IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!
P.O. Box 355
Penryn, CA 95663,

PATTY JOHNSON
8713 Tulare Ct.
Elk Grove, CA 95758,

JOE TEIXEIRA
8217 Wooded Brook Drive
Elk Grove, CA 95758,

and

LYNN WHEAT
8770 Williamson Drive
Elk Grove, CA 95624,

Plaintiffs,

v.

Case No. 1:17-cv-00058-RDM

UNITED STATES DEPARTMENT OF INTERIOR
1849 C Street, NW
Washington, DC 20240,

SALLY JEWELL, in her official capacity as
Secretary of the Interior
1849 C Street, NW
Washington, DC 20240,

BUREAU OF INDIAN AFFAIRS
1849 C Street, NW
Washington, DC 20240,

LARRY ROBERTS, in his official capacity as Acting
Assistant Secretary-Indian Affairs
1849 C Street, NW
Washington, DC 20240,

AMY DUTSCHKE, in her official capacity as
Regional Director Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825,

Defendants,

and

WILTON RANCHERIA, CALIFORNIA
9728 Kent Street
Elk Grove, CA 95624,

Proposed Intervenor-Defendant.

WILTON RANCHERIA, CALIFORNIA'S UNOPPOSED MOTION TO INTERVENE AS A DEFENDANT

Wilton Rancheria, California (the Tribe), a federally recognized Indian tribe, *see* 82 Fed. Reg. 4,915-02 (Jan. 17, 2017), moves this Court for leave to intervene as a defendant as of right pursuant to Federal Rule of Civil Procedure 24(a)(2), or, in the alternative, to intervene permissively pursuant to Rule 24(b)(1)(B). The Tribe relies on the accompanying statement of points and authorities. Consistent with Rule 24(c), the Tribe requests leave to defer filing an answer in intervention or other responsive pleading until such time as Defendants are required to answer, or upon order of this Court.

Pursuant to Local Civil Rule 7(m), the Tribe has conferred with counsel for Plaintiffs and Defendants. Counsel for Plaintiffs has stated that Plaintiffs do not oppose the Tribe's intervention. Counsel for Defendants has stated that Defendants consent to the Tribe's permissive intervention and take no position on the Tribe's intervention as of right.

Respectfully submitted this 15th day of February, 2017.

WILTON RANCHERIA, CALIFORNIA

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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF WILTON RANCHERIA, CALIFORNIA'S UNOPPOSED MOTION TO INTERVENE

INTRODUCTION

Wilton Rancheria, California (the Tribe), a federally recognized Indian tribe, has been landless for nearly sixty years due to its unlawful termination. As part of its longstanding effort to restore land for its people and to promote economic development and tribal self-determination, the Tribe asked the Secretary of the Interior to acquire 35.92 acres of land located in the City of Elk Grove, County of Sacramento, California, into trust on its behalf for gaming purposes.

On January 19, 2017, the Secretary issued a final decision, pursuant to her authority under the Indian Reorganization Act (IRA), 25 U.S.C. § 5108, approving the Tribe's request. Ex. A, BIA Record of Decision at 4, 13 (Jan. 19, 2017). Plaintiffs' complaint in this Court was filed a week before that decision. The complaint seeks "emergency relief" to prevent the transfer of the land in trust for the Tribe and states that Plaintiffs "anticipate challenging" the Secretary's decision to acquire the land in trust under various federal statutes. Compl. ¶¶ 63-64.

The Tribe seeks to intervene as a defendant in these proceedings. The Tribe satisfies all of the criteria required to intervene under Federal Rule of Civil Procedure 24. First, the Tribe has promptly filed this motion. Second, the Tribe's interest in this suit is obvious because the land at issue is land the Secretary has acquired in trust for the Tribe. Third, Plaintiffs' suit threatens to deprive the Tribe of this land's trust status and undo the enormous effort the Tribe has expended to obtain that status. Finally, the Tribe's intervention is necessary to preserve its historical and economic interests in the land.

Accordingly, the Court should grant the Tribe's motion to intervene as of right under Rule 24(a)(2). In the alternative, the Court should grant the Tribe's motion for permissive intervention under Rule 24(b)(1)(B). Plaintiffs do not oppose the Tribe's intervention, while

Defendants consent to the Tribe's permissive intervention and take no position on the Tribe's intervention as of right.

BACKGROUND

Through its land-to-trust application, the Tribe has sought to restore lands in "an area it historically inhabited" and continues to inhabit today. Ex. A, BIA Record of Decision at 11. The members of the Tribe are "descended from peoples who spoke variations of Uto-Aztecan languages: the Bay, Plains, and Northern Sierra dialects of the Miwok language, and the Nisenan (or Southern Maidu) language." *Id.* "The Tribe's historic Rancheria, established in 1927," its modern tribal headquarters, and the application site are located within territory that was historically occupied predominately by Plains Miwok people. *Id.*

In 1906, Congress began to appropriate money for the purchase of small tracts of land for landless Indians in California. *See* Act of June 21, 1906, Pub. L. No. 258, 34 Stat. 325, 333. In 1927, the United States purchased a 38.77-acre parcel for the Tribe. Ex. A, BIA Record of Decision at 11. Even prior to this land purchase, the Sacramento Indian Agency recognized the Tribe in its communications with tribal members, including correspondence in 1925 that provided a draft constitution and bylaws for review. *Id.* In 1935, the Federal Government "treated the Rancheria as a 'reservation' for purposes of the [IRA], holding an election" of the Tribe's adult members. *Id.* The Tribe voted to accept the IRA and, in 1936, adopted an IRA Constitution. *Id.*

In 1958, as part of the United States' general policy of termination with respect to Indian tribes, Congress enacted the California Rancheria Act of Aug. 18, 1958 (Rancheria Act), Pub. L. No. 85-671, 72 Stat. 619 (amended 1964). Section 1 of the Rancheria Act provided that the assets of forty-one named Rancherias—including Wilton Rancheria—would "be distributed in

accordance with the provisions of th[e] Act." *Id.* By 1964, the Government had ceased federal supervision over the Tribe. 29 Fed. Reg. 13,146 (Sept. 22, 1964); Compl. ¶ 28.

In 2007, the Tribe filed suit against the United States to restore its federal recognition. Compl. ¶¶ 29-30. In 2009, the United States stipulated to doing so, agreeing that "the Tribe was not lawfully terminated, and the Rancheria's assets were not distributed, in accordance with the provisions of the [Rancheria] Act." Stipulation for Entry of Judgment at 2, *Wilton Miwok Rancheria v. Kempthorne*, No. 5:07-cv-2681 (N.D. Cal. July 16, 2009), ECF No. 62-1; *see also* 74 Fed. Reg. 33,468 (July 13, 2009) (adding the Rancheria to the list of tribes eligible for federal services). The United States further agreed to "process, pursuant to 25 C.F.R. Part 151, any applications for land into trust for any parcels of land acquired by the Tribe." Stipulation for Entry of Judgment at 5. For years, however, the United States did "not acquire[] [any] land in trust" for the Tribe, and the Tribe "remain[ed] landless." Ex. A, BIA Record of Decision at 12.

In 2012, the Tribe began to move forward with plans to promote its economic development and self-sufficiency. Compl. ¶ 34. Acquisition of land into trust by the United States for gaming purposes would enable the Tribe "to provide its membership with employment and educational opportunities, and needed social and governmental services." Ex. A, BIA Record of Decision at 14. In addition, "revenue and job opportunities" created by the gaming resort "would improve the socioeconomic condition of tribal members and reduce dependence on public assistance programs." *Id.* at 14-15.

In 2013, the Tribe filed an application with the Bureau of Indian Affairs (BIA), asking the Secretary to acquire land in trust on its behalf. Compl. ¶ 34. Consistent with its intention to use its application site for gaming purposes, the Tribe explained why it qualifies for a Restored

Lands Exception pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719(b)(1)(B)(iii), and 25 C.F.R. § 292.10. Ex. A, BIA Record of Decision at 59-60.

During consideration of the Tribe's application, the BIA prepared an Environmental Impact Statement (EIS), evaluating the alternative sites identified by the Tribe. *Id.* at 10. In June 2016, after considering the draft EIS and public comments received in response, the Tribe submitted a revised application, identifying a 35.92-acre site located in the City of Elk Grove, County of Sacramento, California (Site), as the application site. *Id*. The Site is located less than two miles from the Tribe's current tribal headquarters and only 5.5 miles from the Tribe's historic Rancheria. *Id.*

On January 11, 2017—eight days before the Secretary issued a final decision—Plaintiffs filed a complaint in this Court and requested a temporary restraining order and preliminary injunction to prevent any transfer if the Secretary agreed to acquire the land in trust. Plaintiffs allege that they "will be affected by the environmental and economic impacts of the Wilton Rancheria's proposed trust acquisition and tribal casino" and that they "anticipate challenging" the Secretary's "decision to acquire land in trust" under various federal statutes. Compl. ¶¶ 5-6, 63.

On January 13, this Court denied Plaintiffs' motion for a temporary restraining order. Four days later, Plaintiffs submitted a formal request to the Department of the Interior and the BIA under 5 U.S.C. § 705, asking that they postpone the effective date of any decision to acquire land in trust on behalf of the Tribe. ECF No. 6-1. In light of that formal request under § 705, the Court denied Plaintiffs' motion for a preliminary injunction without prejudice.

On January 19, the Secretary issued a final decision agreeing to acquire the Site into trust for the Tribe. Ex. A, BIA Record of Decision at 4. On February 10, the Department and the

BIA denied Plaintiffs' formal request under § 705, and the land was transferred to the United States on that same day.

ARGUMENT

I. THE TRIBE SHOULD BE GRANTED INTERVENTION AS A MATTER OF RIGHT

A party has the right to intervene under Federal Rule of Civil Procedure 24(a)(2) if four requirements are met: (1) the motion is timely made; (2) the applicant has a legally protected interest relating to the property or transaction which is the subject of the pending litigation; (3) the interest could be impaired or impeded as a result of the litigation; and (4) existing parties do not adequately represent the applicant's interests. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Under the law of this circuit, "a party seeking to intervene as of right must [also] demonstrate that it has standing under Article III of the Constitution." *Id.* at 731-32. The Tribe satisfies each of these requirements.

A. The Tribe's Motion To Intervene Is Timely

The D.C. Circuit has instructed that timeliness "is to be judged in consideration of all the circumstances," placing particular emphasis on the "time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008) (internal quotation marks omitted).

The Tribe's motion to intervene is timely. It has been filed a mere 35 days after Plaintiffs filed their complaint, only 27 days after the Secretary's final decision, and just 5 days after the denial of Plaintiffs' § 705 request. The purpose of the Tribe's intervention would be to defend the Secretary's acquisition of the Site into trust for the Tribe. The Tribe's intervention is necessary to preserve the Tribe's legally protected interest. *See infra* pp. 7-8. And the Tribe's

intervention would not prejudice Plaintiffs or Defendants. This Court has not taken any action to address Plaintiffs' claims on the merits, and in fact, Defendants have not even filed their answer. *See Fund for Animals*, 322 F.3d at 735 (finding a motion to intervene was timely when filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer").

B. The Tribe Has A Legally Protected Interest In This Suit

The D.C. Circuit has held time and again that "[a]n intervenor's interest is obvious when he asserts a claim to property that is the subject matter of the suit." *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981); *see also Fund for Animals*, 322 F.3d at 735 (citing and quoting *Foster*, 655 F.2d at 1324). There can be no question that the Tribe has the requisite interest to justify intervention in this case. The Tribe has a claim to the property the Government has acquired in trust for the Tribe, and that property is the subject matter of Plaintiffs' suit. *See* Compl. ¶¶ 5-6, 63 (focusing on "Wilton Rancheria's proposed trust acquisition and tribal casino" and the Secretary's "decision to acquire [the] land in trust" for the Tribe).

Plaintiffs' complaint acknowledges that they "anticipate challenging" the Secretary's decision to take land into trust for the Tribe under the IRA, IGRA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA). *Id.* ¶ 63. The Tribe has an important and recognized interest in the Secretary's decision regarding its land-to-trust application. *See Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 11-12 & n.2, 18 (D.D.C. 2000) (corporation whose members relied on oil and gas had a right to intervene to support an oil and gas development against a NEPA and APA challenge); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 968, 972 (3d Cir. 1998) (private interests that directly benefited from a Forest Service decision had a right to intervene to defend that decision against a NEPA challenge).

Wilton Rancheria is the direct beneficiary of the Secretary's challenged decision to take the Site into trust and to approve the Site for gaming. The Tribe applied to have the Site placed into trust so that it may develop a gaming resort that will provide economic opportunities to its members. "Approximately 62.4% of the Tribe's families are below the federal poverty line, and 42% of working-age members are unemployed." Ex. A, BIA Record of Decision at 75. As noted by the Secretary, "[t]he Tribe has an immediate need for a reliable and significant source of income to meet these present unmet needs." *Id*.

IGRA provides tribes with the statutory basis for gaming as a means to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The planned gaming resort is expected to bring financial security and self-sufficiency to the Tribe and its 700 members. Gaming income will be used to strengthen the tribal government and provide essential housing, educational, and other social services to the Tribe's members. The Tribe's interest in this litigation could not be more clear or substantial.

C. Plaintiffs' Suit Threatens To Impair The Tribe's Interest

The "practical consequences of denying intervention" could be grave. *Fund for Animals*, 322 F.3d at 735 (internal quotation marks omitted). Plaintiffs' suit threatens to challenge the Secretary's final decision to take the land into trust for the Tribe, as well as undo the enormous efforts the Tribe has expended over more than four years to obtain restored land upon which it can pursue economic development.

As noted within the Secretary's decision, the Tribe needs land because "it currently has no . . . land held in trust by the United States." Ex. A, BIA Record of Decision at 75. "The effects of termination of the Tribe by the federal government in 1964 were poverty and the accompanying health and social issues." *Id*. Although the Tribe was restored in 2009, "this did

not erase the 45-year period during which the Tribe experienced significant economic and governmental disadvantages." *Id.* The Tribe has a demonstrated need for a reliable and significant revenue stream to address these problems. *Id.* Thus, if the Secretary's decision in this case were to be reversed, the impact on the Tribe would be direct, immediate, and devastating.

The Tribe submitted its initial request for land in trust to the BIA in 2013, more than four years ago. Since that time, it has carefully complied with IGRA and with the Secretary's substantive and procedural requirements for acquiring the Site in trust. It has also worked closely with City of Elk Grove and County of Sacramento officials to obtain community feedback and support for the Tribe's application. *Id.* at 80. As the beneficiary of the Secretary's decision, the Tribe has an interest in disposing of any legal challenges to that decision as quickly as possible. Further delay will impose substantial unjustified economic and social burdens on the Tribe and its members.

D. The Tribe's Interests Are Not Adequately Protected By Defendants

A proposed intervenor must also show that, absent intervention, "representation of his interest 'may be' inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). The "burden of making that showing should be treated as minimal." *Id.*; *see also Fund for Animals*, 322 F.3d at 735 (noting that the requirement is "not onerous"). The Tribe easily meets that burden here.

Here, Defendants must "represent the interests of the American people, as expressed in [federal law]." *Fund for Animals*, 322 F.3d at 736. And though the Tribe shares those interests, the Tribe has an additional, "more narrow and focus[ed]" *financial* interest in what will happen to the land going forward. *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977).

As explained above, the Tribe seeks to develop and use the land to build and operate a gaming resort—something it can do only on land that has been acquired in trust since the Tribe regained federal recognition. *See* 25 U.S.C. § 2719(b)(1)(B)(iii). Defendants "would be shirking [their] duty were [they] to advance [the Tribe's] narrower interest at the expense of [their] representation of the general public interest." *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986). For this reason, the D.C. Circuit has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736; *see also Dimond*, 792 F.2d at 192-93 ("A government entity . . . is charged by law with representing the public interest of its citizens. State Farm, on the other hand, is seeking to protect a more narrow and 'parochial' financial interest not shared by the citizens of the District of Columbia."); *Costle*, 561 F.2d at 912-13 ("Given the acknowledged impact that regulation can be expected to have upon their operations, appellants' participation in defense of EPA decisions that accord with their interest may also be likely to serve as a vigorous and helpful supplement to EPA's defense." (footnote omitted)); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) ("The school board represents all parents within the District. The intervening appellants may have more parochial interests centering upon the education of their own children.").

Moreover, as the beneficiary of the Secretary's decision, the Tribe has an interest in disposing of any legal challenges to that decision as quickly as possible. Further delay will impose substantial unjustified economic and social burdens on the Tribe and its members. The Defendants will certainly be less able to fully appreciate the heavy economic and social costs that the Tribe will continue to suffer if this case sees any significant delays in review or the administration of justice.

E. The Tribe Has Article III Standing

Lastly, there is no doubt that the Tribe has asserted an injury that is both particularized and sufficiently imminent to confer Article III standing. This Court has recognized that "there always exists significant overlap between Rule 24(a)'s interest requirement and Article III's injury-in-fact requirement." *100Reporters LLC v. U.S. Dep't of Justice*, 307 F.R.D. 269, 284 (D.D.C. 2014). "[T]hat likely never is truer than in a situation such as this," where there is an "imminent and concrete risk" that Plaintiffs may challenge the Secretary's final decision to acquire the land in trust for the Tribe. *Id.*

In sum, the Tribe is entitled to intervene as of right.

II. ALTERNATIVELY, THE TRIBE SHOULD BE GRANTED PERMISSIVE INTERVENTION

Even if this Court determines that the Tribe is not entitled to intervene as a matter of right, it should approve the Tribe's intervention under Rule 24(b)(1)(B). This Court may exercise its discretion to grant the Tribe's motion to intervene so long as the Tribe presents "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

All of the requirements for permissive intervention are easily satisfied here. As noted above, the Tribe has standing, the Tribe's motion is timely, and the Tribe's primary claim—that the Secretary properly acquired land in trust for the Tribe—is at the heart of this case. Nor will the Tribe's intervention "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The Tribe has promptly moved to intervene before Defendants' filing of their answer, and Plaintiffs' suit threatens to deprive the Tribe of its only land the Government has agreed to hold in trust. Moreover, the Tribe's participation is "likely to

serve as a vigorous and helpful supplement to [the] defense." *Costle*, 561 F.2d at 912-13. There is therefore every reason for this Court to exercise its discretion to permit intervention under Rule 24(b)(1)(B) if it determines that the Tribe may not intervene as a matter of right under Rule 24(a)(2).

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that this Court grant its unopposed motion to intervene as a defendant as of right, or in the alternative, permissively.

DATED this 15th day of February, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 15, 2017, the foregoing motion, the accompanying statement of points and authorities, and a proposed order were filed via the Court's CM/ECF system and served upon ECF-registered counsel for all parties to this proceeding.

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