IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS,

Plaintiff,

v.

DOUGLAS BURGUM, et al.,

Defendants,

and

YOCHA DEHE WINTUN NATION and KLETSEL DEHE WINTUN NATION OF THE CORTINA RANCHERIA,

Movant-Intervenor-Defendants.

Civil Action No.: 25-cv-00958-TNM

Judge Trevor N. McFadden

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

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I. INTRODUCTION

The Yocha Dehe Wintun Nation and the Kletsel Dehe Wintun Nation of the Cortina Rancheria (together, the "Patwin Tribes") respectfully move to intervene in a matter that significantly affects their unique interests.

The Patwin Tribes are federally recognized tribal governments whose Patwin people have, since time immemorial, used, occupied, and maintained a cultural and spiritual connection to the northeast San Francisco Bay Area, including the area now known as Solano County (named for Patwin Chief Francisco Solano).

Today, that same area is also the primary market for the Cache Creek Casino Resort ("CCCR"), operated by Yocha Dehe on its longtime reservation lands in next-door Yolo County. CCCR revenues support tribal programs, services, and government, as well as Patwin cultural preservation activities by and benefitting both Patwin Tribes.

The Scotts Valley Band of Pomo Indians, an unrelated Pomo tribe from a different part of California, has proposed to build a casino and establish a government headquarters in the Solano County city of Vallejo (the "Project"). If allowed to proceed, the Project would, among other things, bulldoze a known Patwin cultural site, materially impact CCCR revenues, and significantly affect tribal programs and services.

The Project is subject to a variety of federal regulatory requirements. Most notable, for this Motion, is the requirement that Scotts Valley demonstrate, by historical documentation, a "significant historical connection" – essentially, "existence of the tribe's villages, burial grounds, occupancy or subsistence use" – to the 160-acre property it has proposed to develop (the "Project Site"). *See* 25 C.F.R. §§ 292.2, 292.12.

In 2019, after reviewing extensive evidence submitted by Scotts Valley, the Patwin Tribes, and other concerned tribal and non-tribal governments, the United States Department of

the Interior ("DOI") issued a detailed, comprehensive Indian Lands Opinion ("ILO") finding Scotts Valley lacked the required significant historical connection. Scotts Valley filed suit challenging the 2019 ILO, and Yocha Dehe applied to intervene as a defendant.

Scotts Valley and DOI successfully opposed the intervention application. Scotts Valley argued Yocha Dehe faced no threat of injury because it would be able to effectively participate in any agency proceedings on remand. Similarly, DOI confirmed its understanding that, following denial of intervention, Yocha Dehe would remain able to "submit information to the agency (as it did before) to ensure that the agency considered all the appropriate arguments to properly assess Scotts Valley's claim of a historical connection to the parcel." Fed. Appellees' Final Resp. Br. at 15, *Yocha Dehe Wintun Nation v. U.S. Dep't of Interior*, 3 F.4th 427 (D.C. Cir. 2021) (No. 21-5009), Doc. 1893213.

On the merits of the 2019 litigation, Scotts Valley lost on every issue but one. On that last issue, the court found DOI should have considered whether the "Indian law canon of construction" should be applied. The proceedings were then remanded to DOI.

During the remand, the Patwin Tribes assembled and timely submitted to DOI extensive evidence demonstrating Scotts Valley did not have – indeed, *could not have had* – a significant historical connection to the Project Site. Notwithstanding its earlier representations, DOI did not consider that evidence. Instead, on January 10, 2025, it issued a new ILO purporting to find a significant historical connection between Scotts Valley and the Project Site.[1] The January 10 ILO expressly states DOI *did not consider* the Patwin Tribes' evidentiary submission.

[1] Letter from Wizipan Garriott, Principal Deputy Ass't Sec'y – Indian Affairs, U.S. Dep't of the Interior, to Hon. Shawn Davis, Chairman, Scotts Valley Band of Pomo Indians at 2-23 (Jan. 10, 2025), https://www.bia.gov/sites/default/files/media_document/scotts_valley_band_of_pomo_indians%2C_january_10%2C_2025%2C_trust_acquisition_decision_letter.pdf ("January 10 Decision").

Abandoned by their trustee, the Patwin Tribes sued. Their March 24, 2025, complaint identifies numerous Administrative Procedure Act violations in DOI's decision-making process, including the agency's unjustified refusal to consider relevant evidence.

Just a few days later, DOI issued a letter (the "March 27 Letter") stating that it planned to reconsider the January 10 ILO due to concerns that relevant evidence had been excluded.[2] The March 27 Letter then invited all recipients – including the Patwin Tribes – to submit their evidence by May 30.

Perhaps recognizing the weight of the evidence that would be submitted by the Patwin Tribes, Scotts Valley filed this action to prevent DOI from considering it. The Patwin Tribes now seek to intervene as of right or, in the alternative, permissively.

II. FACTUAL BACKGROUND

Below, the Patwin Tribes provide a condensed version of the factual background most relevant to their application to intervene. A more extensive history of the Patwin Tribes' and their ancestral lands – and Scotts Valley's misguided efforts to claim a significant historical connection to those lands – can be found in the March 24, 2025, complaint filed in related case *Yocha Dehe Wintun Nation v. U.S. Department of Interior*, No. 25-cv-00867-TNM.

A. The Patwin Tribes

The Patwin Tribes are federally recognized tribal governments whose Patwin people historically used and occupied the area now known as Solano County. Declaration of Sarah R. Choi, ¶ 2 (attached as Exhibit A). The Project Site contains a known Patwin cultural resource,

[2] Letter from Scott J. Davis, Senior Advisor to the Sec'y of the Interior, U.S. Dep't of the Interior, to Hon. Shawn Davis, Chairman, Scotts Valley Band of Pomo Indians at 1 (Mar. 27, 2025), https://www.bia.gov/sites/default/files/media_document/2025.03.28_correction_scotts_valley_band_of_pomo_indians_partial_reconsideration_of_01.10.25_deci.pdf ("March 27 Letter").

and it is part of and surrounded by a landscape of additional cultural sites. *Id.* ¶ 3; Declaration of Chairman Charlie Wright, ¶ 3 (attached as Exhibit B).

The Patwin Tribes continued to use and occupy their ancestral lands – including those in what is now Solano County – into the 1850s. Over time, however, they were driven from much of their ancestral territory by successive waves of settlers. By the early 1900s, the United States forced most of the surviving Patwin onto isolated, barren reservations, with little opportunity for meaningful economic development. Choi Decl. ¶ 4; Wright Decl., ¶ 3.

With the passage of the Indian Gaming Regulatory Act ("IGRA"), however, Yocha Dehe was able to develop the Cache Creek Casino Resort on its longtime reservation lands in Yolo County (immediately north of Solano County). Choi Decl. ¶ 6. The Resort primarily draws its customers from the San Francisco Bay Area. *Id.* Resort revenues are used to provide health care, education, and other government services; to revitalize Patwin language and culture; and to protect and care for the lands, waters, cultural resources, and people throughout Patwin ancestral territory. *Id.* ¶ 6.

Kletsel Dehe's reservation, by contrast, is too remote and too arid for economic development, leaving Kletsel Dehe with extremely limited resources. Wright Decl. ¶ 3. Kletsel Dehe continues to engage in cultural site protection efforts in traditional Patwin territory, including Solano County. *Id.* ¶ 4. But because of its limited resource base, Kletsel Dehe often undertakes this work in partnership with Yocha Dehe. *Id.*

The Patwin Tribes have maintained their cultural and spiritual connection to their ancestral lands in Vallejo and the surrounding area. For example, the Patwin Tribes jointly hold a cultural easement allowing them to protect and preserve cultural resources and native landscapes in Vallejo public parks. Choi Decl. ¶ 7; Wright Decl. ¶ 4. They recently helped

create and preserve a 1,500-acre open space park in nearby Fairfield, California. And they actively work to protect additional Patwin cultural sites in and around Solano County, including those known to exist on the Project Site. Choi Decl. ¶ 7; Wright Decl. ¶ 4.

B. The Scotts Valley Band of Pomo Indians

Scotts Valley is a Pomo Tribe whose ancestral lands are northwest of Clear Lake, California, approximately 100 miles from Vallejo. Choi Decl. ¶ 5. In 1911, the United States created a reservation for Scotts Valley at Clear Lake. *Id.* In 1965, Scotts Valley citizens voted to terminate that reservation, and in return received property in fee simple at Clear Lake. *Id.* In 1991, Scotts Valley was restored to federal recognition and established its government headquarters at Clear Lake. *Id.* Today, Scotts Valley owns multiple properties and businesses at and around Clear Lake. *Id*.

C. Scotts Valley's 2019 Restored Lands Request

IGRA generally prohibits gaming on Indian lands taken into trust after the statute's 1988 enactment. But the statute includes an exception for lands taken into trust "as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). This is commonly known as the "restored lands exception." Ever since being restored to federal recognition in 1991, Scotts Valley has been legally authorized to seek gaming-eligible "restored lands" in its Clear Lake homeland.

Instead, Scotts Valley has sought approval to conduct gaming on Patwin ancestral lands in the San Francisco Bay Area. In 2016, Scotts Valley requested that DOI issue an ILO declaring 128 acres of land in Vallejo eligible for gaming under the restored lands exception. As noted above, Scotts Valley was required to demonstrate a "significant historical connection" to the property. 25 C.F.R. §§ 292.11-292.12. The Patwin Tribes (among others) compiled and provided DOI with evidence demonstrating Scotts Valley had no such connection.

In 2019, after carefully reviewing evidence submitted for and against Scotts Valley's restored lands request, DOI found the Pomo tribe lacked a significant historical connection to the 128-acre property. DOI's conclusion was memorialized in a detailed ILO addressing each and every one of Scotts Valley's contentions (the "2019 ILO"). The 2019 ILO was thorough, well-reasoned, and supported by thousands of pages of evidence submitted by interested parties, including concerned tribal governments.

D. The 2019 ILO Litigation

Scotts Valley filed suit, seeking to invalidate both the 2019 ILO and IGRA's implementing regulations (the "2019 ILO Litigation"). Yocha Dehe applied to intervene as a defendant. DOI and Scotts Valley successfully opposed the application by arguing that Yocha Dehe faced no threat of injury because it would be allowed to meaningfully participate in any proceedings that might be ordered on remand.

Indeed, the district court order denying Yocha Dehe's intervention in the 2019 ILO Litigation expressly referenced and relied on the understanding that Yocha Dehe would have a right to make a further evidentiary showing in any subsequent DOI proceedings: "What would happen if the Court were to rule in Scotts Valley's favor? . . . Yocha Dehe submitted a considerable volume of material about its historical connection to the land when the question about Scotts Valley's association with the parcel was pending before the agency the first time, and it can do so again." *Scotts Valley Band of Pomo Indians v. U.S. Dep't of Interior*, 337 F.R.D. 19, 26 (D.D.C. 2020).

Scotts Valley echoed this assurance before the D.C. Circuit, representing that "Yocha Dehe would not be precluded from providing input at the agency review level or from advocating for its own conclusions" if the 2019 ILO were remanded, "just as [Yocha Dehe] did

leading up to the [2019 ILO]." Scotts Valley Final Br. at 26, *Yocha Dehe*, 3 F.4th 427 (No. 21-5009), Doc. 1893220.

Similarly, DOI confirmed its understanding that, following denial of intervention, Yocha Dehe would remain able to "submit information to the agency (as it did before) to ensure that the agency considered all appropriate arguments to properly assess Scotts Valley's claim of a significant historical connection to the parcel." Fed. Appellees Final Resp. Br. at 15, *Yocha Dehe*, 3 F.4th 427 (No. 21-5009), Doc. 1893213.

After defeating Yocha Dehe's intervention application, DOI and Scotts Valley returned to the merits of the 2019 ILO litigation. On the merits, the District Court upheld IGRA's implementing regulations but struck down the 2019 ILO for failure to consider whether the "Indian law canon of construction" – a principle of interpretation applicable to certain legal issues where all tribal interests are aligned – should be applied in Scotts Valley's favor. *Scotts Valley Band of Pomo Indians v. U.S. Dep't of Interior*, 633 F. Supp. 3d 132, 141-54, 165-68 (D.D.C. 2022). In doing so, the District Court made it clear that it was neither requiring the agency to apply the Indian law canon of construction on remand nor dictating the ultimate resolution of Scotts Valley's restored lands request. *See id.* at 168 ("[I]t is not [the court's] role to . . .substitute its judgment for that of the agency . . . ."); Transcript of May 8, 2023, Bench Ruling at 16:23-24, *Scotts Valley*, 633 F. Supp. 3d 132 (No. 19-cv-1544-ABJ) ("I didn't rule that the Department of the Interior had to apply the [canon].").

E. Scotts Valley's 2024 Restored Lands Request and Proposed Project

On remand, Scotts Valley sought multiple federal approvals for the Project, including a new ILO. Importantly, Scotts Valley did not limit its ILO request to the 128-acre parcel considered in 2019. Choi Decl. ¶ 10. This time, Scotts Valley also sought a restored lands determination for three additional parcels – a total of 160 acres. *Id*.

During the proceedings on remand, the Patwin Tribes repeatedly requested to be heard with respect to Scotts Valley's claims of a significant historical connection to the Project Site. They sent numerous written requests for DOI to establish a fair, transparent, fact-based process in which all tribes could participate on equal footing. *Id.* ¶ 12. DOI never responded. *Id.* They requested government-to-government consultation with DOI, proposing more than 40 dates on which they could come to Washington, D.C. for a meeting with DOI officials. *Id.* DOI did not answer those requests either. *Id.*

Rather than continuing to wait for DOI to establish a reasonable decision-making process, in November 2024 the Patwin Tribes provided Defendants with substantial evidence and analysis demonstrating that Scotts Valley had not met the requirements of the restored lands exception. *Id.* ¶ 13. This evidence included hundreds of pages of ethnohistorical documentation and expert analysis affirmatively demonstrated Scotts Valley never used or occupied – and therefore lacked any significant historical connection to – the Project Site. *Id.* On November 27, 2024, DOI Principal Deputy Assistant Secretary-Indian Affairs Wizipan Garriott confirmed this evidence had been received and promised it would be considered as part of the agency's decision-making process. *Id.* ¶ 15; Wright Decl. ¶ 6. Yocha Dehe confirmed this understanding in a follow-up letter. Choi Decl. ¶ 15.

F. The January 10 Decision

On January 10, 2025, DOI issued a decision approving the Project (the "January 10 Decision"). The January 10 Decision included an ILO, signed by Mr. Garriott, erroneously concluding Scotts Valley has a significant historical connection to the Project Site and satisfied all other requirements of the restored lands exception. January 10 Decision at 2-23. The Decision expressly stated that DOI *did not consider* any of the evidence submitted by the Patwin Tribes and other concerned stakeholders. *Id.* at 3-4.

G. The Patwin Tribes' Complaint and the March 27 Letter

A few days after the Patwin Tribes' complaint, DOI issued the March 27 Letter. Expressing concern that prior decision-makers failed to consider relevant evidence during the remand process, the Letter invites Scotts Valley and other interested tribes to "submit evidence and/or legal analysis regarding whether the [Project Site] qualifies as restored lands" by May 30. March 27 Letter at 1.

Perhaps recognizing the weight of the previously excluded evidence, Scotts Valley sued to prevent DOI from considering it. First Am. Compl., *Scotts Valley Band of Pomo Indians v. Burgum*, No. 25-cv-00958-TNM (D.D.C. Apr. 4, 2024), Dkt. 12 ("FAC"). They allege DOI should be prohibited from considering any evidence post-dating the 2019 ILO. *Id.* ¶¶ 38, 45, 53-56; *id.* at Prayer For Relief ¶¶ B-C. The Patwin Tribes now move to intervene to protect their unique interests.

III. ARGUMENT

The Patwin Tribes respectfully seek to intervene in defense of DOI's reconsideration. They have Article III standing to intervene (Part III.A). They satisfy Federal Rule of Civil Procedure ("Rule") 24(a)(2)'s four requirements for intervention as of right (Part III.B). And, in the alternative, they meet Rule 24(b)'s criteria for permissive intervention (Part III.C).

A. The Patwin Tribes Have Article III Standing

The Patwin Tribes have standing to defend the March 27 Letter.[3] A party intervening in defense of agency action can demonstrate standing by showing that it would be "injured in fact

[3] Following the U.S. Supreme Court's decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657 (2020), "some judges in this district have continued to require all intervenors of right to demonstrate Article III standing, while others have not." *Farmer v. U.S. EPA*, No. 24-cv-1654 (DLF), __ F. Supp. 3d __, 2024 U.S. Dist. LEXIS 226649, at *5 n.2 (D.D.C. Dec. 16, 2024). Because some Circuit precedent continues to suggest

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." *Forest Cnty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 11 (D.D.C. 2016) (quoting *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001)). All three elements are readily apparent here.

If the March 27 Letter were set aside, the Patwin Tribes would suffer concrete, particularized and imminent injuries-in-fact. First, as Scotts Valley itself has alleged, invalidating the March 27 Letter would effectively allow the Project to move forward. *See, e.g.,* FAC ¶¶ 24-25 (describing 2025 ILO as authorizing the Tribe to move forward). And, as described above, the Project would cause the Patwin Tribes substantial harm: it would bulldoze a Patwin cultural site (Choi Decl. ¶ 10); it would place a Pomo "headquarters" on Patwin ancestral lands – a further cultural injury (Choi Decl. ¶ 3; Wright Decl. ¶ 5); it would substantially reduce the revenues used by Yocha Dehe to support tribal programs and services (Choi Decl. ¶¶ 6, 11); and it would significantly undermine the Patwin Tribes' cultural protection efforts (Choi Decl. ¶ 6; Wright Decl. ¶¶ 4-5). That is more than enough to demonstrate injury-in-fact. *See, e.g., Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 9 (D.D.C. 2019) (injury-in-fact caused by economic harm from proposed casino project); *Connecticut v. U.S. Dep't of Interior*, 344 F. Supp. 3d 279, 298-99 (D.D.C. 2018) (injury-in-fact where reversal of agency decision would "create new competition"); *Forest Cnty.*, 317 F.R.D. at 12 (injury-in-fact where reversal of agency decision would place tribal casino at a "competitive disadvantage").

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defendant-intervenors must establish Article III standing, the Patwin Tribes make that showing here.

Second, invalidating the March 27 Letter would injure the Patwin Tribes by depriving them of the benefit of a favorable agency action. The March 27 Letter benefits the Patwin Tribes by ensuring DOI decisionmakers will consider their evidence – evidence which, it bears repeating, demonstrates Scotts Valley lacks the "significant historical connection" required for the Project. Circuit precedent finds injury-in-fact sufficient to support intervention where the applicant "benefits from agency action, the action is 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); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003). That is precisely the situation here: the March 27 Letter benefits the Patwin Tribes; Scotts Valley has challenged the Letter; and if that challenge is successful the Patwin Tribes' benefits would be eliminated.

Third, invalidating the March 27 Letter would injure the Patwin Tribes by depriving them of the opportunity to be heard on an issue of critical importance. Again, the Patwin Tribes timely submitted extensive evidence demonstrating the absence of a "significant historical connection" between Scotts Valley and the Project Site. Choi Decl. ¶ 13. Their complaint in pending related case number 25-cv-00867-TNM explains why DOI's unjustified refusal to consider that evidence violated the APA. *See* Compl. ¶¶ 142-48, *Yocha Dehe*, No. 25-cv-00867-TNM (Mar. 24, 2025), Dkt. 1; *see also Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (an agency's "refusal to consider evidence bearing on the issue before it" is arbitrary and capricious). The March 27 Letter is a meaningful step toward correcting that error, and it cements the Patwin Tribes' right to be heard. If Scotts Valley prevails, that right will be lost. For this reason, too, the injury-in-fact requirement is satisfied. *See, e.g.*, *Am. Tunaboat Ass'n v.*

Ross, 391 F. Supp. 3d 98, 108 (D.D.C. 2019) (denial of access to agency decisionmakers caused "real injury").[4]

Each of the three categories of injury-in-fact described above is fairy traceable to an order invalidating the March 27 ILO. *Forest Cnty.*, 317 F.R.D. at 11 (causation element satisfied when injury would have been caused by invalidation of the government action the intervenor seeks to defend). And each "would be prevented if the government action is upheld." *Id.*; *see also Sault Ste. Marie*, 331 F.R.D. at 12. Therefore, the "traceability" and "redressability" elements of standing are also met.

Finally, it is worth noting that the March 27 Letter was issued shortly after the Patwin Tribes filed suit and invites the Patwin Tribes to resubmit any evidence the agency may have previously ignored. March 27 Letter at 1. In that sense, the Patwin Tribes' concerns are among the "objects" of the Letter. And, in this Circuit, if the applicant for intervention is one of the objects of agency action, "there should be little question" about injury-in-fact or redressability. *Fund for Animals*, 322 F.3d at 734.

B. The Patwin Tribes Are Entitled to Intervene as of Right.

Rule 24(a)(2) gives an applicant the right to intervene if (1) the motion to intervene is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the action may as a practical matter impair or impede its ability to protect its interest; and (4) the proposed intervenor's interest may not be adequately represented

[4] To the extent this injury may be considered procedural, it is nonetheless sufficient to establish injury-in-fact because failing to consider the Patwin Tribes' evidence meaningfully increases the risk that the Project – a source of harm to Patwin cultural, governmental, and economic interests – will move forward. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009) (denial of ability to file comments on agency action may establish Article III standing if concrete interests are affected); *Am. Tunaboat Ass'n*, 391 F. Supp. 3d at 108 (finding injury-in-fact where agency's procedural error affected interests in compliance costs and regulatory efficiency).

by existing parties. *Fund for Animals*, 322 F.3d at 731 (quoting Fed. R. Civ. P. 24(a)(2)). The Patwin Tribes meet each of these requirements.

1. The Motion to Intervene is Timely.

The Patwin Tribes' motion to intervene is timely. Scotts Valley filed its (original) complaint just ten days ago. This Motion is filed pursuant to an expedited briefing schedule for intervention motions set by the Court after discussion with all parties. *See* Apr. 7, 2025 Minute Entry. And the Patwin Tribes have committed to meeting the remainder of that schedule, as well as the schedule for responding to Scotts Valley's request for a preliminary injunction. Therefore, the Patwin Tribes' intervention will not delay the proceedings or prejudice the existing parties. Nothing more is required under Rule 24(a)(2). *See, e.g.*, *Roane v. Leonhart,* 741 F.3d 147, 151 (D.C. Cir. 2014) (timeliness requirement "aimed primarily at preventing potential intervenors from unduly disrupting litigation"); *Sault Ste. Marie*, 331 F.R.D. at 12 (motion found timely where intervention would not delay briefing).

2. The Patwin Tribes Have an Interest Relating to the Property that Is the Subject of this Action.

In this Circuit, "constitutional standing is alone sufficient to establish that [an intervenor] has 'an interest relating to the property or transaction which is the subject of the action.'" *Fund for Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)). As explained above, the Patwin Tribes have standing here: they will be injured if Scotts Valley receives the relief it requests, that injury will have been caused by Scotts Valley obtaining the requested relief, and the injury will be prevented if the requested relief is denied. *See supra* Part III.A. Because the Patwin Tribes "have shown they have Article III standing, [they] have necessarily shown that they have a legally protectable interest in the action," sufficient to support intervention as of right. *Sault Ste. Marie*, 331 F.R.D. at 12.

3. This Action Threatens to Impair the Patwin Tribes' Interests.

The Patwin Tribes also meet the third Rule 24(a)(2) requirement because this action threatens to impair their interests. Such threats are evaluated in terms of "the practical consequences" of denying intervention – that is, whether, as a practical matter, resolution of the case without the applicants might impair or impede their ability to protect their interests. *Fund for Animals*, 322 F.3d at 735 (quoting *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977)). Here, the practical consequence of denying the Patwin Tribes intervention would be to exclude them from a dispute about their own rights to have their evidence considered by DOI. Doing so would cause the injuries described above. *See supra* pp. 10-12. It would also shortcut the Patwin Tribes' earlier-filed litigation seeking to redress those very injuries. In contrast, the Patwin Tribes' "involvement [in this action] may lessen the need for future litigation to protect their interests" – a further indication that the third Rule 24(a)(2) factor favors intervention. *Sault Ste. Marie*, 331 F.R.D. at 13 (quoting *Costle*, 561 F.2d at 911).

4. The Patwin Tribes' Interests May not Be Adequately Represented Without Intervention.

The Patwin Tribes meet the fourth Rule 24(a)(2) criterion because no existing party adequately represents their interests. This requirement is "not onerous." *Fund for Animals*, 322 F.3d at 735 (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986)). The Patwin Tribes need only "show[] that representation of [their] interest[s] '*may* be' inadequate; and the burden of making that showing should be treated as minimal." *Id*. (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)) (emphasis added). The Patwin Tribes easily clear this low bar, for there is good reason to believe DOI may not adequately represent their interests here.

First, as a general matter, governmental entities typically "do not adequately represent the interests of aspiring intervenors." *Id.* at 736. The federal government has an obligation to represent the American public as a whole, while the Patwin Tribes seek to address more specific cultural, economic, governmental, and procedural concerns. "The Government need not, and indeed cannot reasonably be expected to, represent these interests." *Sault Ste. Marie*, 331 F.R.D. at 13; *see also Forest Cnty.*, 317 F.R.D. at 15 (federal agency would be "shirking its duty" if it were to advance the particular interests of an intervenor tribe).

Second, and more specifically, the Federal Defendants have been inconsistent (to put it charitably) in their commitment to representing the Patwin Tribes' interests. In prior litigation, DOI promised the Patwin Tribes would have a meaningful opportunity to be heard on remand; during the remand, however, the agency refused to respond to the Patwin Tribes' concerns and ignored their consultation requests. In a November 27, 2024, meeting, DOI officials promised the evidence submitted by the Patwin Tribes would be considered prior to any agency decision; less than two months later, however, those same officials issued a decision which expressly disclaimed any consideration of the Patwin Tribes' evidence. To be sure, the Patwin Tribes support the Federal Defendants' current interest in correcting some of these errors. But under the unfortunate circumstances presented here, it is not at all clear whether or how DOI could adequately represent the Patwin Tribes' interests. *See, e.g.*, *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (applicant "ordinarily should be allowed to intervene unless it is clear that [an existing] party will provide adequate representation"); *U.S. House of Representatives v. Price*, No. 16-5202, 2017 U.S. App. LEXIS 14178, at *10 (D.C. Cir. Aug. 1, 2017) (equivocation regarding intent to protect intervenor's interest gives rise to concerns about adequate representation).

Nor would any other prospective intervenor adequately represent the Patwin Tribes' interests. The Patwin Tribes have a distinctive cultural connection to the Project Site. Choi Decl. ¶¶ 2-3, 7, 14; Wright Decl. ¶¶ 2, 4-5; *see Western Org. of Res. Councils v. Jewell*, No. 14-1993, 2015 U.S. Dist. LEXIS 194028, at *15 (D.D.C. July 15, 2015) (recognizing that separate sovereigns have distinct interests that another sovereign cannot adequately represent). The Project Site is within Patwin ancestral territory, contains a known Patwin cultural resource, and is part of and surrounded by a landscape of several other cultural sites. Choi Decl. ¶¶ 2-3. The Patwin Tribes are uniquely interested in advocating for the protection of those resources.

C. In the Alternative, the Patwin Tribes Should Be Granted Permissive Intervention.

The Patwin Tribes have standing, satisfy all of the requirements of Rule 24(a)(2), and are therefore entitled to intervene as of right. But even if they were not, permissive intervention pursuant to Rule 24(b) would be appropriate.

Rule 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). It also requires the Court to consider whether intervention would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). In addition, the courts in this Circuit require the applicant to identify an independent ground for subject matter jurisdiction. *EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). The Patwin Tribes meet each of these requirements.

First, the Patwin Tribes' motion to intervene is timely for the reasons set forth above. *See supra* Part III.B.1.

Second, the Patwin Tribes have 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). In applying this requirement, the phrase "claim or defense" is "not interpreted strictly." *See Nuesse v. Camp*, 385 F.2d 694, 704

(D.C. Cir. 1967); *Sault Ste. Marie*, 331 F.R.D. at 14. Here, the Patwin Tribes seek to defend DOI's March 27 Letter and support DOI's determination to reconsider the January 10 Decision in light of all relevant evidence. *See* Proposed Answer ¶¶ 33-56 (responding to Scotts Valley's claims for relief). They also propose to assert affirmative defenses which share questions of law and fact in common with Scotts Valley's claims for relief. *See* Proposed Answer at p.15. For both reasons, the second permissive intervention criterion is satisfied. *See, e.g.*, *Sault Ste. Marie*, 331 F.R.D. at 14 (sharing a defense in common with the federal government "is sufficient under Rule 24(b)(1)(B)"); *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007) ("Intervenors . . . present defenses to the precise claims brought by plaintiffs. This showing is sufficient for the purposes of permissive intervention.").

Third, permitting the Patwin Tribes to intervene will not unduly delay or prejudice the adjudication of the case. This litigation remains in its earliest stages. And the Patwin Tribes seek intervention in a timely manner and pursuant to an expedited briefing schedule set by the Court after discussion with all parties. *See supra* Part III.B.1. The Patwin Tribes are also prepared to file a response to Scotts Valley's pending motion for a preliminary injunction on the date DOI's response is due, and will not delay the adjudication of that motion or any other aspect of these proceedings.

Fourth, the Court has independent jurisdiction over the Patwin Tribes' answers. This Court may exercise supplemental jurisdiction because this is a federal question case and the Patwin Tribes seek to defend the same agency decision under the same federal law as the decision challenged in the complaint. *See, e.g.*, *Sault Ste. Marie*, 331 F.R.D. at 14 ("[B]ecause the Court has federal question jurisdiction over this case, it has independent jurisdiction over the movants' answers and future motions."); 7C Charles Alan Wright & Arthur R. Miller, *Federal*

Practice and Procedure § 1917 (3d ed. Apr. 2025 Update) (supplemental jurisdiction can confer jurisdiction in federal question cases where existing parties have asserted claims under federal law and claims by or against intervenor arise out of a common nucleus of operative facts).

Additional considerations also support permissive intervention. As this Court has previously recognized, "Indian tribes' 'participation in litigation critical to their welfare should not be discouraged.'" *Sault Ste. Marie*, 331 F.R.D. at 14 (quoting *Arizona v. California*, 460 U.S. 605, 615 (1983)). Moreover, the Patwin Tribes have unique information and perspective that may be helpful in reaching a just result – after all, what's ultimately at stake is whether DOI will (finally) consider *their* evidence. *See, e.g.*, *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972) ("[T]he interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard.").

IV. CONCLUSION

For the reasons set forth above, the Patwin Tribes respectfully request that their motion to intervene be granted.

Respectfully submitted on April 11, 2025.

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