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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

A.D. and C. by Carol Coghlan Carter, their next friend S.H. and J.H. a married couple; M.C. and K.C. a married couple; for themselves and on behalf of a class of similarly-situated individuals, Plaintiffs, v. Kevin Washburn, in his official capacity as Assistant Secretary of Bureau of Indian Affairs; Sally Jewell, in official capacity as Secretary of Interior, U.S. Department of the Interior; Gregory A. McKay, in his official capacity as Director of the Arizona Department of Child Safety, Defendants.	No. 2:15CV-01259-PHX-NVW **THE NAVAJO NATION'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE AS DEFENDANT**

I. THE NATION MEETS THE STANDARD FOR INTERVENTION AS A RIGHT

a. The Nation's Motion to Intervene is timely.

Plaintiffs' Response misconstrues the timeliness requirement. Timeliness is determined by the totality of the circumstances. *See NAACP v. New York*, 413 U.S. 345, 366 (1973); *see generally*, James W. Moore, 3B *Moore's Federal Practice* § 24.13 (timeliness is not merely a function of when the motion was filed relative to the filing of the action). In determining timeliness, the Ninth Circuit looks to three factors: (1) the stage of the proceeding; (2) the

prejudice to other parties; and (3) the reason for and length of the delay. *United States v. State of Or.*, 745 F.2d 550, 552 (1984) *cert. denied,* 439 U.S. 83 (1978). The Nation filed its Motion to Intervene merely four months after the Complaint was filed in the matter. The Nation is required to receive the necessary and appropriate approvals before it can move forward intervening in a case. It takes time to get the appropriate approvals within the Nation's government. Therefore the four months it took the Nation to acquire the appropriate approvals from the necessary officials and draft its Motion is more than reasonable.[1]

Plaintiffs do not identify which of the three factors of timeliness they believe the Nation's Motion does not satisfy. Rather, Plaintiffs argue the Nation's Motion is untimely based on the fact that "intervention at this juncture will only prolong closing of pleadings and the litigation generally". Response at 3. Plaintiffs do not articulate what the prejudice to them would be if the Nation's Motion was granted. *See State of Or.*, 745 F.2d at 552 (The issue of prejudice to the existing parties is the most important consideration in deciding whether a motion for intervention is untimely). There has been no showing of the kind of serious prejudice that would preclude the Nation's intervention. *Cf. NAACP,* 413 U.S. 345, 369 (1973) (serious disruption); *Alaniz v. Tillie Lewis Foods,* 572 F.2d 657, 659 (9th Cir.). The potential prolonging of closing of pleadings does not rise to the level of serious disruption and therefore does not result in prejudicing Plaintiffs. The current case has not reached a critical stage of such a nature that intervention would prejudice the parties.

[1] Plaintiffs reference to the article by Felicia Fonseca, *Arizona Think Tank Challenges U.S. Indian Child Welfare Act*, Associated Press The Big Story, http://bigstory.ap.org/article/bef2271bb35141bab675eb3849c8df30/arizona-think-tank-challenges-us-indian-child-welfare-act (visited on December 14, 2015) to demonstrate the Nation knew of the existence of the Complaint the date it was filed is misleading. The article makes no indication the Navajo Department of Justice knew of the lawsuit on July 7, 2015. The only statement made regarding the Navajo Department of Justice is that Ms. Fonseca left messages with the Department regarding this matter but received no response.

Additionally, Plaintiffs themselves have indicated they intend to file an amended complaint for the purposes of substituting M.C., K.C., and baby boy C with other named plaintiffs. Response at 2 n.1. The filing of an amended complaint will allow Defendants the opportunity to file answers and potentially additional pre-trial motions based on the newly named party and the facts contained in the amended the complaint. Therefore the filing of an amended complaint will prolong the closing of pleadings and litigation generally. Since Plaintiffs themselves are going to take actions to prolong the closing of pleadings, the Nation's Motion to Intervene does not create an issue of serious prejudice against any of the parties.

b. The Nation's interest rises to the level of a protectable interest.

The Nation's interest in this case remains regardless of the adoption of baby boy C. The Nation has an interest in children like baby boy C whose placement is governed by the Indian Child Welfare Act (ICWA). Navajo Nation has the largest population of all Indian Nations in Arizona. *See* Maricopa Association of Governments, *Demographic Profiles for Arizona Indian Reservations: 2010 Decennial U.S. Census and 2011 American Community Survey 5-year Estimates*, (visited on December 14, 2015). If Plaintiff's request for class certification is approved by this court, the class will assuredly include a number of Navajo children. The Nation has an interest in each of these children's involvement and placement in the state system.

Contrary to Plaintiffs assertion, the Nation's interest in defining its citizenship is directly implicated in this lawsuit. *See* Complaint at ¶ 40 (citing the Navajo Nation citizenship requirements). All of the provisions challenged by Plaintiffs rely on the definition of "Indian child". Since ICWA's definition defers to tribal citizenship, the Nation's determination of tribal citizenship is at issue in this matter. Indeed, it is because of how the Nation determines it citizenship that Plaintiffs allege make the definition of "Indian child" in ICWA race based. Plaintiffs' allegations in the Complaint directly attack the Nation's citizenship requirements as

being solely racially based. Complaint at ¶ 40. While Plaintiffs are not challenging the ability of the Nation to determine its membership, they are challenging how the Nation determines its membership. Plaintiffs direct challenge to the specific provisions of ICWA are dependent on the definition of "Indian child" being race-based and therefore unconstitutional. In doing so, Plaintiffs are seeking to prohibit citizens of the Nation from receiving the benefits of ICWA because of the Nation's prerequisites for citizenship.

Plaintiffs allege the Nation should not be concerned about the attack on ICWA's definition of "Indian child" since the Nation's minor citizens will continued to be classified as Indian for the purpose of the provisions of ICWA not being challenged. Response at 4. However, Plaintiffs are not only attacking some of the most fundamental provisions of ICWA, they are attacking the provisions that directly affect the Nation's ability to protect its interest in its minor citizens in state court, such as the jurisdiction-transfer (25 U.S.C. § 1911(b)), active efforts (25 U.S.C. § 1912(d)), clear and convincing evidence burden of proof (25 U.S.C. § 1912(e)), beyond a reasonable doubt of proof of termination of parental rights proceeding (25 U.S.C. § 1912(f)), and foster/preadotive and adoption placement preferences provision (25 U.S.C. §§ 1915(b), (a)). The Nation has great cause for concern that these provisions would not apply to its minor citizens in Arizona state court. The Nation has an interest in having its citizens receiving the benefits from ICWA and an interest in how it defines those citizens.

Additionally, if Plaintiffs are successful in their quest to have the definition of "Indian child" in ICWA deemed race-based, it will have devastating effects on the Navajo Nation. While such a determination would not directly affect the Nation's ability to define its citizenship, it would greatly affect Congress's ability to protect Indian interests, since Congress would no longer be able to rely on defining "Indian" based on tribal membership. There are numerous

statues where Congress has legislated to protect the interest of Indians. In doing so Congress has relied on tribal membership to define "Indian".[2] All of these statutes might be considered unconstitutional race based statues if the Court finds that ICWA's definition is race based.

c. The Nation's interest are more specific than the United States.

The Ninth Circuit has "permitted intervention on the government's side in recognition that the intervenors' interests are narrower than that of the government and therefore may not be adequately represented." *Arakaki v. Cayetano*, 324 F.3d 1078, 1087 (9th Cir. 2003). The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) *citing* 7C Wright, Miller & Kane, § 1909, at 318 (1986).

The Nation's interest in this case is unique from that of the federal government. The Nation, unlike the federal government, is concerned about its ability to maintain a relationship with its own minor citizens. Also, the Nation has an interest in defending its citizenship requirements as being politically based rather than racially based. The federal government does not share these same interests. While the Nation may have the same ultimate objective as the federal government, to uphold the constitutionality of ICWA, this only creates a rebuttable presumption of adequacy of representation, which may be overcome by a very compelling showing to the contrary. *See Arakaki*, 324 F.3d at 1087; *Wildearth Guardians v. Jewel*, No. 2:14-CV-00833 JWS, 2014 WL 7411857, at *3 (D. Ariz. Dec. 31, 2014) (While the Proposed Intervenors and the Service want the same result, they have distinct reasons for doing so). The

[2] *E.g.*, 25 U.S.C. § 2201 (2)(B) (Indian Land Consolidation Act) defining Indian to mean "any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe…"; 25 U.S.C. § 479 (Protection of Indians and Conservation of Resources) defining Indian to "include all persons of Indian descent who are who are members of any recognized Indian tribe…"; 25 U.S.C. § 450b (d) (Indian Reorganization Act) defining Indian as "a person who is a member of an Indian tribe".

Nation's specific interests in its relationship with its minor citizens and definition of its citizenship rebuts the presumption that federal government adequately represents its interests.[3]

The Nation's interests meet the very compelling showing requirement. The federal government cannot represent the Nation's interest in protecting its minor citizens who are currently part of the child welfare system in the state of Arizona. The federal government does not maintain the same interest to these children and their placements that the Nation. The federal government's Motion to Dismiss in this matter contains arguments directed toward the upholding the constitutionality of ICWA but they do not purport to make any arguments regarding the Nation's interest in maintaining a relationship with the minor citizens.

Additionally, the defense of the constitutionality of ICWA does not equate to protecting the Nation's citizenship requirements. The federal government has not raised any arguments regarding the Nation's citizenship requirements in their Motion to Dismiss. Nation has an interest in defending its citizenship requirements as non-raced based.

Both of these issues are narrower issues than the defense of ICWA's constitutionality. They are specific Navajo Nation issues, unique to the arguments made by the federal government in its Motion to Dismiss. *See Forest Conservation Council*, 66 F.3d 1489, 1491-92 (9th Cir. 1995) abrogated on other grounds by *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)(finding inadequate representation by the federal government is likely when an applicant asserts a personal interest that does not belong to the general public); *California for*

[3] Plaintiffs attempt to add an additional requirement to the "very compelling showing" requirement, that of "the proposed intervenor must demonstrate a likelihood that the government will abandon or concede a potentially meritorious reading of the statute." Response at 6. However, this factor as articulated in Lockyer v. United States, 450 F.3d. 436, 443-44 (9th Cir. 2006), applies only when a proposed intervenor argues that its interpretation of a contested statute differs from that of the government. The Nation is not arguing a different interpretation of ICWA than the federal government but that it has narrower and different interests than the federal government.

Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1190 (9th Cir. 1998)(a showing of a more narrow and parochial interest than the public at large demonstrated representation by the government may be inadequate); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 1000-01 (8th Cir. 1993)(applicants interests were narrower and more parochial than the state's interest and therefore no presumption of adequate representation arises). There is no guarantee the federal government will adequately protect the Nation's interest in these matters. Since the Nation has made compelling showing that its interest will not be adequately represented by the current parties to the litigation, its Motion to Intervene should be granted as a matter of right.

II. THE NATION SHOULD BE GRANTED PERMISSIVE INTERVENTION.

Plaintiffs fail to compile a persuasive argument against granting the Nation's request for permissive intervention. Instead of providing an analysis of why the Nation's request should be denied under Fed. R. Civ. P. 24(b) and the factors contained in *Spangler v. Pasadena City Bd. Of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977), Plaintiffs attempt to persuade the court that the Nation should be relegated to amicus curiae status. Response at 9. Amicus curiae are for people who have any interest in the subject matter. *See* Fed. R. App. Pro. 29 (not requiring a particular standard for the interest of an amicus brief). It is not meant to be used by parties who have a protectable interest which would be directly affected by the pending litigation. The Court should not deny a request for permissive intervention just because the option of amicus curiae is available.

The only reasons given by Plaintiffs as to why the request for permissive intervention should be denied is 1) intervention on the defendant-side of the case always prejudices the plaintiff to some degree, Response at 9, and 2) the Nation has nothing significant to contribute to the just and equitable adjudication of the legal question presented. Response at 9-10. Plaintiffs

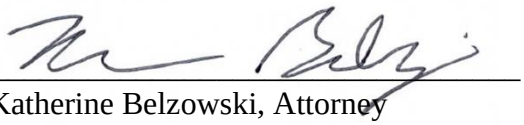
fail to state why the Nation's request for permissive intervention is prejudicial to them in this specific case, just that in general all intervention on the defendant-side will be prejudicial to the Plaintiff. As noted by Gila River Indian Community (Community) in their Reply brief filed on November 12, 2015, if such an assertion was true the liberal purpose of Rule 24 would be frustrated. Community's Reply Brief at 10. The Court should require more than a vague assertion by Plaintiffs that the granting of the Nation's request for permissive intervention would be prejudicial.

Plaintiffs also attempt to argue the Nation will add nothing to the adjudication of this matter. Response at 9. Throughout their Complaint Plaintiffs allege the Nation's citizenship requirements are race based and that the Nation's children are harmed by being put in the "ICWA penalty box." As noted by Community in its Reply Brief, Plaintiffs argument against permissive intervention does not address the anomaly of asking this Court to decide the legal and constitutional significance of the Community's and the Nation's relationship with their minor citizens without the Indian Nations in the courtroom. Both the Nation and the Community are taking an active role in the lives of their minor citizens and are attempting to assert their unique perspectives, experiences, and relationships to these children. To relegate these interests to merely amicus curiae status would be signify that an Indian Nation's interest in its children is not as important as a third party's interest.

III. CONCLUSION

Pursuant to Rule 24(a)(2), the Nation has a right to intervene in this suit. Alternatively, the Court should permit the Nation to intervene under Rule 24(b)(1)(B). In the event the Court denies the Motion, it should provide for the proposed Motion to Dismiss to be filed as an amicus brief.

Respectfully submitted this 14th day of December, 2015.

By: /s/ 
Katherine Belzowski, Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO INTERVENE was electronically transmitted to the Clerk's Office for filing using the CM/ECF System **on this 17th day of November, 2015 and copy to the following:**

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