

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

---

IN RE: AQUEOUS FILM-FORMING  
FOAMS PRODUCTS LIABILITY  
LITIGATION

MDL No. 2-18:mn-2873-RMG

This Document Relates to:  
*City of Camden, et al. v. 3M Company,*  
Case No. 2:23-cv-03147-RMG

---

**MEMORANDUM OF LAW IN SUPPORT OF LEECH LAKE BAND OF OJIBWE'S  
MOTION TO INTERVENE FOR LIMITED PURPOSE TO CLARIFY SETTLEMENTS**

## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
III. ARGUMENT .....	4
A. The Band May Intervene as of Right .....	4
1. The Band’s Motion to Intervene is Timely .....	4
2. The Band Has Significant Protectable Interests in This Action.....	6
3. Denial of the Motion Would Impair Tribes’ Ability to Protect Their Interests .....	7
4. Tribes’ Interests Are Not Adequately Represented by Plaintiffs .....	7
B. The Band is Also Entitled to Permissively Intervene.....	8
IV. CONCLUSION .....	9

## TABLE OF AUTHORITIES

Page

**Cases**

<i>Alt v. U.S. E.P.A.</i> , 758 F.3d 588 (4th Cir. 2014) .....	4
<i>City of Camden, et al. v. 3M Co.</i> , No. 2:23-cv-03147-RMG .....	1
<i>City of Camden, et al. v. E.I. DuPont de Nemours and Co. (n/k/a EIDP, Inc.), et al.</i> , No. 2:23-cv-03230-RMG .....	1
<i>Feller v. Brock</i> , 802 F.2d 722 (4th Cir. 1986) .....	4
<i>Good v. Am. Water Works Co., Inc.</i> , No. CV 2:14-01374, 2016 WL 5746347 (S.D. W. Va. Sept. 30, 2016) .....	3
<i>Gould v. Alleco, Inc.</i> , 883 F.2d 281 (4th Cir. 1989) .....	4
<i>Houston Gen. Ins. Co. v. Moore</i> , 193 F.3d 838 (4th Cir. 1999) .....	3
<i>N.C. State Conf. of NAACP v. Cooper</i> , 332 F.R.D. 161 (M.D.N.C. 2019) .....	8
<i>Ohio Valley Env't Coal., Inc. v. McCarthy</i> , 313 F.R.D. 10 (S.D. W. Va. 2015) .....	6, 7
<i>Savannah Riverkeeper v. U.S. Army Corps of Eng'rs</i> , No. 9:12-610-RMG, 2012 WL 13008326 (D.S.C. Aug. 14, 2012) .....	8
<i>Smith v. Pennington</i> , 352 F.3d 884 (4th Cir. 2003) .....	3
<i>Stuart v. Huff</i> , 706 F.3d 345 (4th Cir. 2013) .....	8
<i>Teague v. Bakker</i> , 931 F.2d 259 (4th Cir. 1991) .....	6
<i>United Airlines, Inc. v. McDonald</i> , 432 U.S. 385 (1977) .....	3, 5
<i>United Guar. Residential Ins. Co. of Iowa v. Phila. Sav. Fund Soc'y</i> , 819 F.2d 473 (4th Cir. 1987) .....	7
<i>United States v. Carpenter</i> , 298 F.3d 1122 (9th Cir. 2002) .....	5
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978) .....	2
<i>Virginia v. Westinghouse Elec. Corp.</i> , 542 F.2d 214 (4th Cir. 1976) .....	8
<i>Vision Church v. Vill. of Long Grove</i> , No. 03 C 5761, 2004 WL 742133 (N.D. Ill. Apr. 6, 2004) .....	8
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980) .....	2
<i>Williams v. Lee</i> , 358 U.S. 217 (1959) .....	2

**TABLE OF AUTHORITIES**  
(continued)

Page

**Other Authorities**

U.S. E.P.A., <i>SDWIS Federal Reports Advanced Search</i> , <a href="https://ordspub.epa.gov/ords/sfdw_rest/r/sfdw/sdwis_fed_reports_public/1">https://ordspub.epa.gov/ords/sfdw_rest/r/sfdw/sdwis_fed_reports_public/1</a> .....	1
---	---

**Rules**

Fed. R. Civ. P. 24(a)(2) .....	3
Fed. R. Civ. P. 24(b)(1)(B) .....	3, 8
Fed. R. Civ. P. 24(b)(3) .....	8

**Treatises**

Kira Mok, et al., <i>Federal PFAS Testing and Tribal Public Water Systems</i> , 130 ENV'T HEALTH Persp. 12 (Dec. 14, 2022).....	1
--	---

## I. INTRODUCTION

The Leech Lake Band of Ojibwe (the “Band”) moves to intervene in *City of Camden, et al. v. 3M Co.*, No. 2:23-cv-03147-RMG and *City of Camden, et al. v. E.I. DuPont de Nemours and Co. (n/k/a EIDP, Inc.), et al.*, No. 2:23-cv-03230-RMG. The Band moves to intervene for a limited purpose—to seek clarification of several significant terms and provisions in the proposed settlements between 3M and public water providers (“3M Agreement”) and DuPont and public water providers (“DuPont Agreement”) (collectively, the “Agreements”). Several terms and provisions in the Agreements could be interpreted to affect the Band’s, as well as other federally recognized Tribes’, potential claims beyond drinking water. Tribes, unlike public water providers (“Water Providers”), have a duty to identify and remediate harms to tribal members’ health and safety and the continuation of culture and lifeways. Ambiguities in the Agreements prevent the Band, as well as over 500 federally recognized Tribes, from making informed decisions to object, remain in, or opt out of the Agreements.

Neither Agreement nor their exhibits indicate that the drafters conceived of Tribes as Class Members. Tribes own and operate 855 Public Water Systems (“Tribal Water Systems”) and serve more than 1.4 million individuals.<sup>1</sup> While the DuPont Agreement makes no reference to Tribal Water Systems, the 3M Agreement references only a fraction of these water systems in an exhibit the drafters characterize as “illustrative only” of potential eligible Class Members. *See* 3M Agreement, Exhibit F (Dkt. No. 3620-1). However, the Agreements’ definitions appear to encompass many Tribal Water Systems. Because of the Agreements’ ambiguities identified in the

---

<sup>1</sup> *See* U.S. E.P.A., *SDWIS Federal Reports Advanced Search*, [https://ordspub.epa.gov/ords/sfdw\\_rest/r/sfdw/sdwis\\_fed\\_reports\\_public/1](https://ordspub.epa.gov/ords/sfdw_rest/r/sfdw/sdwis_fed_reports_public/1) (last visited Nov. 2, 2023). *See also* Kira Mok et al., *Federal PFAS Testing and Tribal Public Water Systems*, 130 Env’t Health Persp. 12 (Dec. 14, 2022), accessible at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9749477/> (via S.D.W.I.S., identifying 855 Tribal Public Water Systems serving over 1.4 million individuals in 2022).

Band's letter to Plaintiffs' Co-Lead Counsel, the Band's intervention is necessary to protect its interests and clarify the impact of the Agreements on those interests. *See* Exhibit A (Letter from Leech Lake Band of Ojibwe to Plaintiffs' Co-Leads (Oct. 27, 2023)).

The Band satisfies the four requirements to intervene as of right under Rule 24(a)(2). First, this Motion is timely, as it comes before the objection deadline. Second, the Band has a significant stake in protecting its interests that are unique and unlike those of the Water Providers. Third, denial of this Motion would impair the Band's ability to protect those interests. Fourth, the Band's interests are not adequately protected Plaintiffs, who created the ambiguities in the Agreements and who likely did not have Tribes in mind when drafting the proposed settlements.

The Band respectfully requests expedited review of this Motion in order to receive the Court's ruling before the objection deadlines on November 11, 2023, and November 21, 2023, respectively.

## **II. BACKGROUND**

Tribes existed before the establishment of the United States and continue to exercise sovereignty "over both their members and their territory." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (citation omitted); *see also Williams v. Lee*, 358 U.S. 217, 218 (1959). Today, there are 574 federally recognized Tribes in the United States. As sovereigns, Tribes develop their lands and resources under the "firm federal policy of promoting tribal self-sufficiency and economic development," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

Tribes provide water within their territories, and many own and operate more than one Public Water System. Unlike Plaintiff Water Providers, Tribes have a duty to remediate contamination of their water systems *and* other natural resources. Natural resources beyond drinking water are culturally significant and sustain tribal members' subsistence lifestyles. Because Tribes must promote the health and welfare of tribal members and the communities in

which they live, the interests of Tribes differ drastically from those of Plaintiff Water Providers.

The Leech Lake Band of Ojibwe owns and operates eleven water systems on the Reservation, including seven Community Water Systems and four Non-Transient Non-Community Water Systems. In late 2022, the Band identified detectable levels of PFAS in one of the Band's water systems that provides water to the Band's Bug-O-Nay-Ge-Shig School. As a water provider that identified PFAS in its systems prior to the settlement dates, the Band's School's water system should be included in the Agreements. However, for reasons discussed in the accompanying Motion for Clarification, it is unclear whether Tribes, or Public Water Systems owned by Tribes, were intended to be included in the Settlement Classes.

On a 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.” Fed. R. Civ. P. 24(a)(2); *see also Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999). Further, 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,” considering whether the intervention will “unduly delay or prejudice the adjudication of the original parties' rights.” Fed. R. Civ. P. 24(b)(1)(B), (b)(3). Absent Class Members must generally intervene before filing papers in an action. *See Good v. Am. Water Works Co., Inc.*, No. CV 2:14-01374, 2016 WL 5746347, at \*3 (S.D. W. Va. Sept. 30, 2016); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977).

The decision whether to grant permissive intervention typically “lies within the sound discretion of the trial court.” *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003) (citation omitted). The Fourth Circuit has long recognized that “liberal intervention is desirable to dispose

of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process.” *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (citation omitted).

The Band meets all requirements to intervene in this action as of right under Rule 24(a)(2) and, in the alternative, for permissive intervention under Rule 24(b). And, although the Court has stayed certain proceedings, the stay binds an “Eligible Claimant or Releasing Party . . . that asserts a Released Claim,” a group that does not include the Band. MDL Dkt. No. 3626 at 15 – 16.

### **III. ARGUMENT**

The Band seeks intervention as of right, or in the alternative permissive intervention, for the limited purpose of seeking clarification of the Agreements. The Band is not a party to this litigation but the Agreements implicate its rights.

#### **A. The Band May Intervene as of Right**

The Band satisfies the four requirements to intervene as of right under Rule 24(a)(2). Its intervention now—before the objection deadline—will promote efficiency and judicial economy with the U.S. Court of Appeals for the Fourth Circuit’s guidance that “liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process.” *Feller*, 802 F.2d at 729 (citation omitted).

##### **1. The Band’s Motion to Intervene is Timely**

To decide if a motion to intervene is timely, the Court must weigh three factors: (1) “how far the underlying suit has progressed”; (2) “the prejudice any resulting delay might cause the other parties”; and (3) “why the movant was tardy.” *Alt v. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014). Timeliness is subject to the Court’s discretion. *See Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989).

This Motion is timely because it comes a week before the objection deadlines (November 11 and 23, respectively), and almost two months before the opt-out deadlines (December 4 and 11,



respectively). *Cf. Alt*, 758 F.3d at 591 (denying intervention sought after several rounds of court-ordered motion deadlines). The Band sought to intervene “as soon as it became clear” that the Agreements could impair its interests. *United Airlines*, 432 U.S. at 386; *see also United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) (intervention timely where proposed intervenors “acted as soon as they had notice” that settlement terms were “contrary to their interests”).

Intervention will not cause undue delay or prejudice; on the contrary, intervention will facilitate judicial economy and orderly administration of the Agreements. The Band filed this motion before the key deadlines passed. It seeks to intervene to obtain clarification of its own rights—those that affect the health and wellbeing of its tribal members and natural resources within the Band’s reservation lands—and those of similarly situated Tribes that may be unaware of the impact of the Agreements may have on their present and future claims.

The Band’s intervention would promote judicial economy by providing Tribes with information and time needed to make sound and informed decisions on large, complicated, and consequential settlements. The Band did not receive settlement notices, and its analysis indicates that the Band may not be alone. *See supra* note 1. If hundreds of Tribes discover after the key deadlines have passed that they are in fact Eligible Claimants, they may seek leave to opt out after the opt-out deadline (or even litigate against 3M and DuPont in the future), swelling the docket and possibly even implicating the walk-away threshold. The better path is to fully apprise the Band and other federally recognized Tribes of their rights, options, and obligations under the Agreements before any key deadlines.

The costs of clarifying the Agreements are minor and cannot compare to the potential costs of failing to clarify the Agreements to Tribes, Plaintiff Water Providers, 3M, and DuPont.

Clarification will afford all potential claimants the ability to make an informed, reasoned decision, and will also provide 3M and DuPont with the certainty they seek from the negotiated settlements.

## **2. The Band Has Significant Protectable Interests in This Action**

An application for intervention as of right must show that it possesses a “significantly protectable interest.” *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (citation omitted). An interest is significant and protectable if a party “stand[s] to gain or lose by the direct legal operation of [a] judgment” in that action. *Id.* An interest can be “significantly protectable” even though it is “contingent upon the outcome of other pending litigation.” *Id.*

The Band, and other federally recognized Tribes, “stand to gain or lose” their ability to participate in the Agreements, and in their ability to raise claims against—and recover from—3M and DuPont. The Band is not currently a party to litigation against 3M or DuPont, but has identified PFAS contamination in one of its water systems. Further, the Band is conducting testing of lakes and fish on the Reservation, which may identify additional contamination. The Band seeks to protect their potential claims for its contaminated water system, as well as future potential claims against 3M or DuPont for further natural resource contamination. However, the release provisions of the Agreements could be interpreted to impact those claims—possibly in ways not intended by the drafters and not clear to either the Band or other Tribes. For these reasons, the Band may “stand to . . . lose” recoveries it seeks. *See Ohio Valley Env’t Coal., Inc. v. McCarthy*, 313 F.R.D. 10, 23-24 (S.D. W. Va. 2015) (“The economic injury directly threatened by one possible outcome of the litigation gives rise to a significantly protectable interest.”).

In addition, the Band has a strong interest in ensuring the Agreements’ terms are fair, adequate, and reasonable for themselves as well as for the Settlement Classes. The Agreements’ indemnity provisions appear to shift liability from 3M and DuPont onto Class Members. For example, if a Tribe files an action against DuPont related to contaminated fish, and the source of

contamination is a Class Member's contaminated water source, the Class Member would be liable for DuPont's contamination. If the Class Member only received \$1,750 from the DuPont settlement, the Class Member's liability to that Tribe would far exceed the Class Member's settlement payment. Class Members deserve to participate in the settlements without running the risk of taking on significant liabilities for damages to neighboring Tribes resulting from 3M or DuPont's contamination.

### **3. Denial of the Motion Would Impair Tribes' Ability to Protect Their Interests**

Tribes' interests will be impaired if intervention is denied because "disposing of the action may as a practical matter impair or impede [Tribes] ability to protect [their] interest[s]." *McCarthy*, 313 F.R.D. at 26 (citation omitted). Intervention is justified where "disposition of the action would put the movant at a 'practical disadvantage' in protecting its interest" or the settlements could be interpreted to "preclude" the "would-be intervenor from protecting its interest later." *Id.* (citation omitted). This "requires a practical analysis, rather than a legal one." *Id.*

Because of significant problems identified, the Band—and other federally recognized Tribes—are unable to meaningfully evaluate the Agreements. If intervention to seek clarification is denied, Tribes could be forced to make critical decisions as to the Agreements without adequate knowledge. The uncertainty and ambiguity of the Agreements indisputably amount to a "practical disadvantage" in protecting the Band's interests. *Id.*

### **4. Tribes' Interests Are Not Adequately Represented by Plaintiffs**

The final factor is satisfied where "representation of [the movant's] interest 'may be' inadequate." *United Guar. Residential Ins. Co. of Iowa v. Phila. Sav. Fund Soc'y*, 819 F.2d 473, 475 (4th Cir. 1987) (citation omitted). Representation may be inadequate where the "existing parties' interests are not completely identical to and may come into conflict with [the intervenor's]

own interests,” *Vision Church v. Vill. of Long Grove*, No. 03 C 5761, 2004 WL 742133, at \*4 (N.D. Ill. Apr. 6, 2004). The burden for this showing is “minimal.” See *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976); *N.C. State Conf. of NAACP v. Cooper*, 332 F.R.D. 161, 168 (M.D.N.C. 2019).

As sovereign governments, the scope of Tribes’ interests are beyond those of Plaintiff Water Providers. It is also clear from the ambiguities in the Agreements that the Water Providers did not adequately represent the interests of Tribes in the negotiation of the Agreements. As raised in greater detail in the Band’s letter to Plaintiff’s Co-Lead Counsel, the Band’s concerns are beyond a difference in litigation strategy that Plaintiffs cannot adequately represent. See *Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013).

#### **B. The Band is Also Entitled to Permissively Intervene**

If the Court finds that the Band may not intervene as of right, it should nevertheless grant the Band’s request for permissive intervention. “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.” Fed. R. Civ. P. 24(b)(1)(B). “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)(3). Permissive intervention “should be construed liberally in favor of intervention.” *Savannah Riverkeeper v. U.S. Army Corps of Eng’rs*, No. 9:12-610-RMG, 2012 WL 13008326, at \*2 (D.S.C. Aug. 14, 2012).

As noted, the Band’s Motion is timely. The Band’s PFAS contamination claims share common questions of law and fact with Plaintiffs’ claims regarding drinking water contamination caused by PFAS manufactured by 3M. The Band—as well as other federally recognized Tribes—has an interest in this action given its own potential claims. Finally, clarification of the Agreements

would not prejudice Plaintiffs' rights because it would not affect their substantive claims in any way.

#### IV. CONCLUSION

The Band has identified several ambiguities in the Agreements that could be interpreted to have significant impacts on the Band's interests. As outlined above, the Band has significant protectable interests in the actions against 3M and DuPont, and seeks timely intervention to protect these interests. The granting of the Band's motion will not cause undue delay or prejudice to the Plaintiff Water Providers, 3M, or DuPont, and instead benefits all parties. Conversely, denial of the Band's motion will impair the Band's ability to protect its interests as well other Tribes' abilities to do the same. Because Indian Tribes, like the Band, possess different interests than the Plaintiff Water Providers', Plaintiffs' have not adequately represented Tribes' interests. For these reasons, the Band respectfully requests that this Court grant leave to intervene in this action for the purpose of advancing their Motion for Clarification. The Band also requests that the Court consider this Motion on an expedited basis, in light of the impending deadlines.

Dated: November 3, 2023

Respectfully submitted,

By: /s/ Eric B. Fastiff

**LIEFF CABRASER HEIMANN &  
BERNSTEIN, LLP**

Elizabeth Cabraser

Eric B. Fastiff

Dan Drachler

Robert Nelson

275 Battery Street, 29th Floor

San Francisco, CA 94111-3339

Telephone: (415) 956-1000

Facsimile: (415) 956-1008

[ecabraser@lchb.com](mailto:ecabraser@lchb.com)

[efastiff@lchb.com](mailto:efastiff@lchb.com)

[ddrachler@lchb.com](mailto:ddrachler@lchb.com)

[rnelson@lchb.com](mailto:rnelson@lchb.com)

Emily N. Harwell  
250 Hudson Street, 8<sup>th</sup> Floor  
New York City, NY 10013  
Telephone: (212) 355-9500  
[eharwell@lchb.com](mailto:eharwell@lchb.com)

**SONOSKY, CHAMBERS, SACHSE,  
ENDRESON & PERRY LLP**

Frank S. Holleman, IV  
145 Willow Street  
Suite 200  
Bonita, CA 91902-1349  
Telephone: (619) 267-1306  
[fholleman@sonosky.com](mailto:fholleman@sonosky.com)

K. Amanda Saunders  
510 L Street  
Suite 310  
Anchorage, AK 99501  
Telephone: (907) 258-6377  
[amandas@sonosky.net](mailto:amandas@sonosky.net)

**LEECH LAKE BAND OF OJIBWE**

Christopher Murray  
Legal Director  
190 Sailstar Drive NE  
Cass Lake, MN 56633  
Telephone: (218) 355-3676  
[christopher.murray@llojibwe.net](mailto:christopher.murray@llojibwe.net)

Ralph Overholt  
Tribal Attorney  
190 Sailstar Drive NE  
Cass Lake, MN 56633  
Telephone: (218) 407-7229  
[ralph.overholt@llojibwe.net](mailto:ralph.overholt@llojibwe.net)

*Attorneys for Leech Lake Band of Ojibwe*

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 3<sup>rd</sup> day of November, 2023 and was thus served electronically upon counsel of record.

Dated: November 3, 2023

/s/ Eric B. Fastiff

**Certificate of Conferral**

Pursuant to Local Rule 7.02, counsel for the Leech Lake Band of Ojibwe on October 27, 2023, sent a letter summarizing the Tribes' issues and the motion to clarify brief to Plaintiffs' Co-Lead Counsel, and attempted in good faith to resolve the matter contained in the motion.

Dated: November 3, 2023

/s/ Eric B. Fastiff