No. 24-1653 (calendared with 23-593)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO CONSERVATION LEAGUE, GREAT OLD BROADS FOR WILDERNESS, AND IDAHO RIVERS UNITED,
Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION,
Respondent,

and

PUBLIC POWER COUNCIL, ET AL.,
Intervenors.

On Petition for Review
of a Final Decision of the
Bonneville Power Administration

PETITIONERS' OPENING BRIEF

Laurence ("Laird") J. Lucas
Andrew R. Missel
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
Attorneys for Petitioners

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioners Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United are non-profit organizations recognized by the IRS as Section 501(c)(3) public charities. None has public shares or corporate parents or affiliates with shares.

Date: June 28, 2024 */s/ Andrew R. Missel*

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INTRODUCTION

Under the Northwest Power Act, 16 U.S.C. § 839 *et seq.*, the Bonneville Power Administration ("BPA") is responsible for funding a large suite of mitigation projects to aid fish and wildlife populations harmed by hydroelectric dams in the Columbia River Basin. For years, BPA has been shortchanging fish and wildlife by underfunding these mitigation projects. State and tribal fish and wildlife agencies that carry out these projects have repeatedly implored BPA to spend more money, but BPA has refused to do so, forcing many mitigation projects to scale back. BPA's parsimony has undermined the protection and restoration of fish and wildlife—particularly threatened and endangered salmon and steelhead species—in the Columbia Basin.

In the past two fiscal years, BPA made record revenues from power sales, leading to a large surplus at the end of each fiscal year eligible for distribution through the "Reserves Distribution Clause," or RDC: $500 million in fiscal year 2022 and $285.4 million in fiscal year 2023. The states and tribes that implement BPA-funded mitigation asked BPA to devote substantial portions of those surpluses to shore up mitigation projects

suffering from years of underfunding, but BPA refused, electing to use less than 15% of the total RDC amount for fish and wildlife.

This case and No. 23-593, which is being heard alongside this case, challenge BPA's RDC decisions in fiscal years 2023 and 2022, respectively. The central legal question in these cases is whether, when making its RDC decisions, BPA had to comply with its duties to fish and wildlife under § 4(h)(11)(A) of the Northwest Power Act, 16 U.S.C. § 839b(h)(11)(A), including its duty of "equitable treatment" for fish and wildlife. BPA contends that it did not have to comply with its § 4(h)(11)(A) duties, but this conclusion rests on an unconvincing, self-serving, and ultimately unreasonable reading of the Northwest Power Act. The Court should reject that reading of the Act and make clear to BPA that it is not free to ignore its duties to fish and wildlife when making decisions concerning the amount of funding available for fish and wildlife mitigation.

JURISDICTIONAL STATEMENT

This Court has statutory subject-matter jurisdiction over this petition for review because it was filed within 90 days of BPA's fiscal year 2023 ("FY2023") RDC decision. 16 U.S.C. § 839f(e)(5).

Petitioners have Article III standing. As demonstrated by the declarations filed with this brief and the declarations filed in the fiscal year 2022 RDC case, No. 23-593, Petitioners are nonprofit conservation groups committed to saving imperiled salmon and steelhead in the Columbia Basin. They and their members face a credible threat of harm to their recreational, aesthetic, scientific, and other interests, especially their interests related to Idaho's salmon and steelhead that are nearing extinction. That harm is fairly traceable to the fiscal year 2023 RDC decision, and this Court can remedy or prevent that harm, at least in part, by remanding the decision to BPA. *See Idaho Conservation League v. BPA* (*ICL v. BPA*), 83 F.4th 1182, 1187–91 (9th Cir. 2023) (finding that Petitioners had standing under similar circumstances).[1]

By the time the Court decides this case, the money allocated in the FY2023 RDC decision may have been spent. *See* 4-ER-469–71, 500 (describing the use of the FY2023 RDC money). This does not affect

[1] Because the FY2022 RDC decision challenged in No. 23-593 and the FY2023 decision challenged in this case threaten to harm Petitioners' interests in very similar ways, Petitioners have filed short declarations with this opening brief that refer to and rely on the longer declarations filed in No. 23-593. The declarations together demonstrate Petitioners' standing.

Petitioners' standing, because standing is measured from "the time the petition[] [was] filed." *Nw. Requirements Utils. v. FERC*, 798 F.3d 796, 805 (9th Cir. 2015). As for mootness, even if the FY2023 RDC money is spent by the time the Court renders a decision, this case fits comfortably within the "capable of repetition, yet evading review" exception to mootness. *See Alcoa, Inc. v. BPA*, 698 F.3d 774, 786–88 (9th Cir. 2012) (discussing the exception). The decision being challenged is one of inherently limited duration that cannot be fully litigated before becoming moot, *see id.*, and there is "a reasonable expectation that the dispute w[ill] recur for both" Petitioners and BPA, *Hooks for and on behalf of NLRB v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1112–13 (9th Cir. 2022). Indeed, the dispute has *already* recurred once: Petitioners' challenge to the FY2023 RDC decision involves the same contested legal issues as the challenge to the earlier FY2022 RDC decision. *See Hooks*, 54 F.4th at 1114 (concluding that a case was "capable of repetition" because the parties would contest the same legal issue in future proceedings).

ISSUES PRESENTED

1. Did BPA violate § 4(h)(11)(A)(i) of the Northwest Power Act when it failed to demonstrate "equitable treatment" for fish and wildlife when making its FY2023 RDC decision?

2. Did BPA violate § 4(h)(11)(A)(ii) of the Northwest Power Act when it failed to take the Northwest Power and Conservation Council's Fish and Wildlife Program "into account ... to the fullest extent practicable" when making its FY2023 RDC decision?

STATEMENT OF THE CASE

I. Background and Events Through the FY2022 RDC Decision.

Petitioners' opening brief in No. 23-593 discusses the devastating effects of hydropower development on salmon and steelhead in the Columbia River Basin; Congress's attempt to address this issue through the Northwest Power Act, 16 U.S.C. § 839 *et seq.*; BPA's role in implementing the Northwest Power Act by funding mitigation measures to aid fish; BPA's recent history of underfunding such measures; and the events leading up to the FY2022 RDC decision. *See* Opening Br. (23-593) at 5–25. That discussion is incorporated by reference here.

II. The BP-24 Rate Case.

BPA finalized the FY2022 RDC decision (the subject of No. 23-593) on January 6, 2023. 1-ER-2. By that time, the BP-24 rate case had already commenced. 4-ER-465. Through the BP-24 rate case, BPA set power and transmission rates for fiscal years 2024–2025.[2] *Id.* For purposes of this case, the BP-24 rate proceeding was significant for three reasons.

First, it was through the BP-24 proceeding that BPA adopted the reserves distribution clause mechanism relevant to the FY2023 RDC decision challenged here. 4-ER-497–502. The mechanism adopted in the BP-24 rate case is substantially identical to the mechanism adopted in the BP-22 rate case—which was the relevant mechanism for BPA's FY2022 RDC decision—with one exception: under the BP-24 mechanism, the first $129 million of any Power RDC surplus automatically goes to "rate relief." 4-ER-499. Other than that, the mechanisms are substantially the same. *Compare* 4-ER-497–502 (mechanism from BP-24), *with* 2-ER-61–65 (mechanism from BP-22); *see also* 4-ER-465–66 (comparing the two RDC mechanisms).

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[2] BPA's fiscal year 2024 began on October 1, 2023 and runs through September 30, 2024.

Crucially, both leave BPA significant discretion to spend RDC funds on fish and wildlife mitigation, as BPA in fact did in both FY2022 and FY2023.

Second, during the BP-24 proceeding, BPA clarified its interpretation of § 4(h)(10)(A) of the Northwest Power Act, 16 U.S.C. § 839b(h)(10)(A). That provision empowers BPA "to use the [BPA] fund and the authorities available to [BPA] under [the Northwest Power Act] and other laws administered by [BPA] to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries." Section 4(h)(10)(A) specifies that BPA is to carry out all its relevant fish-protection duties, including its mitigation funding duties, "in a manner consistent with the [Northwest Power and Conservation Council's power] plan, ... the [Fish & Wildlife] [P]rogram adopted by the Council under this subsection, and the purposes of this chapter." 16 U.S.C. § 839b(h)(10)(A).

In the BP-24 record of decision ("BP-24 ROD"), which ended the BP-24 process, BPA stated that "compliance with the 'consistency' requirement" of § 4(h)(10)(A) is not "dependent on the level of BPA's spending." 4-ER-545. According to BPA, "the 'in a manner consistent with' standard of ... § 4(h)(10)(A) should be understood in reference to the

substantive mitigation actions that BPA funds, not to the funding itself or the amount BPA spends." 4-ER-546. That is, the projects that BPA funds must themselves be "consistent" with the Council's Fish & Wildlife Program, but the "consistency" requirement imposes no duty on BPA to provide adequate funding for those projects. *See* 4-ER-547 (arguing that § 4(h)(10)(A) does not require BPA to provide adequate funding for mitigation projects).

Finally, a coalition of tribal entities participated in the BP-24 rate case and raised the issue of BPA's inadequate mitigation funding. The tribal parties—the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Columbia River Inter-Tribal Fish Commission—submitted testimony during the rate case concerning (among other things) the effects of BPA's "flat funding" policy. 4-ER-549–64; *see also* Opening Br. (23-593) at 10–12, 14–18, 22–24 (discussing BPA's flat funding). According to that testimony, the tribes "have not had sufficient funding to carry out the [mitigation] projects needed for BPA to meet its Treaty obligations, *or the [Council's] Fish and Wildlife Program*." 4-ER-556 (emphasis added). "BPA has steadfastly opposed most inflation increases, effectively holding project and program

funding levels flat (well below inflation) since 2018. In real dollars, this is effectively a 20 percent reduction in Program funding over the past 5 years." *Id*. According to the tribal parties, the proposed modest spending increase on fish and wildlife mitigation during the BP-24 rate period would not be sufficient to address mitigation funding shortfalls, and would "maintain an overall decline in fish and wildlife funding at a time when the Columbia River fish stocks are in jeopardy." 4-ER-554.[3]

III. The Presidential Memorandum on Restoring Salmon to the Columbia Basin.

On September 27, 2023, President Biden issued a "Memorandum on Restoring Healthy and Abundant Salmon, Steelhead, and Other Native Fish Populations in the Columbia River Basin," hereinafter referred to as the "Presidential Memorandum." 4-ER-565–68; *see also* 88 Fed. Reg. 67,617 (Oct. 2, 2023). The Presidential Memorandum recognizes that "[t]he

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[3] Petitioners also participated in the BP-24 rate proceeding, arguing that BPA had to comply with its § 4(h)(11)(A) duties when setting rates under § 7 of the Northwest Power Act. By the time the BP-24 decision became ripe for challenge in this Court, however, *ICL v. BPA* had foreclosed that argument. *See* 83 F.4th at 1193 (holding that "§ 4(h)(11)(A) should not be read to apply to the [§ 7] ratemaking process itself"). Thus, Petitioners did not challenge the BP-24 decision in this Court.

Columbia River and its tributaries, wetlands, and estuaries are the lifeblood of the Pacific Northwest" and that "[t]he salmon, steelhead, and other native fish populations in the Columbia River Basin ... are essential to the culture, economy, and way of life of Tribal Nations in the region and Indigenous peoples in Canada." 4-ER-565. The Memorandum acknowledges that "[a]ctions since 1855, including the Federal Government's construction and operation of dams in the Basin, have severely depleted fish populations," and that "populations of salmon, steelhead, and other native fish populations in the Basin continue to decline or have not recovered to the level that would warrant removing any population from the list of threatened and endangered species." *Id.*

The Presidential Memorandum calls for "a sustained national effort to restore healthy and abundant native fish populations in the [Columbia] Basin" and lists compliance with the "equitable treatment" mandate of the Northwest Power Act as a "priority" of the Biden Administration. 4-ER-566. The Memorandum then sets forth a policy of "work[ing] with the Congress and with Tribal Nations, States, local governments, and stakeholders to pursue effective, creative, and durable solutions, informed by Indigenous Knowledge, to restore healthy and abundant salmon,

steelhead, and other native fish populations in the Basin."[4] *Id*. The Memorandum instructs the relevant federal agencies, including BPA, "to utilize their authorities and available resources to advance the policy" set forth in the Memorandum. 4-ER-566–67.

IV. The Fiscal Year 2023 RDC Process and RDC Decision.

In August 2023, BPA predicted that there was just a 47% chance that the Power RDC would trigger for FY2023. 4-ER-506. BPA projected an average Power RDC surplus of $26 million in the event the RDC were to be triggered. *Id.*

Financial conditions then improved for BPA and, after the fiscal year came to a close, the agency announced that the FY2023 Power RDC had indeed been triggered. 4-ER-511–13. The amount of excess reserves available for distribution was $285.4 million, 10 times larger than the projected mean value from August. 4-ER-513. Under the BP-24 rate schedules' RDC mechanism, the first $129 million of that amount had to be

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[4] The Memorandum lists other policy goals in addition to salmon restoration, including "secur[ing] a clean and resilient energy future for the region." 4-ER-566. But, consistent with the Memorandum's title, the policy goal of restoring healthy salmon runs to the Basin is listed first.

applied to "rate relief"—*i.e.*, credited to customers to effectively lower power rates—while BPA retained discretion to apply the remaining $150+ million to "reduce debt, incrementally fund capital projects, further decrease rates ..., distribute to customers, or any other Power-specific purposes." 4-ER-499.

On November 16, 2023, BPA released its proposal for the FY2023 Power RDC surplus: $129 million, plus an additional $36.4 million, for rate relief; $90 million for debt reduction; and $30 million—less than 20% of the available RDC amount—"to address, on an accelerated basis, fish and wildlife mitigation that (i) [BPA] anticipates would otherwise need to be addressed during future rate periods and (ii) will result in avoidance of those costs in future rate periods." 4-ER-515–16. The proposed conditions on the fish-and-wildlife allocation were identical to the conditions from the FY2022 fish-and-wildlife allocation. *Compare* 4-ER-515, *with* 1-ER-2. BPA told stakeholders that they had until December 1, 2023 to submit comments on the RDC proposal. 4-ER-470.

Several Native American tribes, the State of Oregon, the Washington Department of Fish and Wildlife ("WDFW"), Petitioners, and a coalition of conservation and fishing groups submitted comments urging BPA to spend

much more of the FY2023 RDC surplus on fish and wildlife mitigation. *See* 4-ER-519–39 (comments).[5] The Yakama Nation called BPA's proposal "an inappropriate allocation of unexpected excess revenues [that] should be revised to more equitably address the needs of fish and wildlife in the Columbia River Basin." 4-ER-521. The Yakama Nation noted that BPA had substantial discretion to apply a larger fraction of the RDC amount to fish and wildlife, and that doing so would "help address the many years of deferred and underfunded BPA operations and maintenance obligations at Columbia Basin hatcheries and fish infrastructure projects." 4-ER-521–22.

Similarly, the Nez Perce Tribe criticized BPA for its earlier FY2022 decision and called on BPA to use the FY2023 Power RDC to "help offset BPA's past failures to meet its legal obligations to fish and wildlife resources." 4-ER-524–25. The Nez Perce Tribe stated that spending more of the FY2023 RDC amount on fish and wildlife would "address a Basin-wide fish and wildlife funding backlog that stems from BPA's chronic underfunding of the Fish and Wildlife Program." 4-ER-525. The Nez Perce

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[5] These comments largely echoed comments made during the FY2022 RDC process. *Compare* 4-ER-519–39 (FY2023 comments), *with* 2-ER-98–134 (FY2022 comments).

Tribe called on BPA to "dedicat[e] at least a substantial portion—if not all—of the RDC to fish and wildlife." *Id.* WDFW, the State of Oregon, Petitioners, and the conservation and fishing groups made similar comments. *See* 4-ER-519–20 (WDFW comments); 539 (Oregon comments); 527–34 (Petitioners); 535–38 (conservation and fishing groups).

Several of the commenters reminded BPA that its RDC decision should be guided by the September 2023 Presidential Memorandum. The Nez Perce Tribe, for example, stated that the FY2023 RDC "provide[d] an opportunity for BPA to be one of the first agencies to demonstrate how it will align with the Presidential Memorandum as it exercises its discretion." 4-ER-524. The conservation and fishing groups stated that "the allocation of the 2023 RDC presents an immediate 'litmus-test' opportunity for BPA to demonstrate its alignment with and support of the policy set in the" Presidential Memorandum.[6] 4-ER-536.

On December 22, 2023, BPA issued its FY2023 RDC decision. 4-ER-460. BPA stuck with its proposal to use just $30 million of the available

[6] The coalition of fishing and conservation groups included Petitioners Idaho Conservation League and Idaho Rivers United.

$150+ million for fish and wildlife mitigation. *Id.* In response to comments concerning § 4(h)(11)(A) of the Northwest Power Act, BPA reiterated its position that "[§] 4(h)(11)(A) applies in decisions respecting the physical operation and management of the dams and reservoirs of the Columbia River System," but does not apply to BPA's decisions regarding fish and wildlife mitigation funding. 4-ER-493. BPA also provided what it called an "*arguendo* discussion"—a brief discussion of how, even if § 4(h)(11)(A) did apply to the FY2023 RDC decision, BPA was complying with it. 4-ER-493–94. In addition, because many of the comments echoed comments made on the FY2022 RDC proposal, BPA incorporated by reference its responses to the FY2022 comments. 4-ER-462.

V. This Petition for Review.

On March 18, 2024, Petitioners filed a petition for review in this Court challenging BPA's FY2023 RDC decision. 4-ER-594–99. On April 25, 2024, the Court released this case from the Mediation Program and ordered the case to be "calendared before the same panel that considers [No.] 23-593." *See* 9th Cir. R. 15-3.2 ("Petitions from related final actions or decisions [under the Northwest Power Act] may be scheduled for hearing before a single panel."). On May 2, 2024, the parties filed a joint motion to modify

the briefing protocol, which the Court granted on June 14, 2024. Per that protocol, this opening brief incorporates by reference several portions of Petitioners' briefs in No. 23-593.

STANDARD OF REVIEW

This Court's review of BPA's FY2023 RDC decision is governed by the Administrative Procedure Act, 5 U.S.C. § 706. *Nw. Env't Def. Ctr. v. BPA* (*NEDC 2007*), 447 F.3d 668, 681 (9th Cir. 2007). "Under the APA, [this Court] must set aside BPA's action if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)). "The ... arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

SUMMARY OF THE ARGUMENT

The central issue in this case is whether § 4(h)(11)(A) of the Northwest Power Act applies at all when BPA makes decisions concerning non-operational fish mitigation (*e.g.*, habitat restoration, fish screen installation), including decisions about funding such mitigation. BPA's position that § 4(h)(11)(A) does not apply at all to such decisions is wrong. An examination of the text, structure, and purpose of the Northwest Power

Act leads to the conclusion that decisions concerning non-operational mitigation actions may be subject to § 4(h)(11)(A). BPA's contrary reading leads to the result that BPA could decrease funding for fish and wildlife mitigation projects to $0 and still comply with the "equitable treatment" mandate of § 4(h)(11)(A)(i)—a result utterly at odds with the design of the Northwest Power Act.

If the Court agrees with Petitioners as to the applicability of § 4(h)(11)(A), the next question is whether the FY2023 RDC decision triggered BPA's duty to show "equitable treatment" for fish and wildlife under § 4(h)(11)(A)(i). Because of the RDC decision's importance to the successful implementation of BPA-funded mitigation projects, it was a decision "significantly affecting" fish and wildlife, triggering BPA's duty to show equitable treatment. BPA did not do so.

The next question (again assuming that the Court agrees with Petitioners as to the applicability of § 4(h)(11)(A)) is whether the FY2023 RDC decision triggered BPA's duty to take the Northwest Power and Conservation Council's Fish & Wildlife Program into account "to the fullest extent practicable" under § 4(h)(11)(A)(ii). Because the RDC decision was plainly a "relevant stage" of a decisionmaking process with significant

ramifications for the successful implementation of the Council's Program, BPA's "fullest extent practicable" duty was triggered. The administrative record does not reflect that BPA complied with this duty.

ARGUMENT

I. BPA's Fish and Wildlife Mitigation Funding Decisions Are Not Exempt from § 4(h)(11)(A).

The central statutory interpretation question in this case is the same as the one presented in No. 23-593: does § 4(h)(11)(A) of the Northwest Power Act apply only to "actions relating to physical water management," BPA Answer. Br. (23-593) at 29–30, or does it also apply to non-operational mitigation actions and the funding of those actions? Petitioners' view is that § 4(h)(11)(A) sweeps broadly and covers both duties related to "physical water management"—*i.e.*, the actual operation of hydroelectric facilities and the hydrosystem—and duties related to non-operational mitigation actions, including BPA's duty to fund such actions.

The very short version of Petitioners' argument is that § 4(h)(11)(A)'s broad, flexible language ("managing, operating, or regulating") can easily be read to include duties related to non-operational mitigation actions, including BPA's funding of those actions, and that such a reading accords far better with the structure and purpose of the Northwest Power Act than

BPA's contrary reading. *See, e.g.*, *United States v. Cox*, 963 F.3d 915, 922 (9th Cir. 2020) (stating that, when construing a statute, a court considers "the structure of the statute as a whole, including its object and policy, and whether the proposed interpretation would frustrate or advance that purpose") (cleaned up). In other words, § 4(h)(11)(A) offers "ample textual room to choose an interpretation that does not undermine the rest of the statute." *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1044 (9th Cir. 2022); *see also id.* at 1043 ("This is one of those classic situations in which a particular textual provision ... does not tell us when it should apply, but where the rest of the statute and our precedents overwhelmingly demonstrate the better answer.").

Petitioners incorporate by reference the portions of their briefs in No. 23-593 setting forth their arguments as to the scope of § 4(h)(11)(A). *See* Opening Br. (23-593) at 29–55; Reply Br. (29-593) at 8–29. There are just two points to add to the discussion in those briefs. The first concerns BPA's interpretation of § 4(h)(10)(A) of the Northwest Power Act and how that interpretation relates to the parties' dispute over the meaning of § 4(h)(11)(A); the second concerns how the Supreme Court's decision in

Loper Bright Enterprises v. Raimondo, 603 U.S. – (2024), affects both this case and No. 23-593.

A. BPA's Interpretation of § 4(h)(10)(A)'s "Consistency" Requirement Shows Why Its Interpretation of § 4(h)(11)(A) Cannot Be Correct.

In the BP-24 ROD, BPA clarified that, in its view, "compliance with the 'consistency' requirement" of § 4(h)(10)(A) is not "dependent on the level of BPA's spending." 4-ER-545. According to BPA, "the consistency requirement should be understood as relating to the mitigation actions themselves, not the amount of money that BPA spends." 4-ER-547.

Taken at face value, this argument would mean that BPA could act "consistent" with the Council's Program by agreeing to fund all mitigation projects in the Program but then providing an egregiously inadequate amount—say, $1—to fund each project.[7] Given that BPA's main role vis-à-

[7] BPA has resisted this conclusion, insisting that, if the agency were to fund all mitigation projects at a level of $1 per project, it would likely violate the consistency requirement. According to BPA, "any inconsistency would stem from the substance of the mitigation actions being implemented, not the funding level itself vis-à-vis an 'implicit' funding adequacy standard." 4-ER-547. This makes no sense. If the "substance of the mitigation actions being implemented" is inconsistent with the Council's Program *because* those actions are being underfunded by BPA, then it is BPA's underfunding that is causing the statutory violation.

vis the Program is to fund its mitigation measures, this result strongly suggests that BPA's interpretation of the "consistency" requirement is not correct. Of course, this case involves § 4(h)(11)(A), not § 4(h)(10)(A)'s "consistency" requirement. But BPA's interpretation of the "consistency" requirement is relevant to this case, for two reasons.

First, BPA has in the past argued that its interpretation of § 4(h)(11)(A)(ii)—an interpretation that excludes BPA's mitigation funding decisions—would not undermine the efficacy of the Council's Program (and § 4(h) of the Northwest Power Act) because of the existence of § 4(h)(10)(A)'s "consistency" requirement. *See* 2-ER-245–46 (portion of BP-22 ROD); Answer. Br. (23-593) at 50–51. In essence, BPA has pointed to the "consistency" requirement as a backstop that ensures that the Council's Program can influence BPA's funding decisions even if § 4(h)(11)(A)(ii) is interpreted to exclude such decisions from its scope. BPA's discussion in the BP-24 ROD reveals that this promise of the "consistency" requirement as a backstop is illusory. Accordingly, BPA's "backstop" arguments in support of its interpretation of § 4(h)(11)(A) cannot be taken seriously.

Second, BPA's interpretation of § 4(h)(10)(A), when considered together with its interpretation of § 4(h)(11)(A), undermines the

persuasiveness of the latter interpretation. Agencies, like courts, must interpret statutes as a whole. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014). Taken together, BPA's interpretations of § 4(h)(10)(A) and § 4(h)(11)(A) lead to the results that (1) *no* provision of the Northwest Power Act applies to BPA's decisions about how much to spend on fish and wildlife mitigation projects and (2) BPA *never* needs to consider the Council's Program when deciding on funding levels for the Program's mitigation projects.

Neither of these results is tenable. BPA's main role vis-à-vis fish and wildlife under the Northwest Power Act is to fund mitigation measures, and the "primary fish and wildlife protection measures are intended to be established through the Council's Program." *Nw. Env't Def. Ctr. v. BPA* (*NEDC 1997*), 117 F.3d 1520, 1531 (9th Cir. 1997). Given that, it is extremely unlikely that Congress would have left BPA with unlimited discretion to spend whatever amount of money it might feel like spending on fish and wildlife mitigation, and equally unlikely that Congress would have given the Council's Program no sway over BPA's mitigation funding decisions. The Program in its current form is comprised *mostly* of non-operational measures, 3-ER-446, and it beggars belief that BPA can ignore the Program

when making the funding decisions that determine whether those measures can be successfully implemented.[8] *See Nardone v. United States*, 308 U.S. 338, 341 (1938) ("A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose."); *Silverado Hospice, Inc. v. Becerra*, 42 F.4th 1112, 1119 (9th Cir. 2022) ("we do 'not lightly conclude that Congress enacted a self-defeating statute'") (quoting *Quarles v. United States*, 139 S.Ct. 1872, 1879 (2019)).

BPA's interpretation of § 4(h)(11)(A) is entitled to deference only to the extent it is persuasive, *see infra*, and its persuasiveness is seriously undermined by the implausibility of BPA's tandem construction of § 4(h)(11)(A) and § 4(h)(10)(A).

B. Under the Supreme Court's Decision in *Loper Bright*, BPA's Interpretation of § 4(h)(11)(A) Is Not Owed Any Deference.

In their opening brief in No. 23-593, Petitioners argued that BPA's interpretation of § 4(h)(11)(A) does not deserve *Chevron* or even *Skidmore*

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[8] In 1982, soon after the Northwest Power Act was passed, BPA told the Council that "[t]imely implementation of the Council's [P]rogram will be constrained by the availability of adequate [BPA] funds." 4-ER-591. This is true, of course, which is why the Council's Program must be considered when BPA makes decisions—like the FY2023 RDC decision—that determine what funds will be "available" to implement the Program.

deference. Opening Br. (23-593) at 45–55. The Supreme Court's decision in *Loper Bright* renders some of that discussion moot: BPA's interpretation cannot receive *Chevron* deference, because *Chevron* deference no longer exists. *See Loper Bright*, 603 U.S. –, slip op. at 35 ("*Chevron* is overruled.").

In its answering brief in No. 23-593, BPA claimed that it was "not asking for *Chevron* deference." Answer. Br. (23-593) at 52. However, BPA argued that it should receive a comparable level of deference—some kind of special BPA-only deference. *Id.*

Petitioners have already explained why there is no "BPA deference." *See* Reply Br. (23-593) at 27–29. But even if there were such a thing, it would no longer exist after *Loper Bright*. That opinion makes clear that binding deference to an agency's statutory interpretation is inconsistent with the APA's judicial-review provision, 5 U.S.C. § 706. *See Loper Bright*, 603 U.S. –, slip op. at 14–15 ("Section 706 makes clear that agency interpretations of statutes ... are *not* entitled to deference.") (emphasis in original); *see also id.* at 35 ("[C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."). That is true whether the deference principle is called *Chevron* deference or BPA deference or something else.

Loper Bright is instructive for another reason: its discussion of the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), illustrates why BPA's interpretation of § 4(h)(11)(A) deserves minimal, if any, respect. First of all, *Loper Bright* confirms that "*Skidmore* deference" is not really "deference" at all, because it does not require—or even allow—a court to accept an agency interpretation of a statute unless the court, exercising its independent judgment, agrees with the agency as to the statute's meaning. *See* 603 U.S. –, slip op. at 8–9 (discussing the "respect" traditionally owed to agency interpretations of statutes). *Skidmore* stands for the principle that, when determining a statute's best meaning, a court may "seek aid from the interpretation[] of those responsible for implementing [the] statute[]." *Loper Bright*, 603 U.S. –, slip op. at 16. But "seeking aid" is not the same thing as "deferring." *See id.* at 8–9.

Under *Skidmore*, BPA's interpretation of § 4(h)(11)(A) has the "power to persuade," but not the "power to control." *Skidmore*, 323 U.S. at 140. For many reasons, BPA's interpretation is not persuasive. As Petitioners have already discussed, both the inconsistency of BPA's interpretation and the interpretation's lack of analytical rigor deprive it of persuasive force. *See* Opening Br. (23-593) at 47–50 (discussing BPA's past inconsistent

statements regarding § 4(h)(11)(A)); *id.* at 52–55 (discussing the flaws in BPA's reasoning).

The fact that the Council—an entity created by the Northwest Power Act and empowered by Congress to develop the Fish & Wildlife Program that BPA funds—disagrees with BPA about the meaning of § 4(h)(11)(A) is yet another reason to give little weight to BPA's interpretation. *See* Council Proposed Amicus Br. (23-593) at 8–13. Indeed, if anyone's interpretation deserves "respect" under *Skidmore* in this case, it is the Council's: unlike BPA, the Council has consistently recognized that § 4(h)(11)(A) applies to non-operational mitigation.[9] *See* Council Proposed Amicus Br. at 12–13 (describing how the Bureau of Reclamation "worked with the Council in the early years of the [P]rogram ... to begin engaging tributary habitat improvements in a set of subbasins, crediting Section 4(h)(11)(A) ... as in part the basis for these developing efforts").

[9] The fact that the Council is an interstate compact agency does not deprive its interpretation of persuasive force under *Skidmore*. *See BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 447–49 (4th Cir. 2007) (giving "respect under *Skidmore*" to a state entity's interpretation of a federal law).

Perhaps more fundamentally, unlike previous interpretive questions that have arisen under the Northwest Power Act, the question of whether § 4(h)(11)(A) applies to decisions concerning non-operational mitigation is not a technical one that implicates BPA's special expertise as a power-marketing agency. *Compare, e.g.*, *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389–90 (1984) (giving "great weight" to BPA's interpretation of a statutory provision concerning a technical power-marketing issue). As is often true of "interpretive issues arising in connection with a regulatory scheme," the statutory interpretation question presented in this case "'fall[s] more naturally into a judge's bailiwick' than an agency's." *Loper Bright*, 603 U.S. –, slip op. at 24 (quoting *Kisor v. Wilkie*, 588 U.S. 558, 578 (2019)). In other words, the Court does not need to "seek aid" from BPA, because BPA has no special expertise to offer.

After *Loper Bright*, BPA has no claim to binding deference of its interpretation of § 4(h)(11)(A). Nor is its interpretation owed any respect under *Skidmore*. It is this Court's job to determine the best meaning of § 4(h)(11)(A) using "all relevant interpretive tools." *Loper Bright*, 603 U.S. –, slip op. at 23. Applying those tools, it is clear that BPA's interpretation cannot be correct.

II. The FY2023 RDC Decision Triggered BPA's Duty to Demonstrate "Equitable Treatment," and BPA Failed to Do So.

Although BPA's mitigation funding decisions are not categorically excluded from the reach of § 4(h)(11)(A), not *every* mitigation funding decision triggers BPA's duty to show "equitable treatment." Under this Court's caselaw, BPA needs to demonstrate equitable treatment "only when [it] makes a final decision that significantly impacts fish and wildlife." *Confederated Tribes of the Umatilla Indian Reservation v. BPA*, 342 F.3d 924, 931 (9th Cir. 2003). When BPA makes such a decision, it must give "a reasoned explanation allowing for meaningful review" as to how it is providing equitable treatment "on the whole." *Id.* at 931–32.

The FY2023 RDC decision "significantly impacts fish and wildlife," triggering BPA's duty to show equitable treatment. BPA did not make that showing.

A. The FY2023 RDC Decision Significantly Impacts Fish and Wildlife, Triggering BPA's Duty to Demonstrate Equitable Treatment.

For the same reasons the FY2022 RDC decision triggered BPA's duty to demonstrate equitable treatment, the FY2023 RDC decision triggered that duty. *See* Opening Br. (23-593) at 55–58; Reply Br. (23-593) at 29–31. The FY2022 decision involved $500 million, of which $50 million was

allocated for fish and wildlife mitigation, while the FY2023 decision involved $150+ million, of which $30 million was allocated for fish and wildlife.[10] 4-ER-469–70. The FY2023 numbers, though smaller than the FY2022 numbers, are still substantial when measured against BPA's annual fish and wildlife spending. *See* 2-ER-197–98 (showing BPA's non-operational mitigation expenditures in recent years). Wherever the line is between "significant" mitigation funding decisions that trigger BPA's duty to demonstrate equitable treatment and smaller decisions that do not trigger that duty, that line was crossed in the FY2023 RDC decision.

Petitioners hereby incorporate by reference the portions of their briefs in No. 23-593 explaining why the FY2022 RDC decision triggered BPA's duty to demonstrate equitable treatment. *See* Opening Br. (23-593) at 55–58; Reply Br. (23-593) at 29–31. Those arguments apply with equal force to the FY2023 RDC decision.

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[10] In reality, the FY2023 RDC decision involved $285.4 million. 4-ER-460. But, as discussed earlier, the RDC mechanism adopted in the BP-24 rate schedules obligated BPA to devote the first $129 million of that amount to rate relief. *See supra* p. 6.

B. BPA Failed to Demonstrate Equitable Treatment.

Because the FY2023 RDC decision "significantly impacts" fish and wildlife, it triggered BPA's duty to demonstrate equitable treatment. *Confederated Tribes*, 342 F.3d at 931. The question is whether BPA gave "a reasoned explanation allowing for meaningful review" as to how it is providing equitable treatment for fish "on the whole." *Id.* at 931–32. For two reasons, BPA did not provide such an explanation.

First, BPA did not even bother to explain what equitable treatment means in the context of non-operational mitigation and funding for such mitigation. On the contrary, in its response to comments on the FY2023 RDC proposal, BPA refused to "adopt a specific theory or standard or test for what would satisfy equitable treatment of fish and wildlife in the context of financial matters." 4-ER-493. This refusal is not surprising given BPA's interpretation of § 4(h)(11)(A). But it means that BPA's explanation for how it is providing equitable treatment is not a "reasoned" one. And it makes "meaningful review" of BPA's compliance with the equitable treatment mandate difficult, to say the least. How can the Court tell whether BPA has demonstrated equitable treatment without knowing what BPA thinks equitable treatment means in the relevant context?

Second, BPA did not explain how it is providing equitable treatment *on the whole*; its explanation, such as it is, is focused entirely on the FY2023 RDC decision itself. *See* 4-ER-493–94. Under *Confederated Tribes*, this is insufficient, because BPA must explain how it is providing equitable treatment "on the whole," *i.e.*, on an "overall" basis. 342 F.3d at 931–32. By focusing only on the FY2023 RDC decision itself, BPA failed to provide such an explanation.

III. BPA Failed to Take the Council's Program into Account "to the Fullest Extent Practicable" When Making the RDC Decision.

BPA's FY2023 RDC decision violated the Northwest Power Act for a second reason: BPA failed to take the Council's Fish & Wildlife Program into account "to the fullest extent practicable" when making that decision.

A. The FY2023 RDC Decision Triggered BPA's Duty to Take the Council's Program into Account "to the Fullest Extent Practicable."

Section 4(h)(11)(A)(ii) requires agencies to fully consider the Council's Program "at each relevant stage of decisionmaking processes." 16 U.S.C. § 839b(h)(11)(A)(ii). The FY2023 RDC decision was a "relevant stage" of a decisionmaking process for the same reason the FY2022 RDC Decision was a "relevant stage." Accordingly, Petitioners incorporate by

reference the "relevant stage" arguments from their briefs in No. 23-593. *See* Opening Br. (23-593) at 62–63; Reply Br. (23-593) at 32–33.

The only thing to add to these arguments is a rejoinder to BPA's contention that the FY2023 RDC process was not a "relevant stage" because it did not involve "select[ing] or implement[ing] fish and wildlife mitigation measures." 4-ER-494. This ignores the fact that "[t]he statute requires consideration of the Council's Program 'at each relevant stage,' recognizing there is more than one." *Nat'l Wildlife Fed'n v. FERC*, 801 F.2d 1505, 1514 (9th Cir. 1986). Clearly, the Council's Program must be considered when BPA selects which specific fish and wildlife mitigation projects to fund, but it must *also* be considered when BPA makes earlier decisions, such as the FY2023 RDC decision, that determine how much money will be available to fund those projects. As BPA once told the Council, "[t]imely implementation of the Council's [P]rogram will be constrained by the availability of adequate [BPA] funds." 4-ER-591. The choice to devote $0, or $10 million, or $30 million, or $150 million of the FY2023 RDC to fish and wildlife mitigation affects the "availability of ... funds" to implement the Program, and thus the RDC decision was a "relevant stage" for purposes of § 4(h)(11)(A)(ii). *Cf. Cottonwood Env't Law*

Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1081–82 (9th Cir. 2015) (discussing how compliance with the Endangered Species Act's procedural requirements may be required at multiple stages).

B. There Is No Indication That BPA Took the Council's Program into Account "to the Fullest Extent Practicable" When Making the FY2023 RDC Decision.

In its response to Petitioners' comments on the FY2023 RDC proposal, BPA insisted that the RDC process was not a "relevant stage" for purposes of § 4(h)(11)(A)(ii). 4-ER-494–95. In a single sentence at the end of that discussion, BPA then said that it found "no credible basis for [Petitioners'] contention that BPA's decision to provide additional funding, which will help address its duties with respect to the Council's program, somehow fails to consider that same program." 4-ER-495.

To the extent that this single sentence can be construed as BPA's attempt to show compliance with the "fullest extent practicable" requirement, it is legally insufficient. For one thing, it impermissibly places a burden on the public that properly lies with BPA: it is not the public's job to guess how an agency is complying with applicable procedural requirements, but rather the agency's job to explain, at the time it makes its decision, how those requirements have informed the decision. *See NEDC*

2007, 477 F.3d at 687 ("[A]n agency must cogently explain why it has exercised its discretion in a given manner, and in reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors ....") (cleaned up).

Neither the single sentence cited above nor anything in the administrative record explains how BPA's FY2023 RDC decision was informed by consideration of the Council's Program "to the fullest extent practicable." At the very least, then, BPA's decision was arbitrary and capricious for the reason that BPA failed to provide a reasonable explanation as to how it took the Council's Program into account "to the fullest extent practicable." *See Prometheus Radio Project*, 592 U.S. at 423 ("The ... arbitrary-and-capricious standard requires that agency action be ... reasonably explained."); *see also NEDC 2007*, 477 F.3d at 689–90 (holding that a decision was arbitrary and capricious because "the record d[id] not show the process, if there was one, that BPA used to determine that its decision ... was consistent with BPA's statutory mandate to use its authority in a manner consistent with the ... Program").

IV. The Court Should Award Declaratory Relief to Ensure that BPA Follows the Law in Future Financial Decisions.

Assuming that the Court is unable to resolve this case before the non-fish-and-wildlife portion of the FY2023 RDC surplus is spent, it should award declaratory relief to the effect that BPA was required to demonstrate "equitable treatment" and to take the Council's Program into account "to the fullest extent practicable" when it made the FY2023 RDC decision, and that it failed to do so.[11] Petitioners' briefs in No. 23-593 explain why this relief would be appropriate, and Petitioners incorporate by reference the relevant portions of those briefs. *See* Opening Br. (23-593) at 67–68; Reply Br. (23-593) at 34–35.

CONCLUSION

For the reasons given above, the Court should grant the petition.

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[11] Of course, if some non-fish-and-wildlife portion, however small, of the FY2023 RDC amount remains available at the time the Court renders its decision, a remand to BPA would still provide some effective relief for Petitioners. *See Or. Nat. Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 820–21 (9th Cir. 2006) (stating the rule that a case is not moot if the court can grant *any* effective relief).

Date: June 28, 2024

Respectfully submitted,

/s/ Andrew R. Missel
Laurence ("Laird") J. Lucas
Andrew R. Missel
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Attorneys for Petitioners

STATEMENT OF RELATED CASES

The undersigned attorney is aware of one related case currently pending in this Court: *Idaho Conservation League et al. v. BPA*, No. 23-593. The Court has ordered that the two cases be heard by the same panel.

Date: June 28, 2024 */s/ Andrew R. Missel*

CERTIFICATE OF COMPLIANCE

I am the attorney for Petitioners.

This brief contains no more than 6,998 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

I certify that this this brief complies with the word limit set by the Court's order of June 14, 2024.

Date: June 28, 2024 */s/ Andrew R. Missel*