IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, JENNIFER KAY BRACKEEN, FRANK NICHOLAS LIBRETTI, HEATHER LYNN LIBERETTI, ALTAGRACIA SOCORRO HERNANDEZ, JASON CLIFFORD, and DANIELLE CLIFFORD,	§	
and	§	
STATE OF TEXAS, STATE OF LOUISIANA, and STATE OF INDIANA,	§	
Plaintiffs,	§	Civil Action No. 4:17-cv-868-O
v.	§	
RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; BRYAN RICE, in his official capacity as Director of the Bureau of Indian Affairs; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary for Indian Affairs; the BUREAU OF INDIAN AFFAIRS; and the UNITED STATES DEPARTMENT OF THE INTERIOR,	§	
Defendants.	§	

BRIEF IN SUPPORT OF CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS' MOTION TO INTERVENE AS DEFENDANTS

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BRIEF IN SUPPORT OF CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS' MOTION TO INTERVENE AS DEFENDANTS

The Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians ("the Tribes") file their Brief in Support of their Motion to Intervene as Defendants, and in support thereof respectfully state as follows:

I. INTRODUCTION

In the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901, *et seq*., Congress declared that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." *Id*. § 1902. In enacting ICWA, Congress exercised its plenary authority over Indian affairs, *see, e.g., United States v. Lara*, 541 U.S. 193, 200–02 (2004), and responded to staggering rates of adoption of Indian children by non-Indians: more than one in four Indian children were placed for adoption and 90 percent of the Indian placements were in non-Indian homes. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–33 (1989). Nearly four decades after the enactment of ICWA, the dramatic overrepresentation of Indian children in foster care and adoption demonstrates the continuing necessity of its safeguards.[1]

ICWA codifies significant legal rights of the intervenor Tribes with respect to foster-care placement and adoption of Indian children. For example, ICWA confirms that tribes exercise

[1] *See, e.g.*, Shamini Ganasarajah, *et al*., *Disproportionality Rates for Children of Color in Foster Care (Fiscal Year 2015)* 14 (Nat'l Council of Juvenile & Family Court Judges, Sept. 2017), *available at* https://www.ncjfcj.org/sites/default/files/NCJFCJ-Disproportionality-TAB-2015_0.pdf; Children's Bureau, U.S. Dep't of Health & Human Servs., *Race/Ethnicity of Public Agency Children Adopted* (July 2015), https://www.acf.hhs.gov/sites/default/files/cb/race2014.pdf.

exclusive jurisdiction over child custody proceedings involving Indian children resident or domiciled on their reservations. 25 U.S.C. § 1911(a). For cases pending in state court, ICWA provides that tribes have a right to intervene and participate as a party. *Id*. § 1911(c). Plaintiffs' First Amended Complaint seeks to invalidate ICWA on an assortment of constitutional grounds; Plaintiffs thus seek to deprive the Tribes of numerous important and substantive rights provided them by ICWA. Further, the Tribes—"separate sovereigns pre-existing the Constitution"—"are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal quotation marks omitted). For these reasons, as explained more fully below, the Court should grant the Tribes' motion to intervene of right or permissively under Federal Rule of Civil Procedure 24.

Pursuant to Local Rule 7.1, counsel for the Tribes has consulted with counsel for Plaintiffs and Defendants. Defendants consent to this motion. Plaintiffs consent to permissive intervention pursuant to Rule 24(b) but do not consent to intervention of right pursuant to Rule 24(a)(2).

II. BACKGROUND AND FACTS

Defendants, in their brief in support of their motion to dismiss, provide an overview of ICWA and the challenged 2016 regulations, which will not be repeated here. *See* Dkt. 28, at 3–7; *see also* Cohen's Handbook of Federal Indian Law 836–61 (Nell Jessup Newtown ed., 2012). Plaintiffs—the states of Texas, Louisiana, and Indiana and seven individuals—challenge specified provisions of ICWA and the 2016 regulations on a hodgepodge of constitutional grounds, including the Commerce, Equal Protection, Due Process, and Spending Clauses, the Tenth Amendment, and the non-delegation doctrine. They also allege that the regulations violate the Administrative Procedure Act, principally on the grounds that ICWA is unconstitutional.

The proposed intervenors are four federally recognized Indian tribes: The Cherokee Nation, based in Tahlequah, Oklahoma, is the largest tribal nation in the United States with over

355,000 citizens; the Oneida Nation is located near Green Bay, Wisconsin, with approximately 17,000 citizens; the Quinault Indian Nation, with its reservation in Taholah, Washington, currently has 3,059 enrolled citizens; and the Morongo Band of Mission Indians is located near Banning, California, and has about 1,000 enrolled citizens.[2]

III. ARGUMENT AND AUTHORITIES

Rule 24 provides two separate avenues for intervention—intervention of right and permissive intervention. The Tribes satisfy the requirements of both types of intervention.

A. The Tribes Should Be Permitted to Intervene of Right.

Rule 24(a)(2) provides four factors governing intervention of right:

> [1] On timely motion, the court must permit anyone to intervene who . . . [2] claims an interest relating to the property or transaction that is the subject of the action, and [3] is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, [4] unless existing parties adequately represent that interest.

See generally Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015); *Franciscan Alliance Inc. v. Burwell*, No. 7:16-cv-00108-O, 2017 WL 2964088, at *2 (N.D. Tex. Jan. 24, 2017). "[T]he inquiry under section (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application. . . ." *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005). "The rule is to be liberally construed, with doubts resolved in favor of the proposed intervenor." *Entergy Gulf States La. LLC v. U.S. Envtl. Prot. Agency*, 817 F.3d 198, 203 (5th Cir. 2016) (quotation marks omitted). The Tribes satisfy each of the four requirements for of-right intervention.

[2] *See* http://www.cherokee.org/About-The-Nation; https://oneida-nsn.gov/; http://www.quinaultindiannation.com/index.htm; http://www.morongonation.org/.

1. This Motion Is Timely.

The Tribes' motion is timely. The Fifth Circuit has applied four factors in determining timeliness: (1) the length of time before the intervenor sought to intervene, (2) "[t]he extent of prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case," (3) the prejudice that the intervenor would suffer if the motion is denied, and (4) any "unusual circumstances." *Ross*, 426 F.3d at 754.

The Fifth Circuit "has long placed an emphasis on the second factor, prejudice to existing parties." *Hill v. Hunt*, No. 3:07-CV-2020-O, 2010 WL 11537555, at *3 (N.D. Tex. Nov. 8, 2010). Although this action was initially filed in October 2017, Plaintiffs filed an amended complaint on December 15, 2017, and Defendants moved to dismiss on February 13, 2018. Plaintiffs have not yet responded to that motion. The Tribes' proposed responsive pleading, attached to their motion, is a motion to dismiss that simply incorporates by reference Defendants' arguments and makes no additional ones. Moreover, Plaintiffs now seek to file yet another amended complaint (Dkt. 33), which would start the motion-to-dismiss briefing anew. Further, Plaintiffs' consent to permissive intervention underscores the timeliness of this motion and the absence of any prejudice to them resulting from it. Thus, the filing of this motion is timely and the granting of the motion will not prejudice any party. Moreover, none of the other three factors counsel against intervention, especially since the parties are not prejudiced.

"The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner." *Hill v. Gen. Motors LLC*, No. 7:14-cv-00064-O, 2015 WL 11117873, at *2 (N.D. Tex. Apr. 28, 2015). "Federal courts should allow intervention where no one will be hurt and greater justice could be attained." *Id.* (internal quotation marks omitted). In *Wal-Mart Stores, Inc. v. Texas*

Alcoholic Beverage Commission, 834 F.3d 562 (5th Cir. 2016), the Fifth Circuit reversed denial of a motion to intervene of right that was filed *after* the district court denied the defendant's motion to dismiss and three months *after* it filed its answer. *Id.* at 564–65. The Fifth Circuit held that the motion was timely because the proposed intervenor "sought intervention before discovery progressed and because it did not seek to delay or reconsider phases of the litigation that had already concluded." *Id.* at 565–66. The Tribes' motion in this case was filed before this Court resolved the pending motion to dismiss, and indeed before Plaintiffs filed their Second Amended Complaint, and is therefore timely.

2. The Tribes Have an Interest Related to the Litigation.

The Fifth Circuit has explained that the proposed intervenor "must point to an interest that is direct, substantial, [and] legally protectable." *Ross*, 426 F.3d at 757 (internal quotation marks omitted) (brackets in original). "[T]he interest must be 'one which the *substantive law* recognizes as belonging to or being owned by the applicant.'" *Id.* (emphasis in original). Further, "[w]ith respect to a potential intervenor seeking to *defend* an interest being attacked by a plaintiff in a lawsuit, . . . the intervenor is a real party in interest when the suit was intended to have a 'direct impact' on the intervenor." *Id.* at 757 n.46 (emphasis in original). While a would-be intervenor may not claim an interest based only on "ideological, economic, or precedential reasons," "an interest that is concrete, personalized, and legally protectable is sufficient to support intervention." *Texas*, 805 F.3d at 657–58.

The Tribes readily satisfy this standard. The Tribes' "interest" with respect to ICWA and the 2016 regulations is substantial. *See Wal-Mart Stores*, 834 F.3d at 566 (noting, in a challenge to the constitutionality of Texas' alcohol regulatory scheme, that the proposed intervenor-defendants had an interest in "the regulatory system governing package stores"); *Texas*, 805 F.3d at 657 (noting, in a challenge to the legality of the Deferred Access for Parents of Americans or

DAPA immigration program, that the proposed intervenor-defendants "have an 'interest' relating to DAPA"). ICWA provides the Tribes with many "enforceable legal entitlement[s]." *Id.* at 659. A few examples suffice:

- ICWA confirms that the Tribes have the right to exercise exclusive jurisdiction over child custody proceedings involving Indian children resident or domiciled on the reservation (with limited exceptions). 25 U.S.C. § 1911(a).
- ICWA secures for tribes the right to petition a state court to transfer jurisdiction to the tribe's court, *id.* § 1911(b), "in the case of children not domiciled on the reservation" and in such cases "creates concurrent but presumptively tribal jurisdiction." *Holyfield*, 490 U.S. at 36.
- ICWA allows the Tribes to intervene in a state-court voluntary or involuntary foster care placement or termination of parental rights proceeding. 25 U.S.C. § 1911(c). ICWA expressly requires the courts to provide notice to the Tribe of an involuntary foster care placement or termination of parental rights proceeding. *Id.* § 1912(a).
- ICWA provides Tribes with the right to petition a court of competent jurisdiction under § 1914 to invalidate a state court ordered foster care placement or termination of parental rights, regardless of whether the underlying proceeding was voluntary or involuntary, on the grounds that such action violates any provision of §§ 1911, 1912 or 1913. 25 U.S.C. § 1914.

As the Supreme Court explained, in enacting ICWA, "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. The numerous prerogatives accorded the tribes through the ICWA's substantive provisions must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but

also of the tribes themselves." *Holyfield*, 490 U.S. at 49 (citations omitted); *see also* 25 U.S.C. § 1902 (declaring that Congress intended ICWA to further the federal policy "to promote the stability and security of Indian tribes"). Indeed, this "suit was intended to have a 'direct impact'" on the Tribes and their considerable rights codified in ICWA. *Ross*, 426 F.3d at 757 n.46. In short, because the Tribes "are the intended beneficiaries of the challenged federal policy," *Texas*, 805 F.3d at 660, they have "a legally protectable interest" for purposes of intervention, *Wal-Mart Stores*, 834 F.3d at 566.

Finally, the Cherokee Nation has an even more direct interest in the "transaction" that is the subject of the first amended complaint. As Plaintiffs allege, one set of private plaintiffs seeks to adopt A.L.M., who qualifies as an Indian child under ICWA and whose biological father is an enrolled citizen of the Cherokee Nation. FAC ¶ 109. Plaintiffs seek to deny the Cherokee Nation its statutory rights in the proceedings involving A.L.M.

These interests are sufficient under the Fifth Circuit's case law. For example, in *Texas v. United States*, 26 states filed suit to enjoin the United States from implementing the "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA) program. The program permitted certain undocumented individuals to remain in the United States. 805 F.3d at 655–56. Three such individuals who were potential beneficiaries of the policy sought to intervene as defendants. *Id.* The plaintiff states and the United States both opposed intervention, and the district court denied the motion. However, the Fifth Circuit reversed. Finding that the proposed intervenors "are intended beneficiaries of the challenged federal policy," the Circuit found that they had "an interest in receiving deferred action under DAPA." *Id.* at 660. The court also found that they had an interest in employment opportunities resulting from DAPA and in bringing up their U.S.-citizen children in the United States. *Id.* at 660–61; *see also City of Houston v. American Traffic Sols., Inc.*, 668 F.3d 291, 294 (5th Cir. 2012) (permitting of right intervention by petition

organizers of a city charter amendment in litigation challenging the amendment); *League of United Latin American Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 433–35 (5th Cir. 2011) (finding a legally protected interest where the intervenor sought to protect his right to vote for all five city council positions).

In sum, "[t]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Wal-Mart Stores*, 834 F.3d at 566 n.2; *see also* 7C Charles Alan Wright, *et al.*, Federal Practice and Procedure § 1908.2 (3d ed. 2017) (explaining that Rule 24 "allow[s] intervention by those who might be practically disadvantaged by the disposition of the action"). As recognized in ICWA itself, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). This lawsuit is a constitutional challenge to ICWA—a law that is critical to the future of tribes as viable self-governing entities. Accordingly, the Tribes' participation, which would prejudice no parties and not interfere with the efficiency of the litigation, both is appropriate and furthers a just outcome of the case.

3. This Action May Impair or Impede The Tribes' Ability to Protect their Interest.

Tribal citizens live across the United States, including within this District. And, as noted above, the status of an Indian child eligible for citizenship in the Cherokee Nation is directly at issue in this case. A judgment invalidating ICWA, in whole or in part, within the Northern District of Texas would undermine the Tribes' statutory rights with respect to Indian children within the District. Moreover, it appears that the First Amended Complaint seeks a *nationwide* injunction against enforcement of both ICWA and the 2016 regulations. If issued, such an injunction could deny the Tribes' statutory rights everywhere. As a result, if Plaintiffs prevail, this action would deprive the Tribes of the ability to protect their substantial interests provided for and codified in

ICWA and would wholly vitiate their ability to protect their most precious resource—tribal children.

4. The Existing Parties Do Not Adequately Represent the Tribes.

As the Fifth Circuit has explained, the adequate-representation factor is "minimal," as "a potential intervenor need only show that 'representation by the existing parties *may* be inadequate.'" *Ross*, 426 F.3d at 761 (emphasis in original); *see also Texas*, 805 F.3d at 661 ("the Rule is satisfied if the applicant shows that the representation of his interest 'may be' inadequate"). In this case, Defendants, for a variety of reasons, do not adequately represent the Tribes. To begin with, the Tribes are not ordinary parties; they are sovereigns. *See Bay Mills*, 134 S. Ct. at 2030. As sovereigns, the Tribes cannot be relegated to subordinate dependence on the litigation positions of others in a matter that so profoundly impacts their vital interests. *See Huff v. Comm'r,* 743 F.3d 790, 799 (11th Cir. 2014) (recognizing the Virgin Islands' sovereign interest in preserving the integrity of its tax system, and explaining that "[t]his type of sovereign interest is precisely the type of legally protectable interest that has long formed the basis for intervention of right under Rule 24(a)(2)"); *Sierra Club v. City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997) (permitting Texas to intervene because "[t]he state *qua* state has an important sovereign interest"); *see also Arizona v. California*, 460 U.S. 605, 614–15 (1982) (permitting intervention by five Indian Tribes because the United States was not an adequate representative of the "Tribes' interests in the water of the Colorado basin," as the determination of the Tribes water rights was "critical to their welfare"). Indeed, this lack of adequate representation is essentially acknowledged by the Defendants, who consent to the Tribes' intervention as of right.

Moreover, the Tribes have a unique interest different from that of the public at large. The Tribes are among the "intended beneficiaries" of ICWA in its recognition and respect of tribal sovereign authority. *See Texas*, 805 F.3d at 661. Moreover, the Tribes' "interest cannot be

subsumed within the shared interest of the citizens" of the United States. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1169 (8th Cir. 1995); *see also Dimond v. District of Columbia*, 792 F.2d 179, 193–94 (D.C. Cir. 1986) (same). Specifically, the Tribes have a singular interest: a broad and vigorous enforcement and implementation of ICWA in general and the statutory rights accorded to tribes in particular. Defendants, on the other hand, "ha[ve] many interests in this case," *Texas*, 805 F.3d at 662, including "maintaining [the federal government's] working relationship with the States," *id.* at 663, and balancing the role and interests of the federal, state, and tribal governments. Moreover, the United States has an overarching interest with respect to the evolving development of the United States' political and legal approach to the Tenth Amendment, Spending Clause, Equal Protection Clause, Due Process Clause, and the non-delegation doctrine. As the Tenth Circuit has explained:

> the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation. In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor.

WildEarth Guardians v. U.S. Forest Serv., 573 F.3d 992, 996 (10th Cir. 2009); *see also Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 383–84 (10th Cir. 1977) (for a governmental agency to protect both public and private interests is an "impossible" task).[3]

As the United States weighs all of these competing interests and equities, it may take legal positions different from the Tribes' and not fully represent the Tribes' interests under ICWA. That

[3] Further, the Tribes "cannot be assured that [Defendants'] current position will remain static or unaffected by unanticipated policy shifts." *National Parks Conservation Ass'n v. U.S. E.P.A.*, 759 F.3d 969, 977 (8th Cir. 2014) (quotation marks omitted); *see also WildEarth Guardians*, 573 F.3d at 997 ("we have recognized that government policy may shift").

is precisely why the Tribes have to right to intervene so that they can singularly focus on protecting their statutory rights. *See Texas*, 805 F.3d at 661–62.

B. The Tribes Should Be Permitted To Intervene Permissively.

Rule 24(b)(1)(B) governs permissive intervention. It provides: "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." As this Court has explained: "Intervention is appropriate when: (1) timely application is made by the intervenor, (2) the intervenor's claim or defense and the main action have a question of law or fact in common, and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *Hill*, 2015 WL 11117873, at *2 (quotation marks omitted). "Unlike intervention as of right, evaluating Putative Intervenors' request for permissive intervention does not center on whether their interests are adequately represented by the existing parties . . . ." *Franciscan Alliance*, 2017 WL 2964088, at *4. Plaintiffs and Defendants have consented to the Tribes' permissive intervention, and each of the three factors supports the Tribes' intervention in this case.

First, for the reasons explained above, this motion is timely.

Second, the Tribes have defenses common with the main action: the lawfulness of the 2016 federal regulations and the constitutionality of the provisions of ICWA challenged by Plaintiffs. *See Siesta Vill. Market LLC v. Perry*, No. 3:06-CV-0585-D, 2006 WL 1880524, at *1 (N.D. Tex. July 7, 2006).

Third, intervention will neither delay the case nor prejudice the other parties. As noted above, Defendants only recently filed their motion to dismiss; Plaintiffs have not filed a response yet; and the Tribes' responsive pleading will incorporate by reference the Defendants' motion, so intervention will not increase Plaintiffs' burden in responding to the pending motion to dismiss.

IV. PRAYER

For the foregoing reasons, the Court should allow the Tribes to intervene of right pursuant to Rule 24(a)(2) or, alternatively, to intervene permissively pursuant to Rule 24(b)(1)(B).

Dated: March 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded to the following via CM/ECF on this 26th day of March, 2018.

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