Linus Everling (SBN 019760)
Thomas L. Murphy (SBN 022953)
Gila River Indian Community
525 W. Gu u Ki
P.O. Box 97
Sacaton, Arizona 85147
(520) 562-9760
linus.everling@gric.nsn.us
thomas.murphy@gric.nsn.us

Donald R. Pongrace (pro hac vice)
(D.C. Bar No. 445944)
Merrill C. Godfrey (pro hac vice)
(D.C. Bar No. 464758)
Akin Gump Strauss Hauer &
Feld, LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564
(202) 887-4000
dpongrace@akingump.com
mgodfrey@akingump.com
Counsel for Gila River Indian Community

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

A.D., C.C., L.G., and C.R. by CAROL COGHLAN CARTER, and DR. RONALD FEDERICI, their next friends, et al.,

Plaintiffs,

v.

KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, et al.,

Defendants.

Case No. 2:15-cv-1259

THE GILA RIVER INDIAN COMMUNITY'S MOTION TO EXPEDITE RULING ON ITS MOTION TO INTERVENE AS DEFENDANT

The Gila River Indian Community hereby moves the Court to expedite ruling on its Motion to Intervene as Defendant (Doc. 47), which was filed on October 16, 2015, and has been pending for over six months. As the Community argued in briefing, it is entitled to intervene as of right. That right to participate in these proceedings is being effectively denied, and the denial is being insulated from appellate review by the Court's

delay in ruling on the motion. By contrast, a prompt ruling on the motion would enable the Community to participate: a ruling would either grant intervention or give the Community an immediately appealable order, so that the Community could seek relief from the Ninth Circuit allowing it to intervene. Absent a prompt ruling from this Court on the Community's long-pending motion, the Community's only avenue for relief is to seek mandamus in the Ninth Circuit. The Community therefore respectfully requests that the Court rule on the Motion to Intervene within 30 days.

BACKGROUND

The original complaint in this action was filed on July 6, 2015, and the last affidavit of service was filed July 31, 2015. After extensions of time for responsive pleadings, motions to dismiss were filed by all defendants on October 16, 2015. The Community filed its Motion to Intervene as a defendant that same day, with a proposed motion to dismiss the complaint attached. Briefing on the Community's Motion to Intervene was completed on November 12, 2015.

Since that time, the Court has held oral argument on the motions to dismiss and has granted plaintiffs leave to amend the complaint, allowing yet another child who is a member of the Community to be added as a putative plaintiff. Also during that time, all parties have served discovery. Now, motions to dismiss the amended complaint have been filed—a critical juncture in the case where the Community's voice needs to be heard—and yet the Court still has not ruled on the Community's Motion to Intervene. The case is proceeding apace, while the Community has been effectively denied the right to participate.

ARGUMENT

Prompt resolution of the Community's Motion to Intervene is critical to the conduct of this action. Rule 24 itself recognizes that motions to intervene must be "timely," a requirement that cannot fully serve its purpose if resolution of such motions is

not also done in a timely manner. Here, the Community filed in a timely manner, but the Court by not ruling promptly is prejudicing the Community's ability to participate in this case. Although management of the Court's docket is a matter of sound discretion, there are limits to that discretion. *See, e.g., Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (writ of mandamus granted to remedy delay by district court); *cf.* 28 U.S.C. § 476 (failure to resolve a pending motion within 6 months is a reportable event under the Civil Justice Reform Act).

The Community is entitled to intervene as of right here, for all the reasons previously stated in briefing on the motion, and permissive intervention is warranted, so the motion should be promptly granted. For example, the only ground on which plaintiffs have contested intervention as of right is the incorrect argument that the government defendants adequately represent the interests of the Community. As previously explained, controlling law shows that a denial of intervention on that ground would be reversible error. In *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995), the proposed defendant-intervenors Arizona and Apache County shared the United States' interest in defending against entry of an injunction, but had particularized interests in specific lands that would be subject to the injunction, and taxes and fees that would be affected. *See id*. at 1492-93. The Ninth Circuit *reversed* the district court's denial of intervention as of right. The Court held that representation was likely inadequate because "[t]he Forest Service is required to represent a broader view than the more narrow, parochial interests of the State of Arizona and Apache County." *Id*.

Thus, the question of adequate representation does not turn on whether the existing defendants have good lawyers or adequate "sincerity" (Doc. 72 at 6). Inadequacy of representation under Rule 24 is not akin to ineffective assistance of counsel. The existing defendants can have the best lawyers in the country and still not adequately represent for purposes of Rule 24 the interests of a *different* sovereign whose relationships with two of its child members are at stake. Rather, under *Forest*

Conservation Council and other controlling precedents previously cited in briefing on the Motion to Intervene, the presence of an intervenor with narrower, more parochial interests is dispositive in favor of intervention.

Here, the Community's particularized interests in the two specific tribal-child relationships at issue (A.D.'s and C.R.'s) are narrower, more parochial interests than the existing defendants' general interest in the constitutionality of ICWA. Indeed, the Community has a narrower interest distinct from even Arizona Indian tribes at large. Its interest is in *these two children's* respective relationships with the Community. These children's child custody proceedings and their ties to the Community could be drastically altered by what happens in this case if the plaintiffs are given the relief they seek.

Denial of intervention on the ground of adequate representation here is foreclosed by *Forest Conservation Council* and the other cases previously cited. But even if the Court denies the motion to intervene, it should promptly enter a reasoned order addressing the controlling precedents cited in briefing, so that the Ninth Circuit can review the Court's order. Denial of intervention is immediately appealable. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 399-400 (1987) (internal citations omitted); *accord, e.g.*, *Forest Conservation Council*, 66 F.3d at 1491 & n.2. Delay in denying a motion to intervene is prejudicial because it insulates the eventual denial from appellate review during the period of delay.

The Community understands that mootness and other justiciability challenges are very serious issues in this case, and that the structure of the case may be greatly altered, or the case may be dismissed entirely, because of these issues. But that is no justification to delay or pocket-veto the motion to intervene. So long as the Plaintiffs are allowed to have a pending complaint that names any child of the Community—if the Plaintiffs themselves have not yet been dismissed because of those justiciability concerns—then the Community cannot justly be kept out of the case as defendants in a "wait-and-see" approach. The Plaintiffs seek relief here that would interfere in currently pending state-

court proceedings involving Community children. Of course, if the Community's children are dismissed as plaintiffs here, then it may well be appropriate to dismiss the Community as a defendant. But until that time, the Community has a right to participate as a defendant.

By failing to rule on the motion, the Court is effectively denying intervention while insulating the denial from review except through an extraordinary writ, such as mandamus. Accordingly, the Community requests that the Court rule on the motion within a reasonable time, but no later than 30 days from the date of this Motion to Expedite.

As previously explained, amicus status does not protect the Community's rights, not least because it gives no rights to participate on appeal. Nevertheless, if intervention is denied, the Community asks that its briefs at least be considered as those of an amicus. This would lessen the amount of prejudice to the Community in these proceedings while any denial of intervention is on appeal. Accordingly, the Community has attached to this motion a motion to dismiss the amended complaint that incorporates by reference the Community's previously lodged motion to dismiss.

CONCLUSION

The Court should rule within 30 days on the Community's motion to intervene and should grant intervention under Rule 24(a)(2), or in the alternative under Rule 24(b). In the event the Court denies the motion, it should provide for the proposed motion to dismiss attached hereto, together with the previously lodged motion to dismiss the original complaint (Doc. 47-1), to be filed and considered together as an amicus brief.

Respectfully submitted,

Linus Everling (SBN 019760)
Thomas L. Murphy (SBN 022953)
Gila River Indian Community
525 W. Gu u Ki
P.O. Box 97
Sacaton, Arizona 85147
(520) 562-9760
linus.everling@gric.nsn.us
thomas.murphy@gric.nsn.us

Donald R. Pongrace (pro hac vice)

/s/ Merrill C. Godfrey
Merrill C. Godfrey (pro hac vice)
Akin Gump Strauss Hauer &
Feld, LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564
(202) 887-4000
dpongrace@akingump.com
mgodfrey@akingump.com
Counsel for Gila River Indian Community

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2016, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and service to all counsel of record in this proceeding.

/s/ Merrill C. Godfrey