

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
Docket No. UE 171**

In the Matter of the Request of)
)
PACIFIC POWER & LIGHT) HOOPA VALLEY TRIBE’S APPLICATION
(dba PacifiCorp)) FOR INTERVENTION
)
Request for a General Rate Increase in the)
Company’s Oregon Annual Revenues)
[Supplemental Docket to UE-170]

HOOPA VALLEY TRIBE’S APPLICATION FOR INTERVENTION

COMES NOW the Hoopa Valley Tribe (“Tribe”), a federally-recognized Indian tribe, by and through its counsel of record, and hereby applies to the Oregon Public Utility Commission (“PUC”) pursuant to O.R.S. § 756.525 and O.A.R. § 860-012-001 to grant the Tribe party status as an intervenor in Docket UE-171 relating to reasonableness of the power subsidy to PacifiCorp’s Klamath Hydroelectric Project and certain off-Project commercial irrigators.

NAME AND ADDRESS OF PETITIONER

The Hoopa Valley Tribe is a federally-recognized Indian tribe with its headquarters along the banks of the Trinity River in Hoopa, California. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68,179, 68,180 (Dec. 5, 2003). Service of process and other communications concerning this proceeding should be made to the following persons:

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MEMORANDUM IN SUPPORT OF APPLICATION TO INTERVENE

The Tribe should be granted intervenor status. O.R.S. § 756.525(2) provides that the PUC may permit a party to apply to appear and participate in a proceeding “[a]t any time before the final taking of evidence” and shall grant the application “if the [PUC] determines that such appearance and participation will not unreasonably broaden the issues or burden the record.”

O.A.R. § 860-012-001 further provides that an application should include, *inter alia*, the following elements: (1) the “nature and extent of the petitioner’s interest in the proceeding;” (2) “the issues petitioner intends to raise at the proceeding;” and “(3) “[a]ny special knowledge or expertise of the petitioner that would assist the [PUC] in resolving the issues in the proceeding.”

The deadline for intervention in Docket UE-171 is March 14, 2005. The Tribe’s petition for intervention is timely. Moreover, as is described in detail below, the PUC’s utility rate decision will have a direct effect on the Tribe. The Tribe’s intervention will also greatly assist the PUC. The Tribe will not broaden the issues or burden the record; rather, the Tribe will bring to bear a unique perspective on the adverse effects of power subsidies to the Klamath Hydroelectric Project and certain off-Project commercial irrigators on the Tribe’s federally-reserved fishing rights downstream of the Klamath Project. The Tribe will not seek grant assistance. *Id.* § 860-012-0100.

A. Nature and Extent of the Hoopa Valley Tribe’s Interest

The Tribe believes that the unreasonable and unfair power rate subsidies to federal and non-federal commercial irrigators in the Upper Klamath Basin, and the adverse effects of those subsidies on lower Klamath River Basin water resources, will have a direct and substantial adverse effect on the salmon fishery of the Klamath and Trinity rivers upon which the Tribe depends for its culture and subsistence. This action and these power rate subsidies have and will continue to have substantial adverse effects on the federally-reserved fishing

rights of the Tribe, and other cultural and economic resources of the Tribe.

Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Tribe. The fishery was “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The Hoopa Indians follow exacting cultural practices to protect individual runs of fish and to celebrate the bounty of the river that gives life to their people. The salmon fishery also holds significant value in the Hoopa culture and economies, and the Tribe holds property rights in the Klamath River Basin fishery. The lower twelve miles of the Trinity River and a stretch of the Klamath River flows through the Hoopa Valley Reservation. All migrating salmon from the Trinity River use the mainstem of the Klamath River as their corridor to and from the sea.

The federal government established the Hoopa Valley Indian Reservation in 1864 pursuant to a statute that required the Reservation be “located as remote from white settlements as may be found practicable.” Act of April 8, 1864, § 2, 13 Stat. 39, 40. The remote Hoopa Valley Reservation was determined to be a suitable homeland for two reasons. First, the reservation was established in the heart of the Tribe’s aboriginal lands, lands the Tribe had occupied since time immemorial and to which they were, and remain, fiercely devoted. Second, the Reservation set aside sufficient resources of the Klamath and Trinity rivers for the Indians to be self-sufficient and achieve a moderate living based on fish. *See* Memorandum from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of the Interior 3, 15, 18-21 (Oct. 4, 1993), *cited with approval*, *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).

The Tribe is actively involved in water allocation issues and fishery protection in the Klamath and Trinity River Basins. In addition to past and present litigation, the Tribe has

intervened in the pending Federal Energy Regulatory Commission proceeding relating to PacifiCorp's application to relicense four of the PacifiCorp dams that comprise the Klamath Hydroelectric Project, and the Tribe has provided technical comments and attended meetings concerning the relicensing effort. *See* Federal Energy Regulatory Commission Project No. 2082.

Indeed, the harm caused by the Klamath Hydroelectric Project and related below-market irrigation tariffs and massive water allocation subsidies is not isolated to the upper Klamath Basin. Other parts of the Klamath-Trinity River Basin are forced to bear the burden of the destruction of upriver fish runs and the environmental effects of dam operations, pumped diversions and water waste. This directly affects the Hoopa's federally-reserved fishing rights. The reduction in upriver fish production also shifts fishing pressure downriver to the Trinity and other tributaries' salmon runs, adversely affecting the Tribe's harvest opportunities. Because of the Tribe's cultural and economic connection to the Klamath Basin and its resources, and the Tribe's continuous involvement in related matters, intervention in this PUC proceeding is warranted.

B. Issues the Hoopa Valley Tribe Intends to Raise in this Proceeding

The matters at issue in this proceeding are of critical concern to the Tribe. The Tribe has been actively engaged in both policy development and litigation to defend the Tribe's federally-reserved fishing rights, restore the Trinity River, and to protect and enhance the Tribe's fishery resources in the Klamath River Basin.

Power rate subsidies and below market irrigation pumping subsidies encourage wasteful and inefficient water use in the upper Klamath Basin. Such waste, in turn, results in less water in the Klamath River to support the salmon fishery, producing conditions known to be lethal to salmonids. These conditions enhance the possibility of disease outbreaks and fish kills, such as the massive fish kill on the Lower Klamath River in September 2002 which killed between

34,000 and 65,000 salmonids, and dramatically reduced the Hoopa harvest that year. When water is inefficiently used in the upper Klamath Basin it must come out of the portion left in the river to support fisheries vital to the Tribe.

The Tribe intends primarily to raise environmental and economic issues related to the adverse impacts of this massive power rate subsidy on water allocation. These subsidies remove any incentive to conserve limited water supplies to allow more water to remain in the river. This harms the Tribe's fishery and culture. Agricultural power rates in the Klamath Basin should be set at the market rate for all similarly situated users. The unique interests and expertise of the Tribe are directly affected by the outcome of this proceeding, but are not represented by any other party. The PUC should not consider the rate subsidy in a vacuum; the effects of the subsidy and irrigation tariff have far reaching cumulative consequences downriver, triggering the Hoopa's substantial interests in this matter.

C. The Tribe's Intervention is Supported by Operation of Federal Law

Intervention is also supported by operation of the Tribe's federally-reserved fishing rights. *See, e.g., United States v. Wilson*, 611 F. Supp. 813, 817 18 (N.D. Cal. 1985), *rev'd on other grounds sub nom., United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986) (noting Hoopa Valley Reservation Indian fishing rights were granted by Congress when it authorized the President to create reservations for Indian purposes). As the U.S. District Court for the Northern District of California noted:

[T]o modern Indians of the Hoopa Valley Reservation, fishing remains a way of life, not only consistent with traditional Indian customs, but also as an eminently practical means of survival in an area which lacks the broad industrial or commercial base which is required to provide its population, Indian or otherwise with predictable, full time employment and income adequate to provide sufficient quantities and qualities of the necessities of life.

Wilson, 611 F. Supp at 818 n.5; *see* 1993 Solicitor Opinion; *Parravano*, 70 F.3d at 542. The Tribe's fishing right entitles them to take fish for ceremonial, subsistence, and commercial

purposes, and include certain conditions of water quality and flow to support all life stages of fish. *Eberhardt*, 789 F.2d at 1359; *United States v. Anderson*, 591 F.Supp. 1, 5-6 (E.D. Wash. 1982), *aff'd in part & rev'd on other grounds*, 736 F.2d 1358 (9th Cir. 1984); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (treaty included an implied water right to as much water on reservation lands as was needed to protect fishing rights).

Intervention by the Tribe will ensure that the Tribe's concerns and interests are thoroughly considered by the PUC. Each of these legal rights and interests support granting the Tribe's application to intervene.

D. The Tribe's Special Expertise Will Assist the PUC

Granting the Tribe's application to intervene will not only protect the rights and interests of the Tribe and its members, it will also serve the interests of the PUC in deciding the important issues raised by the power rate subsidy. The ecological resources the Tribe seeks to protect will benefit all the residents of Oregon and California. The reduction in needless water allocation will improve habitat conditions for anadromous and resident fish species in the Klamath Basin. The information capable of being uniquely presented by the Tribe will show the need for Klamath Basin irrigation tariffs that are just and reasonable, non-discriminatory, and market-based, and which promote efficient use of water in the Klamath Basin so that the Klamath-Trinity fishery is better protected through increased flows.

The Tribe's participation will facilitate development of a more complete record and allow for informed decision making consistent with the protection of the Tribe's federally-reserved fishing right. The Tribe seeks to ensure careful consideration of the environmental costs of the current below market Klamath irrigation power subsidy to the downriver rights of the Tribe. Given the Tribe's historical knowledge of the river and current

fisheries expertise, the Tribe's participation as an intervenor in this proceeding will assist the PUC.

CONCLUSION

The Tribe has a direct and substantial interest in this proceeding insofar as the unreasonable power subsidies to be considered in this proceeding adversely affect its federally-reserved fishing rights and its members' livelihoods by limiting the harvest of anadromous and resident fish in the Klamath-Trinity Basin. For the foregoing reasons, the Hoopa Valley Tribe respectfully requests that the PUC grant its application to intervene in the above-captioned proceeding.

DATED this 14th day of March, 2005.

Respectfully submitted,

MORISSET, SCHLOSSER, JOZWIAK & MCGAW

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2005, in addition to electronic service, I mailed the original and five copies of Hoopa Valley Tribe's Application for Intervention with the Public Utility Commission of Oregon, via ***First-Class Mail*** to:

Public Utility Commission of Oregon
Attn: Filing Center
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I further certify that on the on the 14th day of March, 2005, in addition to electronic service, I served a copy of Hoopa Valley Tribe's Application for Intervention on counsel via ***First-Class Mail and/or E-mail*** to the following addresses:

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[Notice will not be electronically mailed, but mailed *First-Class* to]:

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I declare the above to be true and correct under penalty of perjury. Executed this 14th day of March, 2005, at Seattle, Washington.

/s/ Rob Roy Smith

Rob Roy Smith, OSB No. 00393

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