5-31. Our brief clearly demonstrates that Bonneville
10 cannot meet the alternatives that are likely to address Treaty and legal obligations and still meet
11 its repayment probability for the Treasury. Bonneville has not addressed the substance of our
12 comments.

13 Again, the result will be that Bonneville has not set its rates high enough to cover its costs
14 and assure repayment to the Treasury.

15 **H. Principle No. 4**

16 We take exception to Bonneville's assertion that it is meeting the critically important
17 Principle number 4, but has not analyzed it. This is an arbitrary and capricious action.

18 CRITFC and the Yakama Nation demonstrated in our brief that 1) it was possible to
19 analyze this issue; and 2) that Bonneville has not planned for sufficient reserves in 2006 to keep
20 Bonneville competitive and assure repayment to the Treasury. NEC/SOS and the OPUC also
21 provided analysis.

1 Bonneville apparently agrees that environmental costs will be much higher after 2006.
2 The only logical explanation for Bonneville's failure to analyze this issue is that the problem will
3 fall during the watch of another Administrator. This approach is inconsistent with Federal
4 Treaty, trust, and fiduciary obligations to the tribes. It is arbitrary and capricious. The Columbia
5 Basin tribes have relied on fish and wildlife since time immemorial. Given the threat of
6 extinction to our resources it is essential that Bonneville position itself to meet the higher costs of
7 restoration after 2006 while assuring continued repayment of its debt to the Treasury. Anything
8 less violates Bonneville's fiduciary duties to the tribes.

9 On page 5-45 and 46 Bonneville appears to be arguing that there are a number of reasons
10 why the more expensive fish and wildlife alternatives will not happen. This is contrary to
11 Bonneville's arguments elsewhere (for example on pages 5-7 to 5-13) that it does not know
12 which alternative will be implemented and Bonneville's rejection of our numerous comments and
13 analysis about why the higher costs alternatives are more likely to be implemented. Bonneville
14 appears to be biased in its treatment of this issue. Bonneville is ignoring the sound evidence
15 from federal agencies and the courts. We continue to believe that Bonneville has been arbitrary
16 and capricious on these issues and that its rates will not be sufficient to meet its costs and assure
17 repayment to the Treasury.

18 Finally, Bonneville appears to believe that some of the environmental costs that it faces
19 will be paid for from Federal appropriations. While we might support such funding, we believe
20 that its is not appropriate to assume changes in Federal law that would require the Congress to
21 provide funding for Bonneville when its rates have been substantially below market rates for the
22 last 60 years. We also see this as the convenient federal pass-the-buck shell game when it comes

1 to tribal issues and environmental problems. Such an assumption would be arbitrary and
2 capricious. It underestimates Bonneville's costs and results in rates that are too low to assure
3 Treasury repayment.

4 Bonneville has not addressed our substantive evidence. Instead they have relied on a
5 statement from John Saven of NRU (on page 5-39) that argues that the analysis provided by Mr.
6 Sheets goes beyond the Study done by the Northwest Power Planning Council. The Sheets
7 testimony clearly states that the analysis was done using a model developed by the Power
8 Planning Council and reasonable assumptions developed by CRITFC and the Yakama Nation.
9 The testimony does not claim that the analysis was the Council's (see WP-02-E-CR/YA-01 page
10 3, line 24 through page 4, line 7). Bonneville appears to have relied on an inaccurate
11 characterization of our testimony. NRU provides no analysis to contradict the testimony. NRU
12 provides no new analysis that suggests that a reserve would not reduce potential rate increases in
13 2006 and improve repayment to the Treasury. This fails the test of reasonableness.

14 Bonneville should have conducted analysis of this important issue. Staffs from the Power
15 Planning Council and Bonneville had met several times to design an analytical method based on
16 existing models at the Council and Bonneville. Bonneville's failure to do such analysis was
17 arbitrary and capricious.

18 **IV. RISK ANALYSIS**

19 **A. Non-Operating Risk Model**

20 **1) CRAC Probability**

21 We take exception to Bonneville's treatment of this issue. On page 6-17 Bonneville alleges
22 that CRITFC and the Yakama Nation did not provide evidence to support our proposal that

1 Bonneville should consider a range of probabilities that the CRAC will not be implemented as
2 designed. On page 41, line 18 through page 42, line 26 of WP-02-B-CR/YA-01 we describe
3 un rebutted evidence that Bonneville has never successfully implemented a cost recovery or
4 interim rate adjustment. Bonneville's assumption that there is a 100 percent probability that it
5 can and will do something that it has never done before is arbitrary and capricious. It
6 overestimates the contingencies available to Bonneville and make it more likely that Bonneville's
7 rates are not high enough to cover its costs and repay the Treasury. There is also evidence on
8 page 7-24 where Bonneville believes a more robust CRAC would be difficult to implement.
9 This raises the obvious question how Bonneville knows that the CRAC that it has proposed will
10 be 100 percent successful. Bonneville has no basis in the record for its assumption that it will be
11 able to trigger a CRAC successfully.

12 **2) MOA Carry forward**

13 We take exception to Bonneville's treatment of this issue. Our rationale is clearly stated in
14 our brief on page 36. Bonneville's assertion that another "Regional Plan addressing funding
15 priorities needs to be in place before funds are reallocated among MOA budget categories" is
16 inconsistent with the provisions of the Northwest Power Act and the existing *Columbia Basin*
17 *Fish and Wildlife Program*. Bonneville's draft decision to double count \$227 million from the
18 MOA as available for both fish and wildlife restoration and any other purpose for risk mitigation
19 is arbitrary and capricious. It overstates the beginning reserves and results in Bonneville setting
20 its rates too low to meet its costs and assure repayment to the Treasury

1 **3) Cost Review**

2 We support the position taken by the PPC that Bonneville should not have assumed that
3 all of the cost review savings will be implemented. We take exception to Bonneville's draft
4 decision.

5 **B. Fish and Wildlife Obligations**

6 Many of these issues in section 6.5, page 6-24 are similar to the exceptions we describe in
7 section 5 on Risk Management. We incorporate those exceptions and the argument in our Initial
8 Brief to address this section as well.

9 **C. Risk and Environmental Obligations**

10 Many of these issues in section 6.6, page 6-26 are similar to the exceptions we describe in
11 Section 5 on Risk Management. We incorporate those exceptions and the argument in our Initial
12 Brief to address this section as well.

13 **D. Legal and Procedural Issues**

14 As discussed in several sections above, Bonneville has failed to provide an objective
15 criterion to determine whether the Fish Funding Principles are being implemented. This is
16 arbitrary and capricious. Bonneville fails to address the evidence provided that it has not
17 included sufficient funding in its base budget to meet substantive law. This is clearly inadequate
18 under the standards of review.

1 **V. RISK MITIGATION**

2 **A. Probability of repaying Treasury**

3 **1) Northwest Power Act § 7(n)**

4 We incorporate by reference the arguments set forth by the Northwest Energy Coalition
5 and Save Our *Wild* Salmon (NVEC) and the Oregon Energy Office (OPUC) concerning section
6 7(n) of the Northwest Power Act on page 7-3 of WP-02-A-01 as well as our arguments
7 previously mentioned in this brief.

8 **2) Multiple deferrals**

9 We incorporate by reference the arguments set forth by the Northwest Energy Coalition
10 and Save Our *Wild* Salmon (NVEC) and the Oregon Energy Office (OPUC). While Bonneville
11 explains the 88% TPP methodology ad nauseum beginning on page 7-9, the fact remains that
12 Bonneville wrote the definition of the 88% standard to look only at the successful games run by
13 ToolKit. Bonneville never described or considered what the downside was like in the 12% of the
14 games that deferred payment to Treasury. That task was left to NVEC, OPUC and CR/YA. The
15 downside is larger than Bonneville purported it to be as evidenced in CR/YA testimony and
16 briefs (*see* WP-02-B-CR/YA-01) and NVEC and OPUC testimony and briefs. Furthermore, the
17 88% TPP standard was written when Bonneville had captive customers with two-year contracts;
18 Bonneville could reset rates to address multiple deferrals. A five-year rate where Bonneville has
19 no captive customers exposes Bonneville to much greater risk. We take exception to
20 Bonneville's treatment of this issue and reiterate our position that Bonneville must weight
21 multiple deferrals differently than single deferrals.

1 We also take exception to Bonneville’s failure to address the effects of cases that miss
2 being able to fully repay the Treasury. Bonneville focuses on the 88 percent probability of
3 meeting its payments to the Treasury. It tends to ignore the fact that when the analysis shows a
4 case that misses Treasury payments—they generally miss more than one payment. Many of
5 these multiple misses occur in cases where there are higher fish and wildlife costs. In a data
6 request that we received from Bonneville we learned that in 61 percent of the cases where
7 Bonneville has deferrals, it would miss payment more than once (see data request CR-BPA:014).
8 Clearly, there will be more political opposition if Bonneville misses Treasury payments two,
9 three, or four times over the next five years. This opposition would make it more difficult to
10 fully fund fish and wildlife restoration and Bonneville’s other obligations. Failure to address
11 these multiple misses of Treasury payments was arbitrary and capricious. It results in Bonneville
12 setting its rates too low to cover all of its costs and assure repayment to the Treasury.

13 **3) Alternative 13u**

14 Bonneville again states that they will not entertain a single fish and wildlife alternative
15 because they are keeping the options open. Bonneville states, “at some point in the future, an
16 Alternative will be selected and at that time the associated impacts will no longer be an
17 uncertainty, but that is not the case now.” WP-02-A-01, page 7-15. CR/YA has demonstrated
18 that the equal probability weighting scheme for fish and wildlife alternatives employed in
19 Bonneville’s Initial Proposal seriously underestimates the risk that Bonneville faces. *See*
20 *generally* WP-02-B-CR/YA-01. CR/YA has also pointed out numerous reports, court cases and
21 treaty and trust responsibility obligations in this and our other briefs that tip the scales heavily
22 toward the need for Bonneville to reanalyze its risk structure to address higher fish and wildlife

1 costs and compliance with the Clean Water Act; alternative 13u best exemplifies the findings in
2 these reports, court cases and treaty and trust obligations. To ignore these facts by hiding behind
3 the Principles is arbitrary and capricious.

4 **B. Cost Recovery Adjustment Clause (CRAC) Design**

5 **1) Forward looking CRAC**

6 We incorporate by reference the arguments set forth by the Northwest Energy Coalition
7 and Save Our *Wild* Salmon (NWECC) and the Oregon Energy Office (OPUC). CR/YA has stated
8 numerous times that Bonneville has never implemented a CRAC. *See* WP-02-B-CR/YA-01,
9 page 41, line 18 through page 42, line 26; WP-02-E-CR/YA-02, page 10, line 11 through page
10 11, line 4. CR/YA believes Bonneville should include in its risk analysis the possibility that a
11 CRAC might not trigger. Furthermore, CR/YA takes exception to Bonneville's refusal to
12 consider a forward-looking CRAC. Bonneville's proposed CRAC exposes Treasury to more risk
13 than Bonneville's customers. Bonneville's lament that a forward-looking CRAC would trigger
14 less frequently than the proposed CRAC (WP-02-A-01, page 7-27) does not diminish the
15 increased protection to Treasury offered by the forward-looking CRAC. Bonneville must follow
16 its statutory guidelines and repay Treasury and FERC must protect Treasury by ensuring
17 Bonneville's rates are sufficient to repay the hydrosystem debt after meeting the Administrator's
18 other costs. *See* WP-02-B-CR/YA-01, page 6, lines 7-14. A forward-looking CRAC advocated
19 by NWECC and OPUC protects Treasury above and beyond Bonneville's proposed CRAC.

20 **C. Planned Net Revenue for Risk**

21 We take exception to Bonneville's draft decision that its PNR is adequate. We
22 provided extensive analysis and evidence in our brief and testimony to show that Bonneville's

1 assumptions were flawed. Our discussion regarding multiple misses to the Treasury is a major
2 problem with Bonneville's approach. Bonneville has failed to address our concerns. The effect
3 of multiple misses will be that Bonneville's rates, including PNRR, are insufficient to meet its
4 costs, including the risks and uncertainty Bonneville faces. The proposed rates are not adequate
5 to assure repayment to the Treasury.

6 In its evaluation of issues raised by utilities that the starting reserve is too low,
7 Bonneville failed to address the comments by CRITFC and Yakama. Our evidence and analysis
8 shows that the starting reserve was too high because it double counts funds that have been
9 committed for fish and wildlife restoration as also being available to address other risks and
10 uncertainties. Bonneville's response does not address our analysis.

11 We take exception to Bonneville's treatment of issue 4 starting on page 7-33 regarding
12 Bonneville double counting of the reserve. Bonneville's analysis is as confused as the cross-
13 examination testimony that Bonneville cites in this section. The facts are clear. Bonneville
14 cannot use a dollar for fish and wildlife restoration that has been unexpended under the MOA
15 and committed to fish and wildlife funding after 2002 (as Bonneville admits on pages 7-34 and
16 7-35) and assume that the same dollar is available for other risks and uncertainties facing
17 Bonneville. This fails the test of reasonableness and is arbitrary and capricious.

18 We also take exception to Bonneville's flawed statement of the facts in Issue 5 starting
19 on page 7-36. Bonneville tries to blame others for the under-expenditure of MOA funds. The
20 Department of Energy is a signatory to the MOA. The Federal agencies committed to provide a
21 certain amount of funding. Then Bonneville worked with some members of the Congressional
22 Delegation to undermine the MOA by supporting an appropriation rider to the Northwest Power

1 Act while ignoring the project selection and accountability provisions in the MOA. There are
2 numerous measures that have been in the Columbia Basin Fish and Wildlife Program for years
3 that Bonneville has refused to implement. It is interesting that Bonneville has the discretion to
4 implement measures that are different than the Program (see page 5-12 of the DROD), but says
5 here that it can't implement restoration measures without Council approval. The DROD appears
6 to use different and inconsistent interpretations of the Northwest Power Act to serve its purposes.

7 We take strong exception to Bonneville's treatment of Issue 6 starting on page 7-37. On
8 page 7-38 Bonneville appears to be saying that the unexpended funds from the MOA are not in
9 addition to the fish and wildlife restoration budgets for 2002-2006. In other words, Bonneville is
10 saying that the unexpended funds cannot be used for additional restoration to offset the failure to
11 implement measures prior to 2002. This ignores the desperate condition of fish and wildlife in
12 the Columbia Basin. Failure to take action this year means even greater action will be needed
13 next year to avoid extinction and address Treaty and trust obligations. Bonneville's position is
14 inconsistent with the MOA, inconsistent with Bonneville statements in the previous issue
15 discussion in the DROD, and inconsistent with Bonneville's Treaty, trust, and fiduciary
16 obligations to the tribes.

17 Finally on page 7-40 Bonneville clearly shows that it is double counting the
18 carryforward. The DROD says that the "carryforward is not being held out from starting
19 reserves, it is available to mitigate risk, including fish cost uncertainty." So Bonneville admits
20 the carryforward is being used in its analysis to mitigate risk. These same dollars cannot go to
21 addressing the serious problems caused by the failure to implement the MOA funding
22 commitments.

1 For all of these reasons, we believe Bonneville's treatment of this issue is arbitrary and
2 capricious. It also fails to meet Bonneville's Treaty, trust, and fiduciary obligations to the Tribes
3 under the Treaties of 1855.

4 **D. Dividend Distribution Clause**

5 CR/YA takes exception to Bonneville's DROD on the threshold level for the Dividend
6 Distribution Clause (DDC) and reiterates our position as described in our briefs and testimony.
7 Bonneville's threshold level should be raised to \$1.6 billion in order to successfully mitigate the
8 extraordinary risks Bonneville faces in this rate period and the next as described earlier in this
9 and our other briefs and testimony. Bonneville theorizes that such a reserve may jeopardize
10 compliance with section 7(n) of the Northwest Power Act. Of course, Bonneville argues earlier
11 (page 7-4) that section 7(n) gives the Administrator flexibility to build reserves to maintain a
12 high Treasury payment probability post 2006 consistent with Principle number 4. Bonneville has
13 not adequately addressed the risks exposed in CR/YA briefs and testimony including Clean
14 Water Act costs and complying with treaty and trust responsibilities. The \$1.6 billion reserve
15 level is reasonable when taking into account risks Bonneville continues to ignore in
16 contravention of Bonneville's legal duty.

17 CR/YA also takes exception to Bonneville's continued use of the sophomoric argument
18 advanced by NRU that any reserve over \$1 billion creates an "attractive nuisance" for
19 "extraregional interests." When extraregional interests observe what the Northwest's true risk
20 liabilities are, and when extraregional interests observe that the Northwest has been receiving
21 cost-based power (far below the average U.S. rate) for decades financed by low cost federal
22 loans, and when extraregional interests observe the Northwest is trying to expose the U.S.

1 taxpayer to Treasury deferrals because Bonneville did not set rates to adequately address the fish
2 and wildlife costs and other risks identified by CR/YA, then the Northwest will see the true
3 definition of "attractive nuisance."

4 It would appear that CR/YA along with UCUT, NWECC, and OPUC are the only parties
5 that are truly concerned with the long-term health of Bonneville. All other parties (with few
6 exceptions) would drive Bonneville to the brink of Treasury deferral. Bonneville must meet its
7 statutory requirements including section 7(n) of the Northwest Power Act and the CR/YA
8 recommendations are the most likely to meet those statutory requirements.

9 **VI. TRANSMISSION AND INTER-BUSINESS LINE ISSUES**

10 **A. GTA Expense Issues**

11 On page 8-10 of the DROD Bonneville addresses whether Bonneville should provide
12 General Transfer Agreement (GTA) service to new preference customers for delivery of Federal
13 power. We support Bonneville's draft decision on page 8-13 to provide a limited amount of
14 GTA service or comparable transfer service under an open access tariff to certain new preference
15 customers. We appreciate Bonneville's efforts to make it possible for some tribes to benefit
16 from the hydroelectric system that has caused so many losses for tribal communities.

17 While we agree with the Bonneville draft decision on this point, we do not waive the
18 legal arguments made in our brief. We incorporate that analysis and the analysis of the UCUT
19 tribes by reference in this document.

20 Finally, we are not certain what NRU was talking about regarding tribal utilities formed
21 after the close of the subscription window. The Yakama Nation is actively considering the
22 formation of a tribal utility prior to the close of the subscription window.

1 **VII. TREATY AND TRUST RESPONSIBILITY**

2 CRITFC and the Yakama Nation take exception to Bonneville's Draft Decision that its
3 initial rate proposal complies with Bonneville's trust responsibilities. WP-02-A-01, pages 18-37.

4 Bonneville's position is based upon and incomplete analysis of *Mitchell* and citation to
5 authority that is not controlling in the Ninth Circuit Court of Appeals, where by statute,
6 Bonneville's rates will be reviewed. Contrary to Bonneville's analysis, the *Mitchell* Court
7 recognized that a trust relationship may exist even where there is no specific statutory delegation
8 of trust duties.

9 Where the Federal Government takes on or has control or supervision over tribal monies
10 or properties, the fiduciary relationship normally exists with respect to such monies or
11 properties (unless Congress has provided otherwise) **even though nothing is said**
12 **expressly in the authorizing or underlying statute (or other fundamental document)**
13 **about a trust fund, or a trust or fiduciary commitment.**

14
15 *United States v. Mitchell* 463 U.S. 206, 225 (emphasis added, citations omitted); *see generally*
16 *Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine*
17 *Revisited*, 1994 Utah Law Rev. 1523-1535 (discussing the control-based trust relationship
18 identified in *Mitchell*); *Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A*
19 *New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah Law
20 Rev. 109, 117-21 (criticizing *North Slope Borough v. Andrus* and discussing cases to the
21 contrary). That is the case here.

22 In the context of the Northwest Power Act, Bonneville has an express duty to use its fund
23 and authorities to protect, mitigate, and enhance fish and wildlife in the Columbia Basin to the
24 extent affected by the development and operation of hydropower in the Basin. 16 U.S.C.

1 839b(h)(10)(A).² As pointed out in our Initial Brief, the losses of salmon due to the development
2 and operation of hydropower in the Basin are well recognized. Where once the Columbia
3 produced annual runs of at least 10-16 million salmon, its runs are now diminished to tens of
4 thousands. *Confederated Tribes and Bands of the Yakima Indian Nation v. Northwest Power*
5 *Planning Council*, 35 F.3d 1371, 1375-79 (9th Cir. 1994) (describing the effects of the
6 development and operation of the Federal Columbia River Power System upon the Basin's
7 anadromous fishery resources)(hereinafter cited as *Yakima Nation*). Bonneville's duty to
8 mitigate for these losses and its control over this fish and wildlife mitigation responsibility is
9 established by the Act. The tribes' dependence on the salmon is also clear. *United States v.*
10 *Winans*, 198 U.S. 371, 381 (1905).

11 Bonneville has a trust responsibility to the tribes and it cannot discharge its trust
12 responsibilities simply by complying with its governing statutes. *See Nance v. Environmental*
13 *Protection Agency*, 645 F.2d 701, 710-11 (9th Cir. 1981)(holding that in designating airshed
14 quality under the Clean Air Act, the federal government owes a trust responsibility to the tribe
15 beyond the statutory and regulatory obligations owed to the general public). Rather, Bonneville
16 must specifically consider the tribes' interests and act affirmatively to protect those interests.
17 Bonneville may not, as it has done, balance tribal interests in order to effect a compromise. *See*
18 *Northern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. 3065, 3071 (D. Mont. May 28, 1985)
19 modified remedy rev'd, 851 F.2d 1152 (9th Cir. 1988).

² Bonneville's use of its fund and authorities must also be consistent with the NPPC's fish and wildlife program, which is required by statute to contain only those measures that are consistent with the legal rights of the CRITFC's member tribes and the Yakama Nation, including the federal government's trust responsibility. 16 U.S.C. 839b (h)(6)(D).

1 CR/YA does not argue that Bonneville has a legal obligation in this proceeding for
2 “funding drawdown of lower Snake River Dams or adopting Fish and Wildlife Alternative 13u”
3 as Bonneville characterizes our position. Instead, as pointed out in our opening brief

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

15
16 WP-02-B-CR/YA-01, page 25. Bonneville has, accordingly, within its chosen fish and wildlife
17 alternatives, a method for meeting its trust obligations while at the same time fulfilling its other
18 needs within the rate case. Bonneville may not, as it has done, simply follow the most expedient
19 and rate-payer acceptable option, while ignoring tribal needs. *Pyramid Lake Paiute Tribe v.*
20 *Morton*, 354 F.Supp. 252 (D.D.C. 1972) cited with approval by the 9th Circuit in *Pyramid Lake*
21 *Paiute Tribe v. Navy*, 898 F.2d 1410 (9th Cir. 1990).

22 Finally, Bonneville owes the tribes a fiduciary trust responsibility independent of statute.
23 *Pyramid Lake Paiute Tribe v. Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). Bonneville
24 can't fulfill that responsibility simply by analyzing its own Act and determining that by
25 complying with the Act that it is fulfilling its "highest and best fiduciary" responsibility to the
26 Yakama and CRITFC tribes. Again, Bonneville's analysis of its trust responsibility is seriously
27 flawed and must be revisited.

1 **VIII. CONCLUSION**

2 For the reasons stated above, the Columbia River Inter-Tribal Fish Commission and the
3 Yakama Nation respectfully requests that the Administrator adopt the recommendations
4 contained herein.

5 DATED April 24, 2000

6 Respectfully submitted,

7
8 _____
9 Tim Weaver
10 Attorney for the Yakama Nation

11
12 _____
13 Kenneth Johnston
14 Attorney for the Columbia River
Inter-Tribal Fish Commission