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
GREAT PLAINS CLAIMANTS, [Proposed] Intervenors.	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GREAT PLAINS CLAIMANTS' SECOND MOTION TO INTERVENE

The Great Plains Claimants respectfully submit this Memorandum of Points and Authorities in support of their Second Motion to Intervene, or in the alternative, to participate as *amicus curiae*. The Great Plains Claimants are more than 400 members of the class of Native American farmers and ranchers who were the victims of discriminatory lending practices by the United States Department of Agriculture ("USDA"). The Great Plains Claimants seek to intervene in these proceedings as Plaintiffs to ensure that their interests are adequately represented in the context of any amendments to the Settlement Agreement, including, but not

limited to, how the more than $380,000,000[1] in unclaimed settlement funds ("Cy Pres Fund") is disseminated.

On August 30, 2013, more than eighteen months after the *Keepseagle* claims deadline and more than a year after Track A claimants received their settlement payments, Class Counsel finally advised this Court that more than $380 million in settlement funds remained unclaimed. Only then did Class Counsel let this Court know that they intended to recommend that the Settlement Agreement "be amended to permit endowment of a foundation that would be charged with disbursing the interest accruing on these [cy pres] funds to serve Native American ranchers and farmers for generations to come." *See* Status Report, Dkt. No. 646, at 1. Despite the passage of more than one year since belatedly alerting this Court of the immense amount of unclaimed settlement funds, Class Counsel still has not sought amendment of the Settlement Agreement.

Since the filing of their August 30, 2013, Status Report, Class Counsel's conceptual "foundation" has morphed from one with a perpetual existence funded by the entirety of the Cy Pres Fund and whose purpose would be limited to disbursement of interest to one with a twenty

[1] The exact size of the Cy Pres Fund and how it has been invested has not been publicly disclosed despite repeated requests for such information. Notwithstanding multiple requests by undersigned counsel during the past seven months and by several of the Great Plains Claimants during the public sessions held by Class Counsel during August 2014 in North and South Dakota, no such information has yet been produced. On September 16, 2014, Class Counsel advised that they invested the unclaimed settlement funds in "instruments held in a segregated trust account" and have asked Oppenheimer, the manager of these unclaimed settlement funds, to "prepare a report for the Court summarizing the way in which these funds were managed and detailing the amount of funds that will be transferred to the Trust." Leaving aside their premature assumption that all such funds will be transferred into a Trust whose endowment has not been approved by this Court, in whole or in part, Class Counsel's continued failure to provide the Great Plains Claimants with even the current balance of the unclaimed settlement funds is inexplicable and supports granting this motion. Moreover, the lack of transparency regarding how these funds have been invested only adds to the belief in Indian Country that the Cy Pres Fund is not being properly administered.

(20) year existence, ostensibly to be funded by 90% of the $380+ million in unclaimed settlement funds and presumably tasked to disburse principal and any accrued interest. Regardless of the form of Class Counsel's presumably forthcoming request, it is clear that any endowment of a new foundation with hundreds of millions of dollars from the Cy Pres Fund will require an Order from this Court amending the settlement agreement. It is also evident that Class Counsel will not seek additional funds for successful *Keepseagle* claimants from these ample unclaimed settlement funds. Class Counsel's forthcoming request to endow a new foundation with the vast majority of the Cy Pres Fund is inconsistent with the course of action sought by the vast majority of those they have purported to represent – supplemental settlement payments.

The Great Plains Claimants note that this case is unique: a class action based on racial discrimination carried out by employees of an agency previously saddled with the moniker "The Last Plantation" against Native Americans, a protected class, coupled with what is believed to be the largest unclaimed settlement fund in American history. If that weren't enough, the propriety of *cy pres* awards, generally and in this case, is also at issue. *See Marek v. Lane*, 571 U.S. ___, 134 S. Ct. 8 (2013) (statement by Roberts, C.J.)(noting the "fundamental concerns surrounding the use of such [cy pres] remedies in class action litigation" and finding that the "Court may need to clarify the limits on the use of such remedies"); *see also In Re Lupron Marketing & Sales Practices Litigation*, 677F.3d 21, 37 (1st Cir. 2012) (holding that distribution of funds at the discretion of the court is not a traditional Article III function and creates the appearance of impropriety); *Nachshin v. AOL*, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011) (finding that it was improper for a judge to approve as cy pres recipients charities that had nothing to do with underlying statutes because "the selection process may answer to the whims and self-interests of the parties, their counsel, or the court"); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 482

(5th Cir. 2011) (Jones, C.J. concurring) (suggesting that district courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations).

Finally, the Great Plains Claimants also recognize that the narrow issue of what a Court should do when intervention is sought after the entry of an Order approving a class action settlement and based on the argument that Class Counsel is not properly representing the class because of their failure to properly communicate with their "clients" and refusal to accede to a course of action demanded by a substantial number of class members (and some of the named Class Representatives) is likely one of first impression.

The Great Plains Claimants respectfully submit that the facts at bar and principles of equity strongly support granting them leave to intervene in these proceedings. This is not a situation where intervention is sought by a small number of absent class members who oppose the relief sought by all of the named class representatives and most of the class members. To the contrary, the Great Plains Claimants – more than 10% of the 3601 successful *Keepseagle* claimants – and many other *Keepseagle* class members oppose endowment of a new foundation with 90% (or other substantial amount) of the Cy Pres Fund. *See* correspondence from Wendell Hannigan, Robert McKay, Dyron B. Kent, Darlene Wood and James Carl Oliphant. Dkt. Numbers 666, 667, 671, 681 and 696.

Many claimants have urged Class Counsel, via letters, via e-mails and through in-person comments during the so-called "listening sessions," to seek amendment of the Settlement Agreement in order to permit supplemental payments to be made to successful *Keepseagle*

claimants.[2] Simply put, the Great Plains Claimants should be permitted to intervene in these proceedings because Class Counsel have not adequately communicated with and are still not following the directions of a substantial minority – and possibly a majority – of their clients, including the lead class representatives, George and Marilyn Keepseagle. *See e.g.* Dkt. Number 679 (letter from the Keepseagles opposing the establishment of a new Foundation, dated March 9, 2014). The Great Plains Claimants respectfully submit that any motion filed by Class Counsel which seeks an amendment of the terms of the judicially-approved Settlement Agreement with respect to leftover settlement funds without seeking a supplemental payment for successful *Keepseagle* claimants constitutes a lack of adequate representation, is tantamount to a breach of their obligations to their clients and warrants granting their request to intervene in this matter.

BACKGROUND

The Settlement Agreement

The Settlement Agreement is the judicially-approved resolution of this important civil rights class action. It hopefully represents the closing chapter in the long history of discrimination by the United States Department of Agriculture (USDA) against Native American farmers and ranchers in its farm loan and farm loan servicing programs, as administered by the Farm Service Agency (FSA) and its predecessor, the Farmers Home Administration. The claims asserted by the Great Plains Claimants and other class members were resolved after years of litigation and a lengthy settlement process, which included a fairness hearing.

The Settlement Agreement resulted in a Total Compensation Fund of $680,000,000.

[2] Undersigned counsel has requested copies of the submissions received by the University of Arkansas School of Law. To date, no such records have been produced and Class Counsel has only offered to provide the Great Plains Claimants with a summary report prepared by the law school.

After deducting attorneys' fees and class representative service awards, the remainder of the Settlement Fund was intended for compensation of individual Native American farmers and ranchers that were victims of discrimination by USDA.

Under the terms of the Settlement Agreement, the Claims Administrator was required to direct any "leftover funds" remaining after all eligible class members received compensation to the Cy Pres Fund. Settlement Agreement, at Section IX(F)(7). Pursuant thereto, Class Counsel is required to designate Cy Pres Beneficiaries to receive equal shares of the Cy Pres Fund. A Cy Pres Beneficiary is defined as:

> 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 the Execution Date that will be proposed by Class Counsel and approved by the Court.

Settlement Agreement, at Section II (I).

Distribution of Class Funds

There were a total of 3,587 successful Track A claimants.[3] These claimants received a total of $224,187,500 in compensation. There were also 14 successful Track B claimants who received a total of $3,364,647.[4] This Court approved a distribution of attorneys' fees in the amount of $60,800,000 and service awards to the named plaintiffs in the sum of $950,000. In addition, the Settlement Fund paid $10,697,141.11 to the IRS to cover income taxes resulting from debt forgiveness of the successful claimants. In sum, the Claims Administrator paid $299,999,288.11 of the $680,000,000 Settlement Fund to class members and Class Counsel.

[3] Track A claims were evaluated in a non-judicial process by a third-party based on the criteria established in Section IX(C) of the Settlement Agreement.

[4] Track B claims were evaluated in a non-judicial process by a third-party based on the criteria established in Section IX(D) of the Settlement Agreement.

Approximately $380,000,000 remained undisbursed as of August 30, 2013. Status Report at 3.[5] Pending the clearance of $3,462,500 in uncashed disbursement checks[6], any remaining funds will be deposited into the Cy Pres Fund.

The Cy Pres Fund

On August 30, 2013, Class Counsel filed a Status Report which disclosed, for the first time, that over $380 million of the Total Compensation Fund remained undisbursed. Dkt. Number 646, at 3. In that Status Report, Class Counsel indicated that no one anticipated that more than several million dollars would remain unclaimed at the time the Settlement Agreement was entered into. *Id.*, at 4. However, in light of the enormous size of the Cy Pres Fund, Class Counsel has decided that the Settlement Agreement needed to be amended and advised this Court of their intent to propose that these unclaimed settlement funds be used as an endowment for a new foundation authorized to distribute interest (only) to eligible *cy pres* recipients on an annual basis. *Id.* at 4. The new foundation would utilize a "grant-making apparatus" to solicit and evaluate requests for *cy pres* distributions and would be responsible for ensuring that funds are properly distributed. *Id.* at 9.

On November 18, 2013, this Court held a status conference at which, *inter alia*, Class Counsel's intent to seek amendment of the Settlement Agreement was discussed. During that status conference, Class Counsel represented that they had held several in-person and telephone

[5] The exact amount of the Cy Pres Fund remains undisclosed to this Court and *Keepseagle* class members.

[6] Class counsel has neither provided this Court nor the *Keepseagle* class with any updates regarding the status of uncashed disbursement checks or anything else related to the size of the Cy Pres Fund since filing its August 30, 2013, Status Report.

conferences[7] with attorneys from the Department of Justice related to their plan to seek leave to endow this new foundation with unclaimed settlement funds. Following the November 18, 2013, status conference, this Court entered an Order directing the parties to file a Status Report by January 21, 2014, and scheduling another status conference for January 27, 2014. On January 21, 2014, the parties filed a short joint status report and motion to reschedule the January 27, 2014, status conference. Dkt. No. 672. That motion was granted two days later and this Court directed the parties to file another status report by March 17, 2014, and scheduled another status conference for March 26, 2014. On March 17, 2014, the parties again filed a short joint status report and motion to reschedule the March 26, 2014, status conference. Dkt. No. 677. That motion was granted on March 21, 2014, and this Court directed the parties to file another status report by May 7, 2014, and scheduled another status conference for May 14, 2014.

On May 7, 2014, the parties filed their Joint Status Report. Dkt. No. 685. That status report advised that the parties had "tentatively agreed to modify the settlement" in order to permit the disbursement of 10% (approximately $38 million) of the Cy Pres Fund to existing "eligible non-profits" and to transfer the "remaining undistributed settlement funds" (approximately $342 million) to a Trust created to administer the funds. Other than indicating that the Trust would seek tax exempt status under the Internal Revenue Code and that it would have a twenty-year existence (as opposed to one with a perpetual existence, as indicated in the August 30, 2013, Status Report), the May 7, 2014, Status Report was extremely short on detail

[7] Undersigned counsel's reasonable requests to participate in these negotiations have been rebuffed, notwithstanding Class Counsel's knowledge that the Great Plains Claimants are diametrically opposed to the creation of a new foundation.

regarding the Trust, its structure or who its directors would be.[8]

On May 21, 2014, this Court convened another status conference during which the parties reiterated their representations in the May 7, 2014, Status Report. During that status conference, Class Counsel also indicated that they would file a motion to amend the settlement agreement this fall and that it would hold several sessions in Indian Country over the summer regarding the Trust and its forthcoming motion to amend the settlement agreement. According to Class Counsel's posting on www.indianfarmclass.com/CyFunds.aspx, "[t]he purpose of these sessions is to provide a venue and opportunity for Keepseagle claimants, tribal governments, interested individuals and nonprofit organizations serving Indian Country to provide input concerning the best uses of the cy pres funds, insight concerning needs in Indian Country agriculture, and thoughts about desired characteristics and experience in future Trustees."

Many of the Great Plains Claimants attended these public sessions and expressed their views regarding what should be done with the unclaimed settlement funds. Without exception, the Great Plains Claimants who testified at these sessions advised Class Counsel that they were opposed to the establishment of a new trust or foundation and supported supplemental payments to successful *Keepseagle* claimants. *See e.g.* Declaration of Connie Knight, at ¶¶ 20-24; Declaration of Palmer DeFender, at ¶¶ 11, 12; Declaration of Mary Waln, at ¶ 12; and Declaration of Dennis Claw, at ¶ 12. The Knight, DeFender, Waln and Claw Declarations are

[8] In their May 7, 2014, Status Report, the parties sought to assure this Court and presumably the *Keepseagle* class members that the hundreds of millions of dollars which will serve as the endowment for this new Trust will be adequately safeguarded because "the parties have agreed that individuals familiar with the needs of Native American farmers and ranchers will oversee the Trust and select recipients of Trust funds." This statement is highly troubling in light of the wide variation in farming and ranching practices across the United States generally and on reservations in particular. Moreover, Native Americans are not fungible and cannot be grouped together in a neat package with a bow. This Court should take great care (assuming a*rguendo* that Class Counsel's endowment is approved) to ensure that individuals "familiar" with each tribe whose members were *Keepseagle* claimants are appointed to the Trust's board of directors.

attached hereto as Exhibits A, B, C and D.

Many of the Great Plains Claimants and others have sent e-mails or written letters to Class Counsel opposing the endowment of a new trust or foundation with unclaimed settlement funds and in favor of supplemental payments to successful *Keepseagle* claimants. Others have written to this Court articulating similar views. *See e.g.* Dkt. Nos. 666, 667, 671, 681, 696. Despite near-universal opposition by class members to endowing a new foundation with most of the unclaimed settlement funds, Class Counsel appear poised to continue to ignore the voices of the individuals that this Court appointed them to represent.

Despite the passage of more than a year since Class Counsel first disclosed its intent to amend the settlement agreement in order to endow a new foundation with more than $300 million of the unclaimed settlement funds, the Great Plains Claimants still know next to nothing about Class Counsel's forthcoming plan. Review of the status reports filed by the parties and attendance at the public sessions held over the summer shed little light on the details thereof. What is clear, however, is that the Great Plains Claimants' interests are not being adequately represented by Class Counsel with regard to the distribution of the $380 million *cy pres* fund.

Class Counsel has advised the Great Plains Claimants that the Federal Government is not amenable, at this time, to an amendment of the Settlement Agreement which permits supplemental payments to successful *Keepseagle* claimants. However, the Settlement Agreement is not merely the product of the negotiations of private parties akin to an ordinary contract. Rather, the Settlement Agreement has been approved by this Court and bears its imprimatur. As such, any decision to amend the settlement agreement and, more importantly,

how to amend it, is not something which can be dictated exclusively by USDA or DOJ.[9] Rather, this case is different for a multitude of reasons, including the immense size of the Cy Pres Fund and because the propriety of the *cy pres* relief contained in the Settlement Agreement, as approved by this Court on April 28, 2011, remains unsettled. The Great Plains Claimants also respectfully submit that the Settlement Agreement should be modified, if for no reason other than 55% of the funds intended for victims of past discrimination remain unclaimed and available for distribution, in whole or in part, to successful *Keepseagle* claimants.

Class Counsel Did Not Adequately Consult with the Great Plains Claimants

In its Status Report, Class Counsel indicated that they formulated the plan for a new foundation only after "extensive discussions with the Class Representatives and leaders within Indian Country." Dkt. No. 646, at 8. First, Class Counsel appear to concede that they did not consult with the Great Plains Claimants. Second, they omit that some of the Class Representatives oppose their plan to amend the Settlement Agreement to endow a new foundation. Third, Class Counsel contend that "[t]here is widespread support in Indian County for a Foundation." *Id.*, at 11. That proposition is disputed and several South Dakota tribes have issued resolutions in opposition to the establishment and endowment of a new foundation from the Cy Pres Fund and support supplemental payments to those subjected to discrimination by USDA. *See* Resolutions by Cheyenne River Sioux Tribe, dated August 20, 2014; Rosebud Sioux Tribe, dated August 13, 2014; and Oglala Sioux Tribe, dated October 10, 2013. Copies of these

[9] Why the Federal Government would be opposed to supplemental payments to Track A claimants is perplexing. Neither the Great Plains Claimants nor any other party is asking that a single penny of additional taxpayer money be spent. Given that USDA's obligations will not change if supplemental payments are ordered, it is respectfully submitted that any federal interests in the Cy Pres Fund or any amendments to the Settlement Agreement are slim.

tribal resolutions are attached hereto as Exhibits E, F and G.

Class Counsel was approved by this Court to represent the interests of Native American farmers and ranchers discriminated against by USDA in its lending practices, not Indian Country generally. It was therefore incumbent upon Class Counsel to communicate with their clients, not tribal leaders, regarding the unexpectedly large size of the Cy Pres Fund and various options for its disbursement once they decided that amendment of the Settlement Agreement would be pursued. Even though Class Counsel has known for some time that over 55% of the Settlement Fund remains unclaimed, virtually no communication or consultation with the members of the Class – the intended beneficiaries of the Settlement Fund – took place until very recently. *See* Knight Declaration, at ¶¶ 16,17; DeFender Declaration, at ¶¶ 11, 12; Waln Declaration, at ¶¶ 10, 11; and Claw Declaration, at ¶¶ 10,11 .

Moreover, Class Counsel's recent communication efforts have fallen far short of the mark. Without doubt, holding a few meetings in regional centers far from tribal lands during which class members were advised what relief will be sought in forthcoming motion practice is hardly adequate consultation with clients. While Class Counsel still has not filed a motion to amend the settlement agreement, it appears clear that they will not be seeking what most of the class members or what lead plaintiffs Marilyn and George Keepseagle desire – an amendment of the settlement agreement to permit supplemental payments to class members from a $380 million unclaimed settlement fund. Class Counsel's refusal to seek such relief is especially perplexing, when there are ample funds available for multiple purposes. For example, using less than 60% of those funds for supplemental payments would result in an additional $50,000 payment to each successful Track A claimant, an additional $12,500 for tax payments to the IRS and still leave

more than $150 million in leftover funds for other purposes.[10]

Class Counsel cannot reasonably claim it could not have kept successful claimants apprised of recent events related to leftover settlement funds. Only 3,601 class members received awards from the Settlement Fund. Without question, Class Counsel had the means to easily communicate with award recipients and could presumably have used only a very small amount of the $380 million in leftover funds during 2013 or early 2014 to write to *Keepseagle* claimants to alert them to the unexpected size of the cy pres fund and to solicit input before deciding how to proceed. While writing to their clients or holding meetings designed to solicit input from their clients before deciding how to proceed *may* have consulted adequate consultation, Class Counsel failed to do so. Simply put, Class Counsel did not make sufficient or adequate efforts to advise and consult with the Great Plains Claimants regarding how the Cy Pres Fund should be distributed before making a *pro forma* effort long after its strategic decisions were firmly locked in place.

Until late July 2014, Class Counsel failed to make virtually any efforts to notify or consult with the overwhelming majority of the Great Plains Claimants about the Cy Pres Fund.[11]

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[10] In the event that this Court does not require all of the unclaimed settlement funds to be directed to supplemental payments to Keepseagle claimants, the Great Plains Claimants do not believe that the endowing a new foundation is the best use of any such remaining leftover settlement funds. The Great Plains Claimants submit that Indian agricultural education would be the best use of any such residual leftover funds and can be fully carried out by existing land grant universities and tribal colleges at far lower administrative costs than utilizing a new foundation. For example, South Dakota State University, which has extension offices through the Federally Recognized Tribes Extension Program (FRTEP) on the Pine Ridge, Rosebud and Cheyenne River reservations, has the expertise and capacity to coordinate such an effort. Moreover, Dr. Barry Dunn, the dean of SDSU's College of Agriculture and Biological Sciences, is an enrolled member of the Rosebud Sioux Tribe and is the only Native American to lead an agricultural college at a land grant university in the United States.

[11] Although a few tribal leaders learned that a large unclaimed settlement fund existed before Class Counsel's July 2014 correspondence, their input was not seriously considered and any inquiries about supplemental payments rejected.

See Knight Declaration, at ¶¶ 15-17; DeFender Declaration, at ¶¶ 9-11; Waln Declaration, at ¶¶ 10, 11; and Claw Declaration, at ¶¶10, 11. Furthermore, prior to receipt of a letter from Class Counsel late that month and shortly before the public sessions were held, none of the Great Plains Claimants received any correspondence or other written information to the proposed foundation from Class Counsel. *See* Knight Declaration, at ¶ 15; DeFender Declaration, at ¶ 9; Waln Declaration, at ¶ 10; and Claw Declaration, at ¶ 10. The Great Plains Claimants still do not have adequate information about Class Counsel's plan to seek to endow a new foundation with most of the Cy Pres Fund pursuant to an amendment to the Settlement Agreement. The failure to advise and consult with the Great Plains Claimants with respect to a radical change to the method of distributing a majority of settlement funds is inexcusable and strongly supports granting this motion.

THE GREAT PLAINS CLAIMANTS ARE ENTITLED TO INTERVENE AS OF RIGHT

The Great Plains Claimants are entitled to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, which states:

> On timely motion, the court must permit anyone to intervene who:
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> * * * * * *
>
> (2) 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.

The D.C. Circuit Court of Appeals considers four factors when determining whether a party may intervene as of right. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998). To intervene as of right: (1) the motion must be timely; (2) the movant must claim an interest relating to the property or transaction which is the subject of the action; (3) the movant

must be so situated that the disposition of the action may, as a practical matter, impair or impede the movant's ability to protect that interest; and (4) the movant's interest is not adequately represented by existing parties. *Id*. The Great Plains Claimants' motion to intervene satisfies all four conditions.

Great Plains Claimants' Motion Is Timely

Great Plains Claimants' motion to intervene is timely. Whether a motion is deemed timely depends on the context of the application. *See In re Vitamins Antitrust Litigation*, 2001 WL 34088808, *3 (D.D.C. 2001). This Court should consider (1) the time elapsed since the commencement of the action, (2) the probability of prejudice to those already party to the proceedings, (3) the purpose for which intervention is sought, and (4) the need for intervention as a means for preserving the movant's rights. *Karsner v. Lothian*¸ 532 F.3d 876, 886 (D.C. Cir. 2008).

In this instance, the Great Plains Claimants seek to intervene in order to ensure that this Court distributes the Cy Pres Fund in an equitable manner that benefits those Native American farmers and ranchers who were discriminated against by USDA and that such distribution is conducted in a transparent manner with appropriate input from all interested parties. Thus, the proper measuring point for timeliness purposes with respect to the instant motion is not the inception of this action or when this Court approved the class settlement; instead, this motion is timely as it relates to and was precipitated by a still-unfiled motion to amend the Settlement Agreement. Some of the Great Plains Claimants were generally unaware of the size of the Cy

Pres Fund or Class Counsel's intent to modify the Settlement Agreement until last fall.[12] Others were not aware of these developments until after they received a letter from Class Counsel during July 2014 and attended meetings held last month.

Without doubt, the Great Plains Claimants have promptly moved to intervene in this matter. This motion was filed prior to any motion practice instituted by Class Counsel related to the Cy Pres Fund or which seeks to amend the settlement agreement. Granting this motion will not cause any party to sustain any prejudice. Accordingly, intervention is timely.

The Great Plains Claimants Have Legally Protected Interests In the Cy Pres Fund

The Great Plains Claimants easily satisfy the second factor of the Rule 24(a) test because each has a legally protected interest in the action. *United States v. Morten*, 730 F.Supp.2d 11, 15-16 (D.D.C. 2010). When determining whether this factor is satisfied, this Court should take into consideration the role that intervention plays in promoting efficiency and due process. *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

The Great Plains Claimants are Native American farmers and ranchers that have documented that they were discriminated against by USDA's Farm Service Agency. The *Keepseagle* Settlement is intended to compensate Native American farmers and ranchers for the harm and injuries they suffered as a result of past discrimination by USDA. As successful *Keepseagle* class members, the Great Plains Claimants are direct beneficiaries of the Settlement Agreement.[13] Accordingly, the Great Plains Claimants have legally protected interests in the

[12] The Great Plains Claimants adopt and incorporate their initial Motion to Intervene as if fully set forth herein.

[13] Although Class Counsel contends that the Great Plains Claimants would benefit from distributions to entities that purport to provide agricultural, business assistance, or advocacy services to Native American farmers and ranchers, that contention is disputed.

distribution of the Cy Pres Fund.

Absent Intervention, Disposition of This Matter Would Impair The Great Plains Claimants' Interests In This Action

Rule 24(a)(2)'s third requirement is that an action must threaten to impair the intervenor's proffered interest in an action. This is not a rigid inquiry. Instead, Rule 24(a)(2) only requires that the applicant's interest be impaired, "as a practical matter." As such, this Court should look to the "practical consequences" of denying intervention. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003).

Class Counsel have indicated their intent to seek amendment of the Settlement Agreement for the purpose of endowing a new entity to manage and dispense 90% of the Cy Pres Fund over a 20-year period. The Great Plains Claimants, who are direct beneficiaries of the Settlement Agreement, have not received adequate communication from Class Counsel regarding the distribution of these funds and are not being adequately represented with respect to what should be done with these millions of dollars in leftover settlement funds.

The Great Plains Claimants' interests in the Cy Pres Fund will be greatly impaired if they cannot intervene in this matter. As the intended beneficiaries of the Settlement Fund and in light of Class Counsel's intent to seek a substantial modification of the Settlement Agreement which will not benefit them, the Great Plains Claimants have interests that would be severely impaired if they are precluded from intervening in this matter and being permitted to present arguments regarding how the Cy Pres Fund should be distributed. In light of the fundamental nature of the forthcoming proposed amendment of the Settlement Agreement and the amounts at issue, declining to permit the Great Plains Claimants to intervene at this time and requiring them to wait until another Fairness Hearing (presumably after preliminary amendment of the Settlement

Agreement) will not adequately protect their interests.

The Great Plains Claimants' Interests Are Not Being Adequately Represented

Finally, the Great Plains Claimants must show that their interests are not adequately represented by an existing party. *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008). Although the Great Plains Claimants bear this burden, it should be noted that this burden is *de minimis*. *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 13 (D.D.C. 2010). The Great Plains Claimants need to only show that there is a *possibility* that their interests may not be adequately represented if they are not allowed to intervene. *Id*. (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003)(emphasis added).

Federal courts have permitted members of a certified class to intervene in an action if their interests are no longer adequately represented by class counsel. *Buchet v. ITT Consumer Financial Corp.*, 845 F.Supp.684, 689-90 (D. Minn. 1994). In *Buchet*, two class members sought to intervene in connection with their objections to an amended settlement agreement proposed by class counsel. *Id*. at 689. The scope of their intervention was limited to the settlement phase of the underlying litigation. *Id*. at 690. The two class members argued that the amended settlement was insufficient and that they did not receive adequate notice from class counsel regarding the terms of the amended settlement agreement. *Id*. The court in *Buchet* granted the class members' motion to intervene, holding that their interests were not adequately represented by class counsel at the settlement phase of the litigation.

The Great Plains Claimants, like the class member-intervenors in *Buchet*, possess interests in this matter that are not being adequately represented by Class Counsel or USDA. The Great Plains Claimants seek to make clear that they do not quarrel with Class Counsel's

efforts which resulted in a $680 million settlement. However, any attempt by Class Counsel to seek amendment of the Settlement Agreement to endow a new foundation with 90% of the Cy Pres Fund is an unprecedented departure from their prior efforts on the Great Plains Claimants' behalf. Equally importantly, Class Counsel's decision to seek an amendment of the Settlement Agreement in order to permit the endowment of a new foundation with 90% of the unclaimed settlement funds was made without adequate communication to or consultation with the Great Plains Claimants and is wholly inconsistent with their goals. Additionally, USDA, which has stated its opposition on the record to supplemental payments to *Keepseagle* claimants, has interests which are substantially different from those seeking intervention herein. Accordingly, the Great Plains Claimants interests are not being adequately represented and this Court should permit them to intervene as of right for the limited purpose of addressing any amendments to the Settlement Agreement.

Therefore, because the Great Plains Claimants satisfy all four conditions established by Rule 24(a), they are entitled to intervene as of right for the limited purpose of addressing the disposition of the Cy Pres Fund.

IN THE ALTERNATIVE, THIS COURT SHOULD GRANT PERMISSIVE INTERVENTION

In the event that this Court determines that the Great Plains Claimants are not entitled to intervention as of right, this Court should still grant permissive intervention pursuant to Rule 24(b), which states, in pertinent part:

> On 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.
> * * * * * *

> (3) In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

An applicant seeking permissive intervention pursuant to Rule 24(b) must demonstrate "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). The Great Plains Claimants satisfy these requirements.

First, the Great Plains Claimants' participation in this case is limited to post-settlement proceedings and will not interfere with the jurisdiction this Court retains over the *Keepseagle* case. *Id.* at 1046-47. The Great Plains Claimants only seek to participate in a matter ancillary to the case in chief – distribution of the Cy Pres Fund. The D.C. Circuit has found such participation appropriate when it will not disturb the court's subject matter jurisdiction. *Id*.

Second, as stated above, the Great Plains Claimants' motion to intervene is timely. This motion is being filed shortly after Class Counsel notified the Great Plains Claimants and other class members about the size of the unclaimed settlement fund and prior to any motion practice related to the Cy Pres Fund. Intervention will not cause delay or prejudice to the existing parties.[14] Finally, the Great Plains Claimants' interests in the Cy Pres Fund share common questions of law and fact with the underlying action. Accordingly, this Court should permit the

[14] It is difficult to imagine how Class Counsel or the Federal Government could be prejudiced if the Great Plains Claimants were permitted to intervene in this matter. Class Counsel purports to represent all of the *Keepseagle* class members, including the Great Plains Claimants. The Federal Government's obligations will also not be impaired, increased or otherwise impacted in the event that the Settlement Agreement's *cy pres* provisions are amended, including if this Court orders supplemental payments to be issued to successful Track A claimants. Defendants in class action settlements are typically focused on admissions of liability and settlement amounts, not on where leftover settlement funds go. It is unclear why USDA would prefer that leftover settlement funds go to endow a new trust rather than having supplemental payments be issued to those it discriminated against.

Great Plains Claimants to intervene pursuant to Fed. R. Civ. P. 24(b).

IN THE ALTERNATIVE, THIS COURT SHOULD ALLOW THE GREAT PLAINS CLAIMANTS TO PARTICIPATE IN THIS ACTION AS *AMICUS CURIAE*

In the event that this Court declines to permit the Great Plains Claimants to intervene in this action, it should allow them to participate in this action as *amicus curiae*. This Court has broad discretion to allow an interested person or group to participate in a pending action. *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 519 F.Supp.2d 89, 93 (D.D.C. 2007). This Court has held that amicus participation is generally appropriate in this Court when:

> (1) "a party is not represented competently or is not represented at all,"
> (2) "the amicus has an interest in some other case that may be affected by the decision in the present case," or
> (3) "when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."

Hard Drive Prods., Inc. v. Does 1-1,495, 892 F.Supp.2d 334, 337 (D.D.C. 2012) (citing *Jin v. Ministry of State Sec.*, 557 F.Supp.2d 131, 137 (D.D.C.2008) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir.1997)). The Great Plains Claimants assert that they are no longer being adequately represented by Class Counsel. As *amicus curiae*, the Great Plains Claimants can assist this Court by providing a unique perspective that goes beyond what the Class Counsel or federal defendants can provide. USDA did not oppose the Great Plains Claimants' alternative request in their first Motion to Intervene to participate as *amicus curiae*. Accordingly, this Court should, in the event that it denies the instant motion to intervene, grant the Great Plains Claimants leave to participate as *amicus curiae*.

CONCLUSION

For the foregoing reasons, this Court should grant Great Plains Claimants' motion to intervene, permit them leave to intervene as plaintiffs and to participate fully in all proceedings related to proposed amendments to the Settlement Agreement. In the alternative, this Court should permit the Great Plains Claimants to participate in all further proceedings as *amicus curiae*.

Respectfully submitted this 16th day of September, 2014.

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