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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;
S.H. and J.H., a married couple;
M.C. and K.C., a married couple;
K.R. and P.R., a married couple;
for themselves and on behalf of a class of similarly-situated individuals,
Plaintiffs,

vs.

KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS; SALLY JEWELL, in her official capacity as Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR; GREGORY A. McKAY, in his official capacity as Director of ARIZONA DEPARTMENT OF CHILD SAFETY,
Defendants.

No. CV-15-1259-PHX-NVW

PLAINTIFFS' RESPONSE TO NAVAJO NATION'S *AMENDED* MOTION TO INTERVENE

The Navajo Nation's *amended* motion to intervene (Doc. 198) largely repeats the arguments raised in its initial intervention motion. Plaintiffs will not repeat arguments they presented in their response to the Nation's original motion, but will incorporate that response (Doc. 97) in its entirety here, with only brief responses to the Nation's new arguments. The Nation's motion fails to provide the "very compelling showing" that the government Defendants' representation is inadequate, as required for intervention here. *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006).

The Nation's Interests

The Nation's interest in the application of ICWA or its validity (Doc. 198 at 5; Doc. 81 at 8) is adequately represented by the state and federal Defendants' vigorous advocacy in this case. The Nation and the government Defendants all "have the same ultimate objective," *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), which is upholding ICWA against Plaintiffs' constitutional challenge. There is no indication that the government Defendants are unable or unwilling to effectively defend ICWA.

In *Bradbury*, private parties sought to intervene in a case challenging the constitutionality of an Oregon law restricting signature gathering for petitions. 438 F.3d at 951. The parties had a significant interest in the outcome of the case, but that interest was adequately represented by the state's defense of the statute. *Id.* at 957. Because both the intervenors and the government "share[d] the same interest," specifically, the defense of the statute's constitutionality, and there was "no evidence … that [the government] defendant is unable to mount an effective defense," or any reason to think the government might make a separate settlement, the court denied intervention. *Id.* Precisely the same is the case here.

Nor is there reason to believe that this lawsuit will "impair or impede" the Nation's "ability to protect [its] interest" which is "adequately represented by" the government Defendants. *Harris v. Arizona Indep. Redistricting Comm'n*, 2012 WL 5835336, at *5 (D. Ariz. Nov. 16, 2012). The Nation remains "an active participant in the Arizona" state court

child custody proceedings of Navajo-ancestry children and continues to "coordinate[] its efforts" with Director McKay and the Bureau of Indian Affairs to implement ICWA . *Id.*

Allowing intervention would unduly delay the proceedings and significantly prejudice the Plaintiffs. In *Harris,* this Court denied permissive intervention to the Nation in a case challenging congressional redistricting, because time was critical, given the upcoming elections. *Id.* at * 7. Here, too, time is a significant factor. The state court child custody proceedings of the named Plaintiffs and putative class members are dynamic, constantly evolving, and these individuals continue to remain within the ICWA Penalty Box during the pendency of this lawsuit. As this Court said in *Harris*, almost a year "ha[s] already passed, and the pleadings are not even closed"; and because intervention will "unnecessar[ily] … add[] complexity and risk of delay without countervailing benefit," permissive intervention should be denied. *Id.*

The Nation's reasserted interest in its ability to define the requirements of its citizenship (Doc. 198 at 6, 7; Doc. 81 at 4), is neither implicated nor affected by this lawsuit, as Plaintiffs previously explained (Doc. 97 at 4–6). The Nation seeks to argue the constitutionality of the definition of "Indian child"—but that issue is beyond the scope of this case. Plaintiffs do not challenge that provision of the statute, and, if Plaintiffs were to prevail, that provision would not be affected: children would still be classified as Indian under that definition of ICWA. The Nation is therefore seeking intervention to *broaden* the scope of this litigation, which is not permissible for an intervenor. "An intervenor is admitted to the proceeding *as it stands*, and in respect of the pending issues, but is *not permitted to enlarge those issues* or compel an alteration of the nature of the proceeding." *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944). *See also EEOC v. Woodmen of the World Life Ins. Soc'y*, 330 F. Supp. 2d 1049, 1055 (D. Neb. 2004) (holding that an intervenor could not assert a cross-claim that would "expand the scope of the proceedings"); *Seminole Nation of Okla. v. Norton*, 206 F.R.D. 1, 7 (D.D.C. 2001) (denying intervention where claims fell outside the scope of the litigation); *Fisher Foods, Inc. v. Ohio Dept. of Liquor Control*, 555 F. Supp. 641, 649–51 (N.D. Ohio 1982) (denying

intervention even though proposed intervenor asserted an interest in its "continued vitality" because, *inter alia*, "collateral or extrinsic issues would be brought in"). This case simply has nothing to do with the Nation's "ability to determine its own citizenship" (Doc. 198 at 10).

The Nation's reasserted interest in C.C.'s welfare, and its interest in all off-reservation minor children of Navajo ancestry (Doc. 198 at 3, 4, 5; Doc. 81 at 3–4, 5–7), is likewise not implicated here (Doc. 97 at 3, 7). Baby boy C.C.'s adoption took place *with the Nation's consent*. Obviously, the Nation's interest in C.C.'s welfare, as evident from its consent to adoption, was more than adequately protected at all stages of C.C.'s state court child custody proceeding. Were Plaintiffs successful in this case, the Nation would continue to seek party-intervenor status in the child custody proceedings of Navajo-ancestry children in Arizona DCS custody under ICWA's intervention provision (25 U.S.C. § 1911(c)), which is not challenged here. Nor is ICWA's tribal-notification provision (25 U.S.C. § 1912(a)), or its qualified-expert-witness provision (25 U.S.C. § 1912(e), (f)), or its maintained-social-and-cultural-ties provision (25 U.S.C. § 1915(d)).

Nor would success by the Plaintiffs in any way impede or impair C.C.'s un-coerced learning of, or voluntary formation of ties to, Navajo culture. The Nation's interests are thus adequately defended by the government Defendants, or are beyond the scope of this litigation.

Participation as *Amicus*

The *amicus* route is the proper way to present the Nation's perspective on how it determines its membership as a matter of law without increasing discovery costs and time, and without creating "additional witnesses, questions, objections, briefs, arguments, and motions." *Fisher Foods*, 555 F. Supp. at 651. The Nation's motion to intervene and its lodged motion to dismiss are essentially an *amicus* brief already, and should be construed as such. Other *amici* have been freely granted leave to submit *amicus* briefs, with the prompt consent of Plaintiffs, and they have fully participated in providing this Court the "benefit of [their] voice." *Harris*, 2012 WL 5835336, at *7. The Nation essentially

concedes that its argument regarding Navajo citizenship is outside the scope of this case, when it declares that Plaintiffs' contentions "may be true for other tribes [but] … not … the Navajo Nation" (Doc. 199 at 4). Since this case is simply not about how the Navajo Nation determines citizenship, the Nation's brief provides helpful policy background as an *amicus*, but the issues it raises are simply not those raised in the complaint. As the District Court put it in *Valley View Health Care, Inc. v. Chapman*, 2013 WL 4541602, at *9 (E.D. Cal. Aug. 27, 2013), in denying an intervention motion but allowing an appearance as *amicus*, "The 'factual' development proposed by Proposed Intervenors does not aid in adjudication of a purely legal issue. … [W]hile the Proposed Intervenors may have a unique point of view and expertise, intervention as a party will not necessarily facilitate resolution on the merits, but is likely to result in a delay in the proceedings and duplicative briefing, adding a layer of unwarranted procedural complexity."

Oral Argument

Plaintiffs believe another oral argument regarding the Nation's intervention will not aid the Court in resolving this amended motion, which merely supplements the Nation's original motion. The Nation presented an engaging oral argument on the intervention question during the December 18, 2015, hearing that addressed all of the interests the Nation reasserts in its amended motion. Plaintiffs rest on the oral presentation made during that hearing.

Conclusion

For the foregoing reasons, the Navajo Nation's intervention motion and request for oral argument should be denied, and the Nation's intervention motion construed and admitted as an *amicus* brief.

RESPECTFULLY SUBMITTED this 27th day of May, 2016 by:

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CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 27th day May, 2016.

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Courtesy Copy Mailed this 27th day of May, 2016 to:

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