

**UNITED STATES OF AMERICA
U.S. DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION**

Fiscal Year (FY) 2022–2023 Proposed)	Docket No. BP-22
Power and Transmission Rate)	
Adjustments Proceeding)	
)	

DIRECT TESTIMONY OF:

Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United

SUBJECT:

Power Rate Issues and Equitable Treatment of Fish and Wildlife

WITNESS:

Mitchell Cutter

February 3, 2021

1 **SECTION 1: INTRODUCTION AND SUMMARY OF TESTIMONY**

2 *Q: Please state your name and qualifications.*

3 A: My name is Mitchell Cutter. My qualifications are shown at BP-22-Q-ID-01.

4 *Q: Please provide an overview of Idaho Conservation League, Great Old Broads for*
5 *Wilderness, and Idaho Rivers United.*

6 A: Idaho Conservation League (“ICL”) is Idaho’s largest state-based conservation
7 organization. ICL represents over 30,000 supporters, many of whom have a deep
8 personal interest in anadromous and resident fish recovery, renewable energy, and rural
9 Idaho communities. Many of ICL’s board, staff, and supporters are retail customers of
10 BPA-sourced power. Great Old Broads for Wilderness (“GOB”) is a national grassroots
11 organization founded in 1989 whose mission is to engage and inspire activism to preserve
12 and protect wilderness and wild lands. GOB has chapters throughout the United States,
13 including multiple chapters in Oregon, Idaho, and Washington. Idaho Rivers United
14 (“IRU”) is a nonprofit environmental advocacy organization with over 5,000 members
15 from throughout Idaho and beyond. As Idaho’s largest statewide river-focused advocacy
16 organization these members, generally, are river-loving rafters, kayakers, anglers, guides,
17 and environmentally-attuned citizens.

18
19 ICL, GOB, and IRU are all very concerned with recovering and sustaining viable
20 populations of Idaho’s Snake River sockeye, Snake River fall Chinook, Snake River
21 spring/summer Chinook, and Snake River steelhead, all deeply imperiled native fish
22 species that are listed as “threatened” or, in the case of sockeye, “endangered” species
23 under the Endangered Species Act (“ESA”).

1 Among other activities that ICL, GOB, and IRU have undertaken to try to protect these
2 imperiled fish species, the groups participated in BPA’s latest Integrated Program Review
3 (“IPR”) and submitted comments focused on BPA’s legal requirements and duties to
4 ensure that fish are given equitable treatment and that BPA fully funds the costs
5 associated with the harmful effects of the lower Snake River dams and other facilities.

6 *See Ex. 1.*

7 *Q: What is the purpose of your testimony?*

8 A: This testimony is intended to highlight aspects of BPA’s Initial Proposal that are, in our
9 view, insufficiently attentive to the agency’s obligations to fish and wildlife, particularly
10 endangered and threatened salmon and steelhead species.

11 *Q: Please briefly describe how your testimony will be organized.*

12 A: This testimony is divided into three parts: this introduction, a section dealing with how
13 the Initial Proposal comports with BPA’s obligation to provide “equitable treatment” to
14 fish and wildlife, and a section dealing with how the Initial Proposal treats risks related to
15 the long-running litigation over the Federal Columbia River Power System (“FCRPS”).

16 *Q: Are there any exhibits to this testimony?*

17 A: Yes. Exhibit 1, located at BP-22-E-ID-01-AT01, consists of the comments submitted by
18 ICL, GOB, and IRU during the IPR process. Exhibit 2, located at BP-22-E-ID-01-AT02,
19 consists of responses to several of our data requests submitted to BPA. Exhibit 3, located
20 at BP-22-E-ID-01-AT03, consists of excerpts from BPA’s IPR Close-Out Report from
21 September 2020. And Exhibit 4, located at BP-22-E-ID-01-AT04, consists of excerpts
22 from the Executive Summary for the 2020 Columbia River System Operations
23 Environmental Impact Statement (“CRSO EIS”).

1 **SECTION 2: EQUITABLE TREATMENT FOR FISH AND WILDLIFE**

2 *Q: Please discuss why BPA’s decisions are important to ICL, GOB, and IRU.*

3 A: As discussed in our petition to intervene, BP-22-S-ID-01, and summarized above, ICL,
4 GOB, and IRU are all concerned with the plight of salmon and steelhead species affected
5 by the FCRPS. BPA, as one of the agencies that manages the system, plays a large role in
6 determining how the system is operated. BPA is also charged with overseeing and
7 partially funding efforts to mitigate the harmful effects of the FCRPS and protect and
8 enhance fish and wildlife adversely affected by the FCRPS.

9 *Q: What obligations does BPA have to take into account fish and wildlife when setting its*
10 *rates?*

11 A: One important obligation is the requirement of “equitable treatment.” The Northwest
12 Power Act requires BPA to “exercise [its] responsibilities consistent with the purposes of
13 [the Act] and other applicable laws, to adequately protect, mitigate, and enhance fish and
14 wildlife, including related spawning grounds and habitat, affected by such projects or
15 facilities in a manner that provides equitable treatment for such fish and wildlife with the
16 other purposes for which such system and facilities are managed and operated.” 16
17 U.S.C. § 839b(h)(11)(A)(i). That means that BPA can’t give short shrift to fish and
18 wildlife in order to keep its rates low, and it has to take into account its obligations to
19 protect and enhance fish and wildlife when making decisions about rates to ensure that
20 it’s providing “equitable treatment.”

21 *Q: Can you explain where your understanding of the “equitable treatment” requirement*
22 *comes from?*

1 A: I'm not a lawyer, but I've read the relevant part of the Northwest Power Act and I've had
2 several discussions with the lawyers representing us in this proceeding.

3 Q: *Is BPA taking into account its obligations to fish and wildlife in this rate case?*

4 A: Not directly. In response to one of our data requests, BPA stated that “[t]he actions BPA
5 may take to meet its various fish and wildlife obligations are not determined in BPA’s
6 rate proceedings.” Ex. 2 at 1. BPA went on to say the following:

7 BPA’s rates recover the costs of BPA’s programmatic fish and wildlife
8 spending as well as the costs of the power share of FCRPS operations,
9 which includes operations and management actions that provide fish and
10 wildlife equitable treatment with the other purposes for which the system is
11 operated. BPA’s forecast programmatic fish and wildlife spending levels
12 are determined in the Integrated Program Review (IPR) process, which is
13 conducted outside of the rate case.

14 BPA’s position seems to be that it doesn’t need to take into account its “equitable
15 treatment” obligation *now* because it already took it into account during IPR and other
16 decisionmaking processes.

17
18 It seems doubtful, though, that BPA actually took into account—much less provided—
19 equitable treatment then, given that its decisions with respect to fish and wildlife funding
20 were driven by its desire to keep “costs—direct funding, direct expense and capital
21 costs—at or below the rate of inflation, inclusive of any new obligations.” Ex. 3 at 2, 4, 6.

22 Q: *What do you recommend that BPA do in this rate proceeding to meet its obligations to*
23 *fish and wildlife?*

24 A: In the Power Rates Policy Testimony, BP-22-E-BPA-15, BPA staff stated that BPA “is
25 facing a unique issue this rate period: a potentially large power rate decrease.” Staff then
26 stated that they “see two general opportunities for the Administrator in this case”: (1)
27 “allow rates to produce a 4.5 percent reduction” or (2) “hold rates flat (that is, at the same

1 level as BP-20), and use the incremental revenue to support BPA’s long-term strategic
2 and financial objectives.” Staff then stated that BPA “has considerable rate setting
3 authority” and need not choose to keep rates as low as possible in the short term.
4

5 ICL, GOB, and IRU agree that BPA has broad authority when setting rates. We believe
6 that authority includes the ability to set rates to provide “equitable treatment” for fish and
7 wildlife. In fact, we think that BPA *must* take into account its “equitable treatment”
8 obligation at this time. That is particularly true because the potential for a rate decrease
9 was not evident during IPR and earlier decisionmaking processes: as BPA stated in
10 response to one of our data requests, “[p]rior to developing the updated secondary market
11 forecast, BPA Staff and many stakeholders assumed secondary revenue would be at or
12 below levels included in BP-20 rates [and] . . . believe[d] a 2–4 percent rate increase
13 would likely be needed to recover BPA’s costs in BP-22.” Ex. 2 at 3. So even if BPA
14 took into account its “equitable treatment” obligation during IPR and other processes, the
15 apparently recent discovery that secondary revenues would allow for a rate decrease
16 amounts to a changed circumstance that should reopen BPA’s consideration of what
17 constitutes “equitable treatment” during the BP-22 rate period.
18

19 With that in mind, we recommend that BPA consider a *third* option in addition to the two
20 options discussed in the Power Rates Policy Testimony: BPA should consider holding
21 rates flat and using the incremental revenue to carry out its mission to protect, mitigate,
22 and enhance fish and wildlife, including related spawning grounds and habitat, harmed by
23 its operations. This could include, for instance, increasing funding for the Lower Snake

1 River Compensation Plan, whose managers have previously informed BPA of the need
2 for more funding. Ex. 1 at 5–6. It could also include increasing funding for habitat
3 restoration efforts.

4
5 ICL, GOB, and IRU recognize that BPA has discretion in *how* it executes its statutory
6 directive to provide “equitable treatment” to fish and wildlife, so these suggestions are
7 not meant to be exhaustive. However, BPA must take into account its “equitable
8 treatment” obligation in some way at this time. Just as the unforeseen rise in projected
9 secondary revenue offers BPA an opportunity to preserve the “scarce resource” of its
10 Treasury borrowing ability, BP-22-E-BPA-15 at 19–20, so too does it offer an
11 opportunity for BPA to take further actions to preserve the *truly* scarce resource of
12 dwindling salmon and steelhead populations affected by its operations.

14 **SECTION 3: MANAGING LITIGATION RISK**

15 *Q: What risks does BPA face from litigation concerning the operation of the FCRPS?*

16 *A:* Several environmental groups—supported by the State of Oregon as an intervenor and
17 several tribes as amicus curiae—have been engaged in a 20-year-long battle in federal
18 court to ensure that the FCRPS is operated in a way that’s consistent with the ESA and
19 other laws. IRU has been a part of that case from the beginning, and ICL just signed on as
20 a plaintiff. The court in that case has ruled in favor of the plaintiffs time and time again
21 and has on several occasions ordered the federal agencies to change their operations to
22 better protect anadromous fish species. In 2016, for instance, the court ordered the
23 agencies to increase spill at eight dams on the lower Columbia and lower Snake Rivers.

1 The plaintiffs just filed a supplemental complaint challenging the 2020 CRSO EIS and
2 the associated biological opinions (“BiOps”). Given the history of the case and the fact
3 that the new EIS and BiOps appear to repeat the same flawed analyses that have been
4 rejected time and time again, it seems like there’s a good chance that the plaintiffs will
5 win again and ask the court to order operational changes, including increased spill.

6 *Q: How is BPA accounting for spill now?*

7 A: In the Power Loads and Resources Study, BP-22-E-BPA-03, BPA states that it has
8 assumed spill levels and other operational measures contained in the Preferred
9 Alternative in the CRSO EIS and BiOps. BPA confirmed this in response to our data
10 requests. Ex. 2 at 4–5.

11 *Q: Is BPA accounting for the risk that the court may require a different spill regime during*
12 *the rate period?*

13 A: In short, no. BPA has said that “staff did not specifically model the risk associated with
14 hypothetical court-ordered spill because staff do not have any information upon which to
15 form a forecast.” Ex. 2 at 6.

16 *Q: Why is this a problem?*

17 A: Given the history of the FCRPS case, it seems likely, or at least possible, that BPA and
18 the other agencies that manage the FCRPS will again be ordered to take steps to better
19 protect endangered fish, including spilling more water or spilling water at different times
20 than set out in the CRSO EIS Preferred Alternative. Additional court-ordered spill could
21 seriously affect generation and, therefore, revenue.

22

1 For instance, one of the high-spill alternatives considered during the CRSO EIS
2 process—MO4—would lead to decreases in hydropower generation of 870 aMW under
3 low water conditions and 1,300 aMW under average water conditions. Ex. 4 at 19. BPA
4 estimates that this would create a huge pressure on rates. *Id.* at 19–20. Revenue shortfalls
5 threaten BPA’s financial interests, of course, but they also threaten BPA’s ability to fund
6 its fish and wildlife program. For that reason, ICL, GOB, and IRU are concerned that
7 BPA is not taking into account the risk of additional court-ordered spill during the rate
8 period.

9 *Q: How could BPA account for the risk of additional court-ordered spill during the rate*
10 *period?*

11 *A:* During the CRSO EIS process, BPA analyzed several different spill scenarios and
12 assessed what effect they would have on generation and rates. *See* Ex. 4. BPA should do
13 the same now as part of its Power and Transmission Risk Study.

14 *Q: Does BPA have enough information to forecast the risk from court-ordered spill?*

15 *A:* Yes. There is uncertainty, of course, but there is uncertainty in all risk modeling. Based
16 on the CRSO EIS process and the type of relief that the plaintiffs have asked for in the
17 past, BPA should have a good idea of what kinds of spill regimes might be on the table.
18 BPA can make sensible assumptions about different regimes and then include those in its
19 model of operating risk. And even if that proves impossible, BPA can include the risk of
20 court-ordered spill in its qualitative risk assessment and mitigation analysis. *See* BP-22-
21 E-BPA-05-CC01 at 57–64. Ignoring this litigation risk, though, makes no sense from a
22 business perspective and threatens BPA’s ability to recover its costs, including the costs
23 associated with funding its fish and wildlife program.

1 Q: *Are there any other risks to BPA from pending litigation?*

2 A: Yes. Last year, the Washington Department of Ecology issued Clean Water Act Section
3 401 certifications for eight FCRPS dams. Ex. 1 at 4. The Army Corps of Engineers has
4 challenged the certifications before the Washington Pollution Control Hearings Board.
5 The 401 certifications, if upheld and put into effect, will force BPA and its partner
6 agencies to operate the dams so as to maintain lower temperatures in the Columbia and
7 lower Snake Rivers. To maintain lower temperatures, the agencies will need to make
8 substantial changes to dam operations and/or invest in mitigation measures.

9
10 BPA briefly mentioned these developments during the IPR workshops, but did not
11 elaborate on whether it is taking them into account during this rate case. In response to
12 one of our data requests, BPA staff stated that “[r]isks associated with potential or
13 pending litigation are generally not modeled in the Risk Study,” Ex. 2 at 7, suggesting
14 that the recent 401 certifications have not been taken into account. ICL, GOB, and IRU
15 believe that BPA should account for this risk, and that the failure to do so is both a bad
16 business decision and potentially detrimental to BPA’s ability to fund fish and wildlife
17 mitigation and restoration efforts.

18 Q: *Does this conclude your testimony?*

19 A: Yes.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing on February 3, 2021 by uploading it to the Bonneville Power Administration's secure website. Pursuant to Section 1010.10(a) of the Procedures Governing Bonneville Power Administration Rate Hearings, such filing constitutes service on all Litigants.

Respectfully submitted on this 3rd day of February 2021.

/s/ Andrew R. Missel
Laurence ("Laird") J. Lucas
Andrew R. Missel
Advocates for the West

*Attorneys for Idaho Conservation League, Great
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United*