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.

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

BRIEF OF APPELLEE SCOTTS VALLEY BAND OF POMO INDIANS (FINAL)

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Appellant's Certificate as to Parties, Rulings, and Related Cases filed on January 29, 2021.

B. Rulings Under Review

References to the rulings at issue appear in the Appellant's Certificate as to Parties, Rulings, and Related Cases filed on January 29, 2021. The district court's Order of September 28, 2020, denying Yocha Dehe's motion to intervene is reported at 337 F.R.D. 19 (D.D.C. 2020). The district court's Order denying Yocha Dehe's motion for reconsideration is available at 2020 WL 8182061 (Dec. 4, 2020).

C. Related Cases

The case on review was not previously before this court or any other court. There are no related cases.

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INTRODUCTION

The case below is an action by plaintiff Scotts Valley Band of Pomo Indians ("Scotts Valley"), under the Administrative Procedure Act, 5 U.S.C. § 706, challenging a decision by the United States Department of the Interior ("Department") under the "Restored Lands Exception" of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(B)(iii), as implemented by the Department's regulations, 25 C.F.R. Part 292, with respect to a parcel located in the City of Vallejo, California ("Vallejo parcel").

Yocha Dehe Wintun Nation ("Yocha Dehe") moved to intervene as a defendant, both as of right and by permission, even though Yocha Dehe is not the subject of the Department's decision and would not be impacted by the judicial decision if Scotts Valley prevails. Rather, Yocha Dehe hopes to participate as a party in this lawsuit merely to prevent Scotts Valley from someday becoming a possible business competitor to Yocha Dehe's successful casino resort.

Yocha Dehe lacks standing and, as a result, any interest in the subject matter of this action to warrant either intervention by right or permissive intervention under the Federal Rules of Civil Procedure, Rule 24. Yocha Dehe also fails to satisfy the other criteria for intervention by right under Rule 24(a) and fails to show the court abused its discretion when it denied permission to intervene under Rule 24(b).

STATEMENT OF ISSUES

Yocha Dehe moved to intervene to defend an agency decision that does not represent an imminent threat to Yocha Dehe's competitive economic interest. In these circumstances, did the district court err or abuse its discretion in deciding that:

1. Yocha Dehe does not have constitutional standing to intervene;

2. Yocha Dehe does not have the right under Rule 24(a) to intervene; and

3. Yocha Dehe should not be permitted to intervene under Rule 24(b), but may file a brief as amicus curiae.

STATEMENT REGARDING ADDENDUM

All applicable statutes and regulations are contained in the Addendum to the Brief for Appellant Yocha Dehe.

STATEMENT OF THE CASE

Scotts Valley is a federally recognized Indian tribe located in northern California. Joint Appendix ("JA") 71 ¶ 3. Its ancestors were among the bands of Pomo Indians who signed the Treaty of Camp Lu-pi-yu-ma with the United States in 1851. *Id.* ¶ 8. The treaty ceded to the United States the lands from San Pablo Bay to Clear Lake, including the area now encompassed by the City of Vallejo. *Id.* The United States Senate refused to ratify the treaty, however, and the government

did not establish the reservation the treaty had promised. JA 72 ¶ 9. Scotts Valley was landless until 1911, when the United States acquired a very small and inadequate parcel for the Tribe. *Id.* ¶ 12. Scotts Valley became landless again when its status as a federally recognized Indian tribe was unlawfully terminated under the California Rancheria Act of 1958. *Id.* ¶ 13. Scotts Valley's recognized status was restored in 1991, but to date none of its lands have been restored to it. JA 73 ¶¶ 14, 15.

Five years ago, Scotts Valley initiated the administrative process to reestablish a homeland with the acquisition of the Vallejo parcel, a 128-acre tract of undeveloped grazing land. JA 75 ¶ 27. Scotts Valley identified multiple uses for the parcel, including development as a tribal homeland and a casino resort where Scotts Valley could raise revenue through tribal gaming in accordance with the Indian Gaming Regulatory Act. JA 76 ¶ 29.

Congress enacted the Indian Gaming Regulatory Act in 1988 to regulate tribal gaming and to further a "principal goal of Federal Indian policy[,] … to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. §§ 2701(4), 2702. The Act restricts gaming to Indian lands, defined to mean lands within an Indian reservation or held in trust by the United States, and it generally prohibits gaming on lands taken into trust after enactment of the Act in 1988, unless the lands qualify for an exception stated in the

Act. 25 U.S.C. §§ 2703(4) (defining "Indian lands"); 2710(a)(1), (b)(1), (d)(1) (authorizing tribal gaming "on Indian lands"); 2719 (prohibiting tribal gaming on lands acquired in trust after October 17, 1988, and providing exceptions). One of the exceptions to the prohibition against gaming on lands placed into trust after 1988 applies to "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). Congress enacted these exceptions "to confer a benefit onto tribes that were landless when [the Indian Gaming Regulatory Act] was enacted," as Scotts Valley was and remains. *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003); *see Butte County, Calif. v. Chaudhuri*, 887 F.3d 501, 503 (D.C. Cir. 2018).

In January 2016, Scotts Valley submitted a written request to the Department for an opinion of whether the Vallejo parcel, if acquired by the United States in trust for Scotts Valley, would be eligible for tribal gaming pursuant to the Restored Lands Exception. JA 75 ¶ 27. This type of decision is known as an Indian Lands Opinion.

The Department's regulations for Indian Lands Opinions outline the conditions a tribe must meet to conduct gaming on newly acquired lands under the Restored Lands Exception. 25 C.F.R. § 292.7. First, the tribe must have been restored or acknowledged by Congress, or through the administrative acknowledgement process, or by a Federal court. 25 C.F.R. §§ 292.7-292.11. For

tribes restored by a Federal court, as Scotts Valley was, the only other requirement is to "establish a connection to the newly acquired lands" by meeting certain criteria: "modern connections to the land," "a significant historical connection to the land;" and "a temporal connection between the date of the acquisition of the land and the date of tribe's restoration." 25 C.F.R. § 292.12. Section 292.12 describes how tribes can demonstrate modern and temporal connections, and the regulations state that "significant historical connection" exists where "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. § 292.2.

The Indian Lands Opinion is only one step in a multi-step administrative process to authorize and establish a tribal casino for a restored Indian tribe under the Indian Gaming Regulatory Act. As applied here, the Indian Lands Opinion only establishes whether the parcel where tribal gaming is proposed qualifies for the Restored Land Exception. A positive Indian Lands Opinion is necessary but not sufficient to authorize a restored tribe to conduct tribal gaming under the Restored Lands Exception.

If a restored tribe succeeds in obtaining a favorable Indian Lands Opinion, the restored tribe must also succeed in an application to place the land into trust,

complete a detailed environmental impact statement that establishes required mitigation for the proposed project, obtain federal approval of a gaming compact with the State of California, obtain federal approval of a tribal gaming ordinance, and obtain federal approval of a management contract if the facility is not managed by the tribe itself. These processes are governed by provisions of the Indian Gaming Regulatory Act and other laws and regulations that are distinct from the laws and regulations at issue in this case. The trust application is governed by the Indian Reorganization Act, 25 U.S.C. § 5108 and 25 C.F.R. Part 151. This is a public process, in which so-called interested parties are entitled to participate and comment. 25 C.F.R. § 151.12. The environmental impact statement is governed by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and 43 C.F.R. Part 46. This, too, is a public process that requires the solicitation of comments from the public. 43 C.F.R. § 46.435. Federal approval of gaming compacts with states, tribal gaming ordinances, and any management contract are governed by Indian Gaming Regulatory Act provisions distinct from that at issue here. *See* 25 U.S.C. §§ 2710 (tribal gaming ordinances and compacts with states) and 2711 (management contracts); 25 C.F.R. Part 293 (gaming compacts) and Parts 531, 533 & 535 (management contracts). Scotts Valley has not completed any of these other necessary steps.

In February 2019, the Department issued an Indian Lands Opinion that concluded Scotts Valley had satisfied all but one of the criteria for a Restored Lands Exception under the Indian Gaming Regulatory Act and the implementing regulations. JA 77 ¶¶ 33-37. The Department found that Scotts Valley is a "restored" tribe, and that "modern connection" exists between Scotts Valley and the Vallejo parcel, as well as a "temporal connection" between Scotts Valley's restoration and the proposed trust acquisition. *Id.* ¶¶ 34-36. It also found, however, that despite evidence of Scotts Valley's historical connection to the Vallejo parcel, the evidence was insufficient to demonstrate a "significant historical connection." *Id.* ¶ 37.

Scotts Valley commenced the action below to challenge the Indian Lands Opinion, the Department's interpretation of the Indian Gaming Regulatory Act, and the application of its regulations and internal procedures. JA 78-83 ¶¶ 42-62.

As stated above, the only regulatory criteria at issue in the case is whether Scotts Valley has a significant historical connection to the land. The federal decision makes no determination regarding any historical or modern interest of Yocha Dehe relating to the Vallejo parcel or its vicinity. The Indian Lands Opinion only aims to address the criteria set out in the Indian Gaming Regulatory Act and the regulations, which uniquely concern Scotts Valley as the applicant tribe. The administrative process does not provide for the consideration of other

Indian tribes. Neither the Act nor the Part 292 regulations provide a mechanism for third parties to participate or provide input into an Indian Lands Opinion for the Restored Lands Exception, in contrast to one of the other exceptions, and unlike the other federal approvals that are necessary before gaming can take place on the Vallejo parcel.

Nevertheless, Yocha Dehe involved itself in the administrative process. It "submitted hundreds of pages of evidence and argument" and "commissioned a group of gaming industry experts" to build a case for blocking Scotts Valley from regaining a homeland and establishing a tribal casino to fund its government. Opening Br. at 9.

Yocha Dehe then moved to intervene in the case below to help the Department defend the negative Indian Lands Opinion. After careful consideration, the district court denied the motion. JA 159-173. The court concluded that since the Indian Lands Opinion was "a threshold determination" which was "but one in a series of many that must be decided in [Scotts Valley's] favor before it can succeed" in securing approval to operate a tribal gaming enterprise, "Yocha Dehe cannot show that the harm it fears is imminent," or that the cause of any such harm could be fairly traced to a remand or even the reversal of the Indian Lands Opinion. JA 169-170. Therefore, Yocha Dehe lacked Article III standing to intervene. *Id.* The court also found that Yocha Dehe did not satisfy

the criteria for intervention under Rule 24(a), because disposing of the action without Yocha Dehe's participation as a party would not as a practical matter impair or impede Yocha Dehe's ability to protect its interests. JA 171-172. Yocha Dehe's request for discretionary permission to intervene was also denied, but the court permitted Yocha Dehe to submit an amicus brief in support of the Department's dispositive motion. JA 173. The court then denied Yocha Dehe's motion for reconsideration, JA 209-217, and denied its motion to stay proceedings during the pendency of this appeal, JA 224-231.

Meanwhile, summary judgment briefing is underway in the district court. Scotts Valley filed its dispositive motion at the end of January, the Department's opposition and cross-motion is due to be filed on March 9, and final briefs, including Yocha Dehe's amicus brief, are set to be filed on April 22.

SUMMARY OF ARGUMENT

Yocha Dehe does not have standing to intervene because it does not face an actual or imminent injury-in-fact caused by Scotts Valley's suit. In contrast to the cases Yocha Dehe relies on, the Indian Lands Opinion does not directly regulate Yocha Dehe or its property, and a judgment vacating the Indian Lands Opinion would not result in imminent harm to Yocha Dehe's competitive advantage or revenue stream, because even a positive Indian Lands Opinion is, at best, only the first step in the direction of future competition.

For similar reasons, Yocha Dehe cannot meet the Rule 24(a) criteria for intervention by right. Yocha Dehe's ability to guard its casino revenues against competition would not be impaired as a practical consequence of denying intervention, as the additional regulatory steps ahead of Scotts Valley provide ample opportunity for Yocha Dehe to express its views. In addition, the federal defendants will adequately represent Yocha Dehe's interests.

Finally, the denial of permissive intervention under Rule 24(b), while permitting Yocha Dehe to advance its arguments in an amicus brief, was well within the bounds of the court's broad discretion. There is no basis to depart from the Court's frequent practice of declining to review this discretionary decision.

ARGUMENT

I. Yocha Dehe is not entitled to intervention as a matter of right.

A. Yocha Dehe lacks standing.

"Intervenors become full-blown parties to litigation, so all would-be intervenors must demonstrate Article III standing." *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018). "To do so, the prospective intervenor must establish injury-in-fact to a legally protected interest, causation, and redressability." *Id.* at 1234; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("party invoking federal jurisdiction bears the burden of establishing these elements").

In this context, where Yocha Dehe "seeks to intervene as a defendant in [a] case against a federal agency, … [Yocha Dehe] must establish that it will be injured by the setting aside of the government's action it seeks to defend, that this injury would have been caused by that invalidation, and the injury would be prevented if the government action is upheld." JA 166 (internal quotation marks omitted).

The "injury in fact" must be "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016) (quoting *Lujan* at 560). The concept of "imminence" is "somewhat elastic," but "it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Lujan* at 564 n.2 (internal quotation marks omitted); *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (future injury must be "certainly impending" or there must be "substantial risk" of the harm); *Trump v. New York*, 141 S.Ct. 530, 535-36 (2020) (holding plaintiffs lacked standing where the government defendants' action would not "inexorably" cause the predicted injury).

When a person's "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed"

to show the action or inaction has caused the injury, and "it is ordinarily substantially more difficult" for a person in that position, as Yocha Dehe is, to establish standing. *Lujan* at 562.

Similarly, when a person's standing rests "on predicted future injury, … he bears a 'more rigorous burden' to establish standing." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (quoting *United Transp. Union v. I.C.C.*, 891 F.2d 908, 913 (D.C. Cir. 1989)). The Court need not accept as true "allegations that are really predictions," but may reject them as "overly speculative." *Id.* (internal quotation marks omitted).

Yocha Dehe asserts that its particularized injury stems from the threat of increased competition by a future Scotts Valley casino, which Yocha Dehe predicts would decrease the revenues of Yocha Dehe's Cache Creek Casino and consequentially impact Yocha Dehe's government programs funded with gaming revenues. *See* Opening Br. at 9-10. Yocha Dehe claims the Indian Lands Opinion "benefits Yocha Dehe by preventing" these harms, and that Scotts Valley's lawsuit threatens to eliminate that benefit. *Id.* at 15.

Seeking to protect its economic interest in minimizing competition for its casino by defending the Indian Lands Opinion that stands in the way of a potential competitor, Yocha Dehe claims standing under the "competitor standing doctrine." *See Washington Alliance of Tech. Workers v. U.S. Dept. of Homeland Security*,

892 F.3d 332, 339 (D.C. Cir. 2018). The "basic requirement" of competitor standing is a showing of "actual or imminent increase in competition." *Id.*; *see also El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995) ("The nub of the 'competitive standing' doctrine is that when a challenged agency action authorizes allegedly illegal transactions that will almost surely cause petitioner to lose business, there is no need to wait for injury from specific transactions to claim standing."). Thus, competitor standing "is premised on the petitioner's status as a *direct* and *current* competitor whose bottom line may be adversely affected by challenged government action." *New World Radio v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002). This formulation "distinguishes an existing market participant from a potential – and unduly speculative – participant." *Save Jobs USA v. Dept. of Homeland Security*, 942 F.3d 504, 510 (D.C. Cir. 2019).

Agency action that permits "a new entrant into a fixed market" and thereby harms competitors "as a matter of economic logic" can provide standing, but it is not enough "to claim that a rival's favorable regulatory treatment has created a skewed playing field" or "an unfair competitive atmosphere." *PSSI Global Services, LLC v. FCC*, 983 F.3d 1, 11 (D.C. Cir. 2020) (internal quotation marks omitted). Cognizable injury exists under the competitor standing doctrine when agency action "provides benefits to an existing competitor or expands the number

of entrants in the petitioner's market, not an agency action that is, at most, the first step in the direction of future competition." *New World Radio* at 172.

Under these principles, Yocha Dehe's asserted injury-in-fact is not sufficiently imminent to give it standing to defend the Indian Lands Opinion, nor is Scotts Valley's challenge to the Indian Lands Opinion an adequate cause of the predicted injury. Invalidation of the Indian Lands Opinion "is, at most, the first step in the direction of future competition." *Id.* Although the negative Indian Lands Opinion stands in the way of one pathway to Scotts Valley's entry into the region's casino market, vacating the opinion would not inexorably transform it into a positive opinion, and even a positive Indian Lands Opinion would not permit Scotts Valley to enter the market, but would merely allow the process to continue.[1] "The difference is critical because [Yocha Dehe] *will* have an opportunity to challenge" a future Interior Department decision "that directly affects it as a competitor," *New World Radio* at 172, including specifically a decision to take land into trust for Scotts Valley to conduct gaming, which is the key legal requisite

[1] For this reason, a negative Indian Lands Opinion is considered a final agency action, but a positive Indian Lands Opinion, without more, is not. *See* Gaming on Trust Lands Acquired after October 17, 1988, 73 Fed. Reg. 29354, 29358 (May 20, 2008) (explaining that an Indian Lands Opinion "is not, per se, a final agency action"); Opinion & Order Denying Motion to Complete Administrative Record, JA 175 (noting Department's statement that the negative Indian Lands Opinion is the Department's "final agency action on this matter").

and often the "last significant hurdle" to opening a tribal casino. *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 11 (D.D.C. 2019).

Yocha Dehe rests its argument on *Crossroads Grassroots Policy Strategies v. FEC*, which states that an injury in fact can be sufficient to create standing "where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." 788 F.3d 312, 317 (D.C. Cir. 2015). Within that framework, however, the claim of injury must not be "too attenuated to constitute a sufficient injury." *Id.* This is where Yocha Dehe's standing fails; its predicted economic injury from competition is too tenuously connected to Scotts Valley's suit for judicial review of the Indian Lands Opinion.

In *Crossroads*, consumer advocacy group Public Citizen filed an administrative complaint with the Federal Election Commission against nonprofit corporation Crossroads GPS, alleging that Crossroads was violating requirements of the Federal Election Campaign Act of 1971 applicable to "political committees." *Crossroads* at 315. The Commission dismissed the administrative complaint against Crossroads. *Id.* Public Citizen then sued the Commission in federal district court under the Federal Election Campaign Act, which authorized the court to reverse the Commission's dismissal if it was contrary to law. *Id.* Crossroads moved to intervene. *Id.* On appeal from the denial of that motion, the Court emphasized that "the agency action at issue involved potential direct

regulation of Crossroads, i.e., a determination of whether Crossroads was a political committee required to register with the FEC. … Crossroads thus has a significant and direct interest in the favorable action shielding it from further litigation and liability." *Id.* at 318. *Crossroads* collapsed the three standing elements into one because the intervenor's injury was so clearly and directly connected to the agency action. *Crossroads* at 316. As noted above, however, when "*someone else*" is the object of the challenged agency action, closer scrutiny is required. *Lujan* at 562.

Here, the Indian Lands Opinion does not directly regulate Yocha Dehe, or hold that Yocha Dehe is not subject to regulation, or directly address Yocha Dehe at all. Any benefit flowing to Yocha Dehe's economic, governmental, or cultural interests from the Indian Lands Opinion is merely an externality of the administrative process. Such interests play no part in shaping the Opinion and, significantly, neither judicial review, nor a remand to the Department, nor even a positive Opinion would directly or imminently endanger those interests. In reaching a conclusion on whether Scotts Valley has demonstrated the required connections to the land under the restored lands exception, neither the Department nor this Court has occasion to address the economic consequences of a proposed gaming facility that may be built on that land. Moreover, any effect on Yocha Dehe's interests is incidental to the determination of the historical connections that

Scotts Valley may have to the subject land, as Scotts Valley's historical connection to the property is not exclusive of any other Indian tribe's historical or cultural connection to it. Therefore, the Indian Lands Opinion did not, by determining Scotts Valley had not established a sufficient historical connection, confirm that Yocha Dehe possesses a significant connection. Nor would an Opinion in Scotts Valley's favor imply any denigration of Yocha Dehe's historical connection to the property.

Furthermore, in *Crossroads*, the agency's action shielded the intervenor from the threat of *immediate* harm, "similar to a favorable civil judgment," *Crossroads* at 317, and therefore "[l]osing the favorable order would be a significant injury in fact," *id.* at 318. If successful, the lawsuit would put Crossroads right back in the crosshairs. *Id.* at 317. Here, though, the Indian Lands Opinion insulated Yocha Dehe from facing possible, contingent harm down the road. Losing the favorable Opinion would simply return Yocha Dehe to the status quo – facing speculative competitive harms from someone who must clear several more hurdles before it is allowed to compete, but not facing imminent injury. More than there being "no guarantee" of harm, Yocha Dehe would still be several steps removed from any crosshairs.

Thus, even if Scotts Valley were successful in the litigation before the district court and the matter was remanded to the Department for further

proceedings, those events are not at all certain to result in an injury (let alone even an unfavorable outcome) to Yocha Dehe. As an initial matter, it is purely speculative that reconsideration of the evidence by the Department would necessarily result in a favorable opinion for Scotts Valley. Indeed, the Department may reconsider the evidence in accordance with applicable directions from the district court and reach the same conclusion regarding Scotts Valley's historical connection to the Vallejo property. Moreover, Yocha Dehe would not be precluded from providing input at the agency review level or from advocating for its own conclusions, just as it did leading up to the Department's first decision.

In addition, even a positive Indian Lands Opinion would not result in federal approval of a gaming facility for Scotts Valley. Before any competitive injury could be felt, Scotts Valley would have to overcome numerous administrative hurdles before any gaming project is ultimately approved. If Scotts Valley succeeds in obtaining a favorable Indian Lands Opinion, it must also succeed in an application for the United States to acquire the land in trust status, complete a detailed Environmental Impact Statement that establishes required mitigation for the proposed project, negotiate and obtain federal approval of a gaming compact with the State of California, obtain federal approval of a tribal gaming ordinance, and obtain federal approval of a management contract if the facility is not managed by the Tribe itself. These actions are based on considerations distinct from those in

an Indian Lands Opinion. Along this path, the Department and Scotts Valley are required to meet many requirements contained in the Indian Reorganization Act and its regulations; the Indian Gaming Regulatory Act and its regulations; the National Environmental Policy Act; the National Historic Preservation Act, 16 U.S.C. §§ 470 et seq.; and Department of Justice title standards, 25 C.F.R. § 151.13. These approvals provide opportunities for an interested party to participate, comment, object and even challenge in the courts. Scotts Valley has not completed any of these other necessary steps.[2]

Finally, completion would not necessarily bring about a threat to Yocha Dehe's economic interests. It is entirely conjectural that a casino of yet-unknown size and scope, operating in Vallejo at some distant date in the future, would even be competitive, let alone harmful to Yocha Dehe's powerhouse Cache Creek

[2] Yocha Dehe points out that Scotts Valley has already submitted what the district court called "a place holder application" for the government to take the land into trust. JA 216; *see* Opening Br. at 18. Scotts Valley submitted the application in August 2016 (JA 76 ¶ 29), eight months after submitting its request for an Indian Lands Opinion (JA 75 ¶ 27) to ensure the application was made "within 25 years after the tribe was restored to Federal recognition," as required by the regulations. 25 C.F.R. § 292.12(c)(2); *see* JA 52 n.19. As the district court explained, the remoteness of Yocha Dehe's predicted injury does not turn on the notion that Scotts Valley has "done no work" to conceptualize the project, or that it has "not taken any steps to initiate the lengthy approval process." JA 217. What is significant is that the separate decision to approve the fee to trust application, not the Indian Lands Opinion at issue here, is the agency action that may ultimately impact Yocha Dehe's interests.

Casino Resort located an hour away. The inherent speculation undercuts any notion of "economic logic" underpinning the predicted financial injury. *PSSI Global Servs.*, 983 F.3d at 11; *see Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) (holding that numerous contingencies and uncertainties made financial impact of future casino "too speculative to support intervention").

Looking for the line dividing "imminent" from "attenuated," *Crossroads* examined precedent which shows that under the circumstances here, Yocha Dehe is on the wrong side of the line. Yocha Dehe's case is less compelling than *Fund for Animals v. Norton*, in which the "sheep that Mongolia regards as its national property and natural resource" were "plainly" the "subject" of the challenged agency action. 322 F.3d 728, 734 (D.C. Cir. 2003). The Fish and Wildlife Service "listed the argali [sheep] as endangered throughout most of its range," but "listed the species as threatened rather than endangered, however, in Mongolia, Kyrgyzstan, and Tajikistan." *Id.* at 730. The agency issued "hundreds of permits for sport hunters to import killed argali (or parts thereof) into the United States [from these countries] as 'trophies.'" *Id.* Conservationists sued the agency, seeking stricter protections for the sheep, and Mongolia's Natural Resources Department moved to intervene on the federal agency's side to defend the listing and permits. Holding that Mongolia had standing to intervene, the Court observed

that the agency action "directly regulate[d] the disposition of [Mongolia's] property." *Id.* at 734. Further, the Court noted that "in some respects Mongolia is itself 'an object of the action … at issue,'" since the complaint alleged that Mongolia's conservation program did not satisfy the Endangered Species Act's criteria for the Fish and Wildlife Service to issue import permits. *Id.* at 734 n.5 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)). Here, in contrast, neither Yocha Dehe nor its property are the subject of the Indian Lands Opinion, nor directly implicated in the district court's review of the Opinion.

Yocha Dehe's case for standing is also less compelling than *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998). There, the Chemical Manufacturers Association and other groups moved to intervene on appeal in support of the Environmental Protection Agency. *Id.* at 953. All parties agreed that the association had standing to intervene. *Id.* at 954. The Court noted that members of the association were "directly subject to the challenged Rule," and that they benefited from features of the Rule challenged on appeal. *Id.* Not so here, as the Indian Lands Opinion does not govern Yocha Dehe, and does not authorize or "require [Yocha Dehe] 'to do anything or to refrain from doing anything.'" *Trump*, 141 S.Ct. at 536 (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

The instant case is not *Clinton v. City of New York*, 524 U.S. 417 (1998), also discussed in *Crossroads*. In *Clinton*, the president used a line-item veto to cancel legislation that would have granted tax benefits to New York State. New York "suffered an immediate, concrete injury the moment" he did so, even though the actual tax liability depended on further administrative action. *Clinton* at 430-31. The Court likened New York to a winning defendant whose verdict was set aside on appeal, and who now must face a second trial. *Id.* Yocha Dehe casts the district court in the Clinton role, ready to snatch away Yocha Dehe's victory. The difference, however, is that if the court vacates the Indian Lands Opinion, Yocha Dehe will not immediately face comparably imminent injury, as no harm will come unless and until multiple intervening decisions are made.

Instead, Yocha Dehe's circumstances are more akin to *Deutsche Bank National Trust Co. v. FDIC*, 717 F.3d 189 (D.C. Cir. 2013), which *Crossroads* held out as "too attenuated." *Crossroads* at 317. In *Deutsche Bank*, the proposed intervenors failed to show their "economic interest faces an imminent, threatened invasion – i.e., one that is not conjectural or speculative." *Deutsche Bank* at 193. "[A]t least two major contingencies" would need to occur before the lawsuit could result in harm to the intervenors – first, the district court's "threshold legal interpretation" of a contract, and next, the plaintiff prevailing on the merits of its breach of contract claim against one of the defendants. *Id.* "[I]t was only after the

contract interpretation was settled that [the intervenors'] interests would crystallize." *Id.* They "might well have standing under Article III at *that* point," the Court stated, "but they do not have it *now*." *Id.* at 194. "[W]here a threshold legal interpretation must come out a specific way before a party's interests are even at risk, it seems unlikely that the prospect of harm is actual or imminent." *Id.* at 193.

Similarly, Yocha Dehe's interest will "crystallize" only after the property is found to be eligible for Scotts Valley to conduct gaming. At that point, the Department would take up Scotts Valley's application to take the land into trust for gaming purposes. That decision-making process (unlike the Indian Lands Opinion process) is designed to account for the impacts on affected persons.

Notably, neither of the two tribal gaming cases Yocha Dehe cites involved a threshold decision like the Indian Lands Opinion. *See Forest County Potawatomi Community v. United States*, 317 F.R.D. 6, 8 (D.D.C. 2016) (challenge to federal decision disapproving amendment to tribal-state gaming compact); *Sault Ste. Marie*, 331 F.R.D. at 6 (challenge to federal decisions disapproving requests to take land into trust for gaming).

As the district court found, Yocha Dehe's showing on the causation element is weak "[f]or similar reasons." JA 169. Because "a series of steps with multiple decision makers stand[s] between Scotts Valley and the proposed development,

[Yocha Dehe] cannot demonstrate that it is substantially probable that the remand, or even the reversal of the preliminary DOI decision at issue[,] will result in lost revenue to Yocha Dehe." JA 170 (citing *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 176 (D.C. Cir. 2012) and *Ctr. for Biological Diversity v. DOI*, 563 F.3d 466, 478 (D.C. Cir. 2009)).

In addition, although a negative Indian Lands Opinion closes one avenue under the Indian Gaming Regulatory Act for Scotts Valley to proceed with a gaming and homeland project at the Vallejo site – the Restored Lands Exception, 25 U.S.C. § 2719(b)(1)(B)(iii) – other statutory exceptions remain available for Scotts Valley to develop a gaming facility at the same site, including the so-called "two-part determination" under § 2719(b)(1)(A), as the Opinion itself notes. JA 68. The harm Yocha Dehe cites here – economic harm due to new gaming competition – would be equally possible if Scotts Valley were able to open a casino under that exception. Indeed, Yocha Dehe would face the same harm if any competitor opened in Yocha Dehe's market. The Indian Lands Opinion does not shield Yocha Dehe from the financial impact of competition from Scotts Valley or anyone else; with or without it, Yocha Dehe remains exposed to such changes. Therefore, the potential abrogation of the Indian Lands Opinion might not even constitute a "but for" cause of Yocha Dehe's hypothetical harm. *See United Transp. Union*, 891 F.2d at 915.

Ultimately, Yocha Dehe is incorrect to claim that "[w]hat counts is that the Opinion prevents Scotts Valley from proceeding with its proposal." Opening Br. at 18-19. What really counts is whether vacating the Opinion would cause imminent harm to Yocha Dehe, and Scotts Valley merely "proceeding with its proposal" would not do so. Because they depend on a "chain of contingencies," Yocha Dehe's potential future harms, which are not "actual," cannot be characterized as "imminent" or "certainly impending." *Clapper*, 568 U.S. at 410. Nor has Yocha Dehe demonstrated a sufficient causal link making its potential injury fairly traceable to the disposition of this lawsuit, resting as it does "on speculation about the decisions of independent actors." *Id.* at 414. Accordingly, Yocha Dehe has not shown it has Article III standing to intervene.

B. Yocha Dehe does not satisfy the requirements of Rule 24(a).

Under Federal Rule of Civil Procedure 24(a), intervention as a matter of right is granted only when the movant "claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

The first two factors overlap with the standing inquiry. Besides the remote and tenuous connection between Yocha Dehe's asserted economic interest in being

free from competition and the possibility that the Indian Lands Opinion will be remanded, this is not a legally protected interest related to the property or transaction at issue in the litigation. An Indian tribe's claim that its "casino operations will become less profitable … does not resemble any [interest] that the law normally protects." *Sokaogon Chippewa*, 214 F.3d at 947. The Indian Gaming Regulatory Act was not intended to entrench incumbent gaming interests and shield them from competition. To the contrary, one of the Act's primary purposes is "to allow newly acknowledged or restored tribes to engage in gaming on par with other tribes," to serve the overall objective of using tribal gaming "'as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'" *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 468 (D.C. Cir. 2007) (quoting 25 U.S.C. § 2702(1)). The Restored Lands Exception, along with the other exceptions to the general prohibition against gaming on newly acquired lands, was intended to "re-establish the … economic vitality" of landless tribes like Scotts Valley, by "ensuring that tribes lacking reservations when [the Indian Gaming Regulatory Act] was enacted are not disadvantaged relative to more established ones." *City of Roseville*, 348 F.3d at 1030-31.

Further, the denial of intervention will not as a practical matter impair Yocha Dehe's interests, as it will have ample opportunity to express its concerns on

remand and during the Department's separate land-into-trust deliberations, which include the agency's consideration of a proposed project's impacts. Yocha Dehe notes that it previously "provided extensive comments to Interior" on Scotts Valley's Indian Lands Opinion request, Opening Br. at 9, and if appropriate, it can do so again on remand. Further, should Scotts Valley prevail in court and on remand to the Department, a favorable decision on gaming eligibility is not a final agency action until the Department issues a Record of Decision. The Record of Decision is issued after the Department has analyzed the proposed acquisition in accordance with the Indian Gaming Regulatory Act, the Indian Reorganization Act, and a final environmental impact statement prepared pursuant to the National Environmental Policy Act. The process includes numerous opportunities for an affected Indian tribe to comment on the proposed project, including comments on impacts related to the gaming activity. *See, e.g.*, 25 C.F.R. § 151.12 (providing for participation by "interested parties"); 40 C.F.R. §§ 1501.7, 1503.3; 43 C.F.R. § 46.435.[3] In the Record of Decision, the Department undertakes a new analysis of

[3] Records of Decision specifically address the effect of the proposed tribal casino on existing tribal casinos. *See, e.g.*, Record of Decision re: Secretarial Determination and Trust Acquisition for Tejon Indian Tribe (Jan. 2021) at 19 & Attachment 2 at 15 (addressing substitution effect on other casinos and responding to public comment regarding competitive effect on tribal casino in the regional gaming market area); Record of Decision re: Secretarial Determination and Trust Acquisition for Tule River Indian Tribe (Sept. 2019) at 16 (addressing "substitution or competitive effects on competing gaming venues, including tribal

the parcel's eligibility for gaming under the Indian Gaming Regulatory Act exceptions, addressing the same statutory and Part 292 criteria covered in the initial Indian Lands Opinion and responding to comments from interested parties and the public. *See, e.g.*, *Stand Up for California! v. U.S. Dept. of Interior*, 410 F.Supp.3d 39, 51-53 (D.D.C. 2019), appeal filed, No. 19-5285 (D.C. Cir. Oct. 25, 2019) (discussing Record of Decision's "full analysis of Wilton [Rancheria]'s qualification under the 'restored lands' exception"); *Stand Up for California v. U.S. Dept. of Interior*, 204 F.Supp.3d 212, 257-61 (D.D.C. 2016); *aff'd*, 879 F.3d 1177 (D.C. Cir. 2018) (discussing Record of Decision's analysis and determination that North Fork Tribe's parcel qualified for gaming under Indian Gaming Regulatory Act exception).

Yocha Dehe's reliance on *Fund for Animals* and *Crossroads* is again misplaced because the outcome of the case below will not have similar "practical consequences" to Yocha Dehe. *Fund for Animals* at 735 (quoting *Nat'l Res. Dev. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977)). In *Crossroads*, the change in the "status quo" would have immediately put the intervenor directly in jeopardy, likely forcing it to defend itself against a renewed administrative complaint, now with the added weight of the district court's ruling against it. *Crossroads* at 320.

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casinos"). Both Records of Decision are available at https://www.bia.gov/as-ia/oig/departmental-gaming-decisions.

In *Fund for Animals*, Mongolia immediately stood to lose "substantial," "irreparable" revenues if the agency's rule was vacated. *Fund for Animals* at 735. Here, as a practical matter, Yocha Dehe's casino will draw the same revenues and face no greater competition, no matter how the court disposes of the action. Moreover, this is not Yocha Dehe's last stand; should it need them, it will have multiple opportunities, unimpaired by any decision to be made in this case, to protect its interest.

Finally, the federal defendants will more than adequately protect any interest of Yocha Dehe's because their interests in upholding the Indian Lands Opinion are aligned. Where, as here, an existing party and proposed intervenor share "the same ultimate objective," "a presumption of adequate representation exists," which is rebuttable "by demonstrating special circumstances that make the representation inadequate, such as 'adversity of interest, collusion, or nonfeasance.'" *Cobell v. Jewell*, No. 96-01285 (TFH), 2016 WL 10704595 (D.D.C. Mar. 30, 2016); *see Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979).

Yocha Dehe asserts that its "focus" is "more specific" than the Department's, Opening Br. at 23, but it fails to identify any specific divergence between its view of "'what the law requires'" and the Department's view. *Id.* (quoting *Costle*, 561 F.2d at 910). Yocha Dehe has not specified any aspect of the

Indian Lands Opinion about which it and the Department disagree, and there is nothing about the specific interests Yocha Dehe seeks to protect that suggests it would defend the Indian Lands Opinion any differently than the defendants will. Further, unlike cases such as *Fund for Animals*, the outcome of this case will impose no direct consequences upon Yocha Dehe, so that its relevant interest is no different from the "general public interest" represented by the government. *Fund for Animals* at 737. Indeed, the government has gone out of its way to consider Yocha Dehe's input on Scott's Valley's request, even though the Restored Lands Exception regulations do not provide for public notice and participation.[4] Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354, 29364 (May 20, 2008) (rejecting recommendation to add "a mechanism to give notice of any action to affected local communities" and to provide that affected persons have standing to intervene); Opening Br. at 24 (conceding that the Department considered Yocha Dehe's comments). Yocha Dehe will be adequately represented by the Department's defense of its decision against Scotts Valley's APA challenge, particularly in conjunction with Yocha Dehe's participation as amicus curiae. *See*

[4] In contrast, the regulations governing a different exception contain detailed public consultation provisions. 25 C.F.R. §§ 292.19, 292.20. Under the Indian Gaming Regulatory Act, that exception accounts for effects on "the surrounding community," 25 U.S.C. § 2719(b)(1)(A), while the Restored Lands Exception does not, *id.* § 2719(b)(1)(B)(iii).

Building and Const. Trades Dept., AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

II. The discretionary denial of permission to intervene should not be disturbed.

A district court has considerable discretion to deny permissive intervention under Rule 24(b). Permission to intervene may be denied "even if the movant established an independent jurisdictional basis, submitted a timely motion, and advanced a claim or defense that shares a common question with the main action." *EEOC v. Nat'l Children's Center, Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998). In other words, the district court may deny intervention even if Yocha Dehe satisfied all the necessary criteria. Furthermore, "[t]he denial of a Rule 24(b) motion is not usually appealable in itself." *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013). As a result, "[r]eversal of a decision denying permissive intervention is extremely rare, bordering on nonexistent." *South Dakota ex rel. Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 787-88 (8th Cir. 2003); *Nat'l Children's Center*, 146 F.3d at 1048 (such reversal "is a very rare bird indeed"); *see* 7C Wright, Miller & Kane, Fed. Practice & Procedure (3d ed.) § 1923 ("it would seem sounder to dismiss out of hand appeals from a denial of permissive intervention").

The court denied permissive intervention under Rule 24(b) in part because of the court's "serious doubts" about Yocha Dehe's standing. JA 173. Because the

court was correct that Yocha Dehe lacks standing, *a fortiori* it did not abuse its discretion to deny permissive intervention. This Court has on several occasions "declined to review the denial of a Rule 24(b) motion once we determined the potential intervenor lacked standing." *Defenders of Wildlife*, 714 F.3d at 1327; *see In re Vitamins*, 215 F.3d 26, 32 (D.C. Cir. 2000) (declining to review whether the trial court abused its discretion by denying intervention but granting *amicus* status). Given Yocha Dehe's lack of standing, and in light of the "wide latitude afforded to district courts under Rule 24(b)" in any event, the Court should decline to reach the issue of permissive intervention here. *In re Endangered Species Act*, 704 F.3d 972, 980 (D.C. Cir. 2013).

Yocha Dehe stresses that it "has a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B), and that it intends "to focus its participation on Scotts Valley's Third and Fourth claims for relief[.]" Opening Br. at 27 (internal quotation marks omitted). The third claim for relief concerns the Department's failure, in several ways, to adhere to its regulations when issuing the Indian Lands Opinion – (i) it required Scotts Valley to demonstrate a historical connection to the parcel itself, rather than a connection to "the vicinity of the land," 25 C.F.R. § 292.2; (ii) it imposed a "continuous" historical connection requirement, contrary to the regulations; (iii) it relied on the distance between the parcel and Scotts Valley's aboriginal village, contrary to the

regulations; and (iv) it failed to involve the Office of Indian Gaming in making the decision, as required by the regulations and administrative practice. JA 80-81 ¶¶ 51-55. The fourth claim concerns the Department's failure to consider relevant evidence – (i) it failed to acknowledge that Scotts Valley families and a majority of Scotts Valley children resided or were present in the vicinity of the parcel; (ii) it failed to acknowledge that the Tribe is currently landless; and (iii) it failed to consider the evidence as a whole, instead examining each item separately. JA 81-82 ¶¶ 56-59.

Contrary to Yocha Dehe's characterization, neither of these claims "relate to Yocha Dehe's Patwin ancestors" or its "aboriginal territor[y]." Opening Br. at 27. It is not clear, and Yocha Dehe has never explained, how its invocation of Yocha Dehe history constitutes "'defenses to the precise claims brought by [Scotts Valley].'" *Id.* (quoting *Sierra Club v. Van Antwerp*, 523 F.Supp.2d 5, 10 (D.D.C. 2007). The district court did not abuse its discretion when it held Yoche Dehe had not established that the issues on which it intends to focus involve questions of law or fact in common with Scotts Valley's claims or the Department's defense.

Rule 24(b) also provides that when "exercising its discretion" to permit intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the parties' rights." Fed. R. Civ. P. 24(b)(3). Permitting Yocha Dehe to join the case with the full rights of a party will diminish

the original parties' control over their own lawsuit. It could prevent any settlement between Scotts Valley and the federal defendants, or prevent those parties from simply accepting the district court's judgment by allowing it to become final without appeal. Under the circumstances, Yocha Dehe's participation as amicus is more appropriate than intervention with full-party status.

CONCLUSION

For the foregoing reasons, Scotts Valley respectfully asks the Court to affirm the district court's decision denying Yocha Dehe's motion to intervene.

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/s/ Tim Hennessy

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I hereby certify that on April 5, 2021, I caused service of the foregoing Brief 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/ Tim Hennessy