

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE NEZ PERCE TRIBE, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 06cv02239-JR
)	
)	Electronically Filed on
DIRK KEMPTHORNE,)	December 4, 2008
SECRETARY OF THE INTERIOR, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**MOTION TO INTERVENE AND FOR EXPEDITED
CONSIDERATION OF THIS MOTION UNDER LCvR 7(j)**

Pursuant to Fed. R. Civ. P. 24, and LCvR 7(j), intervenor, the Native Village of Atka, respectfully moves this Court for an Order granting it permissive intervention as a plaintiff in this action, and for granting it leave to file the attached Complaint in Intervention. Pursuant to LCvR 7(c), the points and authorities in support of this Motion are set forth as follows. Intervenor further moves for expedited consideration of this Motion in light of LCvR 7(j), which provides that pleadings in intervention are deemed to be filed “*on the date on which the order granting the motion is entered.*”

Intervenor, the Native Village of Atka, is a federally recognized Indian tribe. Intervenor is expressly listed on the “Account Holders Distribution List” provided by Defendants to counsel for Intervenor, who also are counsel for Plaintiffs in this action. As a member of the putative class when this action was filed as a class action, Intervenor received the Notice approved by this Court on October 15, 2008 and sent by Plaintiffs’ counsel on October 17, 2008. On December 1, 2008, this Court denied Plaintiffs’ Motion for Class Certification (Dkt. #86). Intervenor now moves timely

under Rule 24(b)(1) for an Order granting it leave to intervene as a plaintiff, and requests expedited consideration of its Motion in light of LCvR 7(j) which provides that intervention pleadings are not filed unless and until the order granting them is entered.

It is well-established that timely intervention by putative class members following denial of class certification generally comports with sound judicial and adversarial principles embedded in doctrines of limitations statutes, class actions, and basic fairness. *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 552-54 (1974). Intervention here is particularly appropriate because Intervenor and Plaintiffs share common claims against Defendants in terms of facts, evidence, and legal theories. Intervenor has an interest in both the federal statutory grounds and the common law basis for the declaratory and other equitable relief sought in this action. Indeed, Intervenor's proposed Complaint in Intervention "is identical in all respects to the main complaint in the case except that it . . . [does] not purport to be on behalf of a class." *McCarthy v. Kleindienst*, 562 F.2d 1269, 1271 (D.C. Cir. 1977); *accord Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (no prejudice where intervention sought timely after class certification denial and intervenors joined in main complaint).

Intervenor's intervention will not cause undue delay or prejudice to the original parties. In addition to the substantive sameness or similarities of its claims and interests to those of Plaintiffs, the proceedings in this action are at a very early stage – pre-discovery and before any rulings on dispositive motions --, and Plaintiffs and Intervenor are represented by the same counsel, the Native American Rights Fund. *See Rivers v. Califano*, 86 F.R.D. 41 (C.D.N.Y 1980). This Motion is made just three days after the Court's denial of class certification and granting of motions to add an additional 22 plaintiffs to this action. (Dkt. #s 84, 85, 86). *See McCarthy v. Kleindienst*, 562 F.2d

at 1274-75 (timely motion to intervene made one day after denial of class certification); *see also* *Cook v. Boorstin*, 763 F.2d 1462, 1466 (D.C. Cir. 1985) (granting timely intervention after denial of class certification).

Pursuant to LCvR 7(a), a Proposed Order granting this Motion is submitted herewith. Pursuant to Fed. R. Civ. P. 24 (c) and LCvR 7(j), a proposed Complaint in Intervention also is submitted herewith. Pursuant to LCvR 7(m), counsel for Intervenor states that before filing this Motion, she discussed it by telephone with counsel for Intervenor-Plaintiff the Caddo Nation of Oklahoma, who stated that she does not oppose this Motion. Counsel for Intervenor-Plaintiff also discussed by telephone the anticipated motion with counsel for Defendants, in a good faith effort to determine whether Defendants opposed this Motion and on what grounds, and is authorized to state that counsel for Defendants stated that they are unable to take a position on this Motion at this time. For the reasons set forth above, Intervenor's Motion to Intervene should be granted.

DATED this 4th day of December, 2008

Respectfully submitted,

/s/ Melody L. McCoy
MELODY L. MCCOY, USDC Bar. No. CO0043
DONALD R. WHARTON
DAVID L. GOVER
DAWN S. BAUM
MARK C. TILDEN
JOHN E. ECHOHAWK
WALTER R. ECHO-HAWK, JR.
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Tel (303) 447-8760
Fax (303) 443-7776
E-mail mmccoy@narf.org

Attorneys for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2008, a true and correct copy of the foregoing MOTION TO INTERVENE; [PROPOSED] COMPLAINT IN INTERVENTION; and, [PROPOSED] ORDER were served by Electronic Case Filing or by regular first class U.S. mail, postage pre-paid, on the following counsel:

JENNIFER HENSHAW MCBEE
ANDREWS DAVIS, PC
100 N. Broadway Ave., Ste 3300
Oklahoma City, OK 73102
Tel (405) 272-9241
Fax (405) 235-8786
jhmcbee@andrewsdavis.com

Attorneys for Intervenor-Plaintiff Caddo Nation of Oklahoma

ANTHONY P. HOANG
MICHAEL THORP
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Washington, DC 20044-0663
Tel (202) 305-0241
Tel (202) 305-0456
Fax (202) 353-2021
Anthony.Hoang@usdoj.gov

JOHN H. MARTIN
U.S. Department of Justice
Natural Resources Section
1961 Stout St., Eighth Floor
Denver, CO 80294
Tel: (303) 844-1383
Fax (303) 844-1350

Attorneys for Defendants

OF COUNSEL:

PAUL SMYTH
ELISABETH BRANDON
THOMAS BARTMAN
GLADYS I. COHOCARI
SHANI N. WALKER
Office of the Solicitor
U.S. Department of the Interior
Washington, DC 20240

TERESA DAWSON
Office of the Chief Counsel
Financial Management Service
U.S. Department of the Treasury
Washington, DC 20227

/s/ Melody L. McCoy
MELODY L. MCCOY, USDC Bar. No. CO0043
Attorney for Intervenors