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 OPENING BRIEF

Matthew G. Adams
Samantha R. Caravello
KAPLAN KIRSCH & ROCKWELL LLP
595 Pacific Ave., 4th Floor
San Francisco, CA 94133
madams@kaplankirsch.com
scaravello@kaplankirsch.com
(628) 209-4151

Paula M. Yost
Attorney General
YOCHA DEHE WINTUN NATION
18960 Pukhum Road, P.O. Box 18
Brooks, CA 95606
pyost@yochadehe-nsn.gov
(530) 796-2016

Attorneys for Appellant
Yocha Dehe Wintun Nation

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appellant is the Yocha Dehe Wintun Nation, Movant-Intervenor-Defendant before the district court. The Appellees are: Scotts Valley Band of Pomo Indians, Plaintiff before the district court; and the United States Department of the Interior, David L. Bernhardt in his official capacity as Secretary of the Department of the Interior, Tara Sweeney in her official capacity as Assistant Secretary for Indian Affairs, and John Tahsuda in his official capacity as Principal Deputy to the Assistant Secretary for Indian Affairs, Defendants before the district court. No parties participated as *amicus curiae* before the district court.

B. Rulings Under Review

The rulings under review are: the Memorandum Opinion and Order issued by Judge Amy Berman Jackson on September 28, 2020 (Docket No. 33, Joint Appendix 159-73) denying Yocha Dehe's motion to intervene as a defendant in this action; and the Memorandum Opinion and Order issued by Judge Amy Berman Jackson on December 4, 2020 (Docket No. 40, Joint Appendix 209-17) denying Yocha Dehe's motion for reconsideration of the denial of intervention. Neither of these rulings has been published in the Federal Supplement. The September 28, 2020 Memorandum Opinion and Order is available on Lexis at 2020 U.S. Dist. LEXIS 177660.

C. Related Cases

This case has not previously been before this Court or any other court. Yocha Dehe is not aware of any related cases pending before this Court or any other court.

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Interior	United States Department of the Interior
JA	Joint Deferred Appendix
Opinion	February 2019 Indian Lands Opinion

INTRODUCTION

This case calls for a straightforward application of clear Circuit precedent. The United States Department of the Interior ("Interior") has issued an Indian Lands Opinion (the "Opinion") that significantly and indisputably favors the Yocha Dehe Wintun Nation ("Yocha Dehe" or "Tribe"). The Scotts Valley Band of Pomo Indians ("Scotts Valley") filed suit in the district court, seeking to invalidate the Opinion and enjoin Interior from any future application of the regulatory requirements on which the Opinion is based. Thus, if Scotts Valley is successful Yocha Dehe will immediately lose both the benefits of the Opinion *and* the ability to protect its interests during future administrative proceedings. Yocha Dehe therefore applied to intervene as a defendant.

This Court has articulated a clear test for determining whether an applicant has standing to intervene in defense of federal agency action: An applicant has standing if it "benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the [applicant's] benefit." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015).

This Court has also articulated a clear test for determining whether, pursuant to Federal Rule of Civil Procedure 24(a)(2)'s requirements for intervention as of right, an applicant for intervention is "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest": An applicant's ability to protect its interest is impaired if an adverse judgment would "make the task of reestablishing the status quo" – that is, regaining the benefits of the challenged agency action – "more difficult and burdensome." *Crossroads*, 788 F.3d at 320.

This Court has further directed that Federal Rule of Civil Procedure 24(b)'s requirement to specify a claim or defense in common with the main action "is not interpreted strictly so as to preclude permissive intervention." *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967).

The district court did not apply any of these clear standards. Ignoring them, it erroneously concluded Yocha Dehe lacks standing, does not satisfy Rule 24(a)(2)'s requirements for intervention as of right, and should not be granted permissive intervention.

Straightforward application of this Court's precedent compels reversal. Yocha Dehe benefits from the Opinion, the Opinion has been challenged, and an adverse result would eliminate the Tribe's benefits; therefore, Yocha Dehe has standing. Scotts Valley has asked the district court to invalidate the Opinion and

enjoin future application of the regulation on which the Opinion is based, making it more difficult and burdensome (if not downright impossible) for Yocha Dehe to regain the Opinion's benefits in case of an adverse decision; therefore, Yocha Dehe's ability to protect its interests is threatened. And Yocha Dehe's intervention papers explicitly identified the claims against which the Tribe intends to defend; this was more than enough to satisfy Federal Rule of Civil Procedure 24(b).

JURISDICTIONAL STATEMENT

Plaintiff-Appellee Scotts Valley commenced this lawsuit under 5 U.S.C. §§ 701-706; 28 U.S.C. §§ 1331, 1362; and 28 U.S.C. §§ 2201-2202. Joint Deferred Appendix ("JA") 70, ¶ 1.

Appellant Yocha Dehe moved to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) and by permission under Federal Rule of Civil Procedure 24(b). JA 85-87.

The district court denied Yocha Dehe's intervention motion on September 28, 2020. JA 159-73. The Tribe's motion for reconsideration was denied on December 4, 2020. JA 209-17. Yocha Dehe timely noticed this appeal on January 12, 2021. JA 232-34.

Denial of Yocha Dehe's motion to intervene as of right was a final order subject to immediate review in this Court. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003). This Court may also exercise its pendent

jurisdiction to reach the district court's denial of permissive intervention, which presents issues that are "inextricably intertwined" with the Tribe's entitlement to intervene as of right. *See Safari Club Int'l v. Salazar*, 704 F.3d 972, 979 (D.C. Cir. 2013).

STATEMENT OF THE ISSUES

1. Does Yocha Dehe have standing to intervene in defense of the Opinion, where (a) the Tribe benefits from the Opinion; (b) the Opinion has been challenged in this litigation; and (c) an adverse decision would invalidate the Opinion, remove the Tribe's benefits, and substantially alter the regulatory and evidentiary requirements applicable to administrative proceedings conducted on remand?

2. Is Yocha Dehe entitled to intervene as of right in this litigation, where (a) the Tribe has standing; (b) the Tribe satisfies the requirements of Federal Rule of Civil Procedure 24(a)(2); and (c) the district court erred in holding otherwise?

3. Was it reversible error for the district court to deny Yocha Dehe permissive intervention, where (a) the Tribe has standing; and (b) the district court based its denial on a clear factual error?

STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), relevant statutes and regulations are submitted in an addendum attached to this brief.

STATEMENT OF THE CASE

1. Statutory and Regulatory Background

The Indian Gaming Regulatory Act comprehensively governs casino gaming activities on "Indian lands." 25 U.S.C. § 2702(3). As a general rule, it prohibits gaming on any such lands acquired by the United States in trust for an Indian tribe after October 17, 1988, the date of the statute's enactment. *Id.* § 2719(a).

The Act also sets out several specific exceptions to the general rule against gaming on newly-acquired trust lands. *See id.* § 2719(b). Scotts Valley only claims to meet one – the "restored lands exception," which allows gaming on newly-acquired lands that are taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii).

Interior has promulgated regulations thoroughly interpreting the restored lands exception. *See* 25 C.F.R. §§ 292.7-292.12. These regulatory requirements 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 v. Jewell*, 776 F.3d 706, 711-12 (9th Cir. 2015). In this way, the regulations shape the overall landscape of the tribal gaming market.

Among other things, Interior's regulations require restored tribes to demonstrate a "significant historical connection" to the newly-acquired land on which they propose to conduct gaming activities. 25 C.F.R. § 292.12(b). The

"significant historical connection" requirement can be satisfied if the newly-acquired land is located within the boundaries of the restored tribe's last reservation or if there is historical documentation of the restored tribe's villages, burial grounds, occupancy, or subsistence use in the vicinity. *Id.* § 292.2.

2. The Yocha Dehe Wintun Nation

Yocha Dehe is a federally recognized Indian tribe comprised of the descendants of Patwin people native to the northeastern San Francisco Bay Area and the lower Sacramento River Valley, an area of California that includes the adjacent counties of Solano and Yolo. JA 105, ¶ 4. Consistent with the Indian Gaming Regulatory Act's strict requirements, Yocha Dehe operates the Cache Creek Casino Resort on its longtime (pre-1988) trust lands in a rural area of Yolo County. *Id.* Cache Creek primarily draws its customers from the San Francisco Bay Area, via Interstate Highway 80. *See* JA 104-05, ¶¶ 2, 4. Revenues generated by Cache Creek are used to fund the Tribe's government, including education, employment, housing, and health care programs and services for the Tribe's citizens. *Id.*; *see also* JA 155-56, ¶ 5.

One of the programs funded with revenues from Cache Creek is Yocha Dehe's Cultural Resources Department, which works to protect Patwin sacred sites throughout Yocha Dehe's ancestral territory – a matter of fundamental importance to the Tribe and its citizens. JA 106, ¶ 5. Much of the Cultural Resources

Department's work occurs in Solano County, which is named for a Patwin leader and contains numerous historic Patwin village and burial sites. *Id.* Not surprisingly, the California Native American Heritage Commission, a state agency, has identified Yocha Dehe and its sister Patwin tribes as the "most likely descendants" of Native American remains found in Solano County. *Id.* Indeed, Patwin cultural resources are present on the very property at issue in this litigation. JA 104, ¶ 2.

3. The Scotts Valley Band of Pomo Indians

In contrast, Scotts Valley consists of the descendants of Pomo Indians whose ancestral territory is a rural area west of Clear Lake, roughly 90 miles to the northwest of Solano County. JA 106-07, ¶ 7. Representatives of the United States traveled to Clear Lake in 1851 to negotiate a treaty with the Pomo. *Id.* Approximately 50 years later, the United States created a reservation for the Pomo near Clear Lake. *Id.* And Scotts Valley's primary tribal office is located in the Clear Lake town of Lakeport. *Id.* This Pomo homeland was separated from the Patwin's Solano County territory by terrain described by federal agents as "very mountainous" and "barely passable," as well as at least two other tribes (the Coast Miwok and Wappo) whose languages the Pomo did not speak and with whom the Pomo sometimes conflicted. JA 107, ¶ 8. There is no known evidence of Pomo

villages, burial grounds, or subsistence use anywhere in Solano County or the San Francisco Bay Area. *Id.*

4. Scotts Valley's Efforts to Develop a Bay Area Casino

Despite the absence of any meaningful historical connection to the San Francisco Bay Area, Scotts Valley has tried repeatedly to develop a casino there. In 2005, Scotts Valley asked Interior to authorize a casino project in Richmond, California, under the restored lands exception. JA 107, ¶ 9. Interior's regulations required Scotts Valley to demonstrate a significant historical connection to the proposed Richmond site. *Id.* In an effort to meet that requirement, Scotts Valley submitted a voluminous record to the federal decision-makers. *Id.* But Interior decided in 2012 that none of Scotts Valley's evidence demonstrated a significant historical connection to Richmond. *Id.* Scotts Valley did not appeal that decision. *Id.*

In 2016, Scotts Valley renewed its efforts to develop a San Francisco Bay Area casino, this time focusing on a property adjacent to Interstate Highway 80 in the Solano County city of Vallejo – approximately 15 miles from Richmond. JA 108, ¶ 10. Specifically, Scotts Valley requested that Interior (i) issue an Indian Lands Opinion declaring the Vallejo property eligible for gaming under the restored lands exception (JA 6-9); and (ii) take the site into federal trust for the development of Scotts Valley's proposed casino (JA 10-49).

To obtain an Indian Lands Opinion declaring the Vallejo property eligible for gaming under the restored lands exception, Scotts Valley was (once again) required to meet Interior's regulatory requirements. *See* 25 C.F.R. §§ 292.7-292.12. Interior conducted a lengthy administrative process addressing those requirements. *See* JA 50-51. Although the agency originally failed to notify Yocha Dehe of the administrative proceedings, the Tribe learned of Scotts Valley's application from another source and provided extensive comments to Interior. JA 106-07, ¶¶ 6-8; JA 154-55, ¶¶ 2-3; JA 50-51. Among other things, Yocha Dehe submitted hundreds of pages of evidence and argument establishing that the Indian Lands Opinion request should be denied because Scotts Valley lacks a significant historical connection to the proposed Vallejo casino site. JA 106-07, ¶¶ 6-8; *see also* JA 54-68 (citing Yocha Dehe submissions).

Yocha Dehe also commissioned a group of gaming industry experts to evaluate the fiscal and economic impacts of Scotts Valley's proposed casino project. JA 108, ¶ 10; JA 155, ¶ 4. The experts concluded Scotts Valley's project will intercept casino patrons who would otherwise visit Yocha Dehe's Cache Creek Casino Resort. JA 108, ¶ 10; JA 155-56, ¶¶ 4-6. More specifically, they calculated that Scotts Valley's proposed casino would decrease Yocha Dehe gaming revenues by 43 percent; impact earnings before interest, taxes, depreciation, and amortization by 57.5 percent; result in 650 to 700 job losses at

Cache Creek Casino Resort; and require steep cuts to Tribal programs and services. JA 104-08, ¶¶ 2, 10; JA 155-56, ¶¶ 4-5. These figures, calculations, and conclusions are not disputed by any party.

In February 2019, Interior issued the Opinion denying Scotts Valley's request to declare the Vallejo site eligible for gaming under the restored lands exception. Citing material submitted by Yocha Dehe during the administrative process, the Opinion concluded the Vallejo site is not gaming-eligible because Scotts Valley lacks a significant historical connection to the property. JA 52-68. Since the site is not eligible for gaming, Scotts Valley cannot lawfully operate a casino there. Thus, the Opinion shields Yocha Dehe from harm to the Tribe's governmental, cultural, and economic interests.

5. The District Court Proceedings

On May 24, 2019, Scotts Valley brought this action challenging the Opinion. JA 69-84. Among other things, Scotts Valley's complaint seeks (i) invalidation of the Opinion and remand to Interior; (ii) declaratory and injunctive relief that would preclude Interior from applying the "significant historical connection" requirement (*i.e.*, the requirement on which the Opinion is based) on remand; and (iii) evidentiary findings that would favor Scotts Valley in any future administrative proceedings. JA 83-84.

Yocha Dehe timely moved to intervene as of right, or in the alternative, by permission. JA 88-102. The Federal Defendants took no position on Yocha Dehe's motion and filed no opposition (or other response) to the Tribe's grounds for intervention. *See* JA 85. Scotts Valley opposed intervention and filed a lengthy opposition brief. JA 116-35.

More than a year passed before the district court denied Yocha Dehe's motion. *See* JA 159-73. With respect to intervention as of right, the district court held Yocha Dehe lacks standing and risks no impairment of its ability to protect its interests. JA 165-72. This holding overlooks clear Circuit precedent allowing an applicant to intervene as of right if it "benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the [applicant]'s benefit." *Crossroads*, 788 F.3d at 317. On permissive intervention, the district court held Yocha Dehe failed to identify any claim or defense sharing a common question of law or fact with the main action. JA 173. That conclusion does not withstand even minimal scrutiny – Yocha Dehe's intervention papers clearly and explicitly identify claims and defenses in which the Tribe seeks to participate. *See* JA 85; JA 96, 101.

Yocha Dehe promptly moved the district court for reconsideration. JA 185-93. Once again, the Federal Defendants took no position and filed no opposition (or other response) addressing the Tribe's grounds for intervention. *See*

JA 185 n.1. Scotts Valley opposed the reconsideration motion. *See* JA 194-208. The district court denied the reconsideration motion on December 4, 2020. JA 209-17.

Acting diligently to protect its rights (*see* Fed. R. App. P. 8(a)(1)(A)), Yocha Dehe moved for a stay pending appeal. JA 218-23. The Federal Defendants opposed staying the district court briefing schedule, but expressly declined to file any brief and did not address Yocha Dehe's grounds for intervention. *See* JA 218. The district court denied the stay motion on January 11, 2021 (JA 224-31), and Yocha Dehe noticed this appeal the very next day (JA 232-34).

SUMMARY OF ARGUMENT

1. Controlling precedent holds that an applicant for intervention has standing if it "benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the [applicant]'s benefit." *Crossroads*, 788 F.3d at 317. Here, Yocha Dehe indisputably benefits from the Opinion; the Opinion has been challenged by Scotts Valley; and a decision in Scotts Valley's favor would remove Yocha Dehe's benefits. Therefore, Yocha Dehe has standing.

2. Yocha Dehe plainly meets Federal Rule of Civil Procedure 24(a)(2)'s four requirements for intervention as of right. No party disputes the timeliness of the Tribe's intervention application. Because the Tribe has standing, it also has the requisite interest in this action. A judgment favoring Scotts Valley would impair

Yocha Dehe's ability to protect its interests by removing the benefits of the Opinion and by eliminating regulatory and evidentiary requirements Scotts Valley would otherwise face on remand – including the requirements on which the Opinion itself is based – thereby making it more difficult and burdensome for Yocha Dehe to regain its current position. And no other party adequately represents Yocha Dehe's interests here – Scotts Valley is adverse, and the Federal Defendants have sought to exclude the Tribe from their administrative proceedings and from this case.

3. This Court should exercise its pendent jurisdiction to reverse the district court's denial of permissive intervention. Contrary to the district court's conclusion, Yocha Dehe clearly and explicitly specified a claim or defense presenting a question in common with the main action. And the court's "serious doubts" about Yocha Dehe's standing are entirely unfounded.

STANDARD OF REVIEW

Yocha Dehe's standing is reviewed de novo. *Crossroads*, 788 F.3d at 316. The Tribe's entitlement to intervene as of right under Federal Rule of Civil Procedure 24(a) is reviewed de novo for issues of law, clear error for findings of fact, and abuse of discretion for matters subject to the district court's discretion. *Id*. The district court's denial of permissive intervention is reviewed for abuse of discretion. *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31-32 (D.C. Cir.

2000). Where the district court has failed or declined to address an issue, no deference is due under any standard of review. *Fund for Animals*, 322 F.3d at 732.

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*, 322 F.3d at 731-32. Yocha Dehe meets both sets of requirements here, and the district court's denial of intervention was directly contrary to this Court's controlling precedent.

A. Yocha Dehe Has Standing.

Because an intervenor as of right "participates on equal footing with the original parties to a suit," applicants for intervention must demonstrate Article III standing. *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009) (quotation omitted). As a general matter, the standing inquiry for an intervening defendant is the same as the standing inquiry for a plaintiff: the intervenor must show injury in fact, causation, and redressability. *Crossroads*, 788 F.3d at 316. As a practical matter, however, standing to intervene in ongoing litigation normally turns on injury in fact: if an adverse litigation outcome would cause the applicant to suffer injury in fact, the causation and redressability requirements are also met. *Id.*; *see also Roeder v. Islamic Republic of Iran*, 333

F.3d 228, 233-34 (D.C. Cir. 2003). Thus, "the case for standing turns on whether [the applicant] alleges a sufficient injury in fact." *Crossroads*, 788 F.3d at 316.

Controlling Circuit precedent finds injury in fact sufficient to support intervention if the applicant "benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the [applicant]'s benefit." *Id.* at 317; *see also Fund for Animals*, 322 F.3d at 733; *Mil. Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998). That is precisely the situation here: the Opinion benefits Yocha Dehe by 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 be eliminated. Therefore, Yocha Dehe has standing to intervene in defense of the Opinion. *Crossroads*, 788 F.3d at 317-18.

The district court overlooked this basis for standing. JA 165-70. Ignoring that Yocha Dehe would suffer "significant injury in fact" from "[l]osing the favorable order" (*see Crossroads*, 788 F.3d. at 318), the court confined its analysis to whether the long-term impacts of Scotts Valley's proposed casino were sufficiently immediate to support standing. JA 167-70. In doing so, the district court focused on the fact that the Opinion is not the only agency approval required for the casino project – other discretionary approvals, including, most notably, Scotts Valley's requested transfer of the Vallejo site into federal trust, would also

be needed. *Id*. Viewing the matter from that (erroneous) perspective, the court concluded Yocha Dehe lacks standing because the Opinion "is not the sole or final hurdle Scotts Valley must overcome to build its casino, and its reversal would not necessarily bring about the threat to Yocha Dehe's economic interests." JA 168; *see also* JA 216.

Neither this Circuit nor any other has established a "sole or final hurdle" limitation on standing. Indeed, such a rule is squarely foreclosed by this Court's decision in *Crossroads*, 788 F.3d at 318-19. There, the Federal Election Commission ("FEC") issued an order declining to investigate a political consulting firm. *Id.* The firm sought to intervene in defense of the order, arguing that reversal would re-open administrative proceedings that might eventually give rise to liability. *Id*. at 315. The district court found this threat "too speculative" to support intervention because even if the order were invalidated the firm would face no liability unless and until the FEC took several additional discretionary actions. *Id*. at 315-16. This Court reversed, holding the firm had standing even though no liability could be imposed without additional agency approvals. *Id*. at 318-19. After all, "[l]osing the favorable order" would itself constitute "a significant injury in fact." *Id*. at 318; *see also Fund for Animals*, 322 F.3d at 733 (threatened loss of favorable agency action is a "concrete and imminent injury"). For that same reason, reversal is warranted here.

The district court also suggested Yocha Dehe lacks standing because invalidation of the Opinion would not guarantee construction of Scotts Valley's casino. JA 168, 170. This, too, was directly contrary to *Crossroads*. There, the intervenor's risk of losing a favorable agency decision constituted concrete and imminent injury in fact even though there was "no guarantee" of any additional future harm. *Crossroads*, 788 F.3d at 318. Because "[l]osing the favorable order would be a significant injury in fact," this Court explained, an applicant may have standing to intervene in defense of agency action even if other, future harm is uncertain. *Id*.; *see also Clinton v. City of New York*, 524 U.S. 417, 430-31 (1998) (dismissing concerns about "speculative" future harm because loss of beneficial federal action caused "immediate, concrete injury").

The district court also departed from precedent in suggesting Yocha Dehe's intervention would be inconsistent with case law addressing tribal gaming disputes. JA 168-69. To the contrary, the courts have explicitly referenced the settled standards discussed above when granting intervention in disputes over tribal gaming projects. *See, e.g.*, *Forest Cnty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 12 (D.D.C. 2016) (setting aside a favorable administrative action constitutes injury in fact); *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 12 (D.D.C. 2019) (loss of a decision preventing casino

development causes injury in fact "even if the fate of the proposed casinos is speculative").

The district court's confusion may be attributable to a misunderstanding of the Indian Gaming Regulatory Act's regulatory framework. The court's standing analysis assumed the Opinion is distinct from – a mere prerequisite to – some future permit application by which Scotts Valley will ask Interior to take the Vallejo property in trust for the development of a casino. *See, e.g.*, JA 169 (finding no injury in fact "*because* Scotts Valley is seeking review of a threshold determination that must be made before it can even apply for permission to establish a casino" (emphasis added)). That assumption was factually inaccurate and legally incorrect.

Scotts Valley applied for permission to develop its casino *more than two years before the Opinion was issued*. JA 10-49. Thus, the Opinion was not a preliminary "threshold determination" about whether Scotts Valley would someday be allowed to seek regulatory approvals for a casino project. JA 169. Rather, it was part and parcel of the casino regulatory approval process. *See* JA 46.

Moreover, it would make no difference if the Opinion had been issued before Scotts Valley requested other casino approvals. *See Crossroads*, 788 F.3d at 317-19. What counts is that the Opinion prevents Scotts Valley from proceeding

with its proposal to develop a casino at the Vallejo site pursuant to the restored lands exception – a significant benefit to Yocha Dehe that would be lost if Scotts Valley prevails in this litigation. Therefore, Yocha Dehe has standing to intervene in the Opinion's defense. *Id.*

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

Federal Rule of Civil Procedure 24(a)(2) gives an applicant the right to intervene if (i) the application is timely; (ii) the applicant claims an interest relating to the property or transaction that is the subject of the action; (iii) the action may as a practical matter impair or impede the applicant's ability to protect its interests; and (iv) the applicant's interest may not be adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2). Yocha Dehe meets each of the four requirements here.

1. Yocha Dehe's Application Was Timely.

Rule 24(a)(2)'s first requirement is a timely application for intervention. Below, neither Scotts Valley nor the district court objected to the timeliness of Yocha Dehe's intervention application. Nor would such an objection have been reasonable – the Tribe moved to intervene just one month after the Federal Defendants filed their answer, well before the administrative record was prepared, and more than 15 months prior to any briefing on the merits of the case. That was more than enough to satisfy the timeliness 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.

Yocha Dehe likewise satisfies 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. In this Circuit, "constitutional standing is alone sufficient" to establish the requisite interest. *Fund for Animals*, 322 F.3d at 735. And, as explained above, controlling precedent confirms Yocha Dehe's standing to intervene in defense of the Opinion here.

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

Contrary to the district court's conclusion (JA 171-72), Yocha Dehe also meets the third Rule 24(a) requirement – potential impairment of the Tribe's ability to protect its interests. The district court concluded Yocha Dehe risks no such impairment even if Scotts Valley were to prevail in this litigation. But that conclusion – like the court's standing analysis – is directly contrary to *Crossroads*, 788 F.3d at 320.

In *Crossroads*, this Court held the third Rule 24(a)(2) requirement is satisfied if an adverse judgment would "make the task of reestablishing the status quo" – *i.e.*, regaining the benefits of the challenged agency decision – "more difficult and burdensome" for the intervenor. *Id*. (citation omitted); *see also Fund for Animals*, 322 F.3d at 735. The same rule applies here. Scotts Valley has asked

for broad relief that goes far beyond invalidation of the Opinion. JA 83-84. Its complaint also seeks to prohibit Interior from applying the "significant historical connection" requirement – *the very regulatory requirement on which the Opinion is based* – in any proceedings conducted on remand. *Compare* JA 83 (seeking to preclude application of "significant historical connection" requirement), *with* JA 52-68 (Opinion based on "significant historical connection" requirement). And, as if that weren't enough to tilt the administrative playing field on remand, the complaint also requests various evidentiary findings and determinations that Scotts Valley believes would be helpful to its prospects in future proceedings. JA 80-84. A decision in Scotts Valley's favor would thus make it "more difficult and burdensome" for Yocha Dehe to regain the benefits of the Opinion. *Crossroads*, 788 F.3d at 320 (citation omitted). For the same reasons articulated in *Crossroads*, Yocha Dehe satisfies the third Rule 24(a)(2) requirement.

In the proceedings below, Scotts Valley also argued – and the district court agreed – that Yocha Dehe could not meet the third Rule 24(a)(2) requirement because there will be "multiple opportunities for Yocha Dehe to be heard in the future." JA 172. This, too, was contrary to precedent. In this Circuit, "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). That Yocha Dehe

may have a chance to be heard on remand does not defeat its right to intervene here and now. *Id.*; *see also Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (third requirement satisfied despite availability of future proceedings); *Fund for Animals*, 322 F.3d at 735 (same).[1]

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

Yocha Dehe meets the fourth Rule 24(a)(2) requirement – inadequacy of representation – as well.[2] The Tribe's burden on this issue is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Yocha Dehe need not show that existing parties will not or cannot represent its interests; rather, it need only explain why representation by existing parties *may be* inadequate. *Fund for Animals*, 332 F.3d at 735. As this Court has noted, an applicant "ordinarily should be allowed to intervene unless it is clear that [an existing] party will provide

[1] A contrary rule would preclude intervention as of right in virtually all Administrative Procedure Act disputes, for the remedy in such cases inevitably involves remand for further agency decision-making. 5 U.S.C. § 706(2); *see also Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

[2] The district court did not reach the fourth factor. JA 173 n.4; *see also* JA 209-217. Yocha Dehe addresses it here because "judicial economy is better served by this Court deciding whether appellants have made a sufficient showing under Rule 24 to be entitled to intervene than by remanding to the district court for that decision." *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981).

adequate representation." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (citation omitted).

Yocha Dehe easily clears this low bar. As an adverse party, Scotts Valley cannot represent the Tribe's interests. And while the Federal Defendants may have an institutional reason to defend the Opinion, that general interest is distinct from Yocha Dehe's more specific focus on protecting its own government, cultural resources, and economy. *See Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (agency would be "shirking its duty" if it were to advance an intervenor's specific objectives rather than the general public interest); *Forest Cnty.*, 317 F.R.D. at 14-15 (fourth requirement satisfied where intervenor tribe was "concerned with preserving [its] own rights and opportunities, including [its] specific economic development goals").

Moreover, the fact that Yocha Dehe and the Federal Defendants both believe the Opinion was lawful does not "ensure agreement in all particular respects about what the law requires." *Costle*, 561 F.2d at 912. This Court has repeatedly confirmed that intervention is appropriate where "the overall point of view might be shared" but the intervenor's "particular" interests are not represented by existing parties. *Id*. at 913; *see also Fund for Animals*, 322 F.3d at 737 ("[P]artial congruence of interests . . . does not guarantee the adequacy of representation.").

The procedural history of Interior's decision-making further demonstrates why the Federal Defendants may not adequately represent Yocha Dehe's interests. Although Scotts Valley's Indian Lands Opinion request addressed land squarely within Yocha Dehe's aboriginal territory, Interior did not request input from – or even notify – the Tribe. JA 154, ¶ 2. And when Yocha Dehe independently learned of Scotts Valley's plans (six months later, from a third party), Interior stated that it planned to make a decision quickly and did not intend to allow any review or comment. JA 154-55, ¶ 3. The Tribe nonetheless submitted comments and those comments were, eventually, considered by Interior. *Id*. But the agency's initial exclusion of Yocha Dehe from the proceedings shows the Federal Defendants may not adequately represent the Tribe's interests here.

Any remaining doubts about the inadequacy of Federal Defendants' representation should be dispelled by their response to Yocha Dehe's Emergency Motion for Stay Pending Appeal (Doc. 1881460). Throughout the district court proceedings, the Federal Defendants never once opposed or questioned Yocha Dehe's grounds for intervention. In response to the Tribe's Emergency Stay Motion, they abruptly reversed course. Without so much as a courtesy notice – much less a principled explanation – Federal Defendants suddenly argued Yocha Dehe lacks standing and does not meet Rule 24(a)(2)'s requirements. *See* Federal Appellees' Response to Emergency Motion for Stay Pending Appeal (Doc.

1884770) at 9-16. Contrary to Circuit precedent and sound common sense, they claim the Opinion does not concern Yocha Dehe at all. *Id*. at 11. The Tribe's Reply in Support of Emergency Motion for Stay Pending Appeal (Doc. 1885877) fully addresses the Federal Defendants' new contentions. Here, it is enough to simply state the obvious: if the Federal Defendants deny the very existence of Yocha Dehe's interest in the Opinion, they cannot adequately represent that same interest in this litigation.

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

The district court addressed permissive intervention in a single, conclusory sentence expressing "serious doubts that Yocha Dehe has standing to intervene" and a belief that the Tribe had not complied with Federal Rule of Civil Procedure 24(b)'s requirement to identify a claim or defense "that shares with the main action a common question of law or fact." JA 173 (quoting Fed. R. Civ. P. 24(b)). Both of those conclusions are erroneous, and this Court should exercise its pendent jurisdiction to reverse.

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

This Court has authority to review the district court's denial of Yocha Dehe's motion for permissive intervention. Although denial of permissive intervention is not usually appealable in itself, this Court's pendent jurisdiction

allows review where permissive intervention presents questions "inextricably intertwined" with issues over which the Court has direct jurisdiction. *Safari Club*, 704 F.3d at 979. Here, the basis for Yocha Dehe's appeal with respect to permissive intervention is inextricably intertwined with the basis for its appeal with respect to intervention as of right (over which this Court has direct jurisdiction) because both concern Yocha Dehe's interest in maintaining the Opinion and protecting the Tribe's government, cultural resources, and economy. Exercise of this Court's supplemental jurisdiction is therefore appropriate. *Id.*; *see also In re Vitamins*, 215 F.3d at 31 ("[T]he basis for appellants' motion for permissive intervention is the same as the basis for its quest for intervention as of right. The two are in that respect inextricably intertwined.").

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

Federal Rule of Civil Procedure 24(b) authorizes district courts to permit intervention by any applicant with "a claim or defense that shares with the main action a common question of law or fact," provided that the application is timely and will not prejudice adjudication of the original parties' rights. Fed. R. Civ. P. 24(b). Although district courts have considerable discretion in applying these standards, their exercise of that discretion "is not free from review." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998).

As noted above, the district court denied permissive intervention for two reasons, both of which constitute reversible error. First, the court expressed "serious doubts" about whether Yocha Dehe has standing to intervene. JA 173. For the reasons stated in Part I.A, *supra*, Yocha Dehe has standing to intervene in defense of the Opinion. The district court's "serious doubts" were unfounded.

Second, the district court believed Yocha Dehe did not "specif[y] the claim or defense it may have 'that shares with the main action a common question of law or fact.'" JA 173 (quoting Fed. R. Civ. P. 24(b)). That conclusion is flatly contradicted by the record. In its intervention papers, Yocha Dehe clearly and explicitly stated its intent to "focus its participation on Scotts Valley's Third and Fourth claims for relief, both of which relate to Yocha Dehe's Patwin ancestors, Scotts Valley's Pomo ancestors, their respective aboriginal territories, and factual evidence about those territories that Yocha Dehe introduced during the administrative proceedings." JA 96. The Tribe further explained that an intervenor's obligation to specify a claim or defense is not interpreted strictly in this Circuit; the obligation is met so long as the proposed intervenor will "present defenses to the precise claims brought by [Plaintiff]"; and Yocha Dehe plans to do so in this case. JA 101 (alteration in original) (citing *Nuesse*, 385 F.2d at 704, and quoting *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007)). The district court abused its discretion by ignoring Yocha Dehe's clear compliance with

the "common question" requirement. *See Nuesse*, 385 F.2d at 704-706 (denial of permissive intervention should be reversed if the district court "has not followed the appropriate standard or approach").

Yocha Dehe satisfied the remaining permissive intervention requirements as well. The Tribe's intervention motion was timely, and neither the parties nor the district court claimed otherwise. *See supra* Part I.B.1; JA 170-71. Nor did the district court or any party suggest Yocha Dehe's intervention would disrupt or prejudice the proceedings. Moreover, as a general rule, "Indian tribes' 'participation in litigation critical to their welfare should not be discouraged.'" *Sault Ste. Marie Tribe*, 331 F.R.D. at 14 (quoting *Arizona v. California*, 460 U.S. 605, 615 (1983)). The district court's denial of permissive intervention was therefore an abuse of discretion. *See Nat'l Children's Ctr.*, 146 F.3d at 1048 (reversing denial of permissive intervention where the applicant plainly satisfied Rule 24(b) and the district court did not fully explain contrary conclusion).

CONCLUSION

For the reasons set forth above, the district court's decision should be reversed and this matter remanded with instructions directing that the Tribe be allowed to intervene. *See Fund For Animals*, 322 F.3d at 737 ("[W]e have not hesitated to direct that intervention be allowed where we found denial to constitute error.").

Respectfully submitted,

Dated: April 5, 2021

/s/ *Matthew G. Adams*

Matthew G. Adams
Samantha R. Caravello
KAPLAN KIRSCH & ROCKWELL LLP
595 Pacific Ave., 4th Floor
San Francisco, CA 94133
(628) 209-4151
madams@kaplankirsch.com
scaravello@kaplankirsch.com

Paula M. Yost
Attorney General
YOCHA DEHE WINTUN NATION
18960 Pukhum Road
P.O. Box 18
Brooks, CA 95606
pyost@yochadehe-nsn.gov

Attorneys for Appellant
Yocha Dehe Wintun Nation

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 6,279 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

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USCS Fed Rules Civ Proc R 24, Part 1 of 2

Current through changes received January 5, 2021.

USCS Federal Rules Annotated > Federal Rules of Civil Procedure > Title IV. Parties

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1)is given an unconditional right to intervene by a federal statute; or

(2)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.

(b) Permissive Intervention.

(1)*In General.* On timely motion, the court may permit anyone to intervene who:

(A)is given a conditional right to intervene by a federal statute; or

(B)has a claim or defense that shares with the main action a common question of law or fact.

(2)*By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A)a statute or executive order administered by the officer or agency; or

(B)any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3)*Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required.A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

History

Amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; March 2, 1987, eff. Aug. 1, 1987; April 30, 1991, eff. Dec. 1, 1991; April 12, 2006, eff. Dec. 1, 2006; April 30, 2007, eff. Dec. 1, 2007.

End of Document

25 USCS § 2702

Current through Public Law 116-259, approved December 23, 2020. Some sections may be more current.

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

§ 2702. Declaration of policy

The purpose of this Act is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

History

HISTORY:

Act Oct. 17, 1988, *P. L. 100-497*, § 3, *102 Stat. 2467*.

End of Document

25 USCS § 2719

Current through Public Law 116-259, approved December 23, 2020. Some sections may be more current.

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct. 17, 1988] unless—

(1)such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act [enacted Oct. 17, 1988]; or

(2)the Indian tribe has no reservation on the date of enactment of this Act [enacted Oct. 17, 1988] and—

(A)such lands are located in Oklahoma and—

(i)are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii)are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B)such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions.

(1) Subsection (a) will not apply when—

(A)the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B)lands are taken into trust as part of—

(i)a settlement of a land claim,

(ii)the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii)the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) shall not apply to—

(A)any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B)the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5 and 7 of the Act of June 18, 1934 (*48 Stat. 985*; *25 U.S.C. 465*, *467*), subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected. Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Internal Revenue Code.

(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code [*26 USCS §§ 1441*, *3402(q)*, *6041*, and *6050I*, and *4401* et seq.]) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) [*25 USCS § 2710(d)(3)*] that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after the date of enactment of this Act [enacted Oct. 17, 1988] unless such other provision of law specifically cites this subsection.

History

HISTORY:

Act Oct. 17, 1988, *P. L. 100-497*, § 20, *102 Stat. 2485*.

End of Document

25 CFR 292.2

This document is current through February 3, 2021 issue of the Federal Register.

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 A — General Provisions

§ 292.2 How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. 2703. In addition, the following terms have the meanings given in this section.

Appropriate State and local officials means the Governor of the State and local government officials within a 25-mile radius of the proposed gaming establishment.

BIA means Bureau of Indian Affairs.

Contiguous means two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point.

Former reservation means lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe.

IGRA means the Indian Gaming Regulatory Act of 1988, as amended and codified at 25 U.S.C. 2701-2721.

Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the Secretary as having a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, as evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary under 25 U.S.C. 479a-1.

Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

(1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;

(2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and

(3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

Legislative termination means Federal legislation that specifically terminates or prohibits the government-to-government relationship with an Indian tribe or that otherwise specifically denies the tribe, or its members, access to or eligibility for government services.

Nearby Indian tribe means an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters.

Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe by the United States after October 17, 1988.

Office of Indian Gaming means the office within the Office of the Assistant Secretary-Indian Affairs, within the Department of the Interior.

Regional Director means the official in charge of the BIA Regional Office responsible for BIA activities within the geographical area where the proposed gaming establishment is to be located.

Reservation means:

(1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;

(2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

Secretarial Determination means a two-part determination that a gaming establishment on newly acquired lands:

(1) Would be in the best interest of the Indian tribe and its members; and

(2) Would not be detrimental to the surrounding community.

Secretary means the Secretary of the Interior or authorized representative.

Significant historical connection means 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.

Surrounding community means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

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 292.7

This document is current through February 3, 2021 issue of the Federal Register.

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 B — Exceptions to Prohibitions on Gaming on Newly Acquired Lands > "Restored Lands" Exception

§ 292.7 What must be demonstrated to meet the "restored lands" exception?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(iii), known as the "restored lands" exception. Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

(a) The tribe at one time was federally recognized, as evidenced by its meeting the criteria in § 292.8;

(b) The tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9;

(c) At a time after the tribe lost its government-to-government relationship, the tribe was restored to Federal recognition by one of the means specified in § 292.10; and

(d) The newly acquired lands meet the criteria of "restored lands" in § 292.11.

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 292.11

This document is current through February 3, 2021 issue of the Federal Register.

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 B — Exceptions to Prohibitions on Gaming on Newly Acquired Lands > "Restored Lands" Exception

§ 292.11 What are "restored lands"?

For newly acquired lands to qualify as "restored lands" for purposes of § 292.7, the tribe acquiring the lands must meet the requirements of paragraph (a), (b), or (c) of this section.

(a) If the tribe was restored by a Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe, the tribe must show that either:

(1) The legislation requires or authorizes the Secretary to take land into trust for the benefit of the tribe within a specific geographic area and the lands are within the specific geographic area; or

(2) If the legislation does not provide a specific geographic area for the restoration of lands, the tribe must meet the requirements of § 292.12.

(b) If the tribe is acknowledged under § 83.8 of this chapter, it must show that it:

(1) Meets the requirements of § 292.12; and

(2) Does not already have an initial reservation proclaimed after October 17, 1988.

(c) If the tribe was restored by a Federal court determination in which the United States is a party or by a court-approved settlement agreement entered into by the United States, it must meet the requirements of § 292.12.

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 292.12

This document is current through February 3, 2021 issue of the Federal Register.

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 B — Exceptions to Prohibitions on Gaming on Newly Acquired Lands > "Restored Lands" Exception

§ 292.12 How does a tribe establish connections to newly acquired lands for the purposes of the "restored lands" exception?

To establish a connection to the newly acquired lands for purposes of § 292.11, the tribe must meet the criteria in this section.

(a) The newly acquired lands must be located within the State or States where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and the tribe must demonstrate one or more of the following modern connections to the land:

(1) The land is within reasonable commuting distance of the tribe's existing reservation;

(2) If the tribe has no reservation, the land is near where a significant number of tribal members reside;

(3) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(4) Other factors demonstrate the tribe's current connection to the land.

(b) The tribe must demonstrate a significant historical connection to the land.

(c) The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:

(1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or

(2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

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]