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IN THE UNITED STATES DISTRICT COURT  
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,

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 AMENDED MOTION  
TO INTERVENE AS DEFENDANT**

(Assigned to The Honorable Neil V. Wake)

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The Navajo Nation (“Nation”) hereby submits this Reply in support of its Amended Motion to Intervene.

### **INTRODUCTION**

Plaintiffs’ counsel purports to speak on behalf of individuals and a class which include the Navajo Nation’s minor citizens. In declaring to know what is best for these minor citizens of the Navajo Nation, Plaintiffs attack the Nation’s citizenship requirements as being nothing more than race based, in an attempt to overturn provisions of the Indian Child Welfare Act (“ICWA”). The Nation seeks intervention in this matter to defend the characterization of its own laws and to protect its interest in all of its off-reservation minor citizens. Plaintiffs attempt to dismiss such intervention as unnecessary, claiming the Nation’s interest are not being implicated and that any interests that are being implicated are adequately represented by the current governmental defendants. However, Plaintiffs arguments ignore its own reference to Navajo Nation law in its Amended Complaint and the admitted lack of knowledge of tribal laws by the current governmental defendants. Plaintiffs presume that they are the correct voice for the children of the Navajo Nation, even though such advocacy places the children directly adverse to the Nation and to their own families. The Nation has a protected interest in protecting the well-being of its children against individuals who would use them to for their own personal interest at the expense of the best interest of the children.

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**ARGUMENT**

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

**a. Plaintiffs have directly implicated the Nation's citizenship requirements in their Amended Complaint.**

Plaintiffs continue to incorrectly allege the Nation's interest in defining its citizenship is not directly implicated in this lawsuit. ECF No. 200 at 2. Plaintiffs attempt to argue that since they are not directly challenging the constitutionality of the definition of "Indian child" any discussion on the provision is only broadening the scope of the case. ECF No. 200 at 2. This assertion is a misstatement and mischaracterization of Plaintiffs' Amended Complaint. The entirety of the Amended Complaint is grounded in Plaintiffs' premise that the definition of "Indian child" is race based, as evidenced by the plain language of Paragraph 60 of the Amended Complaint, which states "ICWA's definition of 'Indian child' is based solely on the child's race or ancestry." ECF No. 150 at ¶ 60. To support this proposition Plaintiffs cite specifically to the Nation's citizenship law. ECF No. 150 at ¶ 60 (citing Navajo Nation Code § 701).

Plaintiffs' mischaracterization of the Nation's citizenship requirements, as being based solely on race, is the foundation for all of Plaintiffs claims against provisions 25 U.S.C. §§ 1911(b), 1912(d), 1912(e), 1912(f), 1915(a), and 1915(b). ECF No. 150 at ¶ 116. If the claim that the Nation's citizenship laws were race based was found to be unsubstantiated, the entirety of Plaintiff's legal argument in the Amended Complaint would collapse. Therefore, Plaintiffs cannot make conclusory statements regarding ICWA's definition of "Indian child" as being based solely on the child's race, and use the Nation's laws to support such statements, and then claim they have not implicated the Nation's interest in a lawsuit that relates directly to the custodial disposition of numerous Navajo children. The Nation has a direct, vital, and sovereign

interest in defending its citizenship requirements against Plaintiffs' mischaracterization and conclusory statements.

**b. The Nation's interest in participating in Arizona state court child custody proceedings will be directly impaired and impeded by Plaintiffs' lawsuit.**

Plaintiffs also argue the Nation's interest in all its off-reservation minor citizens is not impaired or impeded because the Nation remains an active participant in Arizona state court child custody cases (ECF No. 200 at 2) and because its interest was protected at all stages of C.C.'s state court child custody proceeding (ECF No. 200 at 3). Again, Plaintiffs miss the Nation's point of intervention, and the effect of their lawsuit on the Nation and its people.

The Nation is not arguing that its current and past participation in Arizona state child custody proceedings under the current law is an issue. The Nation is supportive of ICWA which provide it with the ability to participate in state court proceedings. However, the Plaintiffs lawsuit, by overturning ICWA's provisions related to jurisdiction-transfer,<sup>1</sup> active efforts,<sup>2</sup> clear and convincing evidence burden of proof,<sup>3</sup> beyond a reasonable doubt of proof of termination of parental rights proceeding,<sup>4</sup> and foster/pre-adoptive and adoption placement preferences provision,<sup>5</sup> will greatly affect the Nation's interest in its off-reservation minor citizens. By attacking the above provisions, Plaintiffs are directly attacking and directly affecting the Nation's ability to protect its interest in its minor citizens in state court. The Nation will lose its long-recognized sovereign authority to protect its minor citizens from unnecessary isolation from their Navajo families, and from their cultural identity, by losing its ability to request jurisdictional transfers and participate in foster/pre-adoptive placement preferences.

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<sup>1</sup> 25 U.S.C. § 1911(b)

<sup>2</sup> 25 U.S.C. § 1912(d)

<sup>3</sup> 25 U.S.C. § 1912(e)

<sup>4</sup> 25 U.S.C. § 1912(f)

<sup>5</sup> 25 U.S.C. §§ 1915(a), (b)

Additionally, because the Nation has an interest in the well-being of all its citizens located off-reservation, the Nation has an interest in having its citizens receive the benefits from ICWA's provisions regarding active efforts (25 U.S.C. § 1912(d)), clear and convincing evidence burden of proof (25 U.S.C. § 1912(e)), and beyond a reasonable doubt of proof of termination of parental rights proceedings (25 U.S.C. § 1912(f)). The Nation's interest in the maintenance of Navajo families extends to Navajo families located off-reservation, and would be greatly implicated if the ICWA provisions challenged by Plaintiffs were found unconstitutional.

**c. The Nation's interests are not adequately represented by the current government Defendants.**

Plaintiffs rely on the statement that the Nation and the government defendants have the same ultimate objective of upholding ICWA, to support their assertion that the Nation's interests are adequately represented by the federal defendant. ECF No. 200 at 1. Plaintiffs statement ignores the nature of the Nation's interest in this case is narrower than the existing parties. If the Nation's only interest in this case was the defense of the constitutionality of ICWA then it is possible it would have adequate representation in the current governmental defendants. However, what sets the Nation's interest apart from the current governmental defendants is its narrower and independent inherent sovereign interest, in the defense in the characterization of its citizenship laws and in the protection of its minor citizens who will make up a majority of Plaintiffs class members. The current governmental defendants have failed to raise the Nation's arguments and concerns in their briefs and the Nation has provided evidence of the current governmental defendants' inability to speak to the defense of tribal law. *See* ECF No. 198 at 9 and 10. Therefore, because the Nation's interests in this matter are narrower and distinct from those of the current governmental defendants, and because these narrower interests cannot be

adequately defended by the current governmental defendants, the Nation should be granted intervention as a matter of right.

## II. 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 10th day of June, 2016.

By: /s/Katherine Belzowski  
Katherine Belzowski, Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **THE NAVAJO NATION'S REPLY IN SUPPORT OF ITS AMENDED MOTION TO INTERVENE AS DEFENDANT** was electronically transmitted to the Clerk's Office for filing using the CM/ECF System on this 10th day of June, 2016 and copy to the following:

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