J. Preston Stieff (4764)
J. PRESTON STIEFF LAW OFFICES, LLC
311 South State Street, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@StieffLaw.com

Michael W. Holditch, *pro hac vice*
PATTERSON REAL BIRD & WILSON LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 926-5292
Facsimile: (303) 926-5293
mholditch@nativelawgroup.com

Attorneys for the Ute Indian Tribe of the Uintah and Ouray Reservation

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,	Case No. 2:24-cv-00723-CMR-RJS-DBP Judge Robert J. Shelby Magistrate Dustin B. Pead UTE INDIAN TRIBE'S REPLY BRIEF ON STANDING PURSUANT TO APRIL 17, 2025, COURT ORDER

ARGUMENT

A. The Current Non-Party Status of the Tribe is not Fatal to Standing

The United States asserts at the outset that "[i]t is settled law that one who was not a party lacks standing to make a [Rule 60(b)] motion." ECF 43 at 4 (quoting C. Wright & A. Miller, 11 Fed. Prac. And Proc. § 2865 (3d ed.) (internal quotation marks omitted). The Tribe acknowledges its non-party status, which is precisely why the Tribe has filed a motion to intervene: to obtain the party-litigant status necessary to seek relief available to parties under the Federal Rules of Civil Procedure. "One who is not an original party to a lawsuit may of course become a party by intervention, substitution, or third-party practice." *Karcher v. May*, 484 U.S. 72, 77 (1987).

The Tribe understands that its right to obtain relief from judgment is predicated on its attaining party status through intervention, which is also why the Court's Order directing the Parties to brief the issue of standing is specific to the Tribe's Motion to Intervene. ECF 35. Indeed, "courts recognize that intervention is the method by which a nonparty achieves standing to make a rule 60(b) motion." *Payne v. Tri-State Careflight, LLC*, 322 F.R.D. 647, 680 (D.N.M. 2017) (citing *Roeder v. Islamic Republic of Iran*, 195 F.Supp.2d 140, 159 (D.D.C. 2002); aff'd, 333 F.3d 228 (D.C. Cir. 2003); *United States v. Kentucky Utilities Co*., 927 F.2d 252, 255 (6th Cir. 1991)). The United States' assertion that the Tribe, due to its current nonparty status, lacks standing to seek relief from judgment is immaterial to the issue currently being briefed at the Court's direction.

B. The United States Improperly Asserts Substantive Challenges to the Merits of the Tribe's Claims for Relief

The Court has directed the Parties to submit briefing on the singular issue of whether the Tribe has "adequately alleged standing, [and] in particular (1) whether it has suffered a judicially cognizable injury and (2) whether such injury is redressable by the court." ECF 35. Disregarding the limited scope of the Court's Order, the United States has taken this as an opportunity to prematurely challenge the substantive merits of the Tribe's claims.

Standing is a threshold issue of justiciability that must be resolved prior to reaching the substantive merits of a party's claim. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 83-84 (1998). Stated differently, a party's (or prospective party's) right to seek relief in court cannot depend on whether the party will prevail on its claims. Such a conclusion would subvert the entire judicial process. *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007) (finding that the purpose of the standing doctrine is to "ensure proper adversarial presentation" of the legal issues being litigated). Therefore, the United States' numerous merits-based arguments, including those discussed below, should be stricken or disregarded by the Court.

First, the United States argues that there is no cognizable injury based on lack of government-to-government consultation because "EPA did consult with the Tribe about the planned action with Ovintiv" and "also conducted further efforts to reach out to the Tribe and Tribal officials about the matter." ECF 43 at 4. This is a factual dispute immaterial to the threshold issue of whether the Tribe has adequately alleged standing. *Via Christ Regional Medical Center, Inc. Blue Cross and Blue Shield of Kansas, Inc.*, 361 F.Supp.2d 1280, 1290-92 (D. Kan. 2005) (finding that the presence of factual disputes precluded dismissal on the basis of standing.) The Court has directed the parties to brief the issue of whether the Tribe has "alleged standing," not to prove the factual allegations contained in the Tribe's pleadings. Moreover, the question of whether consultation took place in October 2021 is not a "jurisdictional fact" germane to the issue of Article III standing, *e.g., Consumer Data Industry Association v. King*, 678 F.3d 898, 906 (10th Cir. 2012), because (i) the resolution of this question fails to negate the "case of controversy" of whether any such consultation was meaningful and carried out in a manner that comports with applicable federal law and policy, and (ii) resolution of this question does not touch on whether the Tribe has suffered a concrete injury redressable by this court. While the Tribe stands by its allegation that there was no meaningful government-to-government consultation with the Tribe meeting the

minimum requirements set by federal law and policy, the adequacy of the Tribe's allegations concerning the threshold issue of standing are not dependent on the outcome of this dispute on the merits.

Next, United States asserts that its "general trust responsibility…does not impose an obligation to consult in this case," and that "EPA acts consistently with the general trust responsibility by implementing the statutes it administered on tribal and non-tribal lands alike." ECF 43 at 5. Whether the United States has an enforceable trust responsibility to the Tribe that was violated is a question of whether the Tribe has raised a *cause of action* against the United States, which is a legal issue entirely separate from and independent of whether the Tribe has met its Article III minimum requirements to allege standing. *Arizona v. United States,* 599 U.S. 555, 564-64 (2023); *Flute v. United States*, 808 F.3d 1234, 1244 (10th Cir. 2015). While the United States may raise this argument at the appropriate time in a subsequent dispositive motion, this argument has no bearing on the issue of standing and, therefore, falls outside the scope of the Court's directive.

Finally, the United States repeatedly asserts that the Tribe has no cause of action under the 2023 Memorandum of Agreement ("MOA") between the Tribe and EPA Region 8, because of language in the MOA stating that its terms do not independently create a legal cause of action. Once again disregarding the call of the question, the United States' contention here is that the Tribe does not have a legally cognizable cause of action, not that it has failed to demonstrate a cognizable injury. Regardless, the Tribe has not raised any breach-of-contract for the United States' violation of the terms of the MOA. The United States' failure to adhere to the MOA is significant to the Tribe's legal challenge to the Consent Decree only insofar as the MOA embodies existing federal law and policy. Mtn. to Intervene, ECF 16 at 3, 7.

The arguments on the substantive merits of the Tribe's challenge to the Consent Decree are irrelevant to the threshold issue of standing and should therefore be stricken or otherwise disregarded by the Court.

C. The Tribe has Alleged Concrete Injury, not a "Bare Procedural" Injury

The United States asserts that an injury arising solely from an alleged failure to engage in government-to-government consultation constitutes nothing more than a "bare procedural" violation insufficient to support Article III standing. ECF 43 at 13. This assertion is wrong for several reasons.

First, this argument once again presumes, contrary to the plain language of the Tribe's pleadings, that the Tribe's injury arises solely from lack of consultation. To the contrary, the Tribe has incurred injury through the United States' arbitrary and capricious decision to disregard, rather than uphold and protect, Tribal sovereignty over its lands and airspace. Mtn. to Intervene, ECF 16 at 5-6.

Second, the United States' blanket statement that procedural injuries cannot support standing is inaccurate. To establish standing from a procedural injury, a litigant "need show only that compliance with the procedural requirements *could* have better protected its concrete interests." *New Mexico v. Department of the Interior*, 854 F.3d 1207, 1215 (10th Cir. 2017). Even if the United States were correct in its assertion the Tribe's injury arises solely from the United States' failure to engage in government-to-government consultation, such isolated "procedural injury" would meet the minimum standing requirements. The EPA's Tribal Consultation policy is specifically designed to protect the concrete interests of tribes affected by agency actions, stating that purpose of the Consultation Policy is to "ensure meaningful and timely input by Tribal officials prior to EPA taking actions or implementing decisions that may affect Tribes" through the guiding principle of that the agency must "work[] directly with federally recognized Tribes as

sovereign entities with primary authority and responsibility for each Tribe's land and membership." EPA POLICY ON CONSULTATION WITH INDIAN TRIBES (Dec. 7, 2023).

Third, lack of consultation is not, itself, the injury suffered by the Tribe. Rather, as discussed in greater detail in the Tribe's Initial Brief on Standing, the Tribe has suffered at least three distinct invasions to its legally recognized interests through the acts and omissions of the United States. These injuries are once again addressed in turn below.

i. Injury to the Tribe's Sovereign Interests

The Tribe has a sovereign interest in protecting the health, safety, and welfare of its citizens and upholding the United States' obligations to recognize and uphold the Tribe's sovereign authority over its lands and airspace. The United States has intruded on these sovereign interests through its failure to involve the Tribe or obtain input from the Tribe in the development and implementation of remedies to address CAA violations on Tribal lands.

The United States argues that there is no sovereign interest being impaired here, as the Tribe has not shown how the Tribe's "power to create and enforce a legal code" has been implicated here. This argument fails on two grounds.

First, a sovereign interest is not limited to the "power to create and enforce a legal code." In *Alfred P. Snapp & Son, Inc. v. Puerto Rico, ex rel. Burez*, 458 U.S. 592, 601 (1982), the U.S. Supreme Court found a distinct sovereign interest in the "exercise of sovereign power over individuals and entities within the relevant jurisdiction." While this sovereign interest "involves the power to create and enforce a legal code," it is not, as the United States suggests, limited thereby. For Indian tribes, the "exercise of sovereign power over individuals and entities" within its jurisdiction is built into its "inherent power necessary to tribal self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). Thus, by failing to allow the Tribe to, at a minimum, provide input on the Tribe's duly adopted priorities and

objectives concerning environmental protection measures affecting its own lands, the United States has intruded on the Tribe's sovereign interests.

Second, the United States wrongly presumes that this issue does not implicate that Tribe's "power to create and enforce a legal code." Pursuant to its duly enacted Constitution and By Laws, attached hereto as **Exhibit 1**, the Tribe establishes and implements tribal law through an elected six-member board known as the Tribal Business Committee. The Business Committee makes decisions for and on behalf of the Tribe through resolution or ordinance, both of which require approval and signature by a quorum of the Business Committee and become binding Tribal law once adopted. Ex. 1, By Laws at § 5. The MOA between the Tribe and EPA Region 8 was duly approved and adopted as a matter of Tribal law pursuant to Business Committee Resolution No. 23-123, attached hereto as **Exhibit 2**. Thus, by disregarding the MOA and the federal law and policy it embodies, the United States is also disregarding duly adopted Tribal law, implicating the Tribe's sovereign interests even under the narrow definition the United States has proffered.

ii. The Tribe has Suffered an Injury to its Quasi-sovereign Interests

The Tribe has a quasi-sovereign interest in upholding, protecting, and advancing the interests of its citizens, which includes a quasi-sovereign interest to "preserve its sovereign territory." *Massachusetts v. E.P.A.*, 549 U.S. 497, 519 (2007). The United States has intruded upon this quasi-sovereign by imposing economic sanctions on one of the major sources of Tribal government revenue that is deployed to provide essential government services to the membership at large.

Again citing *Alfred P. Snapp*, the United States argues that the "State does not have standing as *parens patriae* to bring an action against the Federal Government," leading to the conclusory assertion that this same limitation should apply to the Tribe. However, such an extrapolation ignores the legal distinctions between the Tribe and the State in this context. In

Alfred P. Snapp, the High Court explained in a footnote that the State cannot assert claims on behalf of its citizens against the United States because "[i]n that field it is the United States, and not the State, which represents them as *parens patriae*." *Alfred P. Snapp*, 458 U.S. at 610 n. 16. However, as explained in the Tribe's Initial Brief, the relationship between Indian tribes and the United States is not similarly defined by the Supremacy Clause and principles of federalism. Unlike states, the inherent sovereign authority of Indian tribes is not automatically supplanted by the exercise of federal regulatory authority. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("[U]ntil Congress acts, the tribes retain their existing sovereign powers."). Therefore, this limitation on the ability of states to bring claims against the United States in a *parens patriae* capacity does not apply to Indian tribes.

iii. The Tribe has or will Imminently Suffer Economic Harm

Finally, the Tribe has suffered or will imminently suffer concrete economic harm from the implementation of the Consent Decree. The basis for this injury is self-explanatory. As has been repeatedly alleged, the Tribe relies on oil and gas production as its primary revenue source, and steep economic penalties imposed on an industry partner (or its successor) operating on the Tribe's reservation will adversely impact these revenue flows.

To help illustrate this injury, the Tribe has noted that it will not receive any portion of these monetary penalties and, as such, the Tribe will only incur economic harm without obtaining any concomitant economic benefits. Br. on Standing, ECF 42 at 9. The United States has misconstrued this statement as an assertion that the Tribe is legally entitled to a portion of CAA penalties. But the Tribe has made no such assertion. Instead, the Tribe's argument is that there are ways to structure CAA remedies to better facilitate and advance the Tribe's ability to conserve its environment while sustaining its economy. The Tribal Clean Air Trust Fund cited in the Tribe's Initial Brief is an apt example. ECF 42 at 10-11.

The United States further argues that the "consent decree does not disadvantage oil and gas production on the Reservation" because it requires the producer to "take the same compliance-related actions at all its facilities in Utah, both on and off the Reservation." ECF 43 at 13. This misses the point. The Tribe's injury is not based on any allegation that Ovintiv or its successor's on-Reservation oil and gas production will face disproportionate economic burdens compared to its off-Reservation production. The injury is in the economic burden itself, not in any alleged discrepancy between how these burdens will manifest on a facility-by-facility basis. These economic burdens will adversely impact the Tribe, regardless of whether or not they apply indiscriminately.

D. The Tribe's Injuries Are Redressable

The United States claims that the Tribe's injuries are not redressable as they hinge solely on the lack of enforcement of the MOA "which does not require . . . specific action." Response, ECF 43 at 9. As the Tribe alleged, however, (and as again addressed above), a "paramount" part of the Tribe's "legally protectable interest" is its "environmental concern": injury to its "lands, natural environment, and the public health of its citizens." Tribal Motion, ECF 16 at 6 (citing *Western Energy Alliance v. Zinke*, 877 F.3d 1157, 1165 (10th Cir. 2017)). *See also* Pldg in Intervention, ECF 16-2 at ¶¶6-9; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . .") In fact, the claim by the United States that the settlement redresses the environmental injury to the Tribe acknowledges the very redressability it now claims is lacking.

The United States acknowledges that the environmental injury to the Tribe is redressable in its statement that the settlement will benefit the air quality on the Reservation. Plaintiffs' Resp., ECF 43 at 7-8. If the United States strives to fashion relief redressing injury to the Tribe's land, environment, and to the public health of its citizens, injury caused by an entity licensed and

regulated by the Tribe, then the Tribe is *sine qua non* to redressing that injury. As a sovereign government, that is what the Tribe does every day. Exhibits, ECF 8, Attach. 7 at pg. 2. (outlining the Tribe's "active role in the management of its lands and resources.") *Cf. Montana v. United States*, 450 U.S. 544, 565-66 (1981) (recognizing tribal jurisdiction over non-Indians such as Ovintiv in Indian Country).

Furthermore, clearly the injury alleged through the failure of the United States to involve the Tribe or obtain input from the Tribe in the development and implementation of remedies to address CAA violations on Tribal lands is redressable through the provision of such input.

The United States next argues that "the Tribe's motion comes too late" because Ovintiv has already complied with "substantial portions of the entered consent decree . . . ." Response, ECF 43 at 10. This is both inaccurate and irrelevant.

It is inaccurate as, regardless of whether the settlement had been entered by the Court, Ovintiv is bound by its terms addressing, among other things, pressurized liquid sampling, directed inspection and preventative maintenance, monthly infrared camera inspections, and investigation and corrective action requirements. ECF 3-1 at sec. XVIII. *See also Id*. at Appendix C. Conversely, those requirements of Ovintiv which *are* triggered by the date the consent decree is entered by the Court range from between 220 days and 400 days from entry. *Id.* at Appendix C. In other words, the deadlines have not passed for the completion of most—if not all—of the mitigation measures required under the settlement.

It is irrelevant as relief could be tailored to account for compliance measures already completed while recognizing the Tribe's conservation objectives and priorities. Again, the Tribal Clean Air Trust Fund cited in the Tribe's initial brief (ECF 42 at 9-10) is an example of the flexibility allowed the parties in formulating the appropriate relief.

CONCLUSION

The Tribe has alleged multiple cognizable injuries resulting from the challenged acts and omissions of the United States, each of which are redressable by a favorable ruling by this Court. Accordingly, the Tribe has adequately alleged Article III standing in this matter.

Dated this 2nd day of June 2025.

PATTERSON REAL BIRD & WILSON LLP

/s/ Michael W. Holditch
Michael W. Holditch, *pro hac vice*
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 926-5292
Facsimile: (303) 926-5293

J. PRESTON STIEFF LAW OFFICES, LLC
s/ *J. Preston Stieff*
J. Preston Stieff (4764)
311 South State Street, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 366-6002 Email:
jps@StieffLaw.com

WORD NUMBER CERTIFICATION

I, Michael W. Holditch, certify that this Brief contains 3,078 words and therefore complies with DUCivR 7-1(a)(4).

/s/ *Michael Holditch*
Michael Holditch