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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

UNITED STATES OF AMERICA and STATE OF UTAH, on behalf of the UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, UTAH DIVISION OF AIR QUALITY, Plaintiffs, v. OVINTIV USA INC., Defendant.	**MOTION TO INTERVENE AND MEMORANDUM OF LAW IN SUPPORT** **Case No. 2:24-cv-00723-RJS** **Chief Judge Robert J. Shelby**

The Ute Indian Tribe of the Uintah and Ouray Reservation (the "Tribe"), by and through its undersigned legal counsel, hereby submits its Motion to Intervene under Fed. R. Civ. P. 24 ("Mtn to Intervene") and supporting Memorandum of Law. The Tribe seeks to intervene for the purpose of obtaining relief from final judgment under Fed. R. Civ. P. 60(b) and prosecuting its

counterclaim against the United States. The Tribe's proposed *Motion for Relief from Judgment* is attached hereto as Exhibit A. The Tribe's accompanying *Pleading in Intervention and Counterclaim against the United States* is attached hereto as Exhibit B.

INTRODUCTION

The Environmental Protection Agency ("EPA") here seeks civil penalties against Defendant Ovintiv USA Inc.'s ("Ovintiv") for alleged non-compliance with the federal Clean Air Act ("CAA") in its operation of oil and gas production facilities located on the Tribe's Uintah and Ouray Reservation ("Reservation"). The United States obtained judicial entry of a consent decree to settle these alleged violations with no consultation with or input from the Tribe.

The Ute Indian Tribe is a federally recognized Indian Tribe with inherent civil regulatory jurisdiction over its Reservation, including lands, waters, and airspace. The Tribe oversees and relies on revenue from oil and gas development on its Reservation. More than 91% of Tribal government revenues come from energy development. The Tribe uses these revenues to provide essential services to the Tribal membership. The Tribe's oil and gas industry partners are also a significant source of employment for Tribal members. Energy development on the Reservation lands supports thousands of jobs and hundreds of millions of dollars in economic development.

The Tribe is placed in a unique position within the dichotomy of oil and gas production and environmental protection. While the Tribe has been forced to depend nearly exclusively on energy production on its Reservation, it is the Tribe and its members who suffer disproportionately from the adverse environmental impacts of energy mineral production. To accommodate these needs, the Tribe continuously endeavors to advance sustainable development on its Reservation.

The United States has a trust responsibility to the Tribe, and all federal agencies must ensure they perform their executive functions in a manner that upholds the federal policy of

environmental justice. In 1994, President Clinton issued Executive Order 12898, requiring each federal agency to make "environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations…" In 2023, President Biden issued Executive Order 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*. This 2023 Executive Order reinforced the federal policy of environmental justice, stating, *inter alia*, that to "all people should be afforded the opportunity to meaningfully participate in agency decision-making processes that may affect the health of their community or environment."

The Tribe and EPA Region 8 have established a protocol specifically designed to ensure Tribal involvement and input in EPA settlement negotiations for alleged CAA violations on the Reservation. This protocol is embodied in a Memorandum of Agreement between the Tribe and the EPA Region 8 ("MOA"). ECF Doc. 4-4. The MOA establishes a protocol for the EPA to carry out its duties to enforce the CAA on the Reservation in a manner that comports both with its trust responsibility to the Tribe and its duty under federal policy to promote environmental justice. Specifically, it requires providing the Tribe the opportunity to engage in dialogue with all parties prior to referring any civil enforcement action to the Department of Justice ("DOJ"). Here, EPA failed.

ARGUMENT

A. The Tribe is Entitled to Intervene as of Right under Rule 24(a)

Fed. R. Civ. P. 24(a) requires that, on timely motion, the Court must permit anyone to intervene who claims an interest in the subject of the action and is so situated that disposing of the action may impair or impede the movant's ability to protect its interest, unless existing parties

adequately represent that interest. The Tenth Circuit takes a "'liberal' approach to intervention and thus favors the granting of motions to intervene." *Western Energy Alliance v. Zinke,* 877 F.3d 1157, 1164 (10th Cir. 2017).

The Tenth Circuit analyzes four factors when determining whether a Rule 24(a) motion should be granted. First, the Court looks to the timeliness of the motion. *Id*. Second, the Court looks to whether the proposed intervenor has an interest that would be "impeded by the disposition of the action." *Western Energy Alliance,* 877 F.3d at 1165. Third, the Court looks to whether "it is 'possible'" for a proposed intervenor's interests to be impaired. *Id*. at 1167. Fourth, the Court looks to whether the proposed intervenor's interests are adequately represented by another party to the litigation. The Tenth Circuit has noted that "the possibility of divergence of interest need not be great in order to satisfy the burden" of the proposed intervenor. *Id.* at 1168.

i. The Tribe's motion to intervene is timely

For a motion to intervene as of right, timeliness is assessed "in light of all of the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001). *But see*, *Payne v. Tri-State Careflight, LLC*, 322 F.R.D. 647, 663 (D.N.M. 2017) (*quoting* 6 James W. Moore, Moore's Federal Practice § 24.10[1], at 24–63 (3d ed. 2012)) ("Unlike Rule 24(a), which governs mandatory intervention, Rule 24(b) specifically vests discretion in district courts to consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.")[1]

[1] For this reason, the lack of delay or prejudice to the existing parties if Tribal intervention is granted here is discussed in relation to permissive intervention in section B below.

In measuring timeliness from the length of time the applicant knew of its interest in the case, the Tenth Circuit looks to the time "when the movant was on notice that its interests may not be protected by a party already in the case." *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010).

In determining timeliness of a motion to intervene filed after entry of final judgment in the underlying case, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977) is instructive. *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849, 850 at fn2 (10th Cir. 1981). In *McDonald*, the Supreme Court found that entry of final judgment was relevant in calculating the parties' appeal deadline and held that a "motion [to intervene filed] within the time period in which the named [party] could have taken an appeal . . . was timely filed and should have been granted." *Id.*

Here, the Tribe received formal notice of the consent decree, which implicates the Tribe's interests, on October 1, 2024, after the matter had been referred to the DOJ. A copy of the October 1 letter is attached as Exhibit C. The Tribe timely filed comments to the record opposing entry of the consent decree. ECF Doc. 4-2. Through its formal comments, the Tribe expected the EPA to retrace its steps and fulfill its obligations. The Tribe was on notice that EPA is not protecting its interests on December 23, 2024, when the EPA rejected the Tribe's comments. ECF Doc. 4 at 12-16. Finally, the Court entered the consent decree on January 8, 2025, six days prior to the filing of the present pleading. This motion is therefore within the 60-day appeal deadline under Federal Rules of Appellate Procedure 4(1)(B) and is timely.

ii. The Tribe has protectable interests that are sufficient to warrant intervention as a matter of right

The Tribe satisfies the second requirement for intervention as a matter of right, as the Tribe has protectable interests in the outcome of this matter. To determine if a proposed intervenor has an interest sufficient to warrant intervention, this Court looks to whether the intervenor has a

protectable interest that "would be impeded by the disposition of the action." *Western Energy Alliance,* 877 F.3d at 1165 (cleaned up). The Tenth Circuit has "declared it indisputable that a prospective intervenor's environmental concern is a legally protectable interest." *Id.* As a sovereign government, the Tribe has an inherent interest in protecting the health and welfare of its citizens. *E.g. Montana v. United States*, 450 U.S. 544, 566 (1981). Its interest in protecting its lands, natural environment, and the public health of its citizens is paramount and is directly implicated in this case. As alleged in the Complaint, Ovintiv has failed to comply with the Clean Air Act and its implementing regulations causing excess emissions of volatile organic compounds ("VOC") from certain oil and gas facilities located on the Reservation. Complaint ¶¶ 2-3. VOCs are a primary contributor to ozone formation and the Uinta Basin, where the Tribe's Reservation is located. *Id.* ¶ 3. It is the Tribe and its citizens that will disproportionately experience the ill effects of excess VOC emissions.

Just as determined in *Western Energy Alliance*, 877 F.3d at 1165, it is "indisputable" that the Tribe's environmental interests alone are sufficient for intervention. Here, however, the Tribe has an accompanying interest in reducing undue economic burdens on its oil and gas industry partners. As outlined *supra*, revenue from oil and gas production on the Reservation is the main source of revenue for the Tribal government. Therefore, the Tribe has a specific interest in the recourse and remedies imposed upon Ovintiv, through the consent decree or otherwise, as these remedies relate to both (i) protection of the environment on the Reservation, and (ii) economic burdens on the Tribe's industry partners that will adversely impact the Tribe.

The Tribe also has an interest in receiving proper notice and consultation regarding the United States' activities on Tribal land pursuant to federal law and policy. Federal law requires the EPA to engage in meaningful consultation with the Tribe on actions that may have Tribal

implications. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, 65 Fed. Reg. 67250 (Nov. 6, 2000). The Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (January 26, 2021) directs federal agencies to submit detailed plans to implement Executive Order 13175.[2] The EPA's "Policy on Consultation with Indian Tribes," does just that, setting out a four-phase consultation process.[3]

While consultation is a key aspect of the intergovernmental relationship between EPA and the Tribe, it does not alone satisfy EPA's trust obligation. Nor does it ensure EPA's compliance with its obligation to promote environmental justice. The MOA between the Tribe and EPA Region 8 is intended to fill this gap. Specifically, the MOA states that the EPA "will consult with the Tribe and afford the Tribe a meaningful opportunity, as far in advance as possible, to provide input on any plan, project, activity, or decision that may affect the interests of the Tribe." MOA at ¶7. This includes an opportunity for Tribal participation and input on appropriate remedies "prior to a decision to refer a civil enforcement case involving violations in Indian country on the U&O Reservation to the Department of Justice." *Id.* Here, the civil enforcement case against Ovintiv for alleged violations in Indian Country was referred to the DOJ without Tribal input.

As highlighted in the Tribe's proposed *Motion for Relief from Judgment* filed herewith as Exhibit A, the MOA is particularly relevant now that the EPA has published a final rule reclassifying the Tribe's Reservation lands to "Moderate" Non-Attainment for Ozone under the CAA. 89 Fed. Reg. 101483 (December 16, 2024). Now, more than ever, the Tribe must be a party

[2] Available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/ (last visited January 13, 2025).
[3] Available at: https://www.epa.gov/tribal/epa-policy-consultation-indian-tribes (last visited Dec. 10, 2024).

both to dealing with sources of air pollution on its Reservation and working to remediate its air quality through more robust controls over those sources.

iii. The Tribe's interests will be substantially impaired if intervention is denied

The Tribe satisfies the third requirement for intervention as a matter of right, as its interests will be impaired if intervention is denied. To determine if intervention should be granted, the Court analyzes whether it is "possible" for the proposed intervenor's interests to be impaired. *Western Energy Alliance,* 877 F.3d at 1167. A proposed intervenor "must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001).

The Tribe's sovereign interests in this case will be impaired if intervention is denied. As discussed above, the Tribe has the right not just to consultation regarding EPA enforcement actions on the Reservation, but also an opportunity to meaningfully participate in the development of remedies that may be established through a consent decree or other form of settlement.

Here, the Tribe was not afforded an opportunity for consultation prior to the referral of this matter to the DOJ. Instead, despite the Tribe seeking information related to the alleged violations as early as July 2020, it was not until October 2024 that the EPA notified the Tribe of the proposed consent decree with Ovintiv – after the terms had apparently been finalized. The Tribe was deprived of any opportunity to engage in negotiations or discussions regarding potential violations on Tribal land. Since EPA did not engage in consultation with the Tribe, and the Tribe was excluded outright from the negotiation of appropriate remedies to settle Ovintiv's CAA violations, the Tribe has been denied the opportunity to protect and advocate for its substantial interests in environmental and public health at stake in this proceeding. Intervention is the last forum available

to the Tribe to protect and advocate for these interests and prevent the implementation of an unlawfully negotiated consent decree.

iv. The Tribe's interests are not adequately represented by either Party

The Tribe satisfies the final requirement for intervention as a matter of right, as the interests of the Tribe are not adequately represented. In this matter, the Tribe and the United States stand in opposition. Additionally, tribes, as distinct sovereign entities, hold interests that often are not adequately represented by the federal government, because tribes are "entitled to take their place as independent qualified members of the modern body politic." *Arizona v. California*, 460 U.S. 605, 615 (1983).

In its accompanying Pleading in Intervention, the relief requested by the Tribe is for the consent decree to be set aside unless and until EPA satisfies its obligations to the Tribe under federal law. This is the opposite of the relief pursued by the United States.

Indeed, the United States' interests in this matter are distinct from the Tribe's. The civil penalties demanded in the United States' complaint and outlined in the consent decree do not contemplate any form of recovery to the Tribe. In fact, nowhere in the United States' complaint, nor in the consent decree, does the United States reference its trust responsibility to the Tribe or any intent to facilitate the environmental goals and priorities of the Tribe.

B. The Tribe should be allowed to intervene permissively under Rule 24(b)

Fed. R. Civ. P. 24(b)(1) provides a separate and alternative ground for intervention. This section provides that, "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact."

This Court has found that permissive intervention is appropriate where the petitioner "(1) makes a timely application, (2) has a separate claim or defense that has a common question of law

or fact with the main action, and (3) does not unduly delay or prejudice the rights of original parties." *Utah ex rel. Utah State Dept. of Health v. Kennecott Corp.*, 232 F.R.D. 392, 398 (D. Utah 2005).

Here, for the same reasons outlined in relation to mandatory intervention, the Tribe's application is timely.

As to the second element, the Tribe's claims that it was not properly consulted prior to this enforcement action are separate from the alleged violations and remedial measures outlined in the consent decree yet share a common question of law or fact with the main action. While the consent decree may be finalized without the Tribe's intervention, doing so would leave the question of disputed fact surrounding legal sufficiency of EPA's attempt to consult with the Tribe unanswered.

Neither will intervention by the Tribe unduly delay or prejudice the rights of the parties. Regardless of entry by the Court, Ovintiv is bound by the terms of the consent decree addressing, among other things, pressurized liquid sampling, directed inspection and preventative maintenance, monthly infrared camera inspections, and investigation and corrective action requirements. ECF Doc 3-1 at sec. XVIII. *See also Id*. at Appendix C. Requirements of Ovintiv measured from the effective date of the consent decree range from between 220 days and 400 days from entry. *Id.* at Appendix C.

Alternatively, Fed. R. Civ. P. 24(b)(2) provides grounds for Tribal intervention. The "whole thrust" of the 1948 Amendment to Federal Rule 24(b)(2) permitting government intervention "is in the direction of allowing intervention liberally to governmental agencies and officers to speak of the public interest." *Boehnen v. Walston & Co.*, 358 F. Supp. 537, 542 (D.S.D. 1973) (citing 7A C. Wright and A. Miller, Federal Practice and Procedure Sec. 1912 (1972)).

Here, the proposed intervenor is the duly elected government of the Tribe. It, and not the EPA, the State of Utah, or Ovintiv, is directly accountable to and speaks for the public interest of its citizens. The Tribe seeks government intervention based on Executive Order 13175 and the MOA made under that Order. For this additional reason, the Tribe should be allowed government intervention under Federal Rule 24(b)(2).

CONCLUSION

For the reasons discussed above, the Tribe should be granted intervention as a matter of right under Fed. R. Civ. P. 24(a)(2) or, in the alternative, permissive intervention under Fed. R. Civ. P. 24(b).

Dated this 14th day of January 2025.

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/s/ Michael W. Holditch
Michael W. Holditch, *pro hac* admission pending

J. PRESTON STIEFF LAW OFFICES, LLC

/s/ J. Preston Stieff
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Attorneys for the Movant

Word Number Certification

I, J. Preston Stieff, certify that this MOTION TO INTERVENE AND MEMORANDUM OF LAW IN SUPPORT contains 3,061 words and complies with DUCivR 7-1(a)(4)