

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 21-5009

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SCOTT'S VALLEY BAND OF POMO INDIANS,
Plaintiff/ Appellee,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; ET AL.,
Defendants/ Appellees,

YOCHA DEHE WINTUN NATION,
Appellant.

Appeal from the United States District Court for the District of Columbia
No. 19-cv-01544 (District Judge Amy Berman Jackson)

FEDERAL APPELLEES' FINAL RESPONSE BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

1. Movant-Intervenor-Defendant/Appellant: Yocha Dehe Wintun Nation.
2. Plaintiff/appellee: Scotts Valley Band of Pomo Indians.
3. Defendants/appellees: United States Department of the Interior; Scott de la Vega, in his official capacity as Acting Secretary of the Department of the Interior; Darryl LaCounte, in his official capacity as Director of the Bureau of Indian Affairs, Exercising the Delegated Authority of the Assistant Secretary–Indian Affairs; and Bryan Newland, in his official capacity as Principal Deputy to the Assistant Secretary for Indian Affairs.

4. The following former officeholders were named as defendants in their official capacities before the district court: David L. Bernhardt as Secretary of the Department of the Interior, Tara Sweeney as Assistant Secretary for Indian Affairs, and John Tahsuda as Principal Deputy to the Assistant Secretary for Indian Affairs. *See* Fed. R. App. P. 43(c)(2).

5. No amicus curiae participated in the district court proceedings.

B. Rulings Under Review

The rulings under review are the district court's September 28, 2020 memorandum opinion denying Yocha Dehe's motion to intervene as a defendant, J.A. 159, and its December 4, 2020 memorandum opinion denying Yocha Dehe's motion for reconsideration of the denial of intervention, J.A. 209.

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Varu Chilakamarri

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INTRODUCTION

The Yocha Dehe Wintun Nation appeals the district court's denial of its motion to intervene, either as of right or permissively, in a case brought by the Scotts Valley Band of Pomo Indians challenging a decision by the Department of the Interior. The Department determined that a parcel of land on which Scotts Valley wants to develop a casino is not eligible for tribal gaming under a specific provision of the Indian Gaming Regulatory Act. That decision was a threshold step in a multistep administrative process that Scotts Valley must undergo before it might be authorized to operate a casino.

Yocha Dehe was not a party to the administrative proceeding, nor did the Department's decision have any immediate consequence for Yocha Dehe. Nonetheless, Yocha Dehe sought to intervene in the district court, claiming a *right* to be a defendant, alongside the Department, in defending against Scotts Valley's Administrative Procedure Act-based challenge. Yocha Dehe argued that it has this right due to its interest in preventing Scotts Valley from ultimately developing a casino that Yocha Dehe believes would compete with its own gaming facility.

The district court denied intervention but invited Yocha Dehe to participate as an amicus curiae. That decision should be affirmed. The district court correctly concluded that Yocha Dehe lacked standing to intervene, because the Tribe failed to show that it would suffer imminent injury if the decision it seeks to defend were set aside. Yocha Dehe also did not meet the requirements of intervention, because it did

not demonstrate how its ability to protect its interest would be impaired and the Federal Defendants adequately represent its interest. Because Yocha Dehe lacks standing and the requirement for pendent appellate jurisdiction has not been met, this Court need not review the denial of permissive intervention, but if it does, it should find no abuse of discretion.

STATEMENT OF JURISDICTION

(A) The district court has jurisdiction under 28 U.S.C. § 1331, because the plaintiff's claims arise under a federal statute, namely, the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq., J.A. 69.

(B) This Court has jurisdiction to review the denial of a motion to intervene as of right pursuant to 28 U.S.C. § 1291. *Karsner v. Lothian*, 532 F.3d 876, 884 n. 7 (D.C. Cir. 2008). The denial of a motion for permissive intervention is not usually appealable in itself, but the court may exercise its pendent appellate jurisdiction to reach questions that are “inextricably intertwined” with ones over which it has direct jurisdiction. *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000).

(C) The district court denied Yocha Dehe's motion to intervene on September 28, 2020, J.A. 159, and Yocha Dehe sought reconsideration of that denial on October 21, 2020. J.A. 185. That motion for reconsideration was denied on December 4, 2020. J.A. 209. Yocha Dehe filed a notice of appeal on January 12, 2021, or 39 days later. J.A. 232; *cf.* Fed. R. App. P. 4(a)(4)(A)(iv), (a)(1)(B).

(D) The appeal is from a final order that is conclusive as to intervention.

STATEMENT OF THE ISSUES

Intervention as of right

1. Did the district court err in concluding that Yocha Dehe lacked standing to intervene as a defendant, where Yocha Dehe would not suffer certain or impending injury from a remand of the challenged agency determination, which was a threshold step in a multistep administrative process that Scotts Valley would need to successfully undertake before it might be authorized to operate a tribal casino?
2. If Yocha Dehe has standing, did the district court err in concluding that the Tribe also failed to meet the requirements under Federal Rule of Civil Procedure 24(a), because resolution of Scotts Valley's complaint would not "impair" Yocha Dehe's ability to protect its interest by being heard as a party in future proceedings?
3. If Yocha Dehe satisfied Rule 24(a)'s impairment factor, did it also demonstrate that the Federal Defendants may not "adequately represent" its interest in obtaining an affirmance below, where there has been no showing that the Federal Defendants have any conflicting or diverging interests in defending the agency's decision?

Permissive intervention

4. (a) Should this Court review the denial of permissive intervention where the movant has not shown how the issues underlying intervention as of right are inextricably intertwined with permissive intervention, and where the movant lacks standing to intervene as of right?

(b) If this Court exercises its jurisdiction, did the district court abuse its discretion by denying permissive intervention where Yocha Dehe did not specify a defense that it has that shares a common question of law or fact with the main action, and where the court has expressly permitted amicus curiae participation?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addendum to the Brief of Appellant.

STATEMENT OF THE CASE

A. The Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* regulates gaming on “Indian lands” to promote tribal economic development, self-sufficiency, and strong tribal governments. *See* 25 U.S.C. § 2701(1)-(2). In general, the Act prohibits gaming “on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988.” *Id.* § 2719(a). However, the Act contains exceptions, including the so-called “restored lands” exception for lands “taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition.” *Id.* § 2719(b)(1)(B)(iii). To qualify under this exception, a tribe that has been restored to Federal recognition must establish (1) a modern connection to the newly acquired lands, (2) a significant historical connection to the land, and (3) a temporal connection between the date of acquisition and the tribe’s restoration. 25 C.F.R. § 292.12.

When a tribe acquires new lands, it may seek an “Indian Lands Opinion” from the Department of the Interior as to whether those lands will meet one of the Act’s exceptions, including the “restored lands” exception. 25 C.F.R. § 292.3.

If a parcel qualifies as “restored land,” a tribe must undertake a number of steps before it may lawfully operate a gaming facility on that land, including: successfully requesting that the Department take the land into trust (which includes a title review, completing an environmental review that sets forth required mitigation for the proposed project, and a regulatory review); obtaining federal approval of a gaming compact with the State; obtaining federal approval of a tribal gaming ordinance; and obtaining federal approval of a management contract if the gaming facility is not managed by the tribe. *See e.g.*, 25 U.S.C. §§ 2710-2711; *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 855 (D.C. Cir. 2006).

B. The 2019 Scotts Valley Indian Lands Opinion

On January 28, 2016, Scotts Valley submitted a request to the Department of the Interior for an Indian Lands Opinion that a 128-acre parcel in Vallejo, California—on which Scotts Valley would like to eventually develop a casino—would qualify for the “restored lands” exception under the Act. J.A. 52-68. On February 7, 2019, the Department issued a letter in which it concluded that Scotts Valley was restored to Federal recognition and that the Tribe had demonstrated the required “modern” and “temporal” connections to the parcel, but that it had failed to demonstrate the second criteria under 25 C.F.R. § 292.12—i.e., the requisite

“significant historical connection” to the land. J.A. 52-53. The Department noted that its determination was limited to the question of whether the parcel would fall under the “restored lands” exception and offered no opinion on whether the Act’s other exemptions for gaming may apply. J.A. 68. The Department noted that its unfavorable Indian Lands Opinion would mean that it would decline to take the parcel in trust for gaming purposes, as the parcel would not meet the regulatory requirements for restored lands. *Id.*

In reaching its conclusion, the Department reviewed and cited documentation submitted by Scotts Valley, as well as materials submitted by groups opposed to Scotts Valley’s request, including Yocha Dehe. J.A. 50-51, 53, 62, 64, 67; *see also* J.A. 172 (noting that the Department’s administrative record reflects twenty-one submissions by Yocha Dehe).

C. Procedural background

On May 24, 2019, Scotts Valley filed a complaint in the district court, challenging the Department’s decision under the Administrative Procedure Act and seeking a remand. J.A. 69. Thereafter, Yocha Dehe filed a motion to intervene as of right or permissively, seeking to defend the agency’s decision alongside the Government. J.A. 85. Yocha Dehe explained that it has an interest in preventing Scotts Valley from ultimately developing a casino in the vicinity of the San Francisco Bay, because such a casino would compete with Yocha Dehe’s own gaming facility (the Cache Creek Casino Resort) located in Yolo County, which draws its primary

market from the San Francisco Bay Area. J.A. 92-94. Yocha Dehe did not claim any ownership interest in the 128-acre parcel itself.

On September 28, 2020, the district court issued a detailed opinion denying Yocha Dehe's motion to intervene. J.A. 159. The court determined that Yocha Dehe failed to establish standing to intervene, because injuries from a potential future competitor casino that has yet to be approved or developed are not sufficiently "imminent" or "certainly impending." *Id.* at 169. The court similarly held that there was an insufficient causal link between the alleged injuries and the challenged decision, given the various other steps that Scotts Valley would need to successfully undergo before it might operate a casino, even if the Department's "restored lands" determination were remanded as a result of this litigation. *Id.* at 170. The court further held that Yocha Dehe had not made the required showing under Rule 24, because resolution of the case would not, as a practical matter, impair Yocha Dehe's ability to protect its future interest. *Id.* at 171-72. The court also denied permissive intervention, but invited Yocha Dehe to participate as an amicus curiae. *Id.* at 173.

Yocha Dehe filed a motion for reconsideration of its intervention motion. J.A. 185. On December 4, 2020, the district court denied that motion, concluding that there had been no intervening change in controlling law or clear error or manifest injustice in the court's prior decision. J.A. 209.

On December 21, 2020, Yocha Dehe filed a motion to stay the district court's proceedings pending appeal. J.A. 218. The district court denied the stay request. J.A.

224. Yocha Dehe noticed this appeal and filed an emergency motion for a stay pending appeal, which this Court granted on March 4, 2021.¹

STANDARD OF REVIEW

This Court reviews “the denial of a motion to intervene as of right de novo for issues of law, clear error as to findings of fact, and an abuse of discretion on issues that involve a measure of judicial discretion.” *Crossroads Grassroots Policy Strategies v. Federal Election Commission*, 788 F.3d 312, 316 (D.C. Cir. 2015) (internal quotation marks omitted). If this Court exercises its pendent jurisdiction to review the denial of permissive intervention, that denial is reviewed for abuse of discretion. *In re Vitamins Antitrust Class Actions*, 215 F.3d at 31.

SUMMARY OF ARGUMENT

1. This Court should affirm the district court’s denial of Yocha Dehe’s motion to intervene as of right.

As an initial matter, the Tribe lacks standing to intervene. To intervene as a putative defendant, Yocha Dehe must show that it would suffer injury in fact if the decision it seeks to defend were set aside. But as the district court concluded, Yocha

¹ Upon inquiry, Federal Appellees advised the Clerk’s Office that in the district court they had taken no position on the motion to intervene and had orally opposed the motion for a stay. Subsequently, on its own motion, this Court ordered the Federal Appellees to file a response to the motion for an emergency stay and it set a merits briefing schedule, setting a deadline for the Federal Appellees’ response brief. February 3, 2021 Order. In accordance with that Order, the Federal Appellees filed a response to the emergency stay motion and now file this brief.

Dehe would suffer no imminent or certainly impending injury. Even a favorable Indian Lands Opinion would not necessarily result in an approved casino, but would instead need to be followed by additional determinations and approvals, including a favorable land into trust decision, before Scotts Valley could establish a casino operation.

Further, the district court correctly concluded that Yocha Dehe did not meet the requirements for intervention as of right under Rule 24(a). Yocha Dehe did not show that disposition of the action would impair its ability to protect its interest, because if the Department's decision is affirmed, Yocha Dehe's interest will be upheld, and if the Department's decision is remanded, Yocha Dehe will have additional opportunities to submit relevant information or views in other proceedings.

In addition, the Federal Defendants adequately represent any interest Yocha Dehe could have in the action below, because that action concerns only whether the Department's decision was rational and lawful, and the Federal Defendants have expressed no hesitancy in fully defending their own administrative decision on the agency's administrative record.

2. This Court need not exercise its pendant appellate jurisdiction to review the district court's denial of permissive intervention. Yocha Dehe has not shown that the issues underlying intervention as of right are inextricably intertwined with permissive intervention in this case. In any event, Yocha Dehe's lack of standing is sufficient reason to decline review.

Even if the Court reviewed this decision, it should affirm the denial. The district court did not abuse its discretion where it based its denial on Yocha Dehe's failure to identify what defense it would have in this action and how that defense shares a common question of law or fact with the main action. Further, the court's invitation to Yocha Dehe to participate as an amicus curiae ensures that Yocha Dehe will be able to raise any arguments it may have in the same manner as the parties, particularly given that this case which will be resolved by summary judgment briefing on an administrative record.

ARGUMENT

I. The district court correctly denied Yocha Dehe's motion to intervene as of right

This Court should affirm the district court's denial of intervention as of right, because Yocha Dehe lacks standing to intervene and did not make the requisite showing under Rule 24(a).

A. Yocha Dehe failed to establish standing

In this Circuit, a putative intervenor is required to establish Article III standing to intervene as of right as a defendant in the district court. *Environmental Integrity Project v. Pruitt*, 709 F. App'x 12, 13 (D.C. Cir. 2017). Where, as here, a party seeks to intervene as a defendant, it must show that it will be injured in fact by the setting aside of the decision it seeks to defend. *See Military Toxics Project v. U.S. Environmental Protection Agency*, 146 F.3d 948, 954 (D.C. Cir. 1998).

The district court correctly held that Yocha Dehe failed to demonstrate standing because the alleged injury it seeks to prevent—i.e., harms from the economic competition that it asserts would result from a casino that Scotts Valley seeks to develop—is not imminent or certainly impending. J.A. 166. As the district court recognized, even if some error were found in the Department’s Indian Lands Opinion and even if that agency decision were ultimately reversed, that determination “is only one step in a multi-step administrative process to establish a tribal casino for a restored tribe under the [Indian Gaming Regulatory Act].” *Id.* at 167 (noting that even with a favorable Indian Lands Opinion, Scotts Valley would need to succeed in having the land placed into trust, complete a detailed Environmental Impact Statement, obtain federal approval of a gaming compact and tribal gaming ordinance, and potentially obtain federal approval of a management contract). In other words, even if Yocha Dehe has identified a concrete harm that could be posed by a future Scotts Valley casino, that harm is not sufficiently impending, and a remand or reversal of the Indian Lands Opinion would still not make it so. For the same reasons, a remand or reversal of the Indian Lands Opinion would not cause injury—it would simply allow the administrative process to continue. *Id.* at 169.

This conclusion is consistent with the determination by many courts that an Indian Lands Opinion standing alone is just that—“merely a legal opinion that does not constitute final agency action” because it has no immediate impact. *Citizens Against Casino Gambling in Erie County. v. Kempthorne*, 471 F. Supp. 2d 295, 327–28

(W.D.N.Y. 2007), amended on reconsideration in part, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007); *Miami Tribe of Oklahoma v. United States*, 198 F. App'x 686, 690 (10th Cir. 2006) (holding that the “DOI Opinion Letter is only a part of the process that will eventually result in the final NIGC action,” but that the opinion letter standing alone “does not have a direct or immediate impact on the Tribe”). Put differently, if the Department were to issue a favorable Indian Lands Opinion, that opinion alone would not be a challengeable agency action because it is an “intermediate statutory interpretation” without a legal consequence, unless and until there is a decision made *based* on that interpretation—e.g., either the denial or approval of a land into trust application. *Citizens Against Casino Gambling in Erie Cty*, 471 F. Supp. 2d at 328.²

Yocha Dehe does not dispute that the Indian Lands Opinion is a threshold step in a process that could very well result in Scotts Valley not developing a casino. Instead, citing *Crossroads Grassroots Policy Strategies*, Yocha Dehe argues that it is

² The unfavorable Indian Lands Opinion in this case was coupled with a de facto denial of Scott's Valley's land into trust application, which was explicitly based on gaming. J.A. 68. Thus, here, the Indian Lands Opinion was part of a final decision. *Cf. Miami Tribe of Oklahoma*, 198 F. App'x at 690 (noting that if the agency relies on the Indian Lands Opinion in denying the tribe's application for a gaming contract, then the tribe can challenge that opinion as part of that agency action in federal court); *TOMAC*, 433 F.3d at 857–58 (challenging agency's decision to take land into trust). But if the agency decision were remanded and the Department issued a favorable Indian Lands Opinion which concluded that the parcel constituted “restored lands,” Scotts Valley would then need to obtain Department approval for its land into trust request, which would require additional procedures and distinct determinations, including an environmental review.

sufficient for standing purposes that Yocha Dehe “benefits” from the agency action that it seeks to defend. Yocha Dehe’s Br. at 15. But *Crossroads* is not so broad.

In *Crossroads*, an advocacy organization triggered a Federal Election Commission enforcement proceeding against the Crossroads corporation, alleging that Crossroads had violated the Federal Election Campaign Act. 788 F.3d at 315. The Commission ultimately dismissed the complaint against Crossroads and the advocacy organization challenged that dismissal in district court. *Id.* This Court held that Crossroads had standing to intervene to defend the “benefit” that it had obtained from the Commission’s dismissal of the enforcement proceeding that had been initiated against Crossroads. Importantly, the Court concluded that the prospect of re-exposure to the enforcement action—i.e., losing the shield of the favorable Commission decision—was in and of itself sufficient injury in fact. *Id.* at 317-18. Contrary to Yocha Dehe’s assertion, it is not in the same position as Crossroads. Yocha Dehe was not a party to the administrative proceeding below, nor did those proceedings put Yocha Dehe at any direct risk. Rather, the situation here is akin to that which *Crossroads* distinguished—i.e., where a potential intervenor-defendant’s claim of injury was too attenuated because a “threshold legal interpretation must come out a specific way” before that party’s interests are even at risk. *Id.* (distinguish *Deutsche Bank National Trust Co. v. FDIC*, 717 F.3d 189, 195 (D.C. Cir. 2013)).

There is good reason for this distinction. If merely identifying a benefit from an agency determination—no matter how attenuated—were sufficient to have

standing to intervene as of right, untold numbers of other entities could similarly assert themselves as party defendants in challenges to agency decisions brought under the Administrative Procedure Act. Other tribes or businesses that also may not want a new entertainment venture in the area, various citizen groups that object to the construction of a new casino—any number of outside individuals and groups could claim a right to intervene and seek control over litigation that is aimed at reviewing federal agency decision making. The district court was correct to conclude that Yocha Dehe lacks standing to intervene given the posture of this case and that the Tribe's interests are more appropriately asserted as an amicus curiae.

B. The district court correctly held that Yocha Dehe did not satisfy Rule 24(a)'s requirements

In deciding whether a party may intervene as of right, the Court employs a four-factor test requiring: 1) timeliness of the intervention application; 2) a legally protected interest; 3) that disposing of the action, as a practical matter, impairs or impedes that movant's ability to protect its interest; and 4) that no party adequately represents the potential intervenor's interest. *Crossroads*, 788 F.3d at 320. Yocha Dehe failed to establish the third and fourth factors.³

³ As to the first factor, it was uncontested that the motion for intervention was timely. J.A. 170. On the second factor, the district court observed that if—contrary to its ruling—Yocha Dehe prevailed on the standing inquiry, then Yocha Dehe would have also established the requisite legally protected “interest” in the action. *Id.* at 171. In other contexts, the United States has urged that a putative intervenor-defendant's “interest” must be one that the intervenor could protect through the assertion of its own substantive legal rights in opposition to a claim in the pending action that could

1. Disposing of the action below will not impair Yocha Dehe's ability to protect its interest

The district court properly concluded that its resolution of Scotts Valley's complaint would not, as a practical matter, "impair" Yocha Dehe's ability to protect its alleged interest. The court reasoned that if it ultimately upheld the Department's Indian Lands Opinion—which determined that the parcel did *not* qualify under the "restored lands" exception—then that would obviate the concerns identified by Yocha Dehe. J.A. 171. On the other hand, if the court were to rule in Scotts Valley's favor and remand the matter back to the agency, that outcome also would not impair Yocha Dehe's interest, because Yocha Dehe could submit information to the agency (as it did before) to ensure that the agency considered all the appropriate arguments to properly assess Scotts Valley's claim of a historical connection to the parcel. *Id.* at 172. And even if Scotts Valley then succeeded on any remand and obtained a favorable Indian Lands Opinion, that would simply enable the relevant agencies to further consider the other applications needed to lawfully operate a casino—such as

have actually been asserted against it as a defendant in a suit, and seeking relief that could have been awarded as against it. *See* Petition for Writ of Certiorari in *United States v. Kane County*, No. 20-96, 2020 WL 4391718, at *16, cert. denied, -- S.Ct. --, 2021 WL 231653. Yocha Dehe's claimed economic interest in a gaming market free from competition from others does not fit within that construct of the kind of "interest" required for intervention purposes. However, the district court's assessment of the "interest" factor here appears consistent with this Court's precedent. *See Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967); *see also Fund for Animals v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003).

the land into trust request—through which there would be other opportunities for Yocha Dehe to provide its views. *Id.*

Yocha Dehe does not dispute the district court’s factual conclusion that the Tribe would be able to participate in the administrative process on remand to ensure that its views are fully considered. Instead, Yocha Dehe suggests that under *Crossroads* and other cases, a would-be intervenor can satisfy the “impairment” factor whenever an adverse judgment would make the task of “reestablishing the status quo” more difficult and burdensome for the intervenor. Yocha Dehe’s Br. at 20. But that suggestion distorts the cited cases, which say more than that—they all turned on the fact that the would-be intervenors were immediately benefited by the agency decision such that a reversal of that decision amounted to an injury and required them to assume a defensive posture in order to reestablish their “status quo.” Thus, the impairment factor was met in *Crossroads* because a remand would have meant that the Crossroads corporation would once again find itself defending against a Federal Election Commission enforcement proceeding. So too in *Fund For Animals v. Norton*, 322 F.3d 728 (D.C. Cir. 2003), the impairment factor was met because an adverse decision would have meant that U.S. hunters could no longer import their Mongolian sheep trophies—a scenario that the would-be intervenor would have to attempt to reverse on remand while it lost hunting revenues in the interim. *Id.* at 735.

Here, the district court correctly recognized that Yocha Dehe is unlike these would-be intervenors, because regardless of the disposition of Scotts Valley’s case

below, Yocha Dehe’s “status quo” will not actually change as a result—the impacts of a potential competitor casino will not be felt. And even if the decision were remanded, there will be “multiple opportunities for Yocha Dehe to be heard in the future even if Scotts Valley succeeds here.” J.A. 172; *see also* Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,361 (May 20, 2008) (“[T]he section 2719(b)(1)(B) exceptions do not require public comment . . . since they present a fact-based inquiry Nonetheless, there are opportunities for public comment in other parts of the administrative process—for example, in the process to take the land in trust and during the NEPA review process.”).

Moreover, Yocha Dehe does not explain how its ability to protect its interest would be impaired in this case, where it has been permitted to present its information and make arguments in the same form (briefing) as any other party, and the decision makers (both at the agency and the district court) have demonstrated that they will fully consider its arguments.

2. The Federal Defendants can adequately represent the movant’s interest

As an initial matter, the district court found no need to reach the issue of whether an existing party can “adequately represent” the movant’s interest, given the other bases for denying Yocha Dehe’s intervention motion. *See* J.A. 173 & n.4. This Court can do the same. However, this Court may also affirm the decision below on grounds other than those found by the district court. *RSM Production Corp. v. Freshfields*

Bruckhaus Deringer, 682 F.3d 1043, 1045 (D.C. Cir. 2012); *see also* 16AA Wright, Miller & Kane, Federal Practice and Procedure § 3974.2 (3d ed.).

The United States' position is that the Federal Government is generally the only required defendant in an Administrative Procedure Act-based challenge to federal agency action. *Cf. Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) (holding that there is no need to join, under Rule 19, nonparties interested in seeing upheld an agency action in which they have a financial interest, when "the United States may adequately represent" the interests of those nonparties "as long as no conflict exists between the United States and the nonparty beneficiaries"). This is true here.

The Government is fully capable of representing the interests of nonparties in this particular suit, where the question before the court is solely whether the Department's decision is rational and complies with the law. Here, the Department previously denied Scotts Valley's request and the Government has never wavered from its intent to vigorously defend that denial in the district court. Given this posture, it is incumbent on Yocha Dehe to demonstrate why the United States could not adequately represent its interests here.

Yocha Dehe's effort to show inadequate representation by the Federal Government falls short. *First*, Yocha Dehe contends that the Federal Government's reasons for defending the Indian Lands Opinion are distinct from Yocha Dehe's more specific goals of protecting its own economic interests. Yocha Dehe's Br. at 23.

But the fact that the United States and a nonparty might have diverging *motivations* for upholding a particular government action does not mean that they have conflicting or diverging litigation *interests*. Agency action always affects members of the public differently from the agency itself. That truism is insufficient to show that the agency's interest in seeing its action upheld diverges from that of non-parties who stand to benefit from that action—otherwise virtually any member of the public who may be indirectly affected by an agency action would have a right to intervene to stand alongside the Federal Government in defense of the agency's action. *See Jones v. Prince George's County*, 348 F.3d 1014, 1019 (D.C. Cir. 2003) (noting that litigation interests can be congruent even when parties may have differing motives).

Yocha Dehe's particular reasons for wanting a decision upholding the agency's action may differ from the agency's reasons, but its interest in this litigation is the same as the Federal Government's—obtaining a judicial decision upholding the agency's action.

Second, Yocha Dehe asserts that the Tribe and Federal Defendants may not agree on all aspects of the case, Yocha Dehe's Br. at 24, but it has not identified any critical issue of divergence in defense of the agency action. The challenge below concerns whether the Department's Indian Lands Opinion was rational and complies with the law. Those inquiries do not turn on the potential competitive economic impact that a Scotts Valley Casino may have on Yocha Dehe or any other entity in the area. Rather, the Indian Lands Opinion must rise or fall on the basis of the agency's

proffered justifications and the legal framework set forth in the Act and regulations, which here do not involve an assessment of competitive economic impact. Moreover, a “mere difference of opinion concerning the tactics with which litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party or who are formally represented in the lawsuit.” *Jones*, 348 F.3d at 1020 (internal quotation marks omitted).

Finally, citing the Federal Defendants’ opposition to its intervention in *this* appeal, Yocha Dehe contends that the Federal Defendants may not adequately represent its interest, because the Federal Defendants do not agree that Yocha Dehe has an “interest” that qualifies it to intervene as of right. Yocha Dehe’s Br. at 25. But this divergence of opinion on intervention is not relevant to the Federal Government’s arguments on the merits of Scotts Valley’s case below; predicts no conflict of interest between Yocha Dehe and the Federal Government in litigating the merits of this case; and does not in any manner undermine the Federal Defendants’ ability to fully defend the Department’s Indian Lands Opinion against Scotts Valley’s challenge.

The denial of intervention as of right should be affirmed, because the Federal Defendants adequately represent Yocha Dehe’s interest in defending the agency action below.

II. The district court did not abuse its discretion by denying permissive intervention

The denial of a motion for permissive intervention is not usually appealable in itself, although the Court may exercise its pendent appellate jurisdiction to reach questions that are inextricably intertwined with those over which the Court has direct jurisdiction. *In re Endangered Species Act Section 4 Deadline Litigation*, 704 F.3d 972, 979 (D.C. Cir. 2013) (internal quotation marks omitted). Yocha Dehe does not explain how this standard is met in this particular case—i.e., why resolution of the questions underlying intervention as of right are “inextricably intertwined” with or would necessarily resolve the questions underlying permissive intervention.

In any event, Yocha Dehe’s lack of standing is a sufficient basis for declining review here. *See Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (declining to review the denial of a Rule 24(b) motion once the court has determined that the potential intervenor lacks standing).

Even if the Court exercised jurisdiction over this question, however, “[r]eversal of a decision denying permissive intervention is extremely rare, bordering on nonexistent.” *South Dakota v. Dep’t of Interior*, 317 F.3d 783, 787 (8th Cir. 2003).

Here, Yocha Dehe contends that the district court abused its discretion by holding, in a conclusory fashion, that Yocha Dehe did not specify the claim or defense that it has that shares a common question of law or fact with the main action. Yocha Dehe’s Br. at 25. While the district court’s statement may have been brief, Yocha Dehe’s motion

for intervention was itself perfunctory on this issue, simply repeating the requirements of Rule 24(b)(1) without providing an explanation of what defense it has (or could have) in a claim that was brought solely against the Federal Government under the Administrative Procedure Act. J.A. 101, 150. While Yocha Dehe identified the issues on which it intends to focus its participation, it is not clear why Yocha Dehe's concern as to judicial resolution of those issues constitutes a "defense" as opposed to an amicus "interest." See *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (internal citation omitted) (describing an amicus interest as an interest "in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case)," or having "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide").

Permissive intervention is wholly discretionary, and the district court can properly deny such intervention even if the movant has established that the requirements of Rule 24(b) are otherwise satisfied. See, e.g., 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1913 (3d ed.), at 376–77. Given the nature of the administrative challenge below, Yocha Dehe's ability to participate in that challenge as an amicus curiae, and the Government's full and consistent involvement in defending its own decision, the district court did not abuse its discretion by denying permissive intervention. See *In re Vitamins Antitrust Class Actions*, 215 F.3d at 32 (declining to review or reverse denial of permissive intervention where trial court granted the

movant amicus status, “enabling them to elucidate the court on their position” without risk of prejudicing the parties).

CONCLUSION

For the foregoing reasons, the district court’s decision denying the motion to intervene as of right should be affirmed, and this Court should decline to review the denial of permissive intervention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, I filed the foregoing Final Response Brief on all counsel of record with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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