ORAL ARGUMENT SCHEDULED FOR MAY 11, 2021
No. 21-5009

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SCOTTS VALLEY BAND OF POMO INDIANS,
*Appellee*,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

*Appellees*,

YOCHA DEHE WINTUN NATION,

*Appellant.*

On Appeal from the U.S. District Court for the District of Columbia,
Case No. 19-cv-1544-ABJ, Hon. Amy Berman Jackson

# APPELLANT'S FINAL REPLY BRIEF

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## GLOSSARY

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|---|---|
| **APA** | Administrative Procedure Act |
| **Cache Creek** | Yocha Dehe's Cache Creek Casino Resort |
| **FEC** | Federal Election Commission |
| **Interior** | United States Department of the Interior |
| **JA** | Joint Deferred Appendix |
| **Opinion** | February 19 Indian Lands Opinion |

## STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), all applicable statutes and regulations not contained in the addendum to Appellant's Opening Brief are contained in an addendum attached to this Reply Brief.

## SUMMARY OF ARGUMENT

Common sense and plain language compel reversal of the district court's decision to deny intervention by the Yocha Dehe Wintun Nation ("Yocha Dehe" or "Tribe").

Yocha Dehe seeks to defend an Indian Lands Opinion (the "Opinion") by the United States Department of the Interior ("Interior") that significantly and undisputedly protects the Tribe's governmental, economic, and cultural interests. Plaintiff the Scotts Valley Band of Pomo Indians ("Scotts Valley") has asked the district court to invalidate the Opinion and enjoin Interior from any future application of the regulatory requirements on which the Opinion is based. If Scotts Valley is successful, Yocha Dehe will immediately lose both the benefits of the Opinion and the ability to protect its interests on remand to Interior.

Common sense dictates that Yocha Dehe is entitled to intervene in the Opinion's defense. For more than two years, the Tribe advocated for the Opinion at the administrative level. The Tribe's advocacy was successful – the Opinion favors Yocha Dehe and explicitly relies on evidence submitted by the Tribe during the administrative proceedings. A Scotts Valley victory would undo – and make it impossible to restore – that successful result. Under these circumstances, there is no sensible reason why the Tribe should be barred from fully participating in the case.

Plain language leads to the same conclusion. This Court's clear, controlling precedent explicitly confirms that an applicant has standing to intervene in defense of agency action if it benefits from agency action, the action is challenged in court, and an unfavorable decision would remove the action's benefits – precisely the situation facing Yocha Dehe here. And a straightforward application of that same body of settled law likewise confirms the Tribe satisfies the intervention requirements of Federal Rule of Civil Procedure 24.

Ignoring both common sense and plain language, the district court denied Yocha Dehe's application to intervene. That decision was reversible error and it should now be corrected.

## ARGUMENT

### I. YOCHA DEHE IS ENTITLED TO INTERVENE AS OF RIGHT.

A non-party may intervene as of right by demonstrating standing and meeting the four-part test set forth in Federal Rule of Civil Procedure 24(a)(2). *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003). Yocha Dehe meets both sets of requirements here, and Appellees' objections are contrary to this Court's controlling precedent.

#### A. Yocha Dehe Has Standing.

In *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015), this Court held that an applicant has standing to intervene if it "benefits from agency action, the action is then challenged in court, and an unfavorable

decision would remove the [applicant]'s benefit." That is the situation here. The Opinion benefits Yocha Dehe by rejecting and blocking Scotts Valley's casino project, thereby preventing harm to the Tribe's governmental, cultural, and economic interests; Scotts Valley has challenged the Opinion; and if that challenge is successful Yocha Dehe's benefits would vanish. Therefore, Yocha Dehe has standing to intervene in the Opinion's defense. *Crossroads*, 788 F.3d at 317-18.

Appellees do not dispute the district court overlooked this basis for standing. *See* Joint Deferred Appendix ("JA") 165-70 (district court opinion); Fed. Br. at 10-14 (failing to dispute); Scotts Valley Br. at 18-33 (same). Instead, they argue Yocha Dehe lacks standing because an Indian Lands Opinion is not the sole or final regulatory approval needed for Scotts Valley's casino project. Fed. Br. at 11; Scotts Valley Br. at 22, 25-27. As explained in Yocha Dehe's Opening Brief (at 16), that contention is directly contrary to *Crossroads*. There, the Federal Election Commission ("FEC") issued an order declining to investigate a political consulting firm. *Crossroads*, 788 F.3d at 318-19. The firm sought to intervene in defense of the FEC order, arguing that reversal would re-open the possibility of an investigation, an investigation might lead to a civil enforcement action, and an enforcement action could result in liability. *Id*. at 315-16.[1] The district court

[1] Scotts Valley's assertion (at 25) that the FEC order at issue in *Crossroads* "shielded the intervenor from the threat of *immediate* harm" is misleading. (*cont'd*)

found that concern "too speculative" to support intervention. *Id*. This Court reversed, holding the firm had standing *even though it would face no potential liability unless and until other discretionary agency decisions occurred*. *Id*. at 315-16, 318. After all, "[l]osing the favorable order" would itself constitute "significant injury in fact." *Id*. at 318. For the same reasons, reversal is warranted here.[2]

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Crossroads found *the threat of losing a favorable FEC order* would cause immediate harm. *Crossroads*, 788 F.3d at 318-19. But, contrary to Scotts Valley's suggestion, reversal of the FEC order would not have imposed immediate liability. *Id*. at 315-16, 318. A series of additional agency approvals would have been required. *Id*.

[2] Because there is no "sole or final hurdle" limitation on standing (*cf*. JA 168, 216), Appellees' lists of statutes and regulations that may apply to Scotts Valley's proposed casino (Fed. Br. at 11; Scotts Valley Br. at 26) do not defeat Yocha Dehe's standing. *Crossroads*, 788 F.3d at 315-16, 318. These other statutes and regulations do nothing to address the injury that Yocha Dehe would suffer if the Opinion's benefits are lost. Moreover, none of the listed authorities substitutes for the Opinion's substantive, enforceable determination that the gaming site does not meet federal gaming eligibility. An Environmental Impact Statement is a procedural requirement that does not determine whether the Vallejo site meets the Indian Gaming Regulatory Act's substantive standards for gaming eligibility. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-53 (1989); *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999). Negotiation of a gaming compact is not required for all types of gaming activities, does not provide opportunity for Yocha Dehe to participate, and is automatically "deemed approved" unless the Secretary of the Interior affirmatively decides, within 45 days, that the compact violates federal law. *See* 25 U.S.C. § 2710(d)(8)(B)-(C). The process for federal approval of Scotts Valley's gaming ordinance does not provide opportunity for Yocha Dehe to participate, and the ordinance can only be disapproved if the National Indian Gaming Commission determines, within 90 days, that the ordinance was not adopted in compliance with Scotts Valley (*cont'd*)

Appellees also argue Yocha Dehe lacks standing because invalidation of the Opinion would not render Scotts Valley's casino a certainty. Fed Br. at 11; Scotts Valley Br. at 25-26. Once again, *Crossroads* holds otherwise. There, this Court found loss of a favorable agency action constituted concrete and imminent injury in fact even though there was "no guarantee" of additional future harm. *Crossroads*, 788 F.3d at 318; *see also Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 12 (D.D.C. 2019) ("even if the fate of the proposed casinos is speculative," reversal of the challenged decision would "cause a significant immediate injury by depriving the [intervenor] of the benefit of a favorable final judgment"). So, too, here. The Opinion prevents Scotts Valley from proceeding with its proposed development – a significant benefit to Yocha Dehe that would be immediately eliminated if Scotts Valley were to prevail in this litigation. Moreover, a Scotts Valley victory would prevent Interior from applying, on remand, the regulatory requirements on which the Opinion is based. *See* JA 83. Thus, Yocha Dehe, like the *Crossroads* intervenor, "has a concrete stake in the favorable agency action currently in place." *Crossroads*, 788 F.3d at 319.

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tribal law or that Scotts Valley was influenced by an individual who poses a threat to the public. *Id.* § 2710(d)(1)(A), (d)(2)(B), (e). And the minimal regulatory requirements for federal acquisition of land in trust do not mandate any substantive analysis of gaming eligibility. *See* 25 C.F.R. § 151.11. Yocha Dehe's interest is in preventing gaming at the project site – and the Opinion is the agency decision that determines gaming eligibility.

Appellees claim *Crossroads* is distinguishable because the Opinion does not directly regulate Yocha Dehe. Fed. Br. at 13; Scotts Valley Br. at 24-25. The Federal Defendants even go so far as to claim Yocha Dehe was not part of the administrative proceedings. Fed. Br. at 13. These arguments are entirely without merit. Yocha Dehe successfully advocated for the Opinion and has standing to defend it. *See WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 19 (D.D.C. 2010). The Opinion specifically identifies Yocha Dehe as one of the "objecting parties" before Interior. JA 50-51. There can be no reasonable dispute that Yocha Dehe was heavily involved in the administrative process – even the district court recognized as much. JA 172; *see also, e.g.*, JA 62-63, 67 (portions of Opinion citing evidence submitted by Yocha Dehe); JA 106-07, ¶¶ 6-8, 154-55, ¶ 3 (describing Yocha Dehe's evidentiary submissions); Scotts Valley Br. at 16 (admitting Yocha Dehe's extensive involvement). Moreover, *Crossroads* explicitly confirmed direct regulation is not required for standing. *Crossroads*, 788 F.3d at 318. An applicant may intervene in defense of a challenged agency action even if it would only benefit from the action "indirectly" or "tangentially." *Id.*[3]

[3] Although direct regulation is not a prerequisite for standing, it bears repeating that the regulations at issue in this case are designed to balance the interests of restored tribes (like Scotts Valley) and the interests of established tribes (like Yocha Dehe). *See Redding Rancheria v. Jewell*, 776 F.3d 706, 711-12 (9th Cir. 2015). Yocha Dehe is subject to this regulatory framework just as surely as Scotts Valley.

Scotts Valley also attempts to distinguish *Crossroads* by suggesting the Opinion does not actually shield Yocha Dehe from any harm. To hear Scotts Valley tell it, a casino at the Vallejo property can just as easily be developed under an alternative Indian Gaming Regulatory Act process known as a "two-part determination." Scotts Valley Br. at 32. That is wishful thinking – and, tellingly, the Federal Defendants have not joined it. The requirements for a two-part determination are onerous, and there is no evidence Scotts Valley could meet them here.[4] In fact, common sense points the opposite way. If a two-part determination were a sure thing, why would Scotts Valley have filed this suit? And on what basis could it possibly have standing to sue? Scotts Valley's proposed "heads I win, tails you lose" approach to standing has no basis in law or logic. *See, e.g.*, *Sierra Club v. EPA*, 755 F.3d 968, 975-76 (D.C. Cir. 2014). If the Opinion causes injury-in-fact sufficient to give Scotts Valley standing to sue, it surely provides Yocha Dehe with a substantial benefit meeting the requirements of *Crossroads*. *Id*.

[4] Among other things, the two-part process would require (i) a determination by the Secretary of the Interior, after extensive consultations, that the proposed casino will not be detrimental to the "surrounding community" (a defined term that includes nearby tribes); and (ii) a concurrence by the Governor of California. 25 U.S.C. § 2719(b)(1)(A); *see also* 25 C.F.R. §§ 292.16-292.22 (requirements); *id.* § 292.2 (definition of "surrounding community"). In the entire 32-year history of the Indian Gaming Regulatory Act, only five of California's 109 federally recognized Indian tribes have successfully obtained a two-part determination and gubernatorial concurrence. Perhaps not surprisingly, Scotts Valley has not even applied for a two-part determination here.

Doubling down on a losing hand, Scotts Valley claims there is no reason to believe its proposed casino would ever compete with Yocha Dehe's Cache Creek Casino Resort ("Cache Creek"). Scotts Valley Br. at 27 ("It is entirely conjectural…"). The record demonstrates otherwise. Scotts Valley applied for permission to build a casino squarely within Yocha Dehe's core gaming market. JA 104-08, ¶¶ 2, 4, 10.[5] The application specifies the size, location, and amenities of the proposed facility. JA 18-21, 32. On the basis of that information, gaming industry experts concluded that Scotts Valley's project will intercept casino patrons who would otherwise visit Cache Creek, resulting in a 43% decrease in Yocha Dehe's gaming revenues, 650-700 job losses at Cache Creek, and steep cuts to Tribal programs and services. JA 108, ¶ 10; JA 155-56, ¶¶ 4-5. These expert

[5] This fact distinguishes the instant case from *New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002), the linchpin of Scotts Valley's arguments alleging an absence of "competitive harm." *See* Scotts Valley Br. at 21-22. *New World Radio* involved a challenge to a radio broadcast license renewal in rural Maryland. *New World Radio*, 294 F.3d at 166. A Washington, D.C. radio station challenged the renewal, fearing the rural broadcaster might later relocate and become a competitor. *Id*. at 172. *New World Radio* found no injury in fact because the relicensing involved a station outside the plaintiff's Washington, D.C. market. *See id*. (explaining that the licensee "has now purchased [the rural] facilities in order to broadcast from that location"). Here, on the other hand, it is undisputed that Scotts Valley's project is located in Yocha Dehe's core gaming market. *See* Opening Br. at 9-10 (statement of facts); Scotts Valley Br. at 10-17 (failing to dispute); *see also* JA 105-108, ¶¶ 4, 10.

determinations stand undisputed. On this record, competition with Cache Creek is hardly "conjectural." *Cf.* Scotts Valley Br. at 27.

Citing *Deutsche Bank National Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013), Appellees argue Yocha Dehe lacks standing because "a threshold legal interpretation must come out a specific way" before Scotts Valley can develop a casino. Fed. Br. at 13; Scotts Valley Br. at 30-31. The argument fails for each of three independent reasons. First, Appellees ignore that loss of the Opinion's benefits would itself cause injury to Yocha Dehe. Fed. Br. at 13; Scotts Valley Br. at 30-31. *Deutsche Bank* pre-dates *Crossroads*, did not involve an application to intervene in defense of agency action, and does not alter the rule that "the threatened loss of [a] favorable [agency] action constitutes a concrete and imminent injury." *Crossroads*, 788 F.3d at 318 (citations omitted). Second, the "threshold legal interpretation" at issue in *Deutsche Bank* concerned the intervenor's contractual *interest* in the subject matter of the case, not (as Appellees suggest) the timing or causation of the intervenor's *injury*. *See Deutsche Bank*, 717 F.3d at 193. There is no equivalent interpretive issue here: no contractual interest is at stake, the Opinion is not ambiguous and requires no interpretation, and Yocha Dehe's interest in the subject matter of the case is beyond fair dispute. Third, the outcome of *Deutsche Bank* did not turn on the existence of a "threshold legal interpretation" – more decisive was the fact that the applicants for

intervention had introduced no evidence supporting their concerns about a settlement between other parties. *Id*. ("Second, and more decisively…").

Grasping at straws, Appellees argue that Yocha Dehe lacks standing because a *positive* Indian Lands Opinion – *i.e.*, one that grants the applicant's request for a determination that its property is eligible for gaming – is not necessarily a final agency action. Fed. Br. at 11-12; Scotts Valley Br. at 22 & n.1. But the Opinion at issue in this case is a *negative* determination – a denial of Scotts Valley's request for a determination that the Vallejo property is gaming-eligible. And no one disputes that a *negative* determination is a final agency action – after all, it represents a conclusive determination that gaming cannot be conducted at the proposed project site. *See* Fed. Br. at 12 & n.2; Scotts Valley Br. at 22 n.1. In fact, Interior admits the Opinion is both a rejection of Scotts Valley's request for a determination of gaming eligibility *and* "a de facto denial of Scotts Valley's land into trust application." Fed. Br. at 12 n.2. In short, the Opinion denies and blocks Scotts Valley's proposed casino project. Because Yocha Dehe risks losing the substantial benefits of that decision, it has standing to intervene. *Crossroads*, 788 F.3d at 318 ("[T]he threatened loss of that favorable action constitutes a concrete and imminent injury.").

Appellees further suggest that a district court decision in Scotts Valley's favor "would simply allow the administrative process to continue." Fed. Br. at 11;

*see also* Scotts Valley Br. at 22. This argument fails for multiple reasons. For one thing, there is no "continuing" administrative process. As things stand, Scotts Valley's project has been denied and the denial significantly benefits Yocha Dehe. Under controlling Circuit precedent, that is enough to confirm Yocha Dehe's standing. *Crossroads*, 788 F.3d at 318. Furthermore, Scotts Valley does not seek a "clean slate" reconsideration of the Opinion. Its complaint also asks to (i) enjoin the Federal Defendants from applying 25 C.F.R. § 292.12 – the regulatory requirement on which the Opinion is based – in any further administrative proceedings; and (ii) secure various evidentiary findings that it believes would be helpful to its cause in future agency decision-making processes. JA 80-84. Thus, a decision in Scotts Valley's favor would not simply "continue" an existing administrative process; rather, it would fundamentally alter the regulatory restrictions applicable to the Vallejo property.[6]

Perhaps recognizing the weakness of their legal position, the Federal Defendants ultimately resort to a straw-man argument. If Yocha Dehe has standing, they warn, "untold numbers of other entities could similarly assert themselves as party defendants in challenges to agency decisions brought under the Administrative Procedure Act." Fed. Br. at 14. These exaggerated concerns have

[6] As explained above, the fact that other agency approvals (*i.e.*, approvals beyond an Indian Lands Opinion) might also be needed does not undermine Yocha Dehe's standing. *See supra* pp. 3-4, 4 n.2.

nothing to do with this case. Yocha Dehe was one of four "objecting parties" during the administrative proceedings. JA 50-51. It participated extensively in those proceedings. JA 105-07, ¶¶ 3, 6-8; JA 154-55, ¶¶ 2-3. The resulting Opinion cites material submitted by Yocha Dehe during the administrative process. *See, e.g.*, JA 50-51, 62-63, 67; JA 105-07, ¶¶ 3, 6-8; JA 154-55, ¶¶ 2-3. And undisputed evidence demonstrates Yocha Dehe benefits from the Opinion in a unique and significant way. JA 104-08, ¶¶ 2, 10; JA 155-56, ¶¶ 4-6. Under controlling Circuit law – settled since at least 1998 – this is more than enough to establish Yocha Dehe's standing. *See Crossroads*, 788 F.3d at 318; *Fund for Animals*, 322 F.3d at 733; *Mil. Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998). There is no reason to believe a straightforward application of this clear, longstanding precedent will suddenly unleash a torrent of inappropriate intervention applications – in this case or any other.

### B. Yocha Dehe Meets the Requirements of Federal Rule of Civil Procedure 24(a)(2).

Yocha Dehe meets each of the four requirements for intervention set forth in Federal Rule of Civil Procedure 24(a)(2), and Appellees' arguments to the contrary do not withstand scrutiny.

**1. Yocha Dehe's Application Was Timely.**

Appellees do not dispute the timeliness of Yocha Dehe's application for intervention. Fed. Br. at 14 & n.1; Scotts Valley Br. at 33-39. The Tribe meets the first requirement of Rule 24(a)(2).

**2. Yocha Dehe Claims an Interest Relating to the Property or Transaction that Is the Subject of this Action.**

In this Circuit, "constitutional standing is alone sufficient" to satisfy the second Rule 24(a)(2) requirement – a claim to an interest relating to the property or transaction that is the subject of this action. *Fund for Animals*, 322 F.3d at 735. And, as explained above, controlling Circuit precedent confirms Yocha Dehe's standing here. *See supra*, pp. 2-12.

Scotts Valley nonetheless claims Yocha Dehe cannot satisfy the second Rule 24(a)(2) requirement, arguing the Tribe's concerns are not among the interests protected by the Indian Gaming Regulatory Act. Scotts Valley Br. at 33-34. But "the zone of interests [test] has no applicability to an intervening defendant in a post-*Lexmark* world." *Crossroads*, 788 F.3d at 320. And even if prudential considerations were relevant, they would not bar Yocha Dehe's intervention here. The very purpose of the Indian Gaming Regulatory Act regulations at issue in this case is to strike "a balance between allowing restored tribes to game on newly acquired lands, while at the same time protecting the

interests of established tribes." *Redding Rancheria*, 776 F.3d at 712. The interests of Yocha Dehe, an established tribe, are perfectly consistent with that purpose.

### 3. An Adverse Judgment May Impair Yocha Dehe's Ability to Protect its Interests.

Yocha Dehe also meets the third Rule 24(a)(2) requirement – potential impairment of the Tribe's ability to protect its interests. Appellees disagree, arguing that this litigation poses no threat because Yocha Dehe "will have ample opportunity to express its concerns" in future proceedings. Scotts Valley Br. at 34-36; *see also* Fed. Br. at 15-16 (similar). But Circuit law has long held that "it is not enough to deny intervention under [Rule] 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977); *see also In re Brewer*, 863 F.3d 861, 873 (D.C. Cir. 2017); *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014); *Fund for Animals*, 322 F.3d at 735; *Nuesse v. Camp*, 385 F.2d 694, 701-02 (D.C. Cir. 1967); *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 4 (D.D.C. 2017). Appellees do not address – or even acknowledge – this clear rule. Fed. Br. at 15-17; Scotts Valley Br. at 34-37.

Appellees' arguments also fail to account for the practical impact of a decision in Scotts Valley's favor. As noted above, Scotts Valley does not merely seek to invalidate the Opinion – it has also requested relief that would (i) bar the Federal Defendants from applying, in future proceedings, the regulatory

requirements on which the Opinion is based (JA 83); and (ii) various evidentiary findings and determinations intended to limit Interior's discretion on remand (JA 80-84). Contrary to the Federal Defendants' suggestion, Yocha Dehe could not simply "submit information to [Interior] (as it did before) to ensure that the agency…properly assess[es] Scotts Valley's claim of a historical connection to the [Vallejo] parcel." Fed. Br. at 15. For that same reason, it would be difficult and burdensome – if not downright impossible – for Yocha Dehe to regain the benefits of the Opinion. Thus, Yocha Dehe satisfies the third Rule 24(a)(2) requirement. *Crossroads*, 788 F.3d at 320 (third requirement satisfied if an adverse decision would make the task of reestablishing the status quo more difficult and burdensome); *Fund for Animals*, 322 F.3d at 735 (same).

Appellees do not seriously dispute that a Scotts Valley victory would make it difficult and burdensome (at the very least) for Yocha Dehe to regain the benefits of the Opinion. Fed. Br. at 15-17; Scotts Valley Br. at 34-37. Instead, they claim the Tribe must meet a higher standard. Fed. Br. at 15-17; Scotts Valley Br. at 34-37. In their view, Yocha Dehe can only satisfy Rule 24(a)(2)'s impairment requirement by demonstrating that an adverse decision would require the Tribe to immediately "assume a defensive posture" in order to reestablish the status quo. Fed. Br. at 16; *see also* Scotts Valley Br. at 36-37 (similar).

Although Appellees' proposed test for impairment of interest is muddy, the absence of merit in their argument is quite clear. As an initial matter, Appellees' position cannot be squared with the plain language of Rule 24(a)(2). The Rule requires only that "disposing of the action *may as a practical matter* impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2) (emphasis added). It says nothing about a requirement to immediately "assume a defensive posture." *Id.*[7] Not surprisingly, Appellees have identified no case in which any court has articulated or applied their proposed "immediate defensive posture" standard. *See* Fed. Br. at 15-17; Scotts Valley Br. at 34-37. Moreover, even if an "immediate defensive posture" were mandatory, Yocha Dehe would easily satisfy the requirement. If Scotts Valley prevails, Yocha Dehe will be immediately forced to play defense in order to regain the benefits of the Opinion – this time on an administrative playing field that is decidedly tilted in Scotts Valley's favor, and without an opportunity to enforce the "significant historical connection" requirement of 25 C.F.R. § 292.12. *See* JA 83 (seeking to preclude application of "significant historical connection" requirement); JA 80-84 (request for additional evidentiary findings and determinations).

[7] The current version of Rule 24(a)(2) was intended to "liberalize the right to intervene in federal actions" and the drafters rejected alternative language that would have imposed a "higher barrier." *See Nuesse*, 385 F.2d at 701. Given this history, there is no basis to read a heightened standard into the Rule.

Moreover, Appellees' position is (yet again) contrary to *Crossroads* and *Fund for Animals*. And (yet again) Appellees cannot meaningfully distinguish either case from this one. Federal Defendants claim "the impairment factor was met in *Crossroads* because a remand would have meant that the [intervenor] would once again find itself defending against a [FEC] enforcement proceeding." Fed. Br. at 16. In truth, the *Crossroads* panel held the impairment factor was satisfied "*because* [an adverse decision] would make the task of reestablishing the status quo more difficult and burdensome" – precisely the standard cited by Yocha Dehe. *See Crossroads*, 788 F.3d at 320 (cleaned up) (emphasis added); Opening Br. at 20-21.[8] *Fund for Animals* likewise confirms Yocha Dehe's position: "Regardless of whether the [intervenor] could reverse an unfavorable ruling by bringing a separate lawsuit, there is no question that the task of reestablishing the status quo if [plaintiff] succeeds in this case will be difficult and burdensome." *Fund for Animals*, 322 F.3d at 735. Neither case supports Appellees' contention that a heightened "immediate defensive posture" test applies to the third Rule 24(a)(2) requirement.

[8] Here, again, Appellees misrepresent the factual and regulatory context of *Crossroads*. As already explained, *supra* pp. 3-4, 3 n.1, an adverse decision would not have immediately initiated an FEC enforcement action against the *Crossroads* intervenor; additional FEC decision-making would have been required prior to the initiation of any agency enforcement action. *See Crossroads*, 788 F.3d 315-16, 318.

Having lost the legal argument, the Federal Defendants suggest Yocha Dehe's opportunity to file an *amicus curiae* brief will mitigate harm to the Tribe's interests. Fed. Br. at 17; *see also id*. at 14 (similar suggestion in the context of standing); Scotts Valley Br. at 38-39 (similar suggestion in the context of adequacy of representation). But they do not – and have not even tried to – address Circuit precedent holding an *amicus curiae* role is "not an adequate substitute for participation as a party." *Nuesse*, 385 F.2d at 704 n.10; *see also In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 32 (D.C. Cir. 2000) (granting amicus status rather than intervention may constitute abuse of discretion).[9]

**4. The Original Parties May Not Adequately Represent Yocha Dehe's Interests.**

Yocha Dehe meets the fourth Rule 24(a)(2) requirement – potential inadequacy of representation – as well. As explained in Yocha Dehe's Opening Brief, the Tribe's burden on this issue "should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Fund for Animals*, 322 F.3d at 235 (same). An applicant "ordinarily should be allowed to

[9] *Building & Construction Trades Department, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994), cited by Scotts Valley (at 38-39) in a parallel argument, is not to the contrary. There, intervention was denied only after this Court affirmed the underlying judgment on the merits – an outcome apparently based on after-the-fact review of the cumulative arguments previously made by the applicant in an *amicus curiae* brief. *Reich*, 40 F.3d at 1282. Here, Yocha Dehe's entitlement to intervene will be resolved well in advance of the merits phase of the case.

intervene unless it is clear that [an existing] party will provide adequate representation." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (citation omitted); *see also Crossroads*, 788 F.3d at 321 (same). In cases like this one, courts in this Circuit "have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736.

Citing an unpublished district court decision, Scotts Valley suggests this Court should apply a higher standard – a presumption of adequate representation – because Yocha Dehe and the Federal Defendants "are aligned" in seeking to uphold the Opinion. Scotts Valley Br. at 37. The suggestion is contrary to published precedent. Because Yocha Dehe's specific governmental, economic, and cultural interests "cannot be subsumed within the shared interest of the citizens of the [United States], no presumption exists that the [Federal Defendants] will adequately represent its interests." *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986); *see also Crossroads*, 788 F.3d at 321 (reliance on general alignment to deny intervention constitutes abuse of discretion); *Costle*, 561 F.2d at 912 (general agreement that agency action was lawful does not render federal representation adequate); *Forest Cnty. Potawatomi Cmty. v. United States*, 317

F.R.D. 6, 14-15 (D.D.C. 2016) (applying "minimal" burden to tribal intervenor-defendant seeking to protect its own economic interests).[10]

For their part, Federal Defendants claim to be "fully capable of representing the interests of nonparties." Fed. Br. at 18. Insomuch as that claim refers to Yocha Dehe's interests – an open question, since the Federal Defendants do not specifically refer to the Tribe – it is simply not credible. After all, the majority of their brief consists of arguments denying that Yocha Dehe has any cognizable interest in the case. *See id.* at 10-17. This Court has not hesitated to find inadequate representation in similar circumstances. *See Crossroads*, 788 F.3d at 321 (identifying federal defendants' challenge to applicant's standing as evidence of inadequate representation).

The Federal Defendants attempt to sweep this disagreement under the rug by suggesting it is not relevant to the merits of the case. Fed. Br. at 20. Their effort is unpersuasive. At base, the merits of this case involve Interior's interpretation of regulations intended to strike a balance between the interests of restored tribes like Scotts Valley and the interests of established tribes like Yocha Dehe. *Redding*

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[10] *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C. Cir. 1979), appended to Scotts Valley's argument (at 37) with a "*see*" signal, does not counsel otherwise. There, the State of Colorado and several Colorado water districts separately sought to intervene in ongoing litigation on behalf of the people of the State. In that unique circumstance, this Court found the principle of *parens patriae* rendered intervention by the water districts – subdivisions of the State – to be unnecessary. *Higginson*, 631 F.2d at 740. That principle has no application here.

*Rancheria*, 776 F.3d at 711-12. And that balance will be struck in the context of a project of critical, undisputed importance to Yocha Dehe's government, economy, and cultural resources. If the Federal Defendants truly believe Yocha Dehe has no stake in the case, they have no business representing the Tribe.

Finally, if more evidence were needed it could readily be found in the Federal Defendants' conduct. As explained in Yocha Dehe's Opening Brief, they initially sought to exclude the Tribe from Interior's administrative proceedings. Opening Br. at 24. More recently, they reversed their position on Yocha Dehe's intervention without any notice or explanation to the Tribe. *Id*. None of this is disputed. *Compare id.*, *with* Fed. Br. at 17-20 (failing to dispute). Under these circumstances, separate representation is more than appropriate – it is necessary. Yocha Dehe "should not need to rely on a doubtful friend to represent its interests, when it can represent itself." *Crossroads*, 788 F.3d at 321.

## II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN DENYING PERMISSIVE INTERVENTION.

The district court's one-sentence denial of permissive intervention constitutes a second reversible error. The court abused its discretion by ignoring Yocha Dehe's clear compliance with the "common question" requirement of Federal Rule of Civil Procedure 24(b). Appellees do not seriously dispute that Yocha Dehe's application for intervention identified claims and defenses that share questions of law and fact with the main action. And their strained efforts to

rehabilitate the district court decision largely rely on reasoning found nowhere in the decision itself. If this Court does not reverse on intervention as of right, it should exercise its power to review and correct the district court's manifestly erroneous denial of permissive intervention.

### A. This Court Has the Power to Review the District Court's Denial of Permissive Intervention.

This Court can and should exercise its pendent appellate jurisdiction to review the district court's denial of Yocha Dehe's motion for permissive intervention. *See* Opening Br. 25-26. Exercise of pendent jurisdiction is appropriate to "reach questions that are inextricably intertwined" with questions over which the Court has direct jurisdiction. *In re Vitamins*, 215 F.3d at 31 (citation omitted).

The Federal Defendants falsely claim Yocha Dehe did not explain how the questions underlying its requests for permissive intervention and intervention as of right are "inextricably intertwined." Fed. Br. at 21. But the explanation is clearly set forth in Yocha Dehe's Opening Brief. *See* Opening Br. at 26 (explaining that both requests concern Yocha Dehe's interest in maintaining the Opinion and protecting the Tribe's government, cultural resources, and economy).[11] This Court has previously found requests for permissive intervention and intervention as of

[11] Indeed, the Federal Defendants appear to raise similar standing challenges to both of the Tribe's intervention requests. *See* Fed. Br. at 10-14, 21.

right to be inextricably intertwined when they share the same basis for intervention, as Yocha Dehe's intervention requests do here. *Safari Club Int'l v. Salazar*, 704 F.3d 972, 979 (D.C. Cir. 2013); *In re Vitamins*, 215 F.3d at 31.

### B. The District Court's Denial of Permissive Intervention Was an Abuse of Discretion.

While district courts have considerable discretion in deciding a motion for permissive intervention, that discretion "is not free from review." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998). A district court analysis that is clearly erroneous or insufficient to support the exercise of discretion must be reversed. *See id.* at 1049; *Nuesse*, 385 F.2d at 704, 706. That is the case here.

Appellees argue the district court appropriately exercised its discretion to deny permissive intervention based on its concerns about Yocha Dehe's standing. Fed. Br. at 21; Scotts Valley Br. at 39-40. But, as explained above (*supra*, pp. 2-12), the district court's standing analysis ignored Circuit law that governs intervention in defense of agency action – an abuse of discretion. *See, e.g.*, *Crossroads*, 788 F.3d at 321 (application of "the wrong legal standard" to an application for intervention constitutes abuse of discretion). Under the proper legal standard, Yocha Dehe has standing to intervene in defense of the Opinion. *See supra* pp. 2-12; Opening Br. at 14-19.

As for the "common question" requirement, Appellees do not seriously dispute that Yocha Dehe specified a defense sharing a common question with the main action, as Rule 24(b) requires. Fed. Br. at 21-22; Scotts Valley Br. at 40-41. They appear to concede the district court's contrary assumption was unfounded. *Compare* JA 173, *with* JA 96; *see also* Opening Br. at 27.

Implicitly conceding the inadequacy of the district court's decision, Appellees attempt to read language into the decision that simply isn't there. Scotts Valley suggests the district court compared Scotts Valley's claims and Yocha Dehe's proposed defenses but found them an insufficient match. *See* Scotts Valley Br. at 40-41. The Federal Defendants imply the district court evaluated Yocha Dehe's proposed defenses but determined they were an amicus "interest" rather than a "defense." *See* Fed. Br. at 22. No trace of either analysis appears anywhere in the district court's one-sentence permissive intervention decision. JA 173; *see also Nat'l Children's Ctr.*, 146 F.3d at 1049 (absence of explanation or analysis does not support exercise of discretion).

Scotts Valley also attempts to erase the connection between its claims and Yocha Dehe's defenses. Scotts Valley Br. at 41. Quoting Yocha Dehe selectively and misleadingly, it suggests the Tribe intends to make arguments that are irrelevant to any claim at issue in the case. Hardly. Yocha Dehe has consistently and specifically expressed its intent to defend against Scotts Valley's claims for

relief – including by discussing evidence the Tribe submitted, and Interior considered, in the administrative process. JA 96; JA 191; *see also* Opening Br. at 27; JA 62-63, 67 (portions of Opinion citing evidence submitted by Yocha Dehe).

The Federal Defendants' contention that Yocha Dehe cannot present a defense to Scotts Valley's claims brought against the Federal Government under the Administrative Procedure Act ("APA") is likewise unconvincing. Fed. Br. at 22. There is no requirement that Yocha Dehe be named as a defendant by Scotts Valley in order to defend against Scotts Valley's challenge to the Opinion. If there were, no party would ever be allowed to intervene in an APA case. *Cf. Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 47 (D.C. Cir. 2016) (trade association intervened in support of federal defendant in APA action); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1277 (D.C. Cir. 2005) (environmental organizations intervened in support of federal defendant in APA action).

Finally, Scotts Valley argues Yocha Dehe's intervention would cause undue delay or prejudice by diminishing Scotts Valley's control over its lawsuit and potentially preventing settlement or resulting in an appeal. Scotts Valley Br. at 41-42. Scotts Valley did not raise this objection to permissive intervention below, and the district court did not address it. JA 131-32; JA 173. This Court should not consider new arguments raised for the first time on appeal. *District of Columbia v.*

*Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal.").

Regardless, Scotts Valley's concerns are unwarranted. Yocha Dehe seeks to participate in the merits briefing below, which is stayed pending this appeal, and will do so on the same schedule as the Federal Defendants. This is not a case where a party seeks to intervene for the express purpose of opposing a settlement or seeking dismissal of the action. *See, e.g.*, *Safari Club*, 704 F.3d at 980 (intervention "late in the settlement process" would jeopardize settlement); *In re Vitamins*, 215 F.3d at 32 (similar); *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (intervention to challenge court's jurisdiction would delay litigation). Yocha Dehe's participation as a defendant will cause no undue delay or prejudice.

## CONCLUSION

The district court's decision should be reversed and this matter remanded with instructions directing that the Tribe be allowed to intervene as of right or, in the alternative, by permission.

Respectfully submitted,

Dated: April 5, 2021

/s/ *Matthew G. Adams*

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,385 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ *Matthew G. Adams*
Matthew G. Adams

## CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, I caused service of the foregoing brief, together with its addendum, on all counsel of record by electronically filing it with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit using the appellate CM/ECF system.

/s/ *Matthew G. Adams*
Matthew G. Adams

# ADDENDUM OF LEGAL AUTHORITIES

## TABLE OF CONTENTS

# 25 USCS § 2710

Current through Public Law 116-344, approved January 13, 2021, with gaps of Public Laws 116-260, 116-283, and 116-315.

***United States Code Service > TITLE 25. INDIANS (Chs. 1 — 50) > CHAPTER 29. INDIAN GAMING REGULATION (§§ 2701 — 2721)***

## § 2710. Tribal gaming ordinances

**(a) Jurisdiction over class I and class II gaming activity.**

**(1)**Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

**(2)**Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

**(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts.**

**(1)**An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

**(A)**such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

**(B)**the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

**(2)**The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

**(A)**except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

**(B)**net revenues from any tribal gaming are not to be used for purposes other than—

**(i)**to fund tribal government operations or programs;

**(ii)**to provide for the general welfare of the Indian tribe and its members;

**(iii)**to promote tribal economic development;

**(iv)**to donate to charitable organizations; or

**(v)**to help fund operations of local government agencies;

**(C)**annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

**(D)**all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

**(E)**the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

**(F)**there is an adequate system which—

**(i)**ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

**(ii)**includes—

**(I)**tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

**(II)**a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

**(III)**notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

**(3)**Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

**(A)**the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

**(B)**the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

**(C)**the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

**(D)**the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

**(4)**

**(A)**A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

**(B)**

**(i)**The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

**(I)**such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 of the Act [*25 USCS § 2712*],

**(II)**income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

**(III)**not less than 60 percent of the net revenues is income to the Indian tribe, and

**(IV)**the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a)(1) [*25 USCS § 2717(a)(1)*] for regulation of such gaming.

**(ii)**The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on the date of enactment of this Act [enacted Oct. 17, 1988].

**(iii)**Within sixty days of the date of enactment of this Act [enacted Oct. 17, 1988], the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

**(c) Issuance of gaming license; certificate of self-regulation.**

**(1)**The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

**(2)**If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

**(3)**Any Indian tribe which operates a class II gaming activity and which—

**(A)**has continuously conducted such activity for a period of not less than three years, including at least one year after the date of the enactment of this Act [enacted Oct. 17, 1988]; and

**(B)**has otherwise complied with the provisions of this section[,]

may petition the Commission for a certificate of self-regulation.

**(4)**The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

**(A)**conducted its gaming activity in a manner which—

**(i)**has resulted in an effective and honest accounting of all revenues;

**(ii)**has resulted in a reputation for safe, fair, and honest operation of the activity; and

**(iii)**has been generally free of evidence of criminal or dishonest activity;

**(B)**adopted and is implementing adequate systems for—

**(i)**accounting for all revenues from the activity;

**(ii)**investigation, licensing, and monitoring of all employees of the gaming activity; and

**(iii)**investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

**(C)**conducted the operation on a fiscally and economically sound basis.

**(5)**During any year in which a tribe has a certificate for self-regulation—

**(A)**the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b) [*25 USCS § 2706(b)(1)*–(4)];

**(B)**the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) [*25 USCS § 2710(b)(2)(C)*] and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

**(C)**the Commission may not assess a fee on such activity pursuant to section 18 [*25 USCS § 2717*] in excess of one quarter of 1 per centum of the gross revenue.

**(6)**The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

**(d) Class III gaming activities; authorization; revocation; Tribal-State compact.**

**(1)**Class III gaming activities shall be lawful on Indian lands only if such activities are—

**(A)**authorized by an ordinance or resolution that—

**(i)**is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

**(ii)**meets the requirements of subsection (b), and

**(iii)**is approved by the Chairman,

**(B)**located in a State that permits such gaming for any purpose by any person, organization, or entity, and

**(C)**conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

**(2)**

**(A)**If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

**(B)**The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

**(i)**the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

**(ii)**the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D) [*25 USCS § 2711(e)(1)(D)*].

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

**(C)**Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

**(D)**

**(i)**The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

**(ii)**The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

**(iii)**Notwithstanding any other provision of this subsection—

**(I)**any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

**(II)**any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

**(3)**

**(A)**Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

**(B)**Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

**(C)**Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

**(i)**the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

**(ii)**the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

**(iii)**the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

**(iv)**taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

**(v)**remedies for breach of contract;

**(vi)**standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

**(vii)**any other subjects that are directly related to the operation of gaming activities.

**(4)**Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

**(5)**Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

**(6)**The provisions of section 5 of the Act of January 2, 1951 (*64 Stat. 1135*) [*15 USCS § 1175*] shall not apply to any gaming conducted under a Tribal-State compact that—

**(A)**is entered into under paragraph (3) by a State in which gambling devices are legal, and

**(B)**is in effect.

**(7)**

**(A)**The United States district courts shall have jurisdiction over—

**(i)**any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

**(ii)**any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

**(iii)**any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

**(B)**

**(i)**An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

**(ii)**In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

**(I)**a Tribal-State compact has not been entered into under paragraph (3), and

**(II)**the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

**(iii)**If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [tribe] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

**(I)**may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

**(II)**shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

**(iv)**If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

**(v)**The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

**(vi)**If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

**(vii)**If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

**(I)**which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

**(II)**under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

**(8)**

**(A)**The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

**(B)**The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

**(i)**any provision of this Act,

**(ii)** any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

**(iii)** the trust obligations of the United States to Indians.

**(C)** If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

**(D)** The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

**(9)** An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12 [*25 USCS § 2711(b)*–(d), (f)–(h)].

**(e) Approval of ordinances.** For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

## History

**HISTORY:**

Act Oct. 17, 1988, *P. L. 100-497*, § 11, *102 Stat. 2472*.



End of Document

# *25 CFR 151.11*

This document is current through the March 26, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 15602 and 86 FR 16027.

***Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter H — Land and Water > Part 151 — Land Acquisitions***

## § 151.11 Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

**(a)** The criteria listed in Section 151.10 (a) through (c) and (e) through (h);

**(b)** The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

**(c)** Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

**(d)** Contact with state and local governments pursuant to 151.10 (e) and (f) shall be completed as follows: upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

## Statutory Authority

*Authority Note Applicable to Title 25, Ch. I, Subch. H, Pt. 151*

## History

[60 FR 32879, June 23, 1995, as corrected at *60 FR 48894*, Sept. 21, 1995, as corrected at *62 FR 1057*, Jan. 8, 1997; *66 FR 3452*, 3462, Jan. 16, 2001, withdrawn at *66 FR 56608*, Nov. 9, 2001; *66 FR 8899*, Feb. 5, 2001, as corrected at *66 FR 10815*, Feb. 20, 2001, withdrawn at *66 FR 56608*, Nov. 9, 2001; *66 FR 19403*, Apr. 16, 2001, withdrawn at *66 FR 56608*, Nov. 9, 2001; *66 FR 42415*, Aug. 13, 2001, withdrawn at *66 FR 56608*, Nov. 9, 2001]



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# *25 CFR 292.16*

This document is current through the March 26, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 15602 and 86 FR 16027.

***Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter N — Economic Enterprises > Part 292 — Gaming on Trust Lands Acquired After October 17, 1988 > Subpart C — Secretarial Determination and Governor's Concurrence > Application Contents***

## § 292.16 What must an application for a Secretarial Determination contain?

A tribe's application requesting a Secretarial Determination under § 292.13 must include the following information:

**(a)** The full name, address, and telephone number of the tribe submitting the application;

**(b)** A description of the location of the land, including a legal description supported by a survey or other document;

**(c)** Proof of identity of present ownership and title status of the land;

**(d)** Distance of the land from the tribe's reservation or trust lands, if any, and tribal government headquarters;

**(e)** Information required by § 292.17 to assist the Secretary in determining whether the proposed gaming establishment will be in the best interest of the tribe and its members;

**(f)** Information required by § 292.18 to assist the Secretary in determining whether the proposed gaming establishment will not be detrimental to the surrounding community;

**(g)** The authorizing resolution from the tribe submitting the application;

**(h)** The tribe's gaming ordinance or resolution approved by the National Indian Gaming Commission in accordance with *25 U.S.C. 2710*, if any;

**(i)** The tribe's organic documents, if any;

**(j)** The tribe's class III gaming compact with the State where the gaming establishment is to be located, if one has been negotiated;

**(k)** If the tribe has not negotiated a class III gaming compact with the State where the gaming establishment is to be located, the tribe's proposed scope of gaming, including the size of the proposed gaming establishment; and

**(l)** A copy of the existing or proposed management contract required to be approved by the National Indian Gaming Commission under *25 U.S.C. 2711* and part 533 of this title, if any.

## Statutory Authority

*Authority Note Applicable to Title 25, Ch. I, Subch. N, Pt. 292*

## History

[*73 FR 29354*, 29375, May 20, 2008, as corrected at *73 FR 35579*, June 24, 2008]

# 25 CFR 292.17

This document is current through the March 26, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 15602 and 86 FR 16027.

***Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter N — Economic Enterprises > Part 292 — Gaming on Trust Lands Acquired After October 17, 1988 > Subpart C — Secretarial Determination and Governor's Concurrence > Application Contents***

## § 292.17 How must an application describe the benefits and impacts of the proposed gaming establishment to the tribe and its members?

To satisfy the requirements of § 292.16(e), an application must contain:

**(a)** Projections of class II and class III gaming income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe;

**(b)** Projected tribal employment, job training, and career development;

**(c)** Projected benefits to the tribe and its members from tourism;

**(d)** Projected benefits to the tribe and its members from the proposed uses of the increased tribal income;

**(e)** Projected benefits to the relationship between the tribe and non-Indian communities;

**(f)** Possible adverse impacts on the tribe and its members and plans for addressing those impacts;

**(g)** Distance of the land from the location where the tribe maintains core governmental functions;

**(h)** Evidence that the tribe owns the land in fee or holds an option to acquire the land at the sole discretion of the tribe, or holds other contractual rights to cause the lands to be transferred from a third party to the tribe or directly to the United States;

**(i)** Evidence of significant historical connections, if any, to the land; and

**(j)** Any other information that may provide a basis for a Secretarial Determination that the gaming establishment would be in the best interest of the tribe and its members, including copies of any:

**(1)** Consulting agreements relating to the proposed gaming establishment;

**(2)** Financial and loan agreements relating to the proposed gaming establishment; and

**(3)** Other agreements relative to the purchase, acquisition, construction, or financing of the proposed gaming establishment, or the acquisition of the land where the gaming establishment will be located.

## Statutory Authority

*Authority Note Applicable to Title 25, Ch. I, Subch. N, Pt. 292*

## History

[*73 FR 29354*, 29375, May 20, 2008, as corrected at *73 FR 35579*, June 24, 2008]

# 25 CFR 292.18

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***Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter N — Economic Enterprises > Part 292 — Gaming on Trust Lands Acquired After October 17, 1988 > Subpart C — Secretarial Determination and Governor's Concurrence > Application Contents***

## § 292.18 What information must an application contain on detrimental impacts to the surrounding community?

To satisfy the requirements of § 292.16(f), an application must contain the following information on detrimental impacts of the proposed gaming establishment:

**(a)** Information regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA);

**(b)** Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

**(c)** Anticipated impacts on the economic development, income, and employment of the surrounding community;

**(d)** Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

**(e)** Anticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment;

**(f)** If a nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land; and

**(g)** Any other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments.

## Statutory Authority

*Authority Note Applicable to Title 25, Ch. I, Subch. N, Pt. 292*

## History

[*73 FR 29354*, 29375, May 20, 2008, as corrected at *73 FR 35579*, June 24, 2008]

# *25 CFR 292.19*

This document is current through the March 26, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 15602 and 86 FR 16027.

***Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter N — Economic Enterprises > Part 292 — Gaming on Trust Lands Acquired After October 17, 1988 > Subpart C — Secretarial Determination and Governor's Concurrence > Consultation***

## § 292.19 How will the Regional Director conduct the consultation process?

**(a)** The Regional Director will send a letter that meets the requirements in § 292.20 and that solicits comments within a 60-day period from:

**(1)** Appropriate State and local officials; and

**(2)** Officials of nearby Indian tribes.

**(b)** Upon written request, the Regional Director may extend the 60-day comment period for an additional 30 days.

**(c)** After the close of the consultation period, the Regional Director must:

**(1)** Provide a copy of all comments received during the consultation process to the applicant tribe; and

**(2)** Allow the tribe to address or resolve any issues raised in the comments.

**(d)** The applicant tribe must submit written responses, if any, to the Regional Director within 60 days of receipt of the consultation comments.

**(e)** On written request from the applicant tribe, the Regional Director may extend the 60-day comment period in paragraph (d) of this section for an additional 30 days.

## Statutory Authority

*Authority Note Applicable to Title 25, Ch. I, Subch. N, Pt. 292*

## History

[*73 FR 29354*, 29375, May 20, 2008, as corrected at *73 FR 35579*, June 24, 2008]



End of Document

# 25 CFR 292.20

This document is current through the March 26, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 15602 and 86 FR 16027.

***Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter N — Economic Enterprises > Part 292 — Gaming on Trust Lands Acquired After October 17, 1988 > Subpart C — Secretarial Determination and Governor's Concurrence > Consultation***

## § 292.20 What information must the consultation letter include?

**(a)** The consultation letter required by § 292.19(a) must:

**(1)** Describe or show the location of the proposed gaming establishment;

**(2)** Provide information on the proposed scope of gaming; and

**(3)** Include other information that may be relevant to a specific proposal, such as the size of the proposed gaming establishment, if known.

**(b)** The consultation letter must include a request to the recipients to submit comments, if any, on the following areas within 60 days of receiving the letter:

**(1)** Information regarding environmental impacts on the surrounding community and plans for mitigating adverse impacts;

**(2)** Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

**(3)** Anticipated impact on the economic development, income, and employment of the surrounding community;

**(4)** Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

**(5)** Anticipated costs, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment; and

**(6)** Any other information that may assist the Secretary in determining whether the proposed gaming establishment would or would not be detrimental to the surrounding community.

## Statutory Authority

*Authority Note Applicable to Title 25, Ch. I, Subch. N, Pt. 292*

## History

[*73 FR 29354*, 29375, May 20, 2008, as corrected at *73 FR 35579*, June 24, 2008]

# 25 CFR 292.21

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***Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter N — Economic Enterprises > Part 292 — Gaming on Trust Lands Acquired After October 17, 1988 > Subpart C — Secretarial Determination and Governor's Concurrence > Evaluation and Concurrence***

## § 292.21 How will the Secretary evaluate a proposed gaming establishment?

**(a)** The Secretary will consider all the information submitted under §§ 292.16-292.19 in evaluating whether the proposed gaming establishment is in the best interest of the tribe and its members and whether it would or would not be detrimental to the surrounding community.

**(b)** If the Secretary makes an unfavorable Secretarial Determination, the Secretary will inform the tribe that its application has been disapproved, and set forth the reasons for the disapproval.

**(c)** If the Secretary makes a favorable Secretarial Determination, the Secretary will proceed under § 292.22.

## Statutory Authority

*Authority Note Applicable to Title 25, Ch. I, Subch. N, Pt. 292*

## History

[*73 FR 29354*, 29375, May 20, 2008, as corrected at *73 FR 35579*, June 24, 2008]



End of Document

# 25 CFR 292.22

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***Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter N — Economic Enterprises > Part 292 — Gaming on Trust Lands Acquired After October 17, 1988 > Subpart C — Secretarial Determination and Governor's Concurrence > Evaluation and Concurrence***

## § 292.22 How does the Secretary request the Governor's concurrence?

If the Secretary makes a favorable Secretarial Determination, the Secretary will send to the Governor of the State:

**(a)** A written notification of the Secretarial Determination and Findings of Fact supporting the determination;

**(b)** A copy of the entire application record; and

**(c)** A request for the Governor's concurrence in the Secretarial Determination.

## Statutory Authority

*Authority Note Applicable to Title 25, Ch. I, Subch. N, Pt. 292*

## History

[*73 FR 29354*, 29375, May 20, 2008, as corrected at *73 FR 35579*, June 24, 2008]



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