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IN THE UNITED STATES DISTRICT COURT
FOR THE 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,

vs.

KEVIN WASHBURN, in his official capacity as Assistant Secretary of BUREAU OF INDIAN AFFAIRS;
SALLY JEWELL, in her official capacity as Secretary of 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' OPPOSITION TO NAVAJO NATION'S MOTION TO INTERVENE

Introduction

On October 16, the Gila River Indian Community sought intervention in this action. More than a month later, on November 18, the Navajo Nation filed its motion to intervene in this action on essentially the same grounds as those contained in Gila River's motion. Plaintiffs, thus, duplicate here many of the arguments they presented in their opposition to Gila River's motion filed on November 2nd.

On November 21, 2015, the relevant state court granted M.C. and K.C.'s petition for adoption of baby boy C. Ex. 1 (document under seal).[1] Thus, the Nation's most direct basis for seeking intervention in the federal action is no longer apposite. Moreover, if the Court were to grant intervention to the Nation, it will significantly delay closing of the pleadings—a concern that the Court expressed and highlighted in the September 23 status conference. Ex. 2, excerpt of transcript 5:5–7; 5:14–19; 15:2–6; 17:24–18:4. We are set for oral argument on motions to dismiss in less than two weeks, with motion for class certification soon to follow thereafter. The Nation's untimely motion would significantly disrupt ongoing proceedings.

I. The Nation Cannot Intervene as of Right.

Federal Rule of Civil Procedure ("FRCP") 24(a)(2) allows an outsider to intervene as of right in ongoing litigation only if the motion to intervene is timely filed and only if the "existing parties" do not "adequately represent [its] interest." Here, the Nation's interests are more than adequately represented. There are already multiple *amicus curiae* briefs before the Court, which present the Court with the perspectives of tribal and other interest groups. Moreover, the motions to dismiss filed by Defendants in this matter raise a full catalog of jurisdictional and merits arguments. The governmental Defendants more than adequately represent the interests of the Nation in this lawsuit. The Nation has failed to make the "very compelling showing," *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir.

[1] Plaintiffs will file an amended complaint to substitute M.C., K.C., and baby boy C. with other named plaintiffs shortly.

2006), that the Defendants will not adequately defend the provisions of ICWA that are challenged here and, by so doing, not adequately represent the interests of the Nation.

The applicant for intervention has the burden of showing all of the four elements of intervention as of right are met: (1) a "timely" intervention application; (2) a "significant protectable interest relating to the property or transaction that is the subject of the action"; (3) "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest"; and (4) "the existing parties may not adequately represent the applicant's interest." *Id.*, 438 F.3d at 954 (citation omitted). Unless the applicant satisfies all four criteria, intervention must be denied. *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991).

A. Timeliness

The Nation filed a motion to intervene along with a proposed motion to dismiss *after* Plaintiffs' briefing on the Defendants' motions to dismiss was completed, and "a little over four months" (Mot. 2) after the complaint was filed. Defendants made timely requests by motion to extend time to file responsive pleadings which were duly granted; the Nation made no such request. Intervention at this juncture will only prolong closing of the pleadings and the litigation generally. Briefing on the Defendants' motions to dismiss is now complete. The Nation delayed filing even beyond other applicants for intervention. Its motion is untimely. *Nat'l Ass'n for Advancement of Colored People v. N.Y.*, 413 U.S. 345, 366-68 (1973) (holding that the intervention motion was untimely because the proposed intervenor waited to file the motion for three months after suit was filed; the suit had reached a critical stage; and there were no unusual circumstances warranting intervention).

B. Protectable Interest, Impairment of the Nation's Ability to Protect Its Interest, and Adequacy of Representation of the Nation's Interest by Existing Parties

The Nation has identified two interests—(1) the Nation's interest in the placement of baby boy C. and other Navajo children (Mot. 3–4, 5–7); and (2) the Nation's interest in how it defines its membership (Mot. 4–5, 7)—neither of which is implicated in this

lawsuit. Nor do these interests rise to the level of protectable interests that would fulfill the test for intervention as of right.

The Nation's interest in the placement of baby boy C. is more than adequately protected in the state court child custody proceeding of baby boy C. In any event such interest in *placement* does not survive baby boy C.'s adoption by M.C. and K.C. Similarly, the Nation's interest in defining its membership is neither implicated in this lawsuit nor affected by it. We are not challenging their ability to determine membership however they see fit. Children will continue to be classified as Indian for purposes of the provisions of ICWA that are not challenged here. *See, e.g.*, 25 U.S.C. § 1911(a). This lawsuit primarily seeks equal protection of the laws for children deemed Indian and seeks to prevent the *state* from placing children deemed Indian in the ICWA penalty box.

Indeed, the Nation and the existing governmental Defendants "have the same ultimate objective," *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003): to uphold the constitutionality of the provisions of ICWA challenged here. Thus, "a presumption of adequacy of representation arises," *id.*, which requires "a very compelling showing to the contrary" to overcome the "presum[ption] that [the governmental Defendant] adequately represents" the interests of the Nation. *Prete*, 438 F.3d at 956; *see also Wildearth Guardians v. Jewel*, 2014 WL 7411857, at *2 (D. Ariz. Dec. 31, 2014) (where proposed intervenors share the same "ultimate objective," the presumption can be rebutted only by "a very compelling showing to the contrary").

The strong presumption that the government will adequately represent the interests of a proposed intervenor that is benefitted by a challenged federal statute applies with full force here. The questions raised by this litigation are primarily legal. The state and federal officials and agencies who are defendants in this case are represented by the Arizona Attorney General and by the United States Department of Justice—attorneys who are fully committed to defending federal law and fully capable of doing so effectively. The Nation has failed to make the requisite "very compelling showing"; instead, the Nation states only

that the Nation has an interest in placement of Navajo children like baby boy C., and in defining its membership.[2]

The Ninth Circuit considers three factors in determining the adequacy of representation:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Arakaki, 324 F.3d at 1086. The presumption that a governmental litigant adequately represents the interests of a proposed intervenor on its side that belongs to "a constituency that it represents," *id.*, "is nowhere more applicable than in a case where the Department of Justice deploys its formidable resources to defend the constitutionality of a congressional enactment." *Lockyer*, 450 F.3d at 444. "[E]very circuit to rule on the matter," *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013), has held that a government defendant will adequately represent the interests of potential intervenors when it is defending the constitutionality of a statutory scheme, even one that specifically and exclusively benefits the party seeking to intervene. *Arakaki*, 324 F.3d at 1086–88; *accord United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984) (requiring "a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant"); *United States v. S. Bend Cmty. Sch. Corp.*, 692 F.2d 623, 627 (7th Cir. 1982) ("Adequate representation … is … to be presumed where, as here, there has been no showing of gross negligence or bad faith.").

In the case of an Indian tribe, moreover, because the courts "presume that the United States is acting on behalf of the Tribe, it is incumbent upon the Tribe to set forth

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[2] The putative class of children, as defined (Compl. ¶ 30), includes children from all federally-recognized tribes, not only Navajo-ancestry or only Gila River-ancestry children.

specific interests that only it can protect by intervening." *S.D. ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 786 (8th Cir. 2003).

The Nation has made no showing here that the two interests it identifies will not be protected by the federal government. First, the Nation's interest in placement of baby boy C. has now evaporated; the Nation's interest in placement of other children who are members of the Nation who are also members of the putative class is currently fully protected by ICWA, and if Plaintiffs prevail, will in the future be fully protected by the provisions of ICWA not challenged here, as well as by the best interest standard that takes into consideration the cultural as well as the psychological ties of a child in a child custody proceeding. Certainly, the Justice Department is aggressively defending the status quo, and the Nation has pointed to no divergence of interests, no inadequacy of representation, and no reason it cannot present its perspective as *amicus*.

Second, given that "the Federal government requires Indian tribes, as a prerequisite for official recognition, to make 'descen[t] from a historical Indian tribe' a condition of membership," *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2585 (2013) (Sotomayor, J., dissenting) (*citing* 25 C.F.R. § 83.7(e) (2012) *renumbered as* 25 C.F.R. § 83.11(e) (2015)), it would be disingenuous to assume, as does the Nation (Mot. 7), that the federal defendants in this case will not vigorously protect the Nation's interest in determining its membership. Here, both the Arizona Attorney General and the U.S. Department of Justice have made it abundantly clear that they intend to defend the constitutionality of ICWA vigorously and in its entirety. There is no reason to doubt their sincerity or their capacity. The interests of the Nation, therefore, are unquestionably adequately represented in this case.

Moreover, in order to make a "very compelling showing" of the government's inadequacy, the Nation "must demonstrate a *likelihood* that the government will abandon or concede a potentially meritorious reading of the statute." *Lockyer*, 450 F.3d at 444 (emphasis added). Far from presenting interests that are "*narrower* than that of the government," *Arakaki*, 324 F.3d at 1087 (emphasis added), the Nation seeks intervention

to *broaden* the scope of this litigation. The Nation seeks to argue the constitutionality of the definition of "Indian child," which in turn defers to the tribe's determination of membership, when that provision is not even challenged by the Plaintiffs here. The Nation seeks particular outcomes in the individual state court child custody proceedings of baby boy C. and other Navajo children who are or will be members of the putative federal class; in contrast, the federal action seeks only declaratory and prospective injunctive relief.

Alleging interests that are not ultimately affected by this litigation only to "compare[]" them "with the interests of existing parties," *id.*, at 1086, does not overcome the fact that both the Nation and the Defendants "have the same ultimate objective." *Prete*, 438 F.3d at 956. "[V]ague speculation" that the existing governmental Defendants will not adequately represent the interests of the Nation falls short of satisfying the "very compelling showing" standard for intervention as of right. *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 740–41 (9th Cir. 2011) (declining intervention as of right in a federal lawsuit to a proposed intervenor who would have been a party-in-interest in state court).

The Nation claims that its interests are "unique and not directly aligned with the present parties to this case" (Mot. 7). It also claims that it has a "strong interest … in the placement of … Indian children" (Mot. 3). It claims it "has specific interests … that are narrower than and unique from the interests of the existing parties" (Mot. 6). But "stronger, more specific interests do not adverse interests make—and they surely cannot be enough to establish inadequacy of representation since would-be intervenors will nearly always have intense desires that are more particular than the state's (or else why seek party status at all)." *Stuart*, 706 F.3d at 353; *see also Natural Res. Defense Council v. N.Y. State Dep't of Envtl. Conservation*, 834 F.2d 60, 61–62 (2d Cir. 1987) ("A putative intervenor does not have an interest not adequately represented by a party to a lawsuit simply because it has a motive to litigate that is different from the motive of an existing party."). The Ninth Circuit has likewise held that being the beneficiary of a statutory scheme does not entitle a party to intervene where the government agency defending the constitutionality

of that scheme does not itself benefit from the scheme. The *Arakaki* court itself held that state government agencies were presumed to adequately represent the rights of individual native Hawaiians who were seeking to intervene in a suit challenging the constitutionality of preferential benefits provided exclusively to native Hawaiians. 324 F.3d at 1086–87.

To accept the Nation's argument that merely having an interest that government officers do not personally share is sufficient to permit intervention as of right would essentially collapse the four-pronged analysis under FRCP 24 into a two-pronged inquiry into the timeliness of the intervention and the intensity of the interest. Unfortunately, for the Nation, precedent on this matter is clearly opposed to its position. The Nation cannot intervene as of right.

II. The Nation's motion for permissive intervention should be denied.

Although the Nation has failed to show it has a right to intervene under Rule 24(a)(2), the Court, on a timely motion, nevertheless "may permit [it] to intervene" if it has put forth a "defense that shares with the main action a common question of law or fact." FRCP 24(b)(1)(B). First, the Nation's delay in filing this motion unduly prejudices the Plaintiffs. Even if the motion were considered timely,[3] and assuming the Nation were to satisfy the requirement of FRCP 24(b)(1)(B), this Court "has discretion to deny permissive intervention." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FRCP 24(b)(3). In the

[3] As the Washington Times reports, the Navajo Nation's Department of Justice was made aware, as early as July 7, 2015 (the day after the complaint was filed), of the existence of this lawsuit. Felicia Fonseca, *Arizona Think Tank Challenges US Indian Child Welfare Act*, THE WASHINGTON TIMES, July 7, 2015, http://www.washingtontimes.com/news/2015/jul/7/arizona-think-tank-challenges-indian-child-welfare/?page=all (visited December 3, 2015). *Accord NAACP*, 413 U.S. at 366 (motion to intervene is untimely where proposed intervenor "knew or should have known of the pendency of the…action because of an informative…article in the New York Times"). Here, the Nation's Department of Justice was specifically asked for public comment the day after this lawsuit was filed.

Ninth Circuit, courts also consider the following additional factors in determining whether intervention should be permitted:

> [T]he nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] … whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977) (footnotes omitted). These considerations weigh strongly against permissive intervention. The two interests the Nation has asserted and the Nation's perspective on those two interests are properly put before the Court through the vehicle of an *amicus curiae* brief, not through intervention.

The plaintiff children will clearly be prejudiced with the Nation's untimely intervention on the defendant-side of the case. Intervention on the defendant-side of the case always prejudices the plaintiff to some degree because he is "left fighting fires on two fronts." *James City Cnty. v. U.S. EPA*, 131 F.R.D. 472, 475 (E.D. Va. 1990). Here, of course, there already are two sets of defendants. "[A] third party" can "contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention." *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943). By intervening, third parties become a "source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair." *Id.*

The Nation offers little, if anything, that is "significantly contribut[ing] … to the just and equitable adjudication of the legal questions presented" in this case. *U.S. Postal Service v. Brennan*, 579 F.2d 188, 192 (2d Cir. 1978) (*citing Spangler*, 552 F.2d at 1329). For example, the fact that the Nation can set its own membership criteria does nothing to explain why the state and federal defendants are justified in placing children deemed

Indian in the ICWA penalty box. Nor would an outcome favorable to the Plaintiffs in this action prevent the Nation, going forward, from setting its own membership requirements; it will only establish that the *state* is required to treat all children equally under uniform, race-neutral law. In any event, the presence of the governmental Defendants who "are zealously pursuing the same ultimate objectives" as the Nation significantly lessens the potential benefits of allowing the Nation to intervene. *Stuart*, 706 F.3d at 355; *see also League of United Latin Am. Citizens v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989) (county not allowed to intervene in a challenge under the Voting Rights Act because its input would not significantly help develop relevant factual issues); *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 756 (9th Cir. 1993) (the "right of self-government" and "privacy" interests asserted by proposed intervenors were insufficient to warrant grant of permissive intervention because those interests were adequately represented by arguments presented by the Governor).

Furthermore, if "intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes, or disappears entirely." *Tutein v. Daley*, 43 F.Supp.2d 113, 131 (D. Mass. 1999) (citation omitted); *Va. Uranium, Inc. v. McAuliffe*, 2015 WL 6143105, at *4 (W.D. Va. Oct. 19, 2015) (same); *Menominee Indian Tribe v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996); *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982) ("[W]here … an existing … party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous[.]").

Instead of "contain[ing] a claim or defense that shares a common question of law or fact with the main action" (Mot. 8), the Nation is raising exactly the same defenses as those raised by the Defendants. *See, e.g.*, State Reply at 7; Federal Mot. Dismiss at 23. The proceedings will not benefit from the mere repetition of these arguments.

Instead of either filing an *amicus curiae* brief or contributing to one of the *amicus* briefs that have already been filed (with the prompt consent of the Plaintiffs), the Nation here seeks only to "prolong or unduly delay" the closing of the pleadings and the litigation

generally. *Spangler*, 552 F.2d at 1329. Allowing a proposed intervenor to file an amicus brief is an adequate alternative to permissive intervention. *McHenry v. Comm'r of Internal Revenue*, 677 F.3d 214, 227 (4th Cir. 2012) (collecting cases); *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 2012 WL 5835336, at *7 (D. Ariz. Nov. 16, 2012) ("[B]enefit of the Navajo Nation's voice can be had by amicus curiae participation, without complicating the expeditious proceeding of the case" by permitting intervention). To the extent the Nation really does represent a perspective that is distinct from the Defendants' and would be potentially helpful to this Court's resolution of the case, the *amicus* route would have been the proper way to present it.

Conclusion

For each of the foregoing reasons, the Navajo Nation's motion to intervene in this case under either FRCP 24(a)(2) or 24(b)(1)(B) should be denied.

RESPECTFULLY SUBMITTED this 7th day of December, 2015 by:

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CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 7th day of December, 2015.

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