

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  
ROUND VALLEY INDIAN TRIBES**

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*Attorneys for the Round Valley Indian Tribes*

The Round Valley Indian Tribes (Tribes or RVIT) hereby move 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 Tribes have an interest in this proceeding that no other party can represent, and the Tribes' intervention is in the public interest. *18 C.F.R. § 385. 214(b)(2)(ii), (iii)*.

#### **I. Interests of Round Valley Indian Tribes**

The Round Valley Indian Tribes are recognized by the United States as entitled to the rights and privileges accorded Indian Tribes under federal law. *89 Federal Register 944, January 8, 2024*. The Round Valley Tribes Reservation, created by executive order in 1856 and enlarged by Congress and the President in 1873, is today comprised of approximately 30,000 acres. The Reservation is bordered on the Eel River's mainstem on the west, the Middle Fork of the Eel River on the east, and the North Fork of the Eel River on the north. The Tribes have unadjudicated and unquantified water rights and fishing rights derived by implication from the creation of the Reservation by the United States. *Baley v. United States*, 942 F. 3d 1312, 1335 (Fed. Cir. 2019) (internal citation and quotation marks omitted), *cert. denied*, 2020 WL 3405869, June 22, 2020 (tribes

have an “implied right to unappropriated water to the extent needed to accomplish the purpose of the reservation”); *Parravano v. Babbitt*, 70 F. 3d 539, 546 (9<sup>th</sup> Cir. 1995) (Yurok and Hoopa Valley Tribes’ Reservations straddling the Klamath River and its tributaries were intended to provide a protected place for the tribes to practice their fishing-based culture, so those tribes have water and fishing rights protected by federal law). Moreover, the Reservation was created out of the ancestral territories of the Tribes that comprise the Round Valley Indian Tribes, so the Tribes arguably have aboriginal rights to water and fish throughout their ancestral territories encompassing much of the upper Eel River watershed. *See United States v. Abouselman*, 976 F. 3d 1146, (10<sup>th</sup> Cir. 2020).

As you may know, RVIT is a member of the Potter Valley Drought Working Group (DWG) that was formed by PG&E to address the effects of drought on Lake Pillsbury reservoir elevation levels, water temperature releases from the reservoir, and modified releases and diversion amounts to the Russian River basin. As noted in PG&E’s application, the flow variance request was developed in consultation with RVIT and the Resource Agencies. RVIT previously supported the request by the National Marine Fisheries Service (NMFS) to implement Interim Protective Measures for the Potter Valley Project (PVP), many of which PG&E intends to implement in coordination with RVIT and the Resource Agencies, as stated in PG&E’s February 9, 2024 Letter of Intent.

No other party can represent the interests of the Tribes, whose history, cultural connections and perspective on the Eel River are unique. The Round Valley Tribes have relied on the Eel River and its fisheries since time began. The Tribes culture and identity depends 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. Furthermore, the Tribes' water rights and fishing rights on the Eel River, and the interests which those rights protect, are affected by the operations and minimum flow requirements of the Potter Valley Project that blocks salmonid habitat above Scott Dam and diverts water from the Eel River into the Russian River. The Tribes plainly have an interest in this proceeding under Rule 214 of the Rules of Practice and Procedure of the Commission.

The Tribes' 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

Round Valley Indian Tribes. 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 the Round Valley Indian Tribes. *Covelo Indian Community v. F.E.R.C.*, 895 F. 2d 581, 586 (9<sup>th</sup> Cir. 1990) (at the time of that case, the Round Valley Indian Tribes used the name Covelo Indian Community); *see also, Nance v. EPA*, 645 F. 2d 701, 711 (9<sup>th</sup> 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 Tribes’ intervention here is required by the public interest in seeing that the Commission’s fiduciary obligations are fulfilled in the flow variance request.

## **II. Communications**

All correspondence and communication with the Round Valley Indian Tribes concerning this matter should be directed to:

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### **III. Conclusion**

For the reasons set forth above, the Motion of the Round Valley Indian Tribes to intervene in the above-captioned proceeding should be granted.

Date: April 1, 2024

Respectfully submitted,

/s/Erica Costa  
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*Counsel for the Round Valley Indian Tribes*


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**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 Round Valley Indian Tribes, each person designated on the official Service List compiled by the Commission in the above-captioned proceedings.

Dated this 1st day of April 2024.

  
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