IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Defendant.	Civil Action No. 1:19-cv-01544-ABJ

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE YOCHA DEHE WINTUN NATION'S MOTION TO INTERVENE

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I. INTRODUCTION

By this motion, the federally-recognized Yocha Dehe Wintun Nation respectfully asks this Court to allow its intervention, so that Yocha Dehe can protect its vital governmental, economic and cultural interests at stake in this litigation. Yocha Dehe seeks to defend a decision of the United States Department of Interior ("Interior") denying the request of the Plaintiff Scotts Valley Band of Pomo Indians to establish a casino in the heart of the San Francisco Bay Area — specifically, within the County of Solano, which is the ancestral territory and core gaming market of Yocha Dehe.

Yocha Dehe seeks limited participation, focusing on two claims to which the historical and expert evidence that Yocha Dehe presented to the Department of Interior relates. That evidence shows the Scotts Valley Pomo tribe lacks the "significant historical connection" to the area in question as required by law, and relatedly, that the parcel in question is within the exclusive territory of Yocha Dehe's ancestors, to wit, the Patwin people. Yocha Dehe is in the best position to present this evidence and the United States does not oppose its intervention. As shown below, Yocha Dehe meets all the requirements to intervene, and the Tribe is committed to adhering to the recently established briefing schedule and all deadlines.

II. BRIEF SUMMARY OF RELEVANT BACKGROUND

A. The Yocha Dehe Wintun Nation

The Yocha Dehe Wintun Nation is a federally recognized Indian tribe comprised of the descendants of Patwin people native to the Northeastern San Francisco Bay Area and the lower Sacramento River Valley, an area of California that includes (but is not limited to) Solano and Yolo Counties. Declaration of Anthony Roberts ("Roberts Dec."), ¶ 2; 84 Fed. Reg. 1200, 1204 (Feb. 1, 2019). Yocha Dehe has long operated a gaming facility on its tribal trust land in a rural area of Yolo County. That facility, known as the Cache Creek Casino Resort ("Cache Creek"),

began in 1985 as a small bingo hall before expanding in 2002, pursuant to the requirements of the Indian Gaming Regulatory Act ("IGRA") and a compact between Yocha Dehe and the State of California, into a complete Class III gaming facility.[1] Roberts Dec., ¶ 2. Cache Creek's primary market is the San Francisco Bay Area. Roberts Dec., ¶ 4. Revenues from its operation are used to fund the tribal government, and they support a variety of tribal programs and services, including providing for the education, employment, housing and healthcare of tribal citizens. Roberts Dec., ¶ 4.

One of the programs funded with revenues from Cache Creek is Yocha Dehe's cultural resources department, which works with nearby governments to protect Patwin sacred sites throughout Yocha Dehe's ancestral territory. Roberts Dec., ¶ 5. Much of that work occurs in Solano County, which is named after a Patwin leader and contains numerous historic Patwin village and burial sites. Roberts Dec., ¶ 5. Indeed, the very parcel proposed to be developed by Scotts Valley contains Patwin cultural resources. Roberts Dec., ¶ 2. In addition, Yocha Dehe holds an unprecedented cultural preservation easement on a waterfront park owned by the City of Vallejo, giving the Tribe the power, in perpetuity, to protect human remains and other cultural resources buried there. Roberts Dec., ¶ 5. Not surprisingly, the California Native American Heritage Commission, a state agency, has identified Yocha Dehe and its sister Patwin tribes as the "most likely descendants" of Native American remains found in Solano County. Roberts Dec., ¶ 5.

B. The Scotts Valley Band Of Pomo Indians

In contrast, Scotts Valley consists of the descendants of Pomo Indians whose ancestral territory is located in a rural area west of Clear Lake, roughly 90 miles northwest of Vallejo.

[1] IGRA divides Indian gaming into three classes. 25 U.S.C. §§ 2703, 2710. Class III gaming includes slot machines, blackjack, and other similar games.

Roberts Dec., ¶ 7. Representatives of the United States traveled to Clear Lake in 1851 to negotiate a treaty with the Pomo. Roberts Dec., ¶ 7. Approximately 50 years later, the United States created a reservation for the Pomo near Clear Lake. Roberts Dec., ¶ 7. And Scotts Valley's primary tribal office is located in the town of Lakeport, on the shores of Clear Lake. Roberts Dec., ¶ 7. This Pomo homeland was separated from Patwin territory in the San Francisco Bay Area by terrain described by one federal agent as "very mountainous" and "barely passable", as well as at least two other tribes (the Coast Miwok and Wappo) whose languages the Pomo did not speak and with which the Pomo sometimes conflicted. Roberts Dec., ¶ 8. Indeed, expert ethno-historians regard the Pomo as a "linguistically isolated people" whose linguistic territory ended at least 70 miles north of Vallejo. Consistent with the foregoing, there is no known evidence of Pomo villages or burial grounds anywhere in Solano County or the City of Vallejo. Roberts Dec., ¶ 8.

C. Scotts Valley's Early Efforts To Develop A San Francisco Bay Area Casino

Despite the absence of any meaningful historic connection to the San Francisco Bay Area, Scotts Valley has tried repeatedly to develop a casino there. Roberts Dec., ¶ 9. In 2005, Scotts Valley asked Interior to authorize a casino gaming project in Richmond, California, approximately 15 miles from Vallejo. Roberts Dec., ¶ 9. Pursuant to 25 C.F.R. part 292, Scotts Valley was required to show it possessed a "significant historical connection" to its proposed Richmond development site. In an effort to meet that requirement, Scotts Valley submitted thousands of pages of documents to Interior. After thoroughly reviewing all of this material, Interior concluded in 2012 that none of Scotts Valley's evidence demonstrated a significant historical connection to Richmond. Scotts Valley did not appeal that decision.

D. Scotts Valley's Renewed Effort To Develop A San Francisco Bay Area Casino

In 2016, Scotts Valley renewed its effort to develop a San Francisco Bay Area casino, this time focusing on Vallejo. On January 28, 2016, Scotts Valley requested that Interior issue an Indian Lands Opinion declaring a property (the "Parcel") located along Interstate 80, the freeway used by the vast majority of Cache Creek's Bay Area patrons, eligible for gaming. On August 11, 2016, Scotts Valley requested that the United States acquire the Parcel in trust for gaming purposes. Among other things, Scotts Valley's trust acquisition request included a description of a proposed casino, resort, and housing project to be built on the Parcel. If built as proposed, this project would reduce Cache Creek's revenues by more than 40 percent, effectively destroying the facility by intercepting its San Francisco Bay Area customers. Roberts Dec., ¶ 10. With that level of impact, Cache Creek would generate *no revenues* for Yocha Dehe, its government, or its programs and services. Roberts Dec., ¶ 2.

Once again, 25 C.F.R. part 292 required Scotts Valley to demonstrate a "significant historical connection" to the proposed project site. And once again, in an effort to meet that requirement, Scotts Valley submitted thousands of pages of documents to Interior. Although not originally invited by Interior to participate in the regulatory process, Yocha Dehe asked to do so, and then identified and submitted evidence — some from its own tribal archives — squarely rebutting each of Scotts Valley's arguments. And, just as it did in 2012, Interior found that Scotts Valley's evidence did not establish the requisite significant historical connection to the area in question. This time, Scotts Valley filed suit challenging the agency's action, seeking, among other things, to set aside Interior's determination that the Parcel is not eligible for gaming.

III. ARGUMENT

Yocha Dehe respectfully requests leave to intervene in defense of Interior's determination. Consistent with its unique interests, its special expertise, and its desire to ensure an efficient and fair resolution of this case, Yocha Dehe intends to focus its participation on Scotts Valley's Third and Fourth claims for relief, both of which relate to Yocha Dehe's Patwin ancestors, Scotts Valley's Pomo ancestors, their respective aboriginal territories, and factual evidence about those territories that Yocha Dehe introduced during the administrative proceedings.

As detailed below, Yocha Dehe has Article III standing to defend Interior's determination that Scotts Valley lacks a significant historical connection to the Parcel, and, pursuant to Federal Rule of Civil Procedure 24(a)(2), it is entitled to intervene in this case as of right. In the alternative, even assuming Yocha Dehe did not qualify for intervention as of right, this Court should permit intervention under Federal Rule of Civil Procedure 24(b), because this motion is timely and Yocha Dehe's participation will neither prejudice the parties nor burden this Court.

A. Yocha Dehe Is Entitled To Intervene As Of Right.

Intervention as of right involves two distinct — but related — sets of requirements. First, as a threshold matter, a prospective intervenor must establish Article III standing. *See Fund for Animals v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003). Second, Rule 24(a)(2) itself sets out four additional criteria: (1) an application to intervene must be timely; (2) the applicant must claim "an interest relating to the property or transaction that is the subject of the action"; (3) the applicant must be situated such that "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) the applicant must show that existing parties may not adequately represent that interest. Fed. R. Civ. P. 24. As explained below, Yocha Dehe meets each of these requirements. It has Article III standing to intervene in defense

of Interior's decision (*see* part III.A.1). And it satisfies each of the four criteria set out in Rule 24(a)(2) (*see* part III.A.2).

1. Yocha Dehe Has Article III Standing.

To demonstrate Article III standing, a prospective intervenor seeking to defend agency action must show that (1) "it will be injured in fact by the setting aside of the [government] action it seeks to defend"; (2) the injury "would have been caused by" the invalidation of that action; and (3) "the injury would be prevented if the government action is upheld." *Forest Cnty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 11 (D.D.C. 2016). Yocha Dehe easily meets these criteria. If Interior's decision were set aside, Yocha Dehe would suffer severe injury to its existing gaming facility, as well as the tribal programs and services reliant on revenues from that facility. *See* Roberts Dec., ¶ 2. Likewise, its cultural resources (including resources at the Parcel itself) would be threatened, as would Yocha Dehe's work to preserve those resources. *See* Roberts Dec., ¶¶ 2, 5. The courts have repeatedly found injury-in-fact in equivalent circumstances. *See, e.g., Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt,* 331 F.R.D. 5, 9 (D.D.C. 2019) (injury-in-fact where reversal of agency action would "directly threaten" economic harm to existing casino); *Connecticut v. U.S. Dep't of Interior*, 344 F. Supp. 3d 279, 298-99 (D.D.C. 2018) (injury-in-fact where reversal of agency decision would "create new competition"); *Forest Cnty.*, 317 F.R.D. at 12-13 (injury-in-fact where reversal of agency decision would place tribal gaming project at a "competitive disadvantage"). The cause of Yocha Dehe's injuries would be fairly traceable to Plaintiff's requested relief. And those same injuries can be prevented if Plaintiff's request for relief is denied (and the status quo is maintained). Thus, Yocha Dehe has Article III standing here.

2. Yocha Dehe Satisfies The Criteria Of Rule 24(a)(2).

a) Yocha Dehe's Motion is Timely.

Yocha Dehe's application to intervene is timely. Because Plaintiff seeks review of agency action under the Administrative Procedure Act ("APA"), this case will be resolved by cross-motions for summary judgment based on an administrative record. *See* Joint Report (ECF 16) at 2. This Court issued its initial scheduling order just three weeks ago. Pursuant to that order, the contents of the record will not be identified until October 10; the record itself will not be finalized until November 26, at the earliest; and summary judgment briefing will begin no sooner than January 9, 2020. Yocha Dehe hereby commits to meeting each applicable deadline (and any future amendments thereto). Therefore, its intervention will not delay the proceedings or prejudice the existing parties. Nothing more is required under Rule 24(a)(2). *See, e.g., Roane v. Leonhart,* 741 F.3d 147, 151 (D.C. Cir. 2014) (timeliness requirement "aimed primarily at preventing potential intervenors from unduly disrupting litigation"); *Sault Ste. Marie Tribe*, 331 F.R.D. at 12 (motion held timely where intervention would not delay briefing); *Cayuga Nation v. Zinke*, 324 F.R.D. 277, 282 (D.D.C. 2018) (same).

b) Yocha Dehe Has An Interest Relating To The Property That Is The Subject Of This Action.

In this Circuit, "constitutional standing is alone sufficient to establish that [intervenor] has an interest relating to the property or transaction which is the subject of the action." *Fund for Animals*, 322 F.3d at 735; *see also Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998). Because Yocha Dehe has constitutional standing (*see* part III.A.1, *supra*), it also has a sufficient interest in this action to support intervention as of right. *See Connecticut*, 344 F. Supp. 3d at 304 (a prospective intervenor with standing "*a fortiori* has an interest relating to the property or transaction which is the subject of the action") (internal quotation omitted).

c) This Action Threatens To Impair Yocha Dehe's Interests.

As discussed above, this action directly threatens Yocha Dehe's economic and cultural interests. For purposes of Rule 24(a)(2), the courts evaluate such threats by focusing on "the practical consequences" of denying intervention — *i.e.,* whether, as a practical matter, resolution of the case without intervention might threaten the proposed intervenor's ability to protect its interest. *Sault Ste. Marie*, 331 F.R.D. at 13 (citing *Fund for Animals*, 322 F.3d at 735). Here, the practical consequence of denying intervention would be to exclude Yocha Dehe from a dispute that centers on *Yocha Dehe's* history, *Yocha Dehe's* aboriginal territory, and historical evidence that *Yocha Dehe* introduced into the administrative record demonstrating that others had no significant historical connection to the Parcel. As such, denying this request for intervention would substantially impact *Yocha Dehe's* commercial, cultural, and governmental efforts. Such an outcome represents an undeniable threat to Yocha Dehe's interests.

d) Yocha Dehe's Interests May Not Be Adequately Represented By The Federal Defendants.

Finally, no existing party to the litigation adequately represents Yocha Dehe's concerns. Notably, Yocha Dehe's burden on this issue is "minimal." *Connecticut*, 344 F. Supp. 3d at 305 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see also Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1972) (describing requirement as "not onerous"). The Tribe is not required to show that existing parties *will not* or *cannot* represent its interests; rather, it need only explain why representation of its interest by existing parties *may be* inadequate. *Connecticut*, 344 F. Supp. 3d at 305; *see also Fund for Animals*, 322 F.3d at 735 (applicant "should be allowed to intervene unless it is clear that [an existing] party will provide adequate representation"). Yocha Dehe easily clears this low bar. Although the Federal Defendants appear to have a general institutional interest in defending their agency decisions,

their overarching obligation is to represent the American public as a whole. *See Forest Cnty*., 317 F.R.D. at 15. In contrast, Yocha Dehe has a specific interest in protecting its own cultural interests and resources, as well as its own gaming revenues. *See id.* (distinguishing defendant agency's general interest in upholding decision-making from intervenor tribe's specific economic and governmental concerns); *Cayuga Nation*, 324 F.R.D. at 283 (same). No other entity can present Yocha Dehe's historical and expert evidence on these issues as effectively as Yocha Dehe can. And only Yocha Dehe can fully represent and protect its own economic and cultural concerns, which are far more direct, specific, and immediate than the Federal Defendants' generalized interest in agency procedures. *See, e.g., Forest Cnty*., 317 F.R.D. at 15 (federal agency would be "shirking its duty" if it were to advance intervenor tribe's specific economic interests rather than those of the general public). This is more than enough to satisfy Rule 24(a)(2). *See, e.g., Fund for Animals v. Norton*, 322 F.3d at 736 ("partial congruence of interests…does not guarantee the adequacy of representation"); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977) (intervention appropriate where "the overall point of view might be shared" but applicant's "particular" interests are not represented by existing parties); *Sault Ste. Marie*, 331 F.R.D. at 13 (granting intervention where applicant had a "financial interest that the Government does not share"); *Connecticut*, 344 F. Supp. 3d at 305 (granting intervention where intervenor's commercial interests and agency's institutional interests were distinguishable); *Forest Cnty*., 317 F.R.D. at 14-15 (granting intervention where intervenor tribe was "concerned with preserving [its] own rights and opportunities, including [its] specific economic development goals").

B. In the Alternative, Yocha Dehe Should Be Granted Permissive Intervention.

Because Yocha Dehe has standing and satisfies all of the requirements of Rule 24(a)(2), it should be granted intervention as of right. But even if this Court were to conclude that Yocha Dehe is not entitled to intervene as of right, the Tribe should be granted permissive intervention pursuant to Rule 24(b)(1). That Rule provides that "[o]n timely motion, the court may permit anyone to intervene who…has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). It also requires the courts to consider whether intervention would "unduly prejudice or delay the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Yocha Dehe plainly satisfies both of these prerequisites.

First, this application is timely for the reasons set forth above. *See* part III.A.2.a, *supra*.

Second, Yocha Dehe has a "claim or defense that shares with the main action a common question of law or fact." In applying this requirement, the Court of Appeals has made it clear that the term "claim or defense" is not interpreted strictly. *See Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967). Thus, the prerequisites for permissive intervention are satisfied so long as the proposed intervenor will "present defenses to the precise claims brought by [Plaintiff]." *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007). That is exactly what Yocha Dehe seeks to do here.

Third, permitting Yocha Dehe to intervene will not in any way — let alone "unduly" — delay or prejudice any existing party's rights. Again, this litigation remains in its earliest stages. *See* part III.A.2.a. Intervention will not affect the current schedule or format for preparing the administrative record and cross-motions for summary judgment. *Id*. And Yocha Dehe is prepared to meet all deadlines adopted in the August 20 Order (or otherwise set by this Court). *Id*. In short, intervention would not disrupt existing or scheduled proceedings in any way.

Yocha Dehe simply seeks to protect its unique tribal interests by offering "increased information (which might reduce the risk of error)." *United States v. ABA*, 118 F.3d 776, 782 (D.C. Cir. 1997). This, too, supports permissive intervention. *Id.*; *see also Sault Ste. Marie*, 331 F.R.D. at 13 (citing *Arizona v. California*, 460 U.S. 605, 615 (1983)) (general policy considerations support tribes' "participation in litigation critical to their welfare.")

IV. CONCLUSION

For the reasons set forth above, Yocha Dehe respectfully requests that its motion to intervene be granted.

Dated: September 10, 2019

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