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

REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

The Yocha Dehe Wintun Nation and the Kletsel Dehe Wintun Nation (together, the "Patwin Tribes") seek to intervene in defense of a Department of the Interior ("DOI") decision that significantly and undisputedly protects their governmental, economic, and cultural interests.

The Scotts Valley Band of Pomo Indians, an unrelated tribe from a different part of California, has proposed to build a casino and establish a government headquarters on the Patwin Tribes' ancestral lands in Vallejo, California (the "Project").

For years, the Patwin Tribes have patiently explained to DOI that the Project does not meet the requirements of the Indian Gaming Regulatory Act's ("IGRA") "restored lands exception" – including, in particular, the requirement that Scotts Valley demonstrate a "significant historical connection" to the 160-acre property it has proposed to develop (the "Project Site").

The Patwin Tribes asked DOI to establish a fair, transparent, fact-based decision-making process in which all interested parties could participate on equal footing. They requested government-to-government consultation with DOI, proposing 40 dates on which they could come to Washington, D.C. for a meeting with DOI officials. And, when those requests went unanswered, they submitted extensive written evidence demonstrating that Scotts Valley did not have a significant historical connection to the Project Site.

DOI initially promised to consider the Patwin Tribes' evidence. But, on January 10, 2025, the agency approved the Project (the "January 10 Decision") and issued an Indian Lands Opinion (the "2025 ILO") purporting to find a significant historical connection and disclaiming any consideration of the Patwin Tribes' evidentiary submission.

The Patwin Tribes sued, alleging (among other things) that DOI erred by failing to consider their evidence. And the agency belatedly realized its mistake. Three days after the Patwin Tribes filed their complaint, DOI issued a letter stating that it would reconsider the 2025 ILO (the "March 27 Letter").

There can be no reasonable dispute that the Patwin Tribes and their concerns were the subjects of the March 27 Letter. The Letter was sent to the Patwin Tribes' leaders. It expressly references concerns about omitted evidence. It invites the Patwin Tribes to re-submit their evidence. And it promises to reconsider the 2025 ILO with that evidence in mind.

It is hardly surprising, then, that the Patwin Tribes easily satisfy the requirements for intervention. First, they have standing to intervene in defense of the March 27 Letter. If the Letter were invalidated the Patwin Tribes would suffer economic and cultural injuries, would be deprived of the Letter's concrete benefits, and would lose the ability to be heard on issues of significant sovereign importance. Second, they meet all requirements for intervention as of right under Federal Rule of Civil Procedure ("Rule") 24(a)(2). And third, in the alternative, they qualify for permissive intervention under Rule 24(b).

II. ARGUMENT

A. The Patwin Tribes Have Article III Standing.

The Patwin Tribes' moving papers explained why they have standing to defend the March 27 Letter. ECF 16-1 at 14-17.[1] An applicant seeking to intervene in defense of agency action can demonstrate standing by showing that it would be "injured in fact by the setting aside of the government 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*

[1] Citations to the Patwin Tribes' Memorandum of Points and Authorities in Support of their Motion to Intervene (ECF 16-1) are to the page numbers in the ECF header.

Cnty. Potawatomi Cmty. v. United States, 317 F.R.D. 6, 11 (D.D.C. 2016). Here, the Patwin Tribes would suffer multiple injuries if the March 27 Letter is invalidated: they would suffer economic and cultural injuries arising from implementation of Scotts Valley's Project; they would be deprived of the benefits of the March 27 Letter; and they would lose the ability to be heard on issues of critical importance. Each of these injuries would be caused by that invalidation and could be prevented by upholding the March 27 Letter. *See id*. at 12.

Federal Defendants do not challenge the Patwin Tribes' standing. *See* ECF 29. Scotts Valley's challenge to the Patwin Tribes' standing is limited to their showing of injury-in-fact. *See* ECF 31 at 14-32. The Patwin Tribes therefore focus their reply on that element.

1. Invalidating the March 27 Letter Would Allow the Project to Move Forward, Causing Economic and Cultural Injuries.

Invalidating the March 27 Letter would allow the Project to move forward, causing economic and cultural injury to the Patwin Tribes. ECF 16-1 at 15. Among other things, the Project would bulldoze a Patwin cultural site (ECF 16-2 ¶ 10); place a Pomo "headquarters" on Patwin ancestral lands (ECF 16-2 ¶ 3; ECF 16-3 ¶ 5); substantially reduce revenue used to support tribal programs and services (ECF 16-2 ¶¶ 6, 11); and significantly undermine the Patwin Tribes' cultural protection efforts (ECF 16-2 ¶ 6; ECF 16-3 ¶¶ 4-5).

Scotts Valley claims the Patwin Tribes' economic injuries are "speculative," noting that prior litigation regarding the 2019 Indian Lands Opinion (the "2019 ILO Litigation") found Yocha Dehe's economic concerns too "remote" to confer standing. ECF 31 at 17-18, 23-25. But there is no longer anything "remote" or "speculative" about Scotts Valley's Project or the harm it would cause. The January 10 Decision approved the Project, acquired the Project Site in trust for Scotts Valley, declared the Project Site eligible for gaming, and purported to conclude the Project's environmental review process. *See* ECF 12 ¶ 21; 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, 29, 30 (Jan. 10, 2025) ("January 10 Decision").[2] And, in connection with that environmental review process, Scotts Valley's own consultants issued a report admitting the Project would materially impact Yocha Dehe's Cache Creek Casino Resort, revenues from which support Yocha Dehe government programs and services, as well as the Patwin Tribes' cultural preservation efforts. ECF 16-2 ¶¶ 6, 11; ECF 16-3 ¶ 4. On these current facts – as distinguished from the facts at issue in the 2019 ILO Litigation – the Patwin Tribes' Project-related injuries can hardly be considered "speculative."

Indeed, Scotts Valley has effectively admitted as much. Its April 1, 2025, Preliminary Injunction request expressly states the Project is not "speculative." ECF 3-1 at 19; *see also id*. at 27 (claiming the January 10 decision "directly authorized [Scotts Valley] to . . . conduct class III gaming" on the Project Site). If that is true, it is hardly "speculative" to suggest the Patwin Tribes would be injured by invalidation of the March 27 Letter.

Contrary to Scotts Valley's suggestion (ECF 31 at 17-18), economic injury from future casino competition has repeatedly been confirmed as a basis for intervenor standing. *See, e.g., Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 10 (D.D.C. 2019); *Connecticut v. U.S. Dep't of Interior*, 344 F. Supp. 3d 279, 298 (D.D.C. 2018); *Forest Cnty*., 317 F.R.D. at 12. In *Sault Ste. Marie*, for example, this Court found various tribal and non-tribal casino operators had standing to intervene in defense of a DOI decision refusing to take land into trust for a Michigan tribe. 331 F.R.D. at 9-12. The DOI decision prevented a new gaming project from moving forward. *Id*. at 10. But if the DOI decision had been reversed, a new

[2] *Available at:* 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.

casino would be "likely," leading to "a loss of gaming dollars . . . and a consequent reduction in funding for government services." *Id*. So too here.

Scotts Valley suggests *Sault Ste. Marie* is distinguishable because it involved substantive interpretation of the Michigan Indian Land Claims Settlement Act ("MILCSA"), a statute benefitting both the plaintiff and the intervening tribes. ECF 31 at 20-21. Not so. MILCSA was not the sole basis for *Sault Ste. Marie* intervenor standing. *Sault Ste. Marie*, 331 F.R.D. at 10-11. The Court also found intervening tribal casino owners would suffer injury-in-fact due to economic harm. *Id.* In fact, *Sault Ste. Marie* also found non-tribal intervenors – who were not governed by MILCSA at all – had standing based solely on economic harm. *Id.* at 11-12.

More fundamentally, Scotts Valley's efforts to distinguish *Sault Ste. Marie* mischaracterize the nature of the Patwin Tribes' interest in this litigation. To hear Scotts Valley tell it, the *Sault Ste. Marie* intervenors had a direct statutory interest in the interpretation of MILCSA, but the Patwin Tribes have no interest whatsoever in the legal questions at issue here. ECF 31 at 21. Scotts Valley is wrong on both counts. As noted above, the *Sault Ste. Marie* intervenors also included non-tribal casino owners who were not statutory beneficiaries of MILCSA. *Sault Ste. Marie*, 331 F.R.D. at 11-12. And the Patwin Tribes have a strong interest in legal questions at issue in the present case – including, most notably, the extent to which DOI will consider evidence relevant to IGRA's gaming eligibility requirements. Just as the tribal intervenors in *Sault Ste. Marie* had an underlying interest in the proper interpretation and implementation of MILCSA's land acquisition requirements, so do the Patwin Tribes have an underlying interest in the proper interpretation and implementation of IGRA's gaming eligibility requirements. *See Redding Rancheria v. Jewell*, 776 F.3d 706, 712 (9th Cir. 2015) (gaming

eligibility requirements balance the interests of restored tribes and the interests of established tribes).

Grasping at straws, Scotts Valley attempts to cast doubt on the Patwin Tribes' cultural connection to the Project area. The effort is unconvincing. There is no reasonable dispute that the Project Site lies within Patwin ancestral territory – indeed, Scotts Valley has previously admitted as much. *See* Compl. ¶ 66, *Yocha Dehe Wintun Nation v. U.S. Dep't of Interior*, No. 25-cv-00867-TNM (D.D.C. Mar. 24, 2025), ECF No. 1. And it is equally clear that the Project will destroy a site known as CA-SOL-275, to which the Patwin Tribes attach cultural importance. ECF 16-2 ¶ 3. Viewed most charitably, Scotts Valley's argument is that DOI found CA-SOL-275 does not meet the separate regulatory definition of "historic site" under the National Historic Preservation Act ("NHPA"). ECF 31 at 27-28. But that is a contested finding, made by DOI *absent mandatory NHPA consultations with the Patwin Tribes*. Compl. ¶¶ 99-108, 166-174, *Yocha Dehe*, No. 25-cv-00867-TNM (D.D.C. Mar. 24, 2025), ECF No. 1. Moreover, even if DOI's finding had been accurate and proper (and it was neither), the cultural injury associated with the Patwin Tribes' loss of CA-SOL-275 would remain just as real. ECF 16-2 ¶ 14; *id.* at Attachment 2.[3]

The remainder of Scotts Valley's "cultural" arguments consist of a series of misleading claims by Scotts Valley's non-tribal development partners, who seem to believe the Patwin Tribes do not truly value their cultural heritage. ECF 31 at 27-31; *see also* ECF 31-2; ECF 31-3. In a lengthy series of arguments, the developers pretend to be surprised by the Patwin Tribes' interest in cultural resource protection on and around the Project Site. ECF 31 at 29-31. The act

[3] Scotts Valley seems to suggest that mitigation measures will minimize harm to CA-SOL-275. ECF 31 at 26-27. But the referenced "mitigation" does not provide the Patwin Tribes with any mechanism for preserving the site. *Id.*

falls flat. For generations, the Patwin Tribes (unlike Scotts Valley) have tirelessly worked to protect cultural resources in and around what is now the City of Vallejo, Solano County, and southern Napa County. *See, e.g.*, ECF 16-1 at 9-10; ECF 16-2 ¶ 7; Compl. ¶¶ 60-62, *Yocha Dehe*, No. 25-cv-00867-TNM (D.D.C. Mar. 24, 2025), ECF No. 1. That work has included extensive discussions with the City of Vallejo concerning the developers' own Solano Ranch project – a proposal that would have overlapped with three of the parcels now included within Scotts Valley's Project Site. Second Declaration of Sarah R. Choi, ¶¶ 3-4 (attached as Exhibit A). It has also included extensive and very public advocacy, for nearly a decade, with respect to the Scotts Valley Project. Compl. ¶¶ 72-139, *Yocha Dehe*, No. 25-cv-00867-TNM (D.D.C. Mar. 24, 2025), ECF No. 1. The developers should have been well aware of the Patwin Tribes' concerns.

Finally, Scotts Valley suggests "multiple unresolved contingencies" preclude the Patwin Tribes' standing. ECF 31 at 31-32. The argument does not withstand scrutiny. A gaming compact is not required for all types of gaming activity and is automatically "deemed approved" unless the Secretary of the Interior decides, within 45 days, that it violates federal law. *See* 25 U.S.C. § 2710(d)(8)(B)-(C). Similarly, approval of a management contract is not required for gaming, provides no opportunity for the Patwin Tribes to participate, and does not address the Patwin Tribes' economic and cultural concerns. *See, e.g.*, 25 C.F.R. § 533.1 (approval only required if gaming facility will be managed by outside entity). And Scotts Valley's "environmental compliance obligations" are not "contingencies" at all; they are ministerial obligations in furtherance of existing Project approvals, to which Scotts Valley has already agreed. Although these steps may affect the immediacy of Scotts Valley's construction, they do not render the Patwin Tribes' injuries uncertain, remote, or speculative.

Here, again, this Court's decision in *Sault Ste. Marie* is instructive. In *Sault Ste. Marie*, DOI's decision to take land into trust for a tribal project proponent was considered "the last significant hurdle preventing the Tribe from opening new gaming facilities in the Lower Peninsula," even though there was not yet any determination that the land was eligible for gaming under IGRA. 331 F.R.D. at 11. The Court explained that the plaintiff tribe could open a gaming facility after the land was placed into trust and before other approvals – it would just do so at the risk of violating IGRA and other applicable laws. *Id.* The same is true here. It is quite clear that Scotts Valley will immediately proceed with the Project if the March 27 Letter is set aside. *See, e.g.*, ECF 12 ¶¶ 24-25. And that is enough to confirm the Patwin Tribes' standing. *Sault Ste. Marie*, 331 F.R.D. at 11.

2. Invalidating the March 27 Letter Would Remove the Benefit of a Favorable Agency Decision, Causing Injury.

The March 27 Letter directly benefits the Patwin Tribes by guaranteeing DOI will reconsider the 2025 ILO with their evidence in mind. *See* ECF 16-1 at 16. Setting aside the March 27 Letter would harm the Patwin Tribes by depriving them of that same benefit. *Id*. Under controlling Circuit precedent, this injury is sufficient for intervention. *See Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003).

Scotts Valley claims the 2019 ILO Litigation forecloses this basis for standing. ECF 31 at 18-19. But, yet again, it ignores critical differences between this case and that one. *See id*. First, the 2019 ILO Litigation concerned an agency decision that confirmed the *status quo ante*: Scotts Valley had no legal ability to conduct gaming prior to the 2019 ILO and no legal ability to conduct gaming after the 2019 ILO; therefore, removing the benefits of the 2019 ILO was not enough to confer standing. *See Yocha Dehe Wintun Nation v. U.S. Dep't of Interior*, 3 F.4th 427,

431 (D.C. Cir. 2021). As the D.C. Circuit put it, there were "too many steps" – including the requirement to obtain a new ILO – separating invalidation of the 2019 ILO from Project-related harm. *Id*. In contrast, the March 27 Letter is an agency decision that would change the *status quo ante*. Removing the benefits of the March 27 Letter would restore the 2025 ILO and return the Patwin Tribes to a circumstance in which Scotts Valley is once again eligible to immediately implement the Project – an injury not present in the 2019 ILO Litigation.

Second, in the 2019 ILO Litigation the D.C. Circuit placed considerable weight on the idea that Yocha Dehe was not the "direct subject" of the agency decision at issue. *Yocha Dehe Wintun Nation*, 3 F.4th at 431. In contrast, the March 27 Letter is expressly intended to provide the Patwin Tribes (among others) with the right to have their evidence considered. 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) ("March 27 Letter").[4] The Letter directs the Patwin Tribes to take specific steps (*i.e*., to compile and submit evidence by May 30) and provides them with specific and direct benefits (*i.e.,* the ability to have their evidence heard, with the 2025 ILO temporarily rescinded in the meantime). *Id*. In other words, the Patwin Tribes are among the direct subjects of the agency decision now under review. Indeed, Scotts Valley's complaint admits as much. ECF 12 ¶ 30 (alleging the March 27 Letter was issued "in response to submissions from third-party Indian tribes"). For this reason, too, the 2019 ILO Litigation does not control.[5]

---

[4] *Available at:* 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.

[5] Indeed, Yocha Dehe was denied intervention in the 2019 ILO Litigation in large part because the District Court expected the Patwin Tribes would be allowed to have their evidence considered on remand. *See Scotts Valley Band of Pomo Indians v. U.S. Dep't of Interior*, 337 F.R.D. 19, 26-27 (D.D.C. 2020).

Scotts Valley also misconstrues *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015), the leading case addressing these issues. Contrary to Scotts Valley's suggestion, *Crossroads* did not involve – and certainly did not require – "ongoing enforcement proceedings and immediate civil liability." ECF 31 at 19. In fact, the opposite is true. *Crossroads* concerned a Federal Election Commission order declining to investigate a political consulting firm. *Crossroads*, 788 F.3d at 318-19. The firm sought to intervene in defense of the Commission's order, arguing that reversal would re-open the possibility of an investigation, an investigation might lead to a civil enforcement action, and an enforcement action could result in liability. *Id*. at 315-16. The Court of Appeals held the firm had standing even though it would face no potential liability unless and until several other discretionary agency decisions occurred. *Id*. at 315-16, 318. After all, "[l]osing the favorable order" would itself constitute "significant injury in fact." *Id.* at 318.

3. Invalidating the March 27 Letter Would Deprive the Patwin Tribes of the Right to be Heard on a Matter of Significant Importance, Causing Injury.

Setting aside the March 27 Letter would also injure the Patwin Tribes by depriving them of the opportunity to be heard on a matter of great significance – namely, Scotts Valley's claims of a "significant historical connection" to Patwin ancestral homelands. ECF 16-1 at 16-17. Scotts Valley claims this injury is insufficient to support standing, arguing the Patwin Tribes "have no right to submit evidence or comment." ECF 31 at 15-17. This argument is contrary to the law and the facts, and it fails in multiple respects.

Scotts Valley principally relies on the fact that IGRA's implementing regulations do not establish a public comment process for the restored lands exception. *See id.* at 15. And, true enough, DOI's rulemaking material states that a restored-lands-specific comment period is not required. *See* Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354,

29,361 (May 20, 2008). But that is not the same as saying interested parties "have no right to comment." *See* ECF 31 at 15. Indeed, the very same rulemaking material cited by Scotts Valley makes clear that interested parties *are* entitled to comment on restored lands requests: "the public may submit written comments that are specific to a particular [Indian] lands opinion." 73 Fed. Reg. at 29,361. And once those comments have been submitted, DOI is legally required to consider them. *See Butte Cnty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).

Butte County v. Hogen illustrates the point. That case, like this one, involved a California tribe's request for a favorable Indian Lands Opinion pursuant to IGRA's restored lands exception – an "informal adjudication," within the meaning of the Administrative Procedure Act. *Id.* at 192-94. Prior to DOI's final agency action, an interested party submitted written evidence questioning whether the applicant tribe met the requirements of the restored lands exception. *Id*. at 193. DOI issued an ILO without considering the evidence. *Id*. at 193-94. The Court of Appeals struck down the ILO, noting that "an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary action within the meaning of [the APA]." *Id*. at 194.

For the same reason, DOI erred by failing to consider the Patwin Tribes' timely-submitted evidence. The March 27 Letter begins to correct that error by inviting the Patwin Tribes to resubmit their evidence and committing to reconsider the 2025 ILO with that evidence in mind. March 27 Letter at 1. If the March 27 Letter is set aside, the Patwin Tribes' injury would be immediately restored.

Scotts Valley also claims the Patwin Tribes had no right to submit evidence because the administrative record was permanently closed in 2019. ECF 31 at 10-11, 15-17. Although not entirely clear, Scotts Valley seems to allege that it "declined" to re-open the administrative record on remand after consulting with DOI. ECF 12 ¶ 20. But it has provided few specifics

about this "declination." *See id.*; *see also* ECF 3-1 at 12; ECF 3-2 ¶ 8. What decisionmakers were involved? What was decided? Who was notified? In contrast, the Patwin Tribes have provided specific evidence that DOI repeatedly represented the record would remain *open* and the Patwin Tribes' submissions *would be* considered. *See* ECF 16-1 at 11-13; ECF 16-2 ¶ 15. In fact, on November 27, 2024, the Principal Deputy Assistant Secretary-Indian Affairs – the very same DOI official who signed the 2025 ILO just a few weeks later – specifically promised to consider the Patwin Tribes' evidentiary submissions. ECF 16-2 ¶ 15.

Furthermore, Scotts Valley's own conduct fatally undermines its claim that the record was "closed" in 2019. The Project Site consists of four parcels comprising a total of 160 acres. In 2016, Scotts Valley applied for the westernmost parcel to be placed in trust and requested an Indian Lands Opinion declaring that parcel gaming-eligible. *See* January 10 Decision at 1. As of 2019, those remained the only requests on record. Not until the summer of 2024 did Scotts Valley seek to place the other three Project Site parcels in trust and request a determination of their gaming eligibility. *See id.* at 1 & n.1 (describing 2016 request and Scotts Valley's "subsequent[] update" to its request to increase the size of the Project Site); ECF 16-2 ¶¶ 8-10. Nevertheless, the 2025 ILO purports to determine that all four parcels meet the requirements of the restored lands exception. *See* January 10 Decision at 1-2, 1 n.1. Scotts Valley cannot have it both ways. If it (and DOI) really believed the record was permanently closed in 2019, there would have been no basis to add three more parcels to the ILO request in 2024 or to include those parcels in the 2025 ILO.

In the end, and regardless of any other right or process, the March 27 Letter provides the Patwin Tribes with an opportunity to have their evidence considered. Invalidation of the March 27 Letter would eliminate that opportunity, a distinct and additional cause of injury-in-fact.

Indeed, Scotts Valley's pleadings make clear the intent of this lawsuit is to prohibit DOI from considering the Patwin Tribes' evidence. ECF 12 ¶¶ 38, 45, 53-56; *id.* at Prayer for Relief ¶¶ B-C. If Scotts Valley is successful in obtaining that relief, the Patwin Tribes will suffer injury sufficient to establish Article III standing. *See Am. Tunaboat Ass'n v. Ross*, 391 F. Supp. 3d 98, 109 (D.D.C. 2019) (determining that plaintiff suffered "real injury" based on denial of access to agency decisionmakers and the decisionmaking process).

Even if this injury is considered procedural, it is nonetheless sufficient to confer standing. A party can establish standing by showing a concrete interest affected by the deprivation of the procedural right. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2008). That is particularly true here, for DOI's refusal to consider the Patwin Tribes' evidence materially impacted the outcome of the decision-making process on remand.

To briefly summarize, the 2025 ILO is expressly based on the two assumptions: (i) that Scotts Valley ancestor Shuk Augustine was among a group of children baptized at Mission Sonoma in 1837; and (ii) that Shuk Augustine lived in a house of migrant workers near the town of Napa in 1870. Compl. ¶¶ 151, *Yocha Dehe*, No. 25-cv-00867-TNM (D.D.C. Mar. 24, 2025), ECF No. 1. The Patwin Tribes' 2024 evidentiary submission thoroughly rebutted both assumptions. *Id.* ¶¶ 116, 154.[6] Among other things, the submission demonstrated that the 1837 baptismal cohort did not, in fact, include Shuk Augustine or any other Scotts Valley ancestor; instead, the children were from an entirely unrelated village 50 miles away from Scotts Valley. *Id*. ¶ 116. The submission also included evidence that Shuk Augustine's alleged (but

[6] Contrary to Scotts Valley's suggestion (ECF 31 at 16), the 2024 submission was the Patwin Tribes' first opportunity to address these two issues – both of which had been inserted into the process *after* DOI's 2016 comment period. *See* Compl. ¶¶ 71-76, *Yocha Dehe*, No. 25-cv-00867-TNM (D.D.C. Mar. 24, 2025), ECF No. 1.

unconfirmed) presence near the town of Napa in 1870 would not have included use or occupancy of the Project Site; by 1870, the Project Site was a private family farm worked by non-Indian labor. *Id*. DOI's failure to consider this evidence directly contributed to the agency's erroneous 2025 ILO – the gaming eligibility determination pursuant to which Scotts Valley seeks to move the Project forward.

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

The Patwin Tribes also satisfy the Rule 24(a)(2) requirements for intervention as of right: (1) the motion to intervene is timely; (2) the Patwin Tribes claim 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 the Patwin Tribes' ability to protect their interest; and (4) the Patwin Tribes' interest may not be adequately represented by existing parties. *See Fund for Animals*, 322 F.3d at 731 (quoting Fed. R. Civ. P. 24(a)(2)).

1. The Motion to Intervene is Timely.

Neither the Federal Defendants nor Scotts Valley disputes that the Patwin Tribes' motion to intervene was timely. *See* ECF 29 at 5-7; ECF 31 at 34.

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

The Patwin Tribes have Article III standing. *See* Part II.A, *supra*. In this Circuit, that is sufficient to satisfy the second requirement for intervention as of right. *See Fund for Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)); *Sault Ste. Marie*, 331 F.R.D. at 12-13; *Forest Cnty.*, 317 F.R.D. at 13 & n.8.

Although Scotts Valley does not (and cannot) dispute this legal principle, it nonetheless suggests the Patwin Tribes lack an interest in the March 27 Letter. ECF 31 at 34-36. The claim is meritless. The March 27 Letter was a direct response to the Patwin Tribes' concerns. *See*

March 27 Letter at 1. It was sent to their Chairmen. *Id.* at 2. And it invited them to submit evidence for consideration by DOI decision-makers. Common sense allows but one conclusion: the Patwin Tribes have a substantial interest in the subject of this action.

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

The Patwin Tribes' moving papers explained how this action threatens to impair their interests, both by causing the injuries that give the Patwin Tribes standing and by shortcutting the Patwin Tribes' own, earlier-filed litigation. ECF 16-1 at 19.

Without responding to the specifics of this showing, Scotts Valley broadly suggests the Patwin Tribes interests will not be impaired because they can be addressed in separate litigation. ECF 31 at 36. But case law is clear that the possibility of a separate lawsuit is not a reason to find a proposed intervenor's interests will not be impaired. *See Fund for Animals*, 322 F.3d at 735; *Sault Ste. Marie*, 331 F.R.D. at 13. The "task of reestablishing the status quo" by separate litigation, even if possible, is "difficult and burdensome." *Fund for Animals*, 322 F.3d at 735; *see also Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 158 (D.D.C. 2001) (finding proposed intervenor's interest "would be practically impaired" if plaintiff prevailed in challenge to agency action because proposed intervenor could no longer rely on agency action "and would have to participate once again in the discussion and comment process"). In fact, the Patwin Tribes' separate lawsuit weighs in favor of their participation, not against it. After all, the Patwin Tribes' involvement in this case "may lessen the need for future litigation to protect their interests." *Sault Ste. Marie*, 331 F.R.D. at 13 (quoting *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977)).

Moreover, the authority on which Scotts Valley relies does not support its position. In *Garcia v. Vilsack*, the proposed intervenor moved to intervene nearly thirteen years after the case was filed. 304 F.R.D. 77, 84 (D.D.C. 2014). By that point, it was clear that intervention would

cause prejudice and delay. And, in that unusual context, it was "very relevant to the Court's assessment of the *timeliness* of [the intervention] motion" that the proposed intervenor could pursue its claim elsewhere. *Id.* (emphasis added). The situation in *Garcia* is simply not present here. The Patwin Tribes moved to intervene just ten days after this action was filed, and no party disputes the timeliness of that motion.

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 represents their interests. The Patwin Tribes' cultural, economic, governmental, and procedural interests in this action are distinct from Federal Defendants' interests. Courts in this Circuit recognize such distinctions and "often conclude[] that governmental entities do not adequately represent the interests of aspiring intervenors" – even in APA-based challenges to federal agency action. *Fund for Animals*, 322 F.3d at 736-37 (D.C. Cir. 2003); *see also, e.g.*, *Sault Ste. Marie*, 331 F.R.D. at 13 ("The Intervenor Tribes and the Casinos have a narrow financial interest that the Government does not share. The Government need not, and indeed cannot reasonably be expected to, represent these interests."); *Forest Cnty.*, 317 F.R.D. at 14-15 (federal government did not adequately represent intervenor tribe's interests even though both sought to uphold agency action); *Cnty. of San Miguel v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C. 2007) ("Thus, although the FWS and the intervenor-applicants share a common interest – upholding the FWS's listing determination – that shared interest does not guarantee adequate representation of the intervenor-applicants' interests and those of their members."); *Am. Horse Prot. Ass'n*, 200 F.R.D. at 159 ("[M]erely because parties share a general interest in the legality of a program or

regulation does not mean their particular interests coincide so that representation by the agency alone is justified.").[7]

Federal Defendants argue they are the only "required defendants[s]" in an APA challenge, and that the "agency is the only necessary party to defend its action" – language relevant to "necessary and indispensable party" analysis under Rule 19, *but not* "adequate representation" analysis under Rule 24(a)(2). *See* ECF 29 at 5-6; *see also id.* at 6 (citing *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996)). Scotts Valley similarly argues adequate representation based on Rule 19 rather than intervention case law. ECF 31 at 36-37. But Rule 19 "involves an entirely different standard" from Rule 24(a), one that is more burdensome and that does not apply here. *Forest Cnty.*, 317 F.R.D. at 14 n.10. The Patwin Tribes need only show that representation by Federal Defendants *may* be inadequate, not that they are indispensable parties to the case. *See id.*; *see also Fund for Animals*, 322 F.3d at 735.

The Patwin Tribes have made that showing. Their interests are not limited to "hav[ing] the federal action upheld," ECF 29 at 6-7, but also include their own cultural, economic, and

[7] It is well-established in this Circuit that the burden on a proposed intervenor to show inadequate representation is only "minimal," *Fund for Animals*, 322 F.3d at 735. Scotts Valley nonetheless attempts to increase that burden by claiming there is a "presumption of adequate representation" when an existing party and proposed intervenor share "the same ultimate objective." ECF 31 at 38 (quoting *Cobell v. Jewell*, No. 96-01285 (TFH), 2016 WL 10704595 (D.D.C. Mar. 30, 2016)). The unpublished district court case on which Scotts Valley relies relied on (a) out-of-Circuit precedent, *Cobell*, 2016 WL 10704595 at *2 n.1, and (b) another district court case that stated "courts now presume that the principal [of a bond] is adequately represented by its surety because they both have the 'same ultimate objective,' *i.e.*, to avoid liability on the payment bond," *Atl. Refinishing & Restoration, Inc. v. Travelers Cas. & Surety Co. of Am.*, 272 F.R.D. 26, 30 (D.D.C. 2010); *Cobell*, 2016 WL 10704595 at *2. The numerous cases concluding the federal government does not adequately represent the interests of intervenors far outweighs this questionable authority. *See, e.g.*, *supra* pp. 20-21. And even if there were a presumption of adequate representation here, it would be rebutted by the Federal Defendants' failure to adequately represent the Patwin Tribes' interests in previous proceedings and their apparent unwillingness to make a full-throated promise to do so now, even in their opposition to the Patwin Tribes' intervention in this case. *See infra* pp. 22-23.

governmental interests. These are not just "motivations" for defending the March 27 Letter, *id.* at 7; they are the Patwin Tribes' interests in this action – interests the courts routinely consider sufficient to satisfy Rule 24(a)(2). *See, e.g.*, *Sault Ste. Marie*, 331 F.R.D. at 13; *Forest Cnty.*, 317 F.R.D. at 15.[8]

If further evidence of potential conflict were needed, it could readily be found in the Patwin Tribes' related, prior-filed litigation challenging the January 10 Decision. That case touches some of the same subject matter at issue here. There, however, the Patwin Tribes and the Federal Defendants remain adverse. To avoid prejudicing their related case, the Patwin Tribes should be allowed their own defense here.

Finally, Federal Defendants fail to reckon with their own failure to adequately represent the Patwin Tribes' interests in the past. *See* ECF 29 at 5-7; ECF 16-1 at 20. And while they now claim "the primary and strongest interest in seeing their own action upheld," ECF 29 at 6-7, they have not provided any specific assurance that this interest will extend to a vigorous defense of the Patwin Tribes' opportunity to have their evidence considered. Such silence is sufficient for the Patwin Tribes to make the minimal showing required that Federal Defendants may not adequately represent their interests in this action. *See 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

[8] Federal Defendants' attempt to distinguish "motivations" and "interests" as legally relevant is also unconvincing. Federal Defendants rely on *Jones v. Prince George's County*, 348 F.3d 1014 (D.C. Cir. 2003), to suggest that "litigation interests can be congruent even when parties may have differing motives." ECF 29 at 7. But in that case – a wrongful death action that is not analogous to the present dispute – the court rejected contentions that the plaintiff and proposed intervenor had differing motivations, allowing the court to conclude their interests were "perfectly congruent." *See Jones*, 348 F.3d at 1019. *Jones* does not address adequacy of representation when motivations and interests differ, as they do here.

regarding intent to protect intervenor's interests gives rise to concerns about adequate representation).

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

The Patwin Tribes have standing, satisfy all 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.

Federal Defendants take no position on whether the Patwin Tribes are entitled to permissive intervention, and they advance no argument in opposition. *See* ECF 29 at 5, 8. And Scotts Valley's opposition is unpersuasive.

As an initial matter, the Patwin Tribes have Article III standing. *See supra* Part II.A; ECF 16-1 at 14-17.

Next, the Patwin Tribes clearly have a claim or defense that shares with the main action a common question of law or fact. They seek to defend the March 27 Letter and the reconsideration proceeding it establishes, and they propose to assert affirmative defenses which share questions of law and fact in common with Scotts Valley's claims for relief and the Federal Defendants' defenses. *See* ECF 16-1 at 21-22. Nothing more is required for permissive intervention purposes. *See Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007). Scotts Valley does not challenge this principle or cite any case law to the contrary. ECF 31 at 40. Instead, it rehashes prior arguments alleging the Patwin Tribes lack an interest in the March 27 Letter. *See id.* These arguments fail for the same reasons set forth in Parts II.A and II.B.2, *supra*.

Finally, the Patwin Tribes' participation will not unduly delay or prejudice this case. On the contrary, the Patwin Tribes will "contribute to the full development of the factual and legal issues presented." *Cf.* ECF 31 at 40 (quoting *Ctr. for Biological Diversity v. U.S. EPA*, 274

F.R.D. 305, 313 (D.D.C. 2011)). For example, Scotts Valley has placed at issue the question of whether and how DOI "decided to issue a final determination based solely on the existing administrative record." ECF 12 ¶ 20. In its view, the March 27 Letter was a reversal of agency position that "unlawfully reopened a closed record." *Id.* ¶¶ 38, 53-56. But the Patwin Tribes will provide relevant facts and legal argument squarely contradicting Scotts Valley's allegations on this point. *See, e.g.,* ECF 16-2 ¶ 15 (describing meeting at which DOI decisionmaker told the Patwin Tribes their evidence would be considered). The Patwin Tribes' participation will contribute to the full development of factual and legal issues in this case. *See Ass'n of Wash. Bus. v. U.S. EPA*, No. 23-cv-3605 (DLF), 2024 U.S. Dist. LEXIS 114090, at *33-34 (D.D.C. June 28, 2024) (granting permissive intervention to tribes whose perspective would advance just and equitable adjudication of the matter).

Scotts Valley's claims that the Patwin Tribes will inject collateral arguments and delay or complicate the case fall flat. *See* ECF 31 at 22, 29-31, 33, 40-41. Despite devoting multiple sections of its opposition brief to this issue, Scotts Valley does not identify any specific place in the Patwin Tribes' intervention papers where the Patwin Tribes indicate an intent to raise legal arguments that would delay the case. Instead, Scotts Valley appears to conflate the Patwin Tribes' separate lawsuit (which does raise legal claims beyond those asserted here) with the Patwin Tribes' proposed intervention here (which does not). *See id.* at 30-31, 33. While there is some overlap between the cases, they are not identical. If they were, Scotts Valley could have – indeed, should have – intervened in the Patwin Tribes' *earlier-filed, pending* lawsuit rather than filing a separate action. The Patwin Tribes' participation in this lawsuit will reduce the risk of future litigation and the possibility of inconsistent rulings – not increase it.

III. CONCLUSION

For the reasons set forth above and in their memorandum of points and authorities in support of their motion to intervene, ECF 16-1, the Patwin Tribes respectfully request that their motion to intervene be granted.

Respectfully submitted on April 21, 2025.

/s/ Samantha R. Caravello
MATTHEW G. ADAMS (CA SBN 229021)*
WILLIAM C. MUMBY (Bar ID CA00218)
Kaplan Kirsch LLP
One Sansome Street, Suite 2910
San Francisco, CA 94104
Telephone: (415) 907-8704
E-mail: madams@kaplankirsch.com
wmumby@kaplankirsch.com

SAMANTHA R. CARAVELLO (Bar ID CO0080)
Kaplan Kirsch LLP
1675 Broadway, Suite 2300
Denver, CO 80202
Telephone: (303) 825-7000
E-mail: scaravello@kaplankirsch.com

Counsel for the
Yocha Dehe Wintun Nation

**Application for admission to D.D.C. Bar pending*

/s/ Brenda L. Tomaras
BRENDA L. TOMARAS
(CA SBN 176900)**
Tomaras & Ogas, LLP
10755-F Scripps Poway Parkway, #281
San Diego, CA 92131
Telephone: (858) 554-0550
E-mail: btomaras@mtowlaw.com

Counsel for the
Kletsel Dehe Wintun Nation of the Cortina Rancheria

***Pro Hac Vice application pending*