**UNITED STATES DISTRICT COURT**
**DISTRICT OF SOUTH DAKOTA**
**CENTRAL DIVISION**

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| GOVERNOR KRISTI NOEM, in her Official Capacity as the Governor of South Dakota, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>DEB HAALAND, in her Official Capacity as United States Secretary of the Interior, et al.,<br><br>Defendants. | CIV: 3:21-cv-03009 |

**TRIBE'S MEMORANDUM IN SUPPORT OF ITS MOTION TO INTERVENE**

## INTRODUCTION

> To the Indian spiritual way of life, the Black Hills is the center of the Lakota people. There ages ago, before Columbus came over the sea, seven spirits came to the Black Hills. They selected that area, the beginning of sacredness to the Lakota people. The seventh spirit brought the Black Hills as a whole – brought it to the Lakota forever, for all eternity, not only in this life, but in the life hereafter. The two are tied together. Our people that have passed on, their spirits are contained in the Black Hills. This is why it is the center of the universe, and this is why it is sacred to the [Lakota people]. In this life and the life hereafter, the two are together.[1]

The Lakota people therefore call this center of our universe – our most sacred site – *the Heart of Everything That Is*.[2] It is where we believe our ancestors emerged onto this earth.[3] It is the site of our most sacred sacraments and ceremonies. Declaration of Steve Vance ("Vance Decl.") at ¶¶ 26-31. Since time immemorial, and still today, Lakota people commune there with

[1] Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 Okla. City U. L. Rev. 317, 318 (1998) (quoting Lakota medicine man Pete Catches).
[2] *Id*. (quoting Charlotte Black Elk).
[3] *Id.* at 322.

Creator. *Id*. We offer prayers. We gather our sacred medicines. *Id*. The Black Hills, known in Lakota as *He Sapa* or *Paha Sapa*, is critical to our religious practice, our identity, and our culture. *Id*. For the Lakota people, our sacred *He Sapa* in its entirety is as crucial to our religious exercise as the Church of the Holy Sepulchre in Jerusalem is to Christians. It is as holy to us as the Wailing Wall is to Jews. It is a site of singular and sacred pilgrimage just as Mecca is to Muslims.

The Cheyenne River Sioux Tribe ("Tribe") and Steve Vance, therefore, have much to lose in this litigation. The Plaintiffs in this case, Governor Kristi Noem and the State of South Dakota ("Governor" or "State") are demanding that this Court order the Department of the Interior ("DOI") and various officials in their official capacity (collectively "Federal Defendants") to issue a permit to detonate fireworks for the Fourth of July holiday within our most sacred site. As set forth in detail in this brief, the granting of this permit will not only infringe the Tribe's and Mr. Vance's First Amendment right to free exercise of religion, including under the Religious Freedom Restoration Act ("RFRA"), but also violate important safeguards for tribal sacred and cultural sites set forth in the National Historic Preservation Act ("NHPA").

Nevertheless, despite the existence of harms that reach a Constitutional magnitude, the State has asserted that it is not aware of even the slightest harm that would occur if the Court enters such an injunction. ECF 3-1 at 30. Instead, the State claims that **it** is the victim of harm because it will be deprived of hosting a "fun, inspirational, traditional, and educational program celebrating our nation's birthday" with a "marquee event such as fireworks." ECF.3-1 at 7. The State relies heavily, in both its Complaint and its Motion for Preliminary Injunction, on founding father, John Adams's, musing to his wife, Abigail, that "Independence Day should 'be celebrated' by every generation of Americans 'with Pomp and Parade, with Shews, Games Sports, Guns, Bells, Bonfires and Illuminations from one end of this Continent to the Other." ECF 1 at ¶ 1; ECF 3-1

at 7. Although it is clear that President Adams enjoyed a celebration, he was also a staunch champion of free exercise of religion under the First Amendment. As he commented to his friend and colleague Thomas Jefferson, "[w]ithout religion this world would be something not fit to be mentioned in polite company, I mean Hell." John Adams Historical Society, Quotes, http://www.john-adams-heritage.com/quotes/ (last accessed May 13, 2021). It is certain that President Adams would not have elevated Pomp or Shews or fun above the free exercise of religion that he and his compatriots enshrined in the First Amendment. It is likely that he would find such a notion deeply antithetical to his conception of American patriotic ideals. Efforts such as Governor Noem's and the State of South Dakota's to run roughshod over religious freedom should offend such basic Constitutional and American principles.

For the reasons set forth in this brief the Tribe and Mr. Vance should be permitted to intervene on this timely motion to defend its legal interest in protecting the free exercise of the religion under both RFRA and the First Amendment and to protect the important cultural and sacred sites in the sacred Black Hills pursuant to the NHPA.

**BACKGROUND**

The Cheyenne River Sioux Tribe is comprised of four of the seven bands of the Lakota Tribe who reside on the Cheyenne River Sioux Indian Reservation in north-central South Dakota: the *Itazipco* or Sans Arc band, the *Siha Sapa* or Blackfoot band, the *Oohenumpa* or Two Kettle band, and the *Mnicoujou*. The Tribe has approximately 16,000 members, about half of whom presently reside on the Reservation. The Tribe and its four bands are successors to the Great Sioux Nation, with which the United States entered into the Fort Laramie Treaty of 1851, 11 Stat. 749, and the Fort Laramie Treaty of 1868, 15 Stat. 635. *See South Dakota v. Bourland*, 508 U.S. 679, 682 (1993). In the Treaty of 1868, Great Sioux Nation reserved for its "absolute

and undisturbed use and occupation . . ." "a tract of land bounded on the east by the Missouri River, on the south by the northern border of the State of Nebraska, on the north by the forty-sixth parallel of north latitude, and on the west by the one hundred and fourth meridian of west longitude," which included the sacred Black Hills *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980) (quoting 15 Stat. 635).

In 1877, however, after gold had been discovered in the Black Hills within the Great Sioux Reservation and American prospectors entered the Tribe's territory in violation of the Treaty, the United States abrogated the Treaty to validate the intrusion and stole the sacred Black Hills from the Lakota people. *Id*. at 382-84. The United States Supreme Court later held this abrogation to have been illegal, noting that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history. . . ." *Id*. at 388.

While the Black Hills were stolen, they remained crucial to the Lakota people. As noted above, the Lakota people consider the Black Hills to be "the Heart of Everything That Is." The Black Hills in their entirety are sacred to the Lakota people as the nexus of Lakota origin. Vance Decl. at ¶ 26. Long before being defaced by the sculpture called Mount Rushmore, the mountain was already a sacred site to the Lakota people, which was called the Six Grandfathers before its destruction. *Id.* at ¶ 27. The Lakota people of the Cheyenne River Reservation still use the Black Hills extensively for a broad range of religious and ceremonial practices in a large number of locations, including some of the Tribe's most important ceremonies. This includes the area around Mount Rushmore. *Id.* at ¶ 28. The Lakota people of the Cheyenne River Reservation also gather plants for medicinal and religious practices within the Black Hills, and these plants could be destroyed – even wiped out completely – by a wildfire event. *Id.* at ¶ 29. Many of these plants do not exist anywhere else, and their loss would be a devastating blow to Lakota

traditional ceremonial, religious, and medicinal purposes. *Id.* at ¶ 30. The Tribe gets lodge poles (*tipestola*) from the Black Hills, and they have few other sources of these poles. A wildfire would devastate this resource. *Id.* at ¶ 31.

The Tribe and Mr. Vance have openly opposed the renewed performance of the fireworks display at Mount Rushmore because of the threat they pose to Lakota sacred sites, Traditional Cultural Properties ("TCP"), and trust lands located in the Black Hills. *Id.* at ¶ 16. For instance, there is an existing trust property that the Tribe uses for an important annual ceremony that belongs jointly to several Tribes, including the Cheyenne River Sioux Tribe, within 50 miles of Mount Rushmore, that would be in danger if a wildfire were to break out. *Id.* at ¶ 17. Because of the National Park Service's ("NPS") 2020 consultation with the Cheyenne River Sioux Tribe and other tribes, referenced in both the State's Complaint (ECF 1 at ¶ 43) and the NPS's denial letter (ECF 3-2 at 101), about the firework event last year, a joint team comprised of 13 tribes are finalizing a report that identifies about 100 additional TCPs belonging to Lakota people located within the Black Hills. The team has completed the physical survey of sites, and they are now working on drafting the Survey report in the NHPA Section 106 consultation with the NPS. *Id.* at ¶ 18.

The additional one hundred or so TCPs add onto the already lengthy list of TCPs, sacred sites, and trust properties in the Black Hills belonging to the Cheyenne River Sioux Tribe and other tribes. *Id.* at ¶ 20. TCPs are properties that are eligible for inclusion on the National Register of Historic Places based on their association with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of living in a community. *Id.* at ¶ 21. The Cheyenne River Sioux Tribal Historic Preservation Officer ("THPO"), Steve Vance, shared his comments in this process with the Acting Superintendent of Mount Rushmore prior to the 2020

event. At that time, Mr. Vance expressed his opinion as THPO for the Tribe that using fireworks on sacred lands in Treaty Territory was egregious because of the grief that it inflicts upon the Lakota people. The event itself is also offensive because of the history of the presidents depicted on the statue and their killing of Natives. *Id.* at ¶ 22.

Beyond these concerns, the same safety issues that caused the fireworks display to be discontinued still persist today. These concerns include the risk of wildfire, threat of water contamination, and the inability of NPS to evacuate that area safely in case of fire in large crowd situations. *Id.* at ¶ 23. All of the tribes at the 2020 meeting with the Acting Superintendent opposed the 2020 event. Nevertheless, the permit was still granted. *Id.* at ¶ 24. The State of South Dakota did not ever consult with the Cheyenne River Sioux Tribe's THPO regarding the event last year and did not apparently consult with the Tribe at all. *Id.* at ¶ 25.

The fireworks themselves will have the immediate impact of interrupting anyone who is using one of the sacred sites for ceremony or prayer during the duration of the event. The summer months are active in Lakota ceremonial practices, and there is a high likelihood that traditional people will be disrupted in their practices by this event. *Id.* at ¶ 32. Beyond being literally interrupted, the fact that this event could be forced upon the Lakota people in the Tribe's sacred lands, despite the Tribe's clear opposition to the event traumatizes them as a people and inflicts grief upon the Tribe. To the Tribe, allowing this event to occur is an attack on one of the Tribe's most sacred places. *Id.* at ¶ 33. The Tribe and Mr. Vance assert that allowing fireworks displays at Mount Rushmore creates an actual, extreme threat to the religious, ceremonial, and medicinal practices of the traditional Lakota people of the Cheyenne River Sioux Tribe. *Id.* at ¶ 34.

## LEGAL STANDARD FOR INTERVENTION

Federal Rule of Civil Procedure 24 allows for non-parties to a suit to intervene in the proceedings. The rule provides for both intervention of right and permissive intervention. Fed. R. Civ. P. 24(a); 24(b). A party may intervene of right in two circumstances: (1) where a federal statute gives the party the right to intervene; and (2) where the party "claims an interest relating to the property or transaction that is subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(1), (2). Meanwhile, a court may permit anyone to intervene who, (1) "is given a conditional right to intervene by a federal statute," or (2) "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(A), (B).

The Eighth Circuit uses the same standards to evaluate a motion to intervene as it does for a typical motion to dismiss. *Nat'l Parks Conservation Assoc. v. EPA*, 759 F.3d 969, 973 (8th Cir. 2014). That is, this Court must accept all material allegations in this motion as true, and it must construe inferences in favor of the Tribe. *Id.* "When the allegations in the underlying controversy are relevant—for instance, when a lawsuit ultimately targets the prospective intervenor's interests or rights—the court should focus its attention on the pleadings because 'standing is to be determined as of the commencement of suit.'" *Id. (citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n. 5 (U.S. 1992)). Would-be intervenors in the Eighth Circuit must establish Article III standing, and, then, they must satisfy the requirements of Rule 24. *See U.S. v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009) ("In our circuit, a party seeking to intervene must establish Article III standing in addition to the requirements of Rule 24.")

To establish standing, the Tribe must show injury, causation, and redressability. *Id*. at 833–34. If the Court determines that the Tribe has satisfied these requirements, then it "must permit" the Tribe to intervene as a matter of right under Rule 24(a)(2) if the Court determines that: (1) the Tribe's motion to intervene is timely; (2) the Tribe "claims an interest relating to the property or transaction that is the subject of the action"; (3) the Tribe is "situated so that disposing of the action may, as a practical matter, impair or impede the Tribe's ability to protect that interest"; and (4) the Tribe "is not adequately represented by the existing parties." *Nat'l Parks Conservation Assoc.*, 759 F.3d at 975 (internal citations omitted).

"Rule 24 should be construed liberally, with all doubts resolved in favor of the proposed intervenor." *Nat'l Parks Conversation Assoc.*, 759 F.3d at 975 (8th Cir. 2014).

## STATUTORY AND CONSTITUTIONAL OVERVIEW

### I. THE FIRST AMENDMENT AND THE RELIGIOUS FREEDOM RESTORATION ACT

Congress enacted RFRA for the purpose of ensuring "very broad protection for religious liberty." *Burwell v. Hobby Lobby, Inc.*, 573 U.S. 682, 693 (2014). Consequently, RFRA provides that government undertakings that "substantially burden a person's exercise of religion" must satisfy strict scrutiny. 42 U.S.C. § 2000bb-1(a). Under RFRA, once a party has demonstrated that a government undertaking has substantially burdened their exercise of religion, then the government bears its own burden of demonstrating that the undertaking is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (citing 42 U.S.C. § 2000bb-1(b)). RFRA builds on the protections of religious freedom and free exercise of religion guaranteed by the First Amendment. However, the U.S. Supreme Court has held that

RFRA "provide[s] even broader protection for religious liberty than was available" under previous First Amendment jurisprudence." *Burwell*, 573 U.S. at 695 n. 3 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997).

## II. THE NATIONAL HISTORIC PRESERVATION ACT

Section 106 of the NHPA requires that federal agencies must take into consideration the effects of any federal undertaking, including the granting of a permit or license, on historic properties. 54 U.S.C. § 306108; *see also Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Army Corps of Eng'rs*, No. 3:11-CV-03026, 2016 WL 5478428 at *5 (D. S.D. Sep. 29, 2016). For that reason, the NHPA has been characterized as a "stop, look, and listen" statute that requires agencies to consider the effects of their actions on historic, cultural, and sacred sites in a comprehensive way. *E.g., Te-Moak Tribe of Western Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 606 (9th Cir. 2010).

The Section 106 process requires agencies to engage in meaningful consultation with Indian tribes on federally authorized undertakings that could affect sites that are on, or could be eligible for, listing in the National Register of Historic Places, including sites that are culturally significant to Indian tribes. 54 U.S.C. § 302706 (providing that "[p]ropert[ies] of traditional religious and cultural importance to an Indian tribe . . . may be determined to be eligible for inclusion on the National Register" and agencies "shall consult with any Indian tribe . . . that attaches religious and cultural significance to [such property]"). Agencies must consult regarding sites that hold "religious and cultural significance" to Indians even if they occur on ancestral or ceded land. 36 C.F.R. § 800.2(c)(2)(ii)(D). The agencies must ensure that the tribes have "a reasonable opportunity to identify [their] concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking's

effects on such properties, and participate in the resolution of adverse effects." *Id.* at 800.2(c)(ii)(A). This process also requires "reasonable and good faith efforts" to consult with tribes on the part of the agencies. *Id.*

An agency's failure to abide by the Section 106 process, particularly the failure to ensure tribes a reasonable opportunity to identify their concerns and the failure of the agency to make its own reasonable and good faith efforts to consult, is arbitrary and capricious and should be set aside. *See Pueblo of Sandia v. United States*, 50 F.3d 856, 860-63 (9th Cir. 1995).

## ARGUMENT

The Tribe and Mr. Vance may intervene of right in this litigation. Not only do they satisfy the Article III standing requirements, but they also satisfy the requirements for intervention of right under Federal Rule 24. Thus, the Court should grant the Tribe's and Mr. Vance's motion to intervene. In the alternative—if the Court disagrees as to whether the Tribe and Mr. Vance may intervene of right—the Tribe and Mr. Vance respectfully ask the Court to permit it to intervene under Federal Rule 24(b).

### I. THE TRIBE AND MR. VANCE SATISFY ARTICLE III STANDING REQUIREMENTS

The Tribe and Mr. Vance have alleged specific injuries that would accrue to the Tribe and individuals if this Court granted the State's motion for preliminary injunction, including (1) imposition of a substantial burden on the Tribes' and individuals' religious practices in violation of 42 U.S.C. § 2000bb; (2) a violation of the Tribe's and individual's rights under the Free Exercise Clause of the First Amendment; and (3) violation of the NHPA Section 106 by forcing the Federal Defendants illegally to bypass evaluation of historic properties in the Black Hills.

These injuries are sufficient to establish Article III standing, including (1) injury, (2) causation, and (3) redressability such that intervention is appropriate. *E.g.*, *FTC v. Johnson*, 800 F.3d 448, 451 (8th Cir. 2015).

### A. The Effect of an Order Granting the State's Motion for Preliminary Injunction Would Result in Injury in Fact to the Tribe and Individuals

The Federal Defendant's decision to deny the Governor's permit for her fireworks display worked in the Tribe's and Mr. Vance's favor because it protects their free exercise of religion in the Black Hills near Mount Rushmore, and it has ensured that the NPS will have an opportunity to engage in consultation with the Cheyenne River Sioux Tribe and other Indian tribes to determine the existence of sites in the Black Hills near Mount Rushmore that may have religious and cultural significance. Absent that protection, the Tribe and Mr. Vance have alleged two kinds of injuries. First, they allege injuries that relate to Lakota religious uses and practices in the Black Hills generally and the Mount Rushmore area specifically, which are contained in allegations that an Order granting injunctive relief in favor of the Governor would violate their rights under both RFRA and the First Amendment. Specifically, the Tribe and Mr. Vance allege that the fireworks display would have both an immediate and potentially long-term impact upon their free exercise of religion, by disrupting practitioners and risking loss of sacred sites, sacred medicines, and other sacred items to fire. Vance Decl. at ¶¶ 26-34. Second, the Tribe and Mr. Vance allege injuries related to preservation of cultural and historic sites of importance in the Black Hills generally and the Mount Rushmore area specifically, which is contained in their allegation that an Order granting injunctive relief in favor of the Governor would force the Federal Defendants to violate their duty to evaluate the existence of historic properties in the Black Hills in violation of NHPA Section 106. Specifically, the Tribe and Mr. Vance allege, and both the State and the DOI confirm, that NPS and the Tribe have already begun the Section 106 NHPA process. *Id.* at ¶¶ 18-24; *see also*

ECF 1 at ¶ 43; ECF 3-2 at 101. It has merely been on hold because of the pandemic. ECF 3-2 at 101. The NPS has committed itself to completing this process. *Id*.

Injury in fact to establish Article III standing "means an invasion of a legally cognizable right that is concrete, particularized, and either actual or imminent." *Am. Civil Liberties Union v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1092 (8th Cir. 2011) (internal citations omitted). The Tribe's and Mr. Vance's three allegations arising from religious practice and Section 106 of the NHPA constitute legally cognizable interests under federal law.

Alleging infringement of a First Amendment right to the free exercise of religion is sufficient to establish a legally cognizable interest such that Article III standing exists. *Id.* (holding that Muslim parents had Article III standing to defend against ACLU's challenge to Muslim charter school's imposition of Islamic principles). Importantly, in this circuit as in others, potential loss of First Amendment freedoms constitutes a particular injury. *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes . . . injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Indeed, the U.S. Supreme Court has determined that even threatened harm to First Amendment freedoms is a powerful and cognizable injury. *See O Centro*, 546 U.S. 418, 439 (2006) (upholding grant of preliminary injunction based on mere threat of prosecution); *see also O Centro Espirita Beneficient Uniao Do Vegetal v. Ashcroft*, 282 Sup. 2d 1236, 1240 (D. N.M. 2002).

Likewise, American Indian tribes and individuals plainly demonstrate an injury in fact when they allege that a violation of Section 106 of the NHPA would threaten their cultural and religious practices and endanger sacred and historic sites. *E.g.*, *Wishtoyo Found. v. U.S. Fish and Wildlife Serv.*, No. 19-03322, 2019 WL8226080, at *6 (C.D. Cal. Dec. 18, 2019) (finding that

Indians established injury in fact and therefore had standing to challenge federal action that would disturb Indian religious and cultural practices by disturbing California condor); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 61 (D.D.C. 2018) (holding that even past tribal member use of an area and allegation that federal undertaking would interrupt that use was sufficient to establish injury in fact and standing under NHPA); *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1201 (D. Or. 2010) (holding that Indians had standing to challenge federal undertaking that would harm cultural, historical, and natural resources that Indians used for cultural, recreational, and aesthetic purposes); *Montana Wilderness Assoc. v. Fry*, 310 F. Supp. 2d 1127, 1150 (D. Mont. 2004) (holding that injury in fact that established Article III standing existed where an Indian alleged that he had "personally visited sites of traditional and cultural significance" in the area of federal undertaking). Further, in this jurisdiction, the government's failure to meaningfully consult with the tribe where they are required to do so by statute, as in the NHPA, is itself an immediate cognizable harm. *See Cheyenne River Sioux Tribe v. Jewell*, 205 F. Supp. 3d 1052, 1059-60 (D. S.D. 2016) (finding the government's mere failure to meaningfully consult on Bureau of Indian Education restructuring was sufficient to sustain lawsuit).

Perhaps more importantly, the Tribe and Mr. Vance will suffer an injury if the protections afforded by the Federal Defendants' decision to deny the Governor her fireworks permit is reversed by this Court. "The desire to ensure compliance with a favorable judgment can also confer standing." *Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, No. CIV. 13-4051-KES, 2013 WL 5954418, at *3 (D.S.D. Nov. 6, 2013) (citing *Salazar v. Buono,* 559 U.S 700, 710 (2010) ("A party that obtains a judgment in its favor acquires a judicially cognizable' interest in ensuring compliance with that judgment."). Here, the DOI decided the State of South Dakota's request for a permit in

a manner that favored the Tribe and had the effect of protecting the Tribe's and individuals' religious freedom and protecting important sacred and historical sites. ECF 3-2 at 101. In addition, the DOI specifically cited to consideration of tribal opposition among the reasons for its decision. *Id.* Importantly, Mr. Vance has indicated that the NPS has already begun this process and has solicited information concerning more than 100 Traditional Cultural Properties in the Black Hills. Vance Decl. at ¶¶ 18-24. For this reason, the Cheyenne River Sioux Tribe has a specific interest in preservation of the DOI's decision that constitutes a legally cognizable interest.

The Tribe's and Mr. Vance's injuries are also both actual and imminent, which is the final requirement for injury in fact. As noted above, the Tribe and Mr. Vance have alleged that the fireworks display would have both an immediate and potentially long-term impact upon their free exercise of religion, by disrupting practitioners and risking loss of sacred sites, sacred medicines, and other sacred items to fire. Vance Decl. at ¶¶ 26-34. The Eighth Circuit has held that a proposed defendant-intervenor establishes imminence when it alleges that the "remedies sought by the [Plaintiff] threaten it with serious injury." *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1024 (8th Cir. 2003). In *Ubbelohde*, imminence sufficient for Article III standing existed where the proposed defendant-intervenors merely "**fear[ed]** that the [c]ourt's ruling would lead to [the alleged injury]." *Id.* (emphasis added). Further, in *Ubbelohde*, even a short period of injury was sufficient to establish both actual and imminent harm. *Id.*

Importantly, the Tribe and Mr. Vance have alleged **immediate** injury, which exceeds the standard for injury set forth in *Ubbelohde* and establishes injury in fact for purposes of Article III standing.

**B. The Tribe's and Mr. Vance's Threatened Injury Is Fairly Traceable to the Outcome of This Lawsuit, and a Decision Favorable to the Defendants Will Likely Redress the Injury**

The second element of Article III standing is causation, which requires the proposed intervenor to demonstrate that the injury alleged "is fairly traceable to the defendant's conduct. . . ." *Tarek ibn Ziyad*, 643 F.3d at 1092. In *Tarek ibn Ziyad*, the Eighth Circuit considered whether a group of Muslim parents enjoyed Article III standing sufficient to intervene in a lawsuit brought by the ACLU to force a public charter school to cease providing religious accommodations to Muslim students. *Id.* at 1091-92. As here, the proposed intervenors had moved to intervene as defendant-intervenors. The Eighth Circuit found that the parents alleged an injury fairly traceable to the defendants because, if the ACLU – the plaintiffs in that case–prevailed in that lawsuit, the court order would force the charter school to discontinue the religious accommodations, which would directly affect the parents' religious freedoms. *Id.* at 1091-93. In short, even where the proposed intervenor's interests are aligned with the defendant, the alleged injury is fairly traceable to the defendant's conduct if the outcome of the litigation causes the defendant to injure the defendant-intervenor.

In the present case, if this Court rules in favor or the State, the State will secure an order directing the Federal Defendants to issue the permits that will cause the alleged harm – both as to religious freedom and as to Section 106 of NHPA – that the Tribe and Mr. Vance have asserted here. This injury is fairly traceable to the Federal Defendants' conduct such that Article III standing exists.

The third element of Article III standing is redressability, which in the instant case is simply the mirror image of causation. "The prospective intervenor must also allege facts showing that the alleged injury is fairly traceable to the defendant's conduct and that a favorable decision will likely

redress the injury." *Id.* at 1092 (internal citation omitted). As in *Tarek ibn Ziyad*, causation is established because a ruling by this Court that opposed the Tribe's interest would force the Federal Defendants to permit conduct that would threaten injury to the Tribe and Mr. Vance. *Id.* 1093. In the inverse, if this Court rules in favor of the Tribe and Mr. Vance, the Federal Defendants' decision to deny the Governor's fireworks permit would stand and the threatened injury would be avoided. A favorable decision would redress the injury such that Article III standing exists.

## II. THE TRIBE AND MR. VANCE MAY INTERVENE OF RIGHT

The Tribe and Mr. Vance have the right to intervene in this action under Federal Rule of Civil Procedure 24(a). This motion to intervene is timely; the Tribe and Mr. Vance have protected interests in the federal property that is the subject of this lawsuit; the Tribe's and Mr. Vance's interest will be impaired if they are not allowed to participate; and no party to the litigation—including the DOI —represents their interests. Each prong of intervention of right is discussed fully below.

### A. The Tribe's and Mr. Vance's Motion Is Timely.

For both intervention of right and permissive intervention, Rule 24 requires that a motion to intervene must be timely. Whether a motion to intervene is timely depends upon the circumstances of the case, and "[n]o ironclad rules govern this determination." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 998 (8th Cir. 1993). Courts in the Eighth Circuit consider factors such as the would-be intervenor's reason for delay in moving to intervene; "how far the litigation has progressed before the motion to intervene is filed"; and "how much prejudice the delay in seeking intervention may cause to other parties if intervention is allowed." *Id.*

Here, there has been no delay. The State filed its Complaint on April 30, 2021, a mere 13 days before the Tribe filed its motion to intervene. The litigation has not progressed in any material

way since then. Indeed, the Federal Defendants have yet to even file an Answer or move to dismiss the Complaint. If its motion to intervene is granted, the Tribe and Mr. Vance intend to comply with the Court's Order granting the State's motion for expedited briefing. The Tribe's and Mr. Vance's instant motion to intervene is filed with a proposed Answer, which met the Order's May 13 deadline. The Tribe's and Mr. Vance's opposition to motion for preliminary injunction will be filed by May 18, 2021, which is also consistent with the Order on expedited briefing.

Because this case is in its infancy, no party to this suit would be prejudiced if the Court grants the Tribe's and Mr. Vance's motion to intervene. Perhaps the Plaintiffs may argue that they will be prejudiced by being required to litigate against an additional party, but that is not the kind of prejudice Rule 24 seeks to prevent. *See id*. at 999 ("Any prejudice to the [plaintiffs] . . . results not from the fact of the [potential intervenor's] delay in seeking intervention, but rather from the [intervenor's] presence in the suit. Rule 24(a) protects exactly this ability to intervene in litigation to protect one's interests."). The Tribe's motion to intervene is timely.

**B. The Tribe and Mr. Vance Have a Legally Protected Interest in This Suit to Prevent the Issuance of a Permit That Would Burden the Tribe's and Mr. Vance's Free Exercise of Religion and Violate the NHPA's Section 106 Process**

To intervene of right, a would-be intervenor must have an "interest relating to the property or transaction that is the subject of the action." *Nat'l Parks Conservation Assoc.*, 759 F.3d at 975. "The interest requirement is a practical standard that should be construed broadly." *Bettor Racing, Inc.*, at *5. "The court should be mindful that '[t]he interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned parties as is compatible with efficiency and due process.'"). *SEC v. Flight Transp. Corp.,* 699 F.2d 943, 949 (8th Cir. 1983)).

In this case, the facts that establish that the Tribe and Mr. Vance will suffer an injury-in-fact also show that the Tribe and Mr. Vance have an interest in this action that warrants

intervention. The Tribe and Mr. Vance have properly alleged that a ruling by this Court that would permit the Governor to have her fireworks display in the Black Hills near Mount Rushmore would infringe the Tribe's right to free exercise of religion under both RFRA and the First Amendment in light of the fact that the Tribe and Mr. Vance have alleged that the fireworks display would have both an immediate and potentially long-term impact upon their free exercise of religion, by disrupting practitioners and risking loss of sacred sites, sacred medicines, and other sacred items to wildfire. Vance Decl. at ¶¶ 26-34. Likewise, the Tribe and Mr. Vance have properly alleged that a ruling by this Court that would permit the Governor to have her fireworks display in the Black Hills near Mount Rushmore would unlawfully bypass meaningful tribal consultation on sacred and cultural sites in which the Federal Defendants are required to engage pursuant to Section 106 of the NHPA and which has already begun. *Id.* at ¶¶ 18-42; ECF 1 at ¶ 43; ECF 3-2 at 101.

Significantly, moreover, both the Governor and the Federal Defendants have acknowledged the Tribe's and Mr. Vance's interest in this lawsuit and placed those interests front and center in this dispute. As an initial matter, the Federal Defendants cited the Tribe's interest as a key reason why they denied the Governor's fireworks permit. ECF 3-2 at 101 (referencing "the park's many tribal partners express [] oppos[ition to] fireworks at the Memorial" and noting "we are committed to respecting tribal connections with the site and building stronger relationships with the associated tribes" by performing a Section 106 survey).

Furthermore, the Governor raises tribal interests in four separate paragraphs of her Complaint and in the supporting declaration of her daughter, Kennedy Noem. Complaint, ECF 2 at ¶¶ 8, 39, 43, and 52; ECF 3-3 at ¶ 4. The Governor's reference to the tribal interest in this lawsuit claims that she already has properly considered and protected tribal interests, a claim with

which the Tribe and Mr. Vance adamantly disagree in this lawsuit. ECF 3-3 at ¶ 4. The Governor's claims regarding the importance of tribal interests in this dispute is, in fact, rather detailed for an initial Pleading:

> From the outset our first priority was to ensure that the event could be held with proper consideration for the safety of spectators, tribal cultural sites, and the environment. Also, our team held multiple community meetings and public hearings leading up the [sic] event, and we invited tribal leaders to provide their perspectives. We also engaged tribal leaders in private discussions that included the National Park Service's . . . regional Office of Tribal Relations/Indian Affairs, to make sure that we understood and addressed any concerns that they might have.

*Id.* The Governor also claims on the face of the Complaint that the State

> rebutted concerns about the event's effect on tribal relations, noting that 'the tribes were consulted before last year's event and invited to attend our planning meetings,' the 'Department of Tribal Relations was involved in every step of the process, and there was 'Native American led programming before the fireworks went off.

ECF 1 at ¶ 52 (quoting ECF 3-2 at 105).

The Governor's reference to the tribal interest in this lawsuit also claims that the Federal Defendant's discussion of tribal rights is "vague and speculative" such that she should prevail in this lawsuit. *Id.* at ¶ 8. In particular, the Governor complains that:

> [The Federal Defendants'] second justification for the denial was that tribal leaders opposed fireworks at the Memorial, and that it was 'committed to respecting tribal connections to the site and building stronger relationships with associated tribes.' The letter did not cite any specific example of tribal opposition to fireworks. Indeed, [the Federal Defendant's] admitted that 'the park committed to the 13 affiliated tribes to conduct a Tribal Cultural Sites/Traditional Cultural Properties Survey of the Memorial in 2020,' but that survey has been 'delayed until summer 2021.' And, once again, [the Federal Defendants] did not explain what has changed since the 2020 event in terms of tribal leaders' position on the even and why that would justify denying a permit this year after granting one last year.

*Id*. at ¶ 43.

Both the Federal Defendants and the Governor have focused this controversy in part upon the legally protected interest of the Tribe and Mr. Vance. The Governor, in particular, has focused

upon the lack of certainty with regard to what the tribal position might be concerning the instant controversy. Neither party can deny therefore that the Tribe and Mr. Vance have an interest in this lawsuit or that the Tribe's and Mr. Vance's perspectives would aid in resolution of the controversy. For this reason and the reasons stated above, the Tribe and Mr. Vance satisfy this prong of the intervention of right inquiry.

**C. Disposition of the Action Threatens to Impair the Tribe's and Mr. Vance's Interests**

The disposition of this suit "may as a practical matter impair or impede" the Tribe's and Mr. Vance's ability to protect their interests. *Nat'l Parks Conservation Assoc.*, 759 F.3d at 976 (citations omitted). If the Plaintiffs obtain the relief they seek, then the Tribe's interests described above would necessarily be impeded. *See, e.g., Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1116 (holding that would-be intervenor satisfied impairment prong of Rule 24(a)(2) with focus on prayer for relief in plaintiff's complaint). The Complaint asks the Court to vacate the DOI's decision regarding the Plaintiffs' request for a permit and to order the DOI to issue the requested permit. As discussed above, any action by the Court granting these prayers for relief would directly impact the Tribe's and Mr. Vance's interests. Disposition of this action in the Plaintiffs' favor would impair the Tribe's and Mr. Vance's interests, which supports their desire to intervene of right.

**D. The Parties Do Not Adequately Represent the Tribe's and Mr. Vance's Interests**

The final requirement for intervention of right is to show that the existing parties do not adequately represent a movant's interests. *See, e.g., United States v. Union Elec. Co.*, 64 F.3d 1152, 1160 (8th Cir. 1995). Although ordinarily there is a presumption that the government adequately represents the interests of its citizens, that presumption does not exist when the interest

of the proposed intervenor does not coincide with the interest of the public at large. *E.g.*, *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1000 (8th Cir. 1993) (finding no adequate representation by government where landowners had particular financial stake in the outcome of litigation that was narrower than the interest of the general public).

The Cheyenne River Sioux Tribe's and Mr. Vance's interest in this litigation does not coincide with the public interest at large. The public at large has a general interest in protection of the national forests, an interest which is, in turn, generally protected by the DOI. The public's interests in this lawsuit would fairly be described as the protection of the national park and the health of South Dakotans. The DOI is tasked with helping to protect these public interests, and the Tribe and Mr. Vance certainly share those interests. However, unlike the public at large, the Tribe and Mr. Vance have a direct cultural and religious connection to the lands at issue in this case because they were part of the Tribe's historic land base; they were part of the lands reserved by the Tribe to itself in the various treaties; and they remain sites of significant cultural and religious significance to the Tribe. The DOI cannot adequately represent the Tribe's and Mr. Vance's cultural and religious interests; this fact serves to overcome the presumption that the government represents the Tribe's and Mr. Vance's interests in this suit.

In this case, "the government represents numerous complex and conflicting interests in matters of this nature." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973 (3d Cir. 1998). As a result, the "interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies." *Id*. at 973-74. "Although it is unlikely that the intervenors' interest will change, it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts." *Id*. at 974.

Significantly, moreover, the Federal Defendants have expressly stated their ignorance concerning the nature of tribal interest in the Black Hills near Mount Rushmore and this particular dispute, noting their intent "to conduct a Tribal Cultural Sites / Traditional Cultural Properties Survey of the Memorial" in summer 2021 to ascertain tribal perspectives of sacred and cultural sites in the area, the precise perspective that the Tribe and Mr. Vance seek to defend and vindicate in this lawsuit. *See* ECF 3-2 at 101. The Tribe and Mr. Vance therefore "can provide expertise to the issues in this dispute." *Nat'l Parks Conservation Assoc.*, 759 F.3d at 977 (citing *Utahns for Better Transp.*, 295 F.3d at 1117). Only the Tribe and individual Lakota religious observers and cultural experts like Mr. Vance are qualified to speak directly to those interests.

No party to the litigation adequately represents the Tribe and Mr. Vance. For this reason, and for the reasons described above, the Court "must permit" the Tribe and Mr. Vance to intervene. *See* Fed. R. Civ. P. 24(a)(2).

## III. ALTERNATIVELY, THE TRIBE AND MR. VANCE SHOULD BE GRANTED PERMISSIVE INTERVENTION UNDER FED. R. CIV. P. 24(b)

Alternatively, the Tribe and Mr. Vance respectfully ask the Court to allow them to intervene under Federal Rule of Civil Procedure 24(b). The Court may grant a party permissive intervention under Rule 24(b) if: (1) the party has "an independent ground for jurisdiction"; (2) the motion is timely; and "(3) [the party's] claim or defense and the main action have a question of law or fact in common." *Flynt v. Lombardi*, 782 F.3d 963, 966 (8th Cir. 2015). Beyond these guideposts, permissive intervention is left to the Court's discretion, but "[d]oubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all related controversies in a single action." *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) (citation omitted).

Taking each factor in turn, the Tribe and Mr. Vance have an independent ground for jurisdiction because they satisfy Article III's standing requirements, as described above. "The principal consideration," though, for permissive intervention is "whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights." *South Dakota ex. rel. Barnett v. U.S. Dep't. of Interior*, 317 F.3d 783, 787 (8th Cir. 2003). Here, there has been no delay. It has only been 13 days since the Plaintiffs filed their Complaint, and the DOI has yet to answer the complaint or move to dismiss it. Because this case is in its infancy, allowing the Tribe and Mr. Vance to intervene will not cause any existing litigant any prejudice. The Tribe's and Mr. Vance's cultural and religious connections to the land that are the subject of this lawsuit necessarily give them a "question of law or fact in common" with the main action. For these reasons, the Tribe and Mr. Vance respectfully ask the Court to permit it to intervene so that they may represent and protect their own interests in this case.

**CONCLUSION**

Because the Tribe and Mr. Vance meet the traditional Article III standing requirements and satisfy each of the four requirements of Rule 24(a), they must be permitted to intervene as of right in this litigation. Alternatively, the Court should exercise its discretion and permit the Tribe and Mr. Vance to intervene so that they may represent and protect its interests in this lawsuit. For the reasons described above, the Court should grant the Tribe's and Mr. Vance's motion to intervene.

Respectfully submitted this 13th day of May 2021.

s/ Leonika Charging-Davison
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