IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN KEEPSEAGLE, et al., Plaintiffs, v. TOM VILSACK, Secretary United States Department of Agriculture, Defendant.	Civil Action No. 1:99CV03119 EGS Judge Emmet G. Sullivan Magistrate Judge Alan Kay

MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE

Movant-Intervenors, the Choctaw Nation of Oklahoma ("Choctaw Nation"), a federally-recognized Native American Indian tribal government, and its Jones Academy Foundation ("Foundation"), respectfully submit this memorandum in support of their motion to intervene in this action for the limited purpose of addressing the *cy pres* distribution plan for leftover settlement funds.

There is precedent for permitting intervention under these circumstances. The Fifth Circuit recently ruled that the state of Texas had a right to intervene in a settled antitrust class action to protect that state government's interest in the *cy pres* distribution plan for unclaimed settlement funds. *In re Lease Oil Antitrust Litigation*, 570 F.3d 244 (5th Cir. 2009).

Under the Federal Rules of Civil Procedure, Movant-Intervenors may intervene either as a matter of right pursuant to Fed.R.Civ.P. 24(a)(2), or through permissive intervention pursuant to Fed.R.Civ.P. 24(b)(2).

BACKGROUND

This is a class action in which plaintiffs alleged that the U.S. Department of Agriculture ("USDA") discriminated against Native American farmers and ranchers in its farm loan and farm loan servicing programs. The case was resolved through a Settlement Agreement, executed on November 1, 2010, which was approved by the Court on April 28, 2011, following a fairness hearing.

The Settlement Agreement established a Settlement Fund of $680,000,000 to compensate individual class members who were victims of the alleged discrimination. This fund was administered by a Claims Administrator proposed by Class Counsel and approved by the Court. After all eligible class members have been compensated through the claims process established by the Agreement, any leftover funds are to be directed to a Cy Pres Fund. Class Counsel may then designate Cy Pres Beneficiaries who are to "receive equal shares of the Cy Pres Fund. … Designations shall be for the benefit of Native American farmers and ranchers, upon recommendations by Class Counsel and approval by the Court." Settlement Agreement Section IX.F.7. A "Cy Pres Beneficiary" is any non-profit organization, other than a law firm, legal services entity, or educational institution, that has provided agricultural, business assistance, or advocacy services to Native American farmers between 1981 and November 1, 2010 that will be proposed by Class Counsel and approved by the Court. Settlement Agreement Section II.I.

On August 30, 2013, Class Counsel filed a status report (Doc. 646) announcing that all claims have now been paid and that a total of $299,999,288.11 has been or will be deducted from the Settlement Fund. This leaves a total of $380,000,711.89 which is available for distribution pursuant to the *cy pres* provision of the Settlement Agreement. Class Counsel assert that the parties had contemplated upon execution of the Settlement Agreement that no more than several

million dollars in settlement funds would be unclaimed. They contend that the actual size of the Cy Pres Fund renders some of the existing terms for *cy pres* distribution impractical, and causes those terms to poorly serve the interests of Native American farmers and ranchers. Class Counsel concluded that some of the *cy pres* terms in the Settlement Agreement should be amended and approached USDA within the past year about such changes. Evidently, to date the USDA has not agreed to the changes proposed by Class Counsel.

Accordingly, Class Counsel announce in the status report that plaintiffs intend to propose that the Settlement Agreement be modified to permit establishment of a new foundation endowed by the $380 million in unclaimed settlement funds and authorized to distribute interest accrued on the settlement funds annually to eligible *cy pres* recipients. The plaintiffs will further propose that the foundation adopt a grant-making apparatus for soliciting and evaluating requests for *cy pres* distributions and for ensuring the funds disbursed are properly expended. Furthermore, the plaintiffs intend to propose that the Settlement Agreement requirement that the *cy pres* funds be disbursed in equal amounts be eliminated and that the population of non-profit organizations eligible to receive *cy pres* funds be expanded to include organizations founded after the Agreement Execution date (November 1, 2010) and educational institutions, such as tribal colleges.

Implicit but unsaid in the status report is that, under the terms of the Settlement Agreement, a new foundation is clearly ineligible to receive any of the Cy Pres Fund. Class Counsel argue that the Settlement Agreement in its present form could support creation of a new foundation by disbursing the entire Cy Pres Fund to a single organization that qualifies as a Cy Pres Beneficiary while extracting a binding commitment from that recipient to use the funds to establish a subsidiary foundation which would then re-grant funds to other non-profit

organizations. However, this construct does not comply with either the letter or the spirit of the Settlement Agreement that this Court has approved, and therefore, absent a modification of the Settlement Agreement, may not be effected. Moreover, it is doubtful that the *cy pres* provisions of the Settlement Agreement now can be modified pursuant to Fed.R.Civ.P. 60(b)(5), as Class Counsel contends. That rule permits a judgment to be modified only to the extent that it has "prospective application" but the *cy pres* provisions are part of a money judgment that has no "prospective application" for the purposes of the rule. *See Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138-39 (D.C. Cir. 1988) (that a money judgment has continuing consequences until it is paid does not mean that it has "prospective application").

More fundamentally, it is doubtful that the *cy pres* provisions of the Settlement Agreement now can be modified at all, regardless of the procedural device invoked.

> Because a district court's authority to administer a class-action settlement derives from Rule 23, the court cannot modify the bargained-for terms of the settlement agreement. That is, while the settlement agreement must gain the approval of the district judge, once approved its terms must be followed by the court and the parties alike.

Klier v. Elf Atochem North America, Inc., 658 F.3d 468, 475 (5th Cir. 2011) (footnotes omitted).

On August 21, 2013, the Choctaw Nation and its Foundation transmitted to Class Counsel a detailed proposal (Exhibit A) to be included among the recommended Cy Pres Beneficiaries under the Settlement Agreement. On August 29, 2013, Class Counsel responded that "he will be happy to consider [this] proposal after the court has determined the method for distributing the remaining settlement funds." The next day Class Counsel filed the status report proposing to change the method for distributing the Cy Pres Fund.

Both the Choctaw Nation and its Foundation are eligible to be Cy Pres Beneficiaries under the terms of the Settlement Agreement. As indicated in Exhibit A, they can satisfy the

"equal share" provision of the *cy pres* distribution by adjusting the scope of their proposal depending on the amount of money they may receive from the Cy Pres Fund.

The Choctaw Nation is the third largest federally-recognized Native American Indian Tribe,[1] with the second largest tribal service area and land base in the lower 48 States covering over 11,700 square miles of extremely rural hills and valleys in southeast Oklahoma (larger than Massachusetts, Delaware, Rhode Island, and the District of Columbia combined). The Choctaw are an agriculturally-centered, multi-subsistence culture originally from the Mississippi, Florida, Alabama, and Louisiana area. As of 2011, the Choctaw Nation had 223,279 enrolled members, of which over 80,000 live in the tribal service area, along with nearly 20,000 Native Americans from over 30 different Tribes. Choctaw citizens can be found in every state (e.g., Texas has 24,024 resident Choctaws, California 23,403, Mississippi 9,260, Arkansas 4,840, and Alabama 4,513). The Nation is involved in agriculture at many levels, including sponsoring an annual Livestock Show for youth from multiple Indian tribes throughout its multi-state region showing beef, swine, goats, and sheep. It also sponsors youth during the region's spring livestock premium sales and supports numerous rural agriculture activities in the communities. Currently, the Nation is conducting farmers markets in Durant, Atoka, McAlester, Hugo, Stigler, Idabel and Broken Bow in conjunction with the USDA Farmer's Market Nutrition Program ("FMNP"). Of the nearly 80 FMNP farmers throughout the Choctaw tribal service area -- approximately 75% are Native/Choctaw farmers.

The Foundation is a not-for-profit, tax deductible, 501(c)(3) charitable organization founded in 2003 and has been actively involved in support of Indian agriculture since its inception. The Foundation seeks financial commitments from individuals, corporations,

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[1] As a federally-recognized Indian tribal government, the Choctaw Nation is immune from state and federal income taxation and contributions to the Nation are tax deductible under Section 170 of the Internal Revenue Code.

organizations, and foundations to enhance facilities and programs in order to provide exceptional educational and life experiences for Native American youth, including career-building training in the areas of agriculture and farm product marketing. The Foundation is not itself an educational institution but provides support to school-age youth such as those attending Jones Academy, which has been administered by the Choctaw Nation for over 120 years and benefits children from dozens of Indian tribes throughout the United States. The Jones Academy is a residential boarding school community that includes a working farm that grows food consumed at the Academy and provides after-school agriculture and ranching activities for resident students. Most Jones Academy students are from highly challenged environments – rural, lower socioeconomic backgrounds, and single parent Indian families, many of whom are unable to care for their children because of court orders or prison sentences. Many Jones Academy students elect to pursue agriculture as an educational specialty. Each year approximately 35% of Jones Academy students choose to enroll in agriculture-related classes, join Future Farmers of America, or become members of the 4-H Youth Development program. The Jones Academy farm programs allow students to select their projects and, if they select animal science, experience a hands-on learning opportunity as they feed, exercise, train, and groom their animal and clean the animal pens – and then show their animals in livestock competitions at local, state and national levels.

ARGUMENT

I. MOVANTS ARE ENTITLED TO INTERVENE AS OF RIGHT

Movants are entitled to intervene as of right pursuant to Fed.R.Civ.P. 24(a)(2), which provides:

> On timely motion, the court must permit anyone to intervene who: … claims an interest relating to the property or transaction that is the 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.

"[A] party seeking intervention as of right must meet four conditions: (1) the motion must be timely; (2) the party must claim an interest relating to the property or transaction which is the subject of the action; (3) the party must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) the party must show that their interest may not be adequately represented by existing parties." *Hardin v. Jackson*, 600 F.Supp.2d 13, 15 (D.D.C. 2009) (Sullivan, J.) (internal quotation marks and citation omitted).

First, an application to intervene must be timely. Whether a given application is timely is a context-specific inquiry, and courts should take into account (a) the time elapsed since the inception of the action, (b) the probability of prejudice to those already party to the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor's rights. *See Karsner v. Lothian,* 532 F.3d 876, 886 (D.C. Cir. 2008). In this case, the proper measuring point for timeliness is not the inception of the action, but the inception of the proceedings regarding distribution of the Cy Pres Fund. The Choctaw Nation and its Foundation have moved to intervene at the outset of these *cy pres* proceedings and there is no prejudice to the rights of the existing parties, who do not claim any entitlement to the funds at issue. Accordingly, this motion is timely.

Second, the intervenor must have an interest in the action. "[I]n the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). "The threat of economic injury from the outcome of

litigation undoubtedly gives a petitioner the requisite interest." *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002). Thus, potential recipients of licenses for the operation of uranium mills in New Mexico were permitted to intervene in an action by environmentalists against government agencies seeking to prohibit the agencies from issuing licenses without first preparing environmental impact statements. The court observed that the outcome of the litigation could have a profound economic effect on the would-be intervenors, and this economic effect gave them an interest within the meaning of Rule 24(a)(2). *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm.,* 578 F.2d 1341, 1344 (10th Cir.1978); *accord Community Nutrition Institute v. Bergland*, 32 Fed.R.Serv.2d 910, 1981 WL 380679 (D.D.C. 1981) (granting intervention where "proposed intervenors may be impeded in protecting their economic interests if they are not allowed to participate in these judicial proceedings."). Likewise, in this case the Choctaw Nation and its Foundation are potential recipients of a share in the Cy Pres Fund. They have a Rule 24 interest is the distribution of the Cy Pres Fund because its distribution could have a profound economic effect on them.

Furthermore, the D.C. Circuit has held that an intervenor who satisfies the test for constitutional standing thereby establishes that it has the requisite interest in the action for purposes of Rule 24. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). In *Fund for Animals*, the plaintiffs filed suit against Department of the Interior officials, alleging that the defendants violated the Endangered Species Act by failing to list the argali sheep as an endangered species. The Country of Mongolia sought to intervene. It argued that, if American hunters were barred from bringing their argali trophies home, some hunters will not travel to Mongolia to hunt the argali, and the revenues that support its conservation program will decline. The court concluded that this was sufficient to establish the elements of standing: (1) injury-in-

fact, (2) causation, and (3) redressability. *Id.* at 733. Just as the threatened loss of tourist dollars was sufficient to establish Mongolia's standing to intervene, here the interest of the Choctaw Nation and its Foundation in receiving a share of the Cy Pres Fund is sufficient to establish their standing and their interest for purposes of Rule 24.

Third, the action must threaten to impair the intervenor's proffered interest in the action. The inquiry is not a rigid one: consistent with the Rule's reference to dispositions that may "as a practical matter" impair the intervenor's interest, Fed.R.Civ.P. 24(a)(2), courts look to the "practical consequences" of denying intervention. *See Fund for Animals, Inc. v. Norton,* 322 F.3d at 735 (citing *Natural Res. Def. Council v. Costle,* 561 F.2d 904, 909 (D.C.Cir.1977)). There is no question that the Court's approval of a distribution plan for the Cy Pres Fund that excludes the Choctaw Nation and its Foundation from a share of the distribution would as a practical matter impair their interest.

Finally, the intervenors must show that their interest may not be adequately represented by existing parties. The Supreme Court has held that this "requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n. 10 (1972). In this case, the interest of the Choctaw Nation and its Foundation are not adequately represented by Class Counsel, who have proposed to modify the Settlement Agreement and establish a distribution plan that would not include them.[2] Likewise, their interest is not adequately represented by the federal defendants, whose obligation is to represent the interests of the American people rather than eligible Cy Pres Beneficiaries who seek a share of the Cy Pres Fund. *See Fund for Animals, Inc. v. Norton*, 322 F.3d at 736. It is well-

[2] If a new foundation is established, as Class Counsel proposes, it is possible that the Choctaw Nation and its Foundation might obtain grants from that foundation. But those grants would not be pursuant to the Settlement Agreement nor would they be subject to supervision and approval by this Court.

established that the United States generally cannot represent the interests of a non-public party. *See id.* at 737.

Therefore, because the Choctaw Nation and its Foundation satisfy all four conditions established by Rule 24(a), they are entitled to intervene as of right for the purpose of addressing the *cy pres* distribution plan.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION

In the alternative, the Court should grant permissive intervention pursuant to Rule 24(b):

> On timely motion, the court may permit anyone to intervene who: … has a claim or defense that shares with the main action a common question of law or fact. … In exercising its discretion the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b). To meet the standard of permissive intervention, the intervenor applicant must (a) show independent grounds for intervention; (b) submit a timely motion and (c) demonstrate a common question of law and fact between the applicant's claim or defense and the main action. *See EEOC v. National Childrens Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). This circuit employs a flexible approach to Rule 24(b) and has permitted third parties to intervene under the Rule for the limited purpose of contesting collateral issues arising from the underlying litigation such as seeking access to materials shielded from public view by a protective order. *Id.*

In this case, the Choctaw Nation and its Foundation plainly satisfy the test for permissive intervention. First, their intervention in this case will not disturb this Court's retained jurisdiction.

Second, the above discussion demonstrates the timeliness of this motion– th e Cy Pres issue is in its legal infancy and intervention will not cause undue delay or prejudice the other

parties.

Third, the resolution of Movants' interest in the Cy Pres Fund shares common questions of law and fact with the main action. It turns on the very same questions that the Court will address in deciding how the distribution of the Cy Pres Fund is to be effectuated.

In the interest of judicial economy, this Court should recognize that the Choctaw Nation and the Foundation meet the standards listed in Rule 24(b)(2), and should therefore grant this motion based on the theory of permissive intervention.

WHEREFORE, it is respectfully submitted that the motion of the Choctaw Nation and its Foundation to intervene in this matter for the purpose of addressing the *cy pres* distribution plan should be granted.

Dated: September 5, 2013

Respectfully submitted,

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