IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANKTON SIOUX TRIBE, Plaintiff, v. KENNETH SALAZAR, Secretary of the Interior, et al., Defendants, and HERMAN, MERMELSTEIN & HOROWITZ, P.A. Intervenor.	)	Civ. No. 1:03CV01603 (TFH)

REPLY MEMORANDUM OF HERMAN, MERMELSTEIN & HOROWITZ, P.A. IN SUPPORT OF ITS MOTION TO INTERVENE TO PROTECT ATTORNEYS' CHARGING LIEN

Introduction and Summary

Herman, Mermelstein & Horowitz, P.A. ("HMH"), counsel of record for Plaintiff in this action, moves to withdraw its appearance as attorneys for the Plaintiff and to intervene for the purpose of protecting its vested interest in Plaintiff's cause of action pursuant to its contingency fee agreement. Plaintiff Yankton Sioux Tribe, which discharged HMH prior to the filing of the Motion, does not oppose the withdrawal of HMH's appearance as its attorneys, but opposes HMH's intervention asserting, *inter alia*, that HMH lacks a protectable interest, that the Yankton Sioux Tribe cannot be sued under principles of sovereign immunity, and that it disputes the validity of HMH's contingency fee agreement with the Yankton Sioux Tribe. The Defendants likewise do not oppose

HMH's withdrawal as Plaintiff's attorneys, but oppose intervention on substantially the same grounds, *inter alia*, that HMH does not have a protectable interest for purposes of intervention and that Plaintiff has tribal immunity from suit.[1]

HMH, as former counsel of record, has a right to intervene to protect its vested interest under the contingency fee agreement between HMH and Plaintiff. Martens v. Hadley Memorial Hosp., 753 F.Supp. 371 (D.D.C. 1990) (granting attorney's motion to intervene under Rule 24(a) to protect attorney's interest in contingency fee). HMH has an interest in Plaintiff's cause of action and any recovery in the case, which vested at the time Plaintiff and HMH entered into their contingency fee agreement and HMH filed this action. For purposes of HMH's Motion to Intervene, its well-pleaded allegations must be accepted as true. The Yankton Sioux Tribe's sovereign immunity is not implicated by HMH's Motion to Intervene to protect this vested interest, or alternatively, its tribal immunity was waived.[2]

It would be a gross injustice to deny HMH intervention in this case. HMH negotiated a settlement on behalf of the Tribe, the material terms of which were approved by referendum vote of

[1] The Defendants also assert that HMH did not comply with its duty to confer on nondispositive motions pursuant to Local Rule 7(m). HMH did not confer with the Defendant's attorneys prior to filing its Motion to Intervene, which was inadvertent. Nonetheless, HMH did confer with representatives of Plaintiff Yankton Sioux Tribe, and advised them of HMH's intent to file a motion to withdraw as counsel of record and to intervene. The United States' Opposition to HMH's Motion to Intervene, in any event, is substantially similar to the Yankton Sioux Tribe's Opposition, so conferring with the United States would not have served to limit or eliminate the issues before the Court. In any event, it is questionable whether a motion to intervene should be characterized as a non-dispositive motion subject to Local Rule 7(m), as the denial of a motion to intervene is an appealable final order. Fund for Animals, Inc. v. Norton, 322 F.3d 728, 732 (D.C. Cir. 2003).

[2] Plaintiff Yankton Sioux Tribe and the Defendants shall be collectively referred to herein as the "Parties".

the members of the Yankton Sioux Tribe on February 22, 2012. While the Parties now claim that a binding settlement has not been reached, the fact is that the Yankton Sioux Tribe made clear its desire to complete settlement on the terms negotiated by HMH. (See email from Glenford Sully, Yankton Sioux Tribe Secretary, to Stuart Mermelstein of HMH dated May 18, 2012, attached hereto as Exhibit "A"). The Tribe's efforts in the past few months have been unabashedly directed at evading HMH's compensation while retaining substitute counsel to complete the settlement obtained by HMH. (See email from Glenford Sully to Stuart Mermelstein dated August 6, 2012, attached hereto as Exhibit "B"). HMH has worked on this case diligently *for nine years*, zealously pursuing the Yankton Sioux Tribe's legal rights, without receiving any compensation and incurring substantial costs. Intervention in these circumstances pursuant to Rule 24(a) is fundamental and necessary in the interests of fairness and justice.

A. HMH Has Alleged Sufficient Facts Supporting Its Motion to Intervene

Yankton Sioux Tribe alleges in its Opposition that HMH's contingency fee agreement with the Tribe is not valid, a point that HMH vehemently disputes. For present purposes, however, it is unnecessary for the Court to resolve this factual dispute. The federal courts have "held that a district court is required to accept as true the non-conclusory allegations made in support of an intervention motion." Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 819 (9th Cir. 2001) (citing cases). "[T]here is no requirement that the district court make findings of fact and conclusions of law in ruling on a motion to intervene, … and motions to intervene are usually evaluated on the basis of well pleaded matters in the motion, the complaint, and any responses of opponents to intervention." Foster v. Gueory, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (holding that

the movant "made a sufficient showing under Rule 24"). The well-pleaded allegations in the papers submitted on this issue are sufficient to establish HMH's right to intervene in this action under Fed.R.Civ.P 24(a).

Indeed, the Yankton Sioux Tribe's argument that the contingency fee retainer agreement is invalid, after HMH devoted substantial work and services over nine years, is outrageous. Jeffrey Herman of HMH met with the Tribe's Business and Claims Committee in April, 2003, at which time the terms of HMH's retention was agreed upon. Mr. Herman was subsequently advised that the Firm's retention had to be confirmed by the Tribe's General Council, and a General Council meeting was scheduled to address the Firm's retention on July 26, 2003. At that meeting, the General Council voted for and confirmed the Firm's retention under the contingency fee retainer agreement.[3] (Exh. 1 to Complaint in Intervention). The Tribe's Secretary then affixed the Tribe's seal to the agreement. (Id.)

HMH filed this action on July 28, 2003, and continued to pursue litigation of the Tribe's claims through the tenures of three different Chairmen of the Tribe's Business and Claims Committee. These Chairmen and other Officers of the Tribe participated in multiple settlement meetings in Washington, D.C. with one or more HMH attorneys, attended by government representatives and their attorneys. HMH also had a number of meetings with the Tribe's General Council and Business and Claims Committee over the years of its representation pertaining to the litigation. Needless to say, the Tribe's Officers were well aware of HMH's representation and its

[3] One must wonder how in good faith the Tribe can affirmatively assert, without evidentiary support, that the General Council never approved HMH's retention. In this regard, HMH has made numerous requests of the Tribe for the minutes of the July 26, 2003 General Council meeting, without response.

continuing efforts on behalf of the Tribe. At no time during HMH's efforts leading up to the settlement negotiated in February, 2012, did any representative of the Yankton Sioux Tribe ever challenge the validity of HMH's contingency fee retainer agreement.[4]

Even if the contingency fee agreement were technically deficient (which HMH vehemently disputes), HMH nonetheless would have a vested interest in being compensated pursuant to a theory of quantum meruit. King & King, Chartered v. Harbert Int'l, Inc., 503 F.3d 153, 156-57 (D.C. Cir. 2007). "The District of Columbia, like other jurisdictions, wants clients to 'compensate attorneys reasonably,' as a matter of 'fundamental fairness.' " Id. at 156 (quoting Connelly v. Swick & Shapiro, P.C., 749 A.2d 1264, 1267-68 (D.C. 2000)). Where "the attorney substantially performed his tasks before being terminated, he may receive the agreed proportion of the client's eventual recovery." Id.[5] Here, HMH negotiated a settlement amount and terms agreed to by the Defendants, which the Yankton Sioux Tribe now hopes to consummate in conjunction with a scheme to freeze HMH out of compensation. Yankton Sioux Tribe makes no contention, nor could it in good faith,

[4] After HMH negotiated the settlement in February, 2012, which the Chairman and the great majority of the Tribe's members sought to consummate, Mr. Herman was asked to attend a meeting of the Tribe's General Council on May 21, 2012, to address questions pertaining to the settlement. Before that meeting, the Chairman and Secretary of the Tribe's Business and Claims Committee had reiterated the Tribe's interest in completing the settlement that HMH had negotiated. (See Exhibit "A" hereto). Based on his discussions with the Tribe's leaders, Mr. Herman understood that the meeting was called to discuss what needs to be done to finalize the settlement. Instead, Mr. Herman was ambushed at the meeting, asked at the outset why the Tribe should not terminate HMH and assert the theory of tribal immunity as a basis for avoiding payment of HMH's fees. HMH was thereupon terminated. The Tribe first affirmatively asserted that the contingency fee retainer agreement was invalid in its Opposition to the Motion to Intervene.

[5] Accordingly, whether analyzed as a contract right under the contingency fee agreement or quantum meruit, the result is the same. HMH is entitled to a fee in the agreed upon amount of 25% of the gross settlement.

that HMH's services in this action were in any way deficient nor that its termination was for cause. Under these circumstances, consummation of a settlement without compensation to HMH would be an affront to "fundamental fairness." Id.

B. Intervention Is Appropriate in this Action

The Parties assert that HMH cannot intervene to protect its interest in attorneys' fees because this is an action for an accounting and equitable relief, not an action for money damages, Rule 24(a) requires only "an interest relating to the property or transaction that is the subject of the action." An attorney retained on a "true contingency fee basis", as here, unquestionably has "an interest in the cause of action" under Rule 24(a). Martens v. Hadley Memorial Hosp., 753 F.Supp. 371, 372 (D.D.C. 1990) (quoting Falcone v. Hill, 235 F.2d 860, 862 (D.C. Cir. 1956)); accord Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970) (granting attorney's motion to intervene under Rule 24, stating "[w]e think it clear that the appellant law firm here claimed an interest in the subject of the action … and is so situated that the final disposition of the action may as a practical matter impair its ability to protect that interest"). See also Fund for Animals, Inc. v. Norton, 322 F.3d 728, 735 (D.C. Cir. 2003) (granting intervention, and holding that movant had a constitutional standing and therefore a sufficient interest in the case under Rule 24(a)); Atlantic Refinishing & Restoration, Inc. v. Travelers Casualty and Surety Co., 272 F.R.D. 26, 29 (D.D.C. 2010) (granting intervention to principal of surety bond); County of San Miguel, Colo. v. MacDonald, 244 F.R.D. 36, 46 (D.D.C. 2007) (granting intervention to advocacy group whose members had interest in property at issue under administrative agency action). Cf. Klamath Irrigation District v. United States, 64 Fed. Cl. 328 (2005) (noting that Rule 24(a) "does not require that the intervenor prove a property right, whether in the constitutional or any other sense").

The fact that this action seeks a judgment for non-monetary relief does not defeat HMH's interest, particularly given the terms under which the numerous related Indian breach of trust cases in this Court have been settled in recent months through the "SPOA"[6] process. The Yankton Sioux Tribe participated in the SPOA group of Tribes seeking settlement of their tribal breach of trust claims against the Defendants, and also participated in discussions of the "template" for the Joint Stipulation of Settlement Stipulation and Order used for the settlement of tribal claims. This template is uniform for these related cases, at the Government's insistence, and provides for the payment of money to the Tribe, as follows:

> 15. **Handling of Settlement Proceeds.** Upon the Court's entry of this Joint Stipulation of Settlement as an Order, or as soon thereafter as reasonably possible, Defendants shall transfer or cause to be transferred, in a single payment, the sum of money specified in Paragraph 2 above, to an account that (a) Plaintiff shall specify to Defendants, within 15 days of the date of the Court's entry of this Joint Stipulation of Settlement as an Order and in advance of Defendants' transfer of the money, and (b) is or shall be in a private bank or other third-party financial institution. The entire sum of money specified in Paragraph 2 above shall be available for use by Plaintiff as it decides in its sole discretion. Defendants shall not transfer to or deposit in, or cause to be transferred to or deposited in, Plaintiff's "Proceeds of Labor" account or any other trust accounts the sum of money specified in Paragraph 2 above.

(See, e.g., Joint Stipulation of Settlement and Order in case no. 1:05cv02500, attached hereto as Exhibit "C"). It is therefore disingenuous for the Parties to contend that HMH does not have interest in this case because the Tribe will not recover money in this action.[7] Lump sum cash payments are

[6] "SPOA" is an acronym for "Settlement Proposal [to] Obama Administration", and refers to a large group of Tribes prosecuting related breach of trust and accounting claims in this Court and other federal courts, that have engaged in joint efforts to reach settlements of these claims.

[7] There should further be no question that it is within the Court's authority and jurisdiction to protect

in fact exactly what settling Tribes have received in these cases. Moreover, the proceeds to which HMH's interest attaches under the terms of its retainer agreement are stated broadly, sufficient to establish an interest in the financial benefit the Yankton Sioux Tribe is to receive in this action, in whatever form:

> Gross proceeds shall include any amount obtained in settlement, by judgment or court order, reparation, Congressional or Government Act, or through an accounting or other remedy, whereby the Tribe is determined or found to be entitled to monies (for which payment is made to the TRIBE or credit given to the Tribal trust account), to which there has not been established such entitlement, credit or right as of the date of this Agreement.

Finally, HMH was counsel of record for Yankton Sioux Tribe in this action for nine years, during which time it received no compensation and no reimbursement of costs (which are presently in the amount of approximately $48,000), while it worked for an outcome favorable to the Yankton Sioux Tribe. HMH's interest in this action is beyond dispute.[8]

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an attorney's interest in a cash settlement of a case before the Court. In this case, the template Stipulation of Settlement is effective upon the Court having "so-ordered" the parties' agreement. (see Exh. "A" attached). The settlement funds are otherwise plainly "within the equitable control of the court." Elam v. Monarch Life Ins. Co., 598 A.2d 1167, 1172 (D.C. App. 1991).

[8] The cases relied upon by the Parties are readily distinguishable. In Dixon-Covington v. AARP, 2005 WL 1271675 (D.D.C. 2005), the plaintiff claimed that she settled the action *pro se* based on an offer made before she retained the attorney seeking to intervene. The Court found that the attorney "has not claimed any interest relating to the property or transaction" that is the subject of the action, and instead "seeks this Court's intervention in his fee dispute with his former client." Id. at *2. Accordingly, the Court denied intervention to the attorney in those unique circumstances without relying upon or citing to Martens v. Hadley Memorial Hosp., 753 F.Supp 371 (D.D.C. 1990), which, in allowing a former counsel of record to intervene, is squarely on point and controlling in the present case. Moreover, Dixon-Covington relied upon Lake Airways, Ltd. v. Pan American World Airways, 109 F.R.D. 541 (D.D.C. 1985), a case also cited by Defendants, which is plainly inapposite. There, a former partner of the law firm representing the plaintiff sought intervention in the underlying action to address the attorney's dispute with his former partners. While intervention was denied to the former partner, the Court acknowledged that there was authority "for the proposition

C. Tribal Immunity Does Not Preclude HMH's Intervention to Protect Its Interest in this Action Pursuant to Rule 24(a)

The parties assert that Yankton Sioux Tribe cannot be sued under the doctrine of sovereign immunity. While tribal immunity may provide a complete defense to an original lawsuit brought against a tribe to collect unpaid attorney's fees, it does not prevent a tribe's former attorneys from intervening in the case in which it was counsel of record for the tribe to protect its established interest in the tribe's cause of action. The Parties do not cite to any case in which an attorney who was counsel of record was denied intervention to protect its interest in attorney's fees on grounds of sovereign immunity. Rather, the nature of the interest asserted by HMH does not implicate sovereign immunity.

A contingency fee agreement "vests" an attorney with an interest in the cause of action. Kellogg v. Winchell, 273 F. 745, 747-48 (D.C. App. 1921).[9] At the time of entry into a contingency fee agreement, there is "a distinct appropriation of the funds by the client and an agreement that the funds should be paid out of it."[10] Continental Casualty Co. v. Kelly, 106 F.2d 841 (D.C. App. 1939); accord Falcone v. Hall, 235 F.2d 860, 862 (D.C. Cir. 1956) (holding that attorney working on contingency fee contract has an interest in the cause of action, as well as the judgment into which the cause of action merges). Implicit in a contingency fee agreement is "the attorney's understanding

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that an attorney with a contingent fee contract has an interest in the litigation sufficient to establish a right to intervene." Id. at 544 n. 8.

[9] District of Columbia law governs an attorney's charging lien interest asserted in the federal courts of the District of Columbia. See Butler Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 178 (2d Cir. 2001) (holding that New York law applies to charging lien in the federal courts in New York).

[10] The attorney's lien is inchoate prior to recovery, but "relates back and takes effect from the time of the commencement of the suit. …" Continental Casualty, 106 F.2d at 843.

that he would look to the fund recovered for payment and not to the personal resources [of the client]." Elam v. Monarch Life Ins. Co., 598 A.2d 1167m 1170 (D.C. App. 1991); See also Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 178 (2d Cir. 2001) (holding under New York law that an attorney's charging lien gives the attorney "an equitable ownership interest in the client's cause of action").

Here, a 25% interest in the Yankton Sioux Tribe's cause of action was appropriated to HMH as of the date this action was brought, July 28, 2003. Yankton Sioux Tribe at that time divested itself of that interest in favor of HMH for the purpose of prosecuting its breach of trust and accounting claims. HMH is now seeking to protect its 25% interest in this Court through Rule 24 intervention, which conceptually cannot be characterized as a claim or suit against the Yankton Sioux Tribe. Tribal immunity, therefore, does not come into play.

The sovereign immunity cases relied upon by the Parties do not concern a former counsel of record's motion for intervention to protect its vested interest in the cause of action pursuant to a contingency fee agreement and are thus distinguishable. In Knight v. U.S., 982 F.2d 1573 (Fed.Cir. 1993), the attorney brought suit against the United States, asserting an interest in the Department of Interior's administrative award of back pay to employees. In dismissing the case on grounds of sovereign immunity, the Court noted that this was a "*naked claim* … for fee collection", and "not a suit for back pay." Id. at 1578-79 (emphasis supplied). The Court expressly distinguished cases where the attorney asserted his fee lien in the underlying litigation. Id. at 1579 n.8. Likewise, in Watters v. Washington Metropolitan Area Transit Authority, 295 F.3d 36 (D.C. Cir. 2002), a prior attorney brought a direct action against the transit authority asserting that it distributed settlement proceeds in disregard of the prior attorney's letter asserting a lien. Here, HMH is not suing in an

original action for breach of an attorney's lien; rather it is seeking to intervene in the underlying action to protect its vested lien interest. [11]

Even if there were an issue of tribal immunity in this case, the facts demonstrate that it has been waived by the Yankton Sioux Tribe. While a waiver of tribal immunity must be explicit under existing case law, it does not require use of the words "sovereign immunity". Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc., 86 F.3d 656, 660 (7th Cir. 1996). In asking this Court to deny HMH intervention to protect its vested interest, the Parties are seeking an expansive and unprecedented application of the doctrine of tribal immunity. In this regard, it is notable that, while tribal immunity is an established doctrine, "it developed almost by accident", and its rationale runs counter to the modern experience of tribal independence and self-governance. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700 (1998). In Kiowa Tribe, the Supreme Court deferred to Congress for any decision on abrogating or limiting the doctrine of tribal immunity, but also made clear that it would make no sense for the courts to *expand* the doctrine of sovereign immunity:

> There are reasons to doubt the wisdom of perpetuating the doctrine [of tribal immunity]. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent

[11] Other cases relied upon by the Parties that denied motions to intervene on sovereign immunity grounds are inapposite. These cases reflect attempts to use intervention as a thinly guised means to circumvent a direct action, which the courts have rejected. In United States v. 706.98 Acres of Land in Montgomery County, 158 F.Supp. 272 (W.D. Ark. 1958), a proposed intervenor attempted to use intervention in a pending suit to seek to quiet title to lands it claimed against the United States, prior to enactment of the Quiet Title Act, 28 U.S.C. §240a9, wherein the United States waived its immunity from such suits. Id. at 275-76; accord United States v. Certain Land Situated in the City of Detroit, 361 F.3d 305 (6th Cir. 2004) (rejecting proposed intervenor's attempt to intervene in condemnation proceeding brought by United States).

> and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. … In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

Id. 118 S.Ct. at 1704-05.

HMH's intervention to protect its attorney's lien may be analogized to a matter asserted in recoupment in a case pending before the Court:

> [W]hen a sovereign nation such as an Indian tribe commences a lawsuit, it waives immunity as to claims of the defendant which assert matters in recoupment-arising out of the same transaction or occurrence which is the subject matter of the government's suit.

Rosebud Sioux Tribe v. A&P Steel, Inc., 874 F.2d 550, 552 (8th Cir. 1989) (holding that counterclaim arising out of same contractual transaction, seeking an amount less than that sought by the plaintiff tribe, is not subject to tribal immunity) (citations, internal quotations omitted); accord Rosebud Sioux Tribe v. Val-U Constr. Co., 50 F.3d 560, 562 (8th Cir. 1995) (noting that recoupment diminishes the plaintiff's recovery and does not assert affirmative relief). As in recoupment, HMH does not seek affirmative relief, but rather to protect its interest in the recovery obtained in the case, which is expressed as a portion of the claim or recovery, and cannot exceed the Tribe's recovery.

Finally, even if HMH's intervention were deemed a claim or request for affirmative relief against the Yankton Sioux Tribe, there is an explicit waiver or sovereign immunity in the Yankton Sioux Tribe's governing documents. First, Article III, Section I of the Tribe's Constitution refers to suits for *or against* the Tribe:

> Section 1. To provide the Tribe with authority to protect their interest in the Tribal land and advise individual members of their rights, privileges and immunities as owners of allotted lands and to

> prosecute claims in the name of the Tribe for loss of tribal alnds to the United States of America and to retain counsel of their choice to represent the Tribe ***in suits for or against the tribe regarding claims*** and to contract with counsel for such service.

(A copy of the relevant provisions of the Yankton Sioux Tribe's Constitution and Amended Bylaws are attached hereto as Exhibit "D"). Alternatively, Article XI of the Yankton Sioux Tribe's Amended Bylaws provides that "[t]his organization shall be in the nature of a corporation", which "shall operate without a State or Federal Charter." Amended Bylaws, Art. XI, §§1, 3. As a corporate organization, the "power to sue and be sued is one of the inherent powers of a corporation." 9 Fletcher Encyclopedia of the Law of Corporations §4226. "[W[henever a corporation is duly created, it has the capacity to sue and be sued." Id. Accordingly, once the Yankton Sioux Tribe declares itself to be "in the nature of a corporation", it by definition undertakes the power to sue and be sued. The power to sue and be sued is not thereby implicit or inferred, but is rather part and parcel of being "in the nature of a corporation." See Rosebud Sioux Tribe v. A&P Steel, Inc., 874 F.2d 550, 552 (8th Cir. 1989) (noting that tribe waived sovereign immunity through its corporate charter, which provided the power to sue or be sued).

D. HMH's Motion to Intervene Satisfies The Elements of Fed.R.Civ.P. 24(a)

The Parties contend that HMH's Motion to Intervene does not satisfy the elements of Rule 24(a)(2). The elements of intervention as of right under Fed.R.Civ.P. 24(a)(2) are as follows:

> (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is 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) whether applicant's interest is adequately represented by existing parties.

Funds for Animals, 322 F.3d at 731. Each of these elements is satisfied by HMH's Motion to

Intervene:

1. *Timeliness*

Defendants assert that the Motion to Intervene is not timely because the Parties have not reached settlement and the Court has not rendered final judgment. The timeliness factor, however, examines whether the proposed intervenor *delayed* in moving for intervention, to the prejudice of the parties in the case. Akiachak Native Community v. U.S. Dep't of Interior, 584 F.Supp. 2d 1, 5 (D.D.C. 2008). Here, HMH moved to intervene in conjunction with its motion to withdraw, when grounds for intervention first arose. The Motion to Intervene, therefore, is timely.

2. *Protectable Interest*

As discussed above, HMH's vested interest in the Yankton Sioux Tribe's claim and recovery in the case, as its former attorneys of record, is a protectable interest in this Court.[12] Martens, 753 F.Supp. at 372.

3. *HMH's Inability to Protect Its Interest*

Neither of the Parties contend that HMH will be able to protect its vested interests absent intervention, nor could they. Indeed, the Yankton Sioux Tribe's blatant plan and scheme is to deprive HMH of fair and proper compensation.

4. *Adequate Representation by Parties*

[12] In Fund for Animals, the Court held that constitutional standing under Article III was sufficient by itself to satisfy the element of a protectable interest. 322 F.2d at 732-33. Constitutional standing under Article III requires (1) injury-in-fact; (2) causation, and (3) redressability. Id. The Court's decision in Martens makes clear that counsel of record has standing to protect its attorney's lien interest. 753 F.Supp. at 372. HMH in this case will be injured by the disposition of this action without protection of its lien interest, which can be addressed by the Court via HMH's intervention. Fund for Animals, supra.

Likewise, neither of the Parties contends that they it adequately represents the vested interests of HMH. They are plainly opposed to those interests. See Gaines, 434 F.2d 52 (granting attorney intervention, noting that "[n]either of the existing parties is concerned with protecting the appellant's [attorney's] interest").

Accordingly, the elements of intervention as of right under Fed.R.Civ.P. 24(a)(2) are satisfied in this case.

Conclusion

Based on the foregoing and the Motion to Intervene, HMH asks this Court for an Order pursuant to Fed.R.Civ.P. 24(a) granting it intervention in this action for the purpose of protecting its interest in attorneys' fees and costs.

Dated: August 31, 2012

Respectfully submitted,

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CERTIFICATES OF SERVICE

I HEREBY CERTIFY that on August 31, 2012, I electronically filed the foregoing Motion with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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