

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company)
In Re: Notice of Application Accepted)
For Filing and Soliciting Comments,) Project No. 77-320
Motions to Intervene, and Protests)
_____)

**MOTION TO INTERVENE BY THE
WIYOT TRIBE**

Curtis G. Berkey
Erica Costa
BERKEY WILLIAMS LLP
430 D Street
Davis, California 95616
Tel: 510-548-7070
cberkey@berkeywilliams.com
ecosta@berkeywilliams.com

Attorneys for the Wiyot Tribe

The Wiyot Tribe (Tribe) hereby moves to intervene in the above-captioned proceeding pursuant to Rule 214 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure, *18 C.F.R. § 385.214*, and the Commission's Notice issued on February 29, 2024, *Notice of Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Protests, Project No. 77-320*. The Tribe has an interest in this proceeding that no other party can represent, and the Tribe's intervention is in the public interest. *18 C.F.R. § 385.214(b)(2)(ii), (iii)*.

I. Interests of the Wiyot Tribe

The Wiyot Tribe is recognized by the United States as entitled to the rights and privileges accorded Indian Tribes under federal law. *89 Fed. Reg. 944, 947, January 8, 2024*. The Wiyot Tribe Reservation is located near the estuary of the mouth of the Eel River, and the lower portion of the River is entirely located within the Wiyot Tribe's ancestral territory. The Tribe also owns land in fee on the Eel River. The Tribe has undertaken several technical studies to support restoration of Pacific lamprey in the Eel River. The Tribe has unadjudicated and unquantified water rights and fishing rights based on aboriginal use and occupancy of their ancestral territory long before the arrival of Europeans. *See United States v. Abouselman*, 976 F. 3d 1146, (10th Cir. 2020). The Tribe has participated in numerous efforts of the resource agencies and stakeholders in the Eel River and

Russian River Watersheds to ensure that the PG&E license surrender application and decommissioning plan that FERC will be asked to approve is fully protective of aquatic species throughout the Eel River Watershed. The Wiyot Tribe's decades of study of the Eel River ecosystem, and its cultural connections to the River and the species it supports, give the Tribe special expertise that will benefit FERC's consideration of the flow variance request. The Wiyot Tribe supports the temporary flow variance request and urges FERC to grant it on the terms proposed.

No other party can represent the interests of the Wiyot Tribe, whose history, cultural ties, and perspective on the lower Eel River are unique. The Wiyot Tribe has relied on the Eel River and its fisheries since time began. The Tribe's culture and identity depend on a healthy Eel River and fishery. Those interests will be affected by the outcome of PG&E's application for temporary variance of its minimum flow requirements for the Potter Valley Project. The Wiyot Tribe plainly has an interest in this proceeding under Rule 214 of the Rules of Practice and Procedure of the Commission.

The Tribe's intervention is in the public interest. The Commission has adopted a policy statement on tribal consultation in its proceedings. *18 C.F.R. § 2.1c*. The policy commits the Commission to assuring that "tribal concerns and interests are considered whenever the Commission's actions or decisions have the potential to adversely affect Indian tribes, Indian trust resources, or treaty rights."

18 C.F.R. §2.1.c (e). Thus, this policy implements the trust responsibility the Commission, like all federal agencies, owes Indian tribes. The federal courts have confirmed that the trust duty applies to the Commission in its dealings with the Wiyot Tribe. The Ninth Circuit Court of Appeals has ruled that “the same trust principles that govern private fiduciaries determine the scope of FERC’s obligations” to Indian Tribes. *Covelo Indian Community v. F.E.R.C.*, 895 F. 2d 581, 586 (9th Cir. 1990); *see also, Nance v. EPA*, 645 F. 2d 701, 711 (9th Cir. 1981)(“[i]t is fairly clear that any Federal government action is subject to the United States’ fiduciary responsibilities toward Indian tribes.”). As a result, the Tribe’s intervention here is required by the public interest in seeing that the Commission’s fiduciary obligations are fulfilled in the flow variance proceeding.

II. Communications

All correspondence and communication with the Wiyot Tribe concerning this matter should be directed to:

Curtis G. Berkey
Erica Costa
Berkey Williams LLP
430 D. Street
Davis, California 95616
Tel: 510-548-7070
cberkey@berkeywilliams.com
ecosta@berkeywilliams.com

III. Conclusion

For the reasons set forth above, the Motion of the Wiyot Tribe to intervene in the above-captioned proceeding should be granted.

Date: March 29, 2024

Respectfully submitted,

/s/Curtis G. Berkey
Curtis G. Berkey
BERKEY WILLIAMS LLP
430 D Street
Davis, CA 95616
Tel: 510-548-7070
cberkey@berkeywilliams.com

Counsel for the Wiyot Tribe

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company)
In Re: Notice of Proceeding to Consider)
Reopening License and Soliciting Comments,) Project No. 77-320
Motions to Intervene, and Protests)
_____)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by first class mail or electronic mail, a Motion to Intervene by the Wiyot Tribe, each person designated on the official Service List compiled by the Commission in the above-captioned proceedings.

Dated this 29th day of March 2024.



Martha Morales, Legal Secretary
BERKEY WILLIAMS LLP
430 D Street
Davis, CA 95616
Tel: 510-548-7070
mmorales@berkeywilliams.com