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

CHAD EVERET BRACKEEN, JENNIFER KAY BRACKEEN, FRANK NICHOLAS LIBRETTI, HEATHER LYNN LIBRETTI, ALTAGRACIA SOCORRO HERNANDEZ, JASON CLIFFORD and DANIELLE CLIFFORD,	§	
and	§	
TEXAS, LOUISIANA, and INDIANA	§	
Plaintiffs,	§	
v.	§	
UNITED STATES OF AMERICA; 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; ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services; and the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	§	Civil Action No. 4:17-cv-868-O
Defendants,	§	
and	§	
CHEROKEE NATION, et al.,	§	
Intervenor-Defendants.	§	

BRIEF IN SUPPORT OF THE NAVAJO NATION'S MOTION TO INTERVENE AS DEFENDANT FOR THE LIMITED PURPOSE OF SEEKING DISMISSAL PURSUANT TO RULE 19

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

The Navajo Nation (the "Nation"), files this Brief in Support of its Motion to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19, and, in support thereof, respectfully states as follows:

I. Background and Facts

In their pleadings, Plaintiffs, the federal Defendants, and the intervenor tribes (the "Tribes") have discussed the background of the Indian Child Welfare Act ("ICWA"); its implementing regulations, including 81 Fed. Reg. 38 (June 14, 2016) (codified at 25 C.F.R. pt. 23) (the "2016 Final Rule"); and the state child-custody proceedings relevant to the case. The Nation does not repeat that background here, but provides the following additional facts that are relevant to its motion to intervene.

The Nation is a federally recognized Indian tribe. *See* 81 Fed. Reg. 5019, 5022 (Jan. 29, 2016). A.L.M., one of the children in this case, is an enrolled member of the Nation. Certificate of Navajo Indian Blood, Ex. 2. On June 28, 2016, the Navajo Children & Family Services received notice of a pending case in Texas state court regarding A.L.M. Gorman Declaration, Ex. 3. A Texas social worker then contacted the Nation's ICWA social worker about the case on June 30, 2016. *Id*. A social worker from the Cherokee Nation was also contacted regarding the case because A.L.M. was eligible for enrollment in both tribes. Dkt. 57-1 at 5. From the date of its initial contact, the Nation participated in the case, supporting reunification efforts while searching for a relative placement. Gorman Declaration, Ex. 3.

On May 2, 2017, Texas terminated the parental rights of A.L.M.'s parents. Dkt. 35 at ¶ 132. On June 29, 2017, the Nation notified the Texas social worker that it had found a Navajo couple willing to adopt A.L.M and the Nation requested that the State of Texas transition the child into this Navajo adoptive home. Gorman Declaration, Ex. 3. After the Nation notified the

Texas social worker of the home's availability, Texas started the process to approve and transition A.L.M. *Id*.

On July 13, 2017, the Navajo placement family was notified that they could start visiting and communicating with A.L.M. *Id*. The Navajo placement family responded on the same day that they were eager to visit with A.L.M. to relieve his anxiety. *Id*. On July 31, 2017, the Navajo placement family visited A.L.M. in El Paso, Texas. *Id*. The Navajo placement family stated that the visit went very well, and they were excited about the adoption moving forward. *Id*.

It was only after the Nation secured this Navajo adoptive placement for A.L.M., and after the state family court was notified, that the foster parents for A.L.M. filed their petition to adopt A.L.M. on July 19, 2017. Dkt. 35 at ¶ 134. On August 1, 2017, the state family court held a hearing regarding the foster parents' petition for adoption of A.L.M. *Id*. at ¶ 137. At the hearing, the Nation notified the state family court that Navajo and Cherokee social workers had reached an agreement that the Nation would be designated as A.L.M.'s tribe. *Id*. at ¶ 138. On August 22, 2017, the state family court issued its decision, finding that the foster parents did not show good cause to depart from ICWA's preferences. *Id*. at ¶ 143. The court also held that the Nation was the controlling tribe. Order Denying Request for Adoption for Child (redacted) at ¶ 6, *In re A.L.M., a Child*, No. 323-105593-17 (323d Dist. Ct., Tarrant Cty., Texas Aug. 22, 2017), Ex. 4.

On August 25, 2017, the Inter-State Compact for Placement of Children request was approved by the State of New Mexico, approving the Navajo adoptive placement and stating that A.L.M. could be moved into the Navajo adoptive home. Gorman Declaration, Ex. 3. The State of New Mexico was already visiting the Navajo adoptive placement family and was willing to

set up services as needed. *Id.* The State of New Mexico had also set up a baby shower for the Navajo adoptive placement family in anticipation of A.L.M.'s arrival. *Id.* All of these plans were placed on hold, however, when the foster parents were granted an emergency stay on September 8, 2017, preventing any change of placement pending the outcome of the foster parents' appeal to the Second District Court of Appeals of Texas. *Id.*

When the Navajo adoptive placement family was informed that the appeals process could take years to complete, the Navajo adoptive placement family felt that this delay was too much, as it would make A.L.M.'s transition that much harder. *Id.* As a result, the Navajo adoptive placement family withdrew from consideration. *Id.*

The Brackeen Plaintiffs ultimately adopted A.L.M. in the Texas state court proceedings, which became final on January 8, 2018. *See* Dkt. 35 at ¶ 152. The Brackeen Plaintiffs and other Plaintiffs allege that application of ICWA's provisions and the 2016 Final Rule exposed them to undue burdens and suffering and that their adoption of A.L.M. exposes them to potential collateral attack. *See, e.g., id.* at ¶ 259.

II. Legal standard

The Federal Rules of Civil Procedure contemplate two types of intervention. This Motion involves intervention of right under Rule 24(a). Fed. R. Civ. P. 24(a). Under Rule 24(a), the Court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

The Fifth Circuit considers four factors when deciding whether a party may intervene of right: (1) whether the motion to intervene is timely; (2) whether the movant "claims an interest

relating to the property or transaction that is the subject of the action;" (3) whether disposition "of the action may as a practical matter impair or impede the movant's ability to protect its interest;" and (4) whether existing parties do not adequately represent the interest claimed by the movant. Fed. R. Civ. P. 24(a)(2); *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).

This inquiry "is a flexible one, which focuses on the particular facts and circumstances surrounding each application," and "intervention of right must be measured by a practical rather than technical yardstick." *Entergy Gulf States La., L.L.C. v. U.S. E.P.A.*, 817 F.3d 198, 203 (5th Cir. 2016). The rule is liberally construed, and any doubts are resolved in favor of the proposed intervenor. *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009). Generally speaking, "[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 422 (5th Cir. 2002) (citation omitted).

III. Argument and Authorities

The Nation respectfully asks the Court to grant its Motion to Intervene because the Nation satisfies the four requirements of Rule 24(a)(2).

A. The Nation's Motion to Intervene Has Been Timely Filed.

The timeliness of a motion to intervene is evaluated by:

> "(1) the length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it sought to intervene; (2) the prejudice that existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) whether unusual circumstances militate for or against a determination that the application is timely."

Heaton, 297 F.3d at 422–23; *see also Ross v. Marshall*, 426 F.3d 745, 754 (5th Cir. 2005). The timeliness of a particular motion is based on "all the circumstances." *Buckland v. Ohio Nat'l Life Assurance Corp.*, 2015 WL 13188295, No. 4:15-cv-400-0, at *2 (N.D. Tex. Oct.

7, 2015) (O'Connor, J.) (citation omitted). The timeliness inquiry is not meant to be a tool "to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to appear sooner." *Id*. (internal quotations omitted)(citations omitted).

The Nation has filed this motion to intervene early enough that the original parties will not be prejudiced by the Nation's intervention. This case remains in its early stages. The complaint in this case was filed in October 2017. An Amended Complaint was filed on December 15, 2017, Dkt. 22, and the Second Amended Complaint was filed on March 22, 2018. Dkt. 35. The federal Defendants and the Tribes filed a Motion to Dismiss the Second Amended Complaint earlier this month, on April 5, 2018. Dkts. 56, 57, and 58.

The parties are currently in the process of filing and responding to pre-trial motions and will not be prejudiced by the Nation's intervention. The period between the filing of the Second Amended Complaint and the filing of this Motion to Intervene is a reasonable amount of time, considering the time that was needed for the Nation to evaluate its interest in the action and prepare its Motion to Intervene and proposed Motion to Dismiss.

On March 26, 2018, the Cherokee, Oneida, and Quinault Nations and the Morongo Band of Mission Indians (collectively, the "Tribes") filed a Motion to Intervene. Dkt. 41. The Court granted that motion on March 28, 2018. Dkt. 45. Plaintiffs and federal Defendants consented to permissive intervention, and federal Defendants consented to intervention as a matter of right. Dkt. 41 at 2. Considering the lack of objection to the timeliness of the Tribes' Motion to Intervene four weeks ago, and because there has not been a material change in circumstances since that motion's filing, the Nation's Motion to Intervene will not prejudice the original parties. Therefore, the Nation's Motion to Intervene should be deemed timely.

B. The Nation's Important Interests in This Case Are the Welfare of Its Children and the Stability of the Tribe.

To demonstrate a significant protectable interest under Rule 24(a)(2), 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). This "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).

The Fifth Circuit has held that individuals who "are the intended beneficiaries of the challenged federal policy" have an interest in the challenged legislation. *Texas*, 805 F.3d at 660. Although 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." *Id.* at 657–58.

ICWA and the 2016 Final Rule protect not only the interests of individual Indian children and families, but also the interest of the tribes themselves. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989). Under the plain language of ICWA, one of its principal purposes is to protect the stability of Indian tribes. *See* 25 U.S.C. § 1901(3) ("there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"); *id.* at § 1902 (declaring the policy of promoting stability and security of Indian tribes through the establishment of minimum federal standards for the removal of Indian children from their families); *see also* H.R. Rep. No. 95-1386, Section 103, at *7546 (ICWA seeks to protect the rights of the Indian community and tribe in retaining its children in its society).

ICWA also provides procedural and substantive standards that protect the legal interests of tribes. For example, ICWA requires state courts to provide notice to the applicable Indian tribe when an Indian child is involved, 25 U.S.C. § 1912; provides that there is tribal court jurisdiction when a child is domiciled on the tribe's reservation, *id.* at § 1911; ensures that tribes have a right to intervene in state court proceedings involving an Indian child, *id.*; and authorizes tribes to challenge child custody orders for violation of ICWA, *id.* at § 1914.

Furthermore, ICWA provides important adoptive placement preferences that necessitate engagement with tribes to identify prospective homes that are eligible for placement. *Id.* at § 1915(a). Through ICWA, Congress recognized the strong interest of tribes in the placement of their Indian children. Accordingly, the Nation, as an intended beneficiary of ICWA and the 2016 Final Rule, has an interest in this case.

The Nation also has an interest in this case because A.L.M. is an enrolled member of the Nation. Gorman Declaration, Ex. 3. As a member, A.L.M. has an established relationship with the Nation, and the Nation, in return, has an interest in his health, safety, and well-being. The actions of the Brackeens in A.L.M.'s case have interfered with his ability to be placed with a Navajo family and potentially deprived him of a connection to his Navajo culture and tribe. Their actions have also deprived the Nation of having one of its children placed with its members.

The Nation's interest in A.L.M., as contemplated by the ICWA, is directly related to the claims in this case. Plaintiffs are seeking to prohibit the application of ICWA and its regulations to A.L.M. and to Navajo children in state custody by declaring certain provisions of ICWA and its regulations unconstitutional. *See* Dkt. 35 at ¶¶ 226–338 and ¶¶ 350–76. Without these provisions, the Nation would lose its ability to participate in state placement proceedings of its

enrolled members, such as A.L.M., thereby directly affecting the Nation's interests in A.L.M. and all Navajo children. *See* 25 U.S.C. § 1911(c). As a result, the Nation may intervene of right, because Rule 24 "allow[s] intervention by those who might be practically disadvantaged by the disposition of the action." 7C Wright & Miller, Fed. Prac. & Proc. Civ. § 1908.2 (3d ed. 2007).

Finally, Plaintiffs and the federal Defendants have consented to the intervention of the other Tribes, at least in part, and the Court has granted the Tribes' Motion. The Tribes possess similar, but not identical, interests to the Nation. The Nation has an enrolled tribal member whose adoption placement is the subject of the Plaintiffs' claims in this case. As such, the Nation has important direct interests at issue here that warrant intervention as a matter of right.

C. The Nation's Interest in Its Children Would Be Harmed If the Court Rules in Favor of the Plaintiffs.

Under the third factor of Rule 24(a)(2), a movant must "'show that disposition of the action may impair or impede the applicant's ability to protect [its] interest' in the subject matter of the litigation." *X-Drill Holdings, Inc. v. Jack-Up Drilling Rig SE 83*, 320 F.R.D. 444, 449 (S.D. Tex. 2017) (citing *Heaton*, 297 F.3d at 422). This showing does not necessarily require the movant to prove that it would be bound by the disposition of the action. *Id.* (citing *Edwards v. City of Houston*, 78 F. 3d 983, 1004 (5th Cir. 1996)). It is sufficient if the "*stare decisis* effect of an adverse judgment constitutes a sufficient impairment to compel intervention." *Id*. (citing *Sierra Club v. Glickman*, 82 F.3d 106, 109–10 (5th Cir. 1996)). Intervention is necessary here because of the tremendous ramifications that the outcome of this case could pose for the Nation.

If Plaintiffs were to prevail in this case, the Nation would be prohibited from enforcing many of the provisions of ICWA for A.L.M. and numerous other Navajo children, including the provision allowing the Nation to participate in state court proceedings. *See* 25 U.S.C. § 1911(c). The Nation has a vital interest in seeing that A.L.M., and all of its children, remain connected to

the Navajo community and become fully-participating and culturally and linguistically-astute tribal citizens. By intervening in state court proceedings to ensure that state child custody determinations are based on standards that aim to place a child with a Navajo family, the Nation allows its children the opportunity to maintain a connection to their people. H.R. Rep. No. 95-1386, Section 103, at *7546 (1978) (noting the rationale for establishing standards for placement of Indian children in Indian foster or adoptive homes).

Finally, a decision holding the provisions of ICWA unconstitutional would have a lasting effect on the Nation's ability to ensure the inclusion of its children in Navajo society as their fate would be dictated solely by state-court proceedings. Such a drastic decision could also have lasting effects on other federal laws[1] aimed at providing benefits to the Nation if it is found that ICWA's placement preferences are impermissibly based on race, and not political status, as suggested the by Plaintiffs. *See* Dkt. 35 at ¶ 331. Practically, the Nation can only prevent these harms to its interests by successfully intervening here.

D. None of the Existing Parties Adequately Represent the Nation's Interests.

The fourth factor of Rule 24(a)(2) requires the potential intervenor to carry the burden of demonstrating inadequate representation, but that burden is minimal. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). The potential intervenor need only show that "representation by the existing parties may be inadequate." *Ross*, 426 F.3d at 761; *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.").

[1] *See, e.g.*, 25 U.S.C. § 2201 (2)(B) (Indian Land Consolidation Act) (defining Indian to mean "any person who is a member of any Indian tribe, [or] is eligible to become a member of any Indian tribe"); 25 U.S.C. § 5129 (Protection of Indians and Conservation of Resources) (defining Indian to "include all persons of Indian descent who are members of any recognized Indian tribe"); 25 U.S.C. § 5304 (Indian Reorganization Act) (defining Indian as "a person who is a member of an Indian tribe").

The Fifth Circuit imposes two presumptions of adequate representation: "when 'the would-be intervenor has the same ultimate objective as a party to the lawsuit' [and] 'when the putative representative is a governmental body or officer charged by law with representing the interests of the [intervenor].'" *Texas*, 805 F.3d at 661 (quoting *Edwards*, 78 F.3d at 1005). When the intervenor's interest is narrower than the government's interest, the Fifth Circuit has held that the minimal burden on the movants to satisfy this requirement is met. *Sierra Club v. Espy*, 18 F.3d 1202, 1207–08 (5th Cir. 1994) (finding the government's representation of the broad public interest, and not just the economic concerns of the timber industry, were enough to show the government's representation of the intervenors' interest is inadequate).

The Nation has specific interests in this suit that are narrower than, and unique from, the interests of the existing parties. Although the federal Defendants and the Tribes have a general interest in obtaining dismissal of this case and the preservation of ICWA and its regulations, the Nation has a narrower interest in the welfare of A.L.M. and its other member children. That interest cannot be protected or defended by any of the existing parties, as it is the unique sovereign interest of the Nation.

Under ICWA, the Indian child's tribe is "the Indian tribe in which an Indian child is a member or eligible for membership." 25 U.S.C. § 1903(5). Because the Nation and the Cherokee Nation agreed that the Nation was the lead tribe in the state child custody proceedings, Dkt. 1 at ¶ 104, the Nation is A.L.M.'s tribe for purposes of ICWA. *See id.*; 25 C.F.R. § 23.109(b), (c) (for a child eligible for membership in multiple tribes, the state court shall defer to the tribe that the child is a member of or that is the lead tribe as decided by the tribes). As A.L.M.'s Indian tribe, the Nation is uniquely able to access the protections of ICWA to preserve its relationship with A.L.M. due to its standing to intervene in the state court child custody

proceedings, 25 U.S.C. § 1911(c), and its members' preference in placement, 25 U.S.C. § 1915(b). Through these provisions, the Nation is able to maintain a connection with the child and participate in the placement decision-making process. The Nation participated in A.L.M.'s state court proceedings, including by locating and defending its Navajo adoptive placement family. Although other tribes may have a general interest in protecting ICWA, the Nation has the specific interest in protecting its relationship with A.L.M. and other member children through the defense of ICWA and its regulations. Accordingly, unlike other tribes, the Nation could be directly harmed by the outcome of this case.

The Nation also has competing interests with the federal Defendants, potentially causing the federal Defendants to take legal positions different from the Nation. For the same reason the Fifth Circuit identified in *Texas*, the federal Defendants have a competing interest in maintaining the federal government's working relationship with the States. *Texas*, 803 F.3d at 663. This interest may affect the federal Defendants' approach to this case. An example of this has already occurred in this case. In their Motion to Dismiss, the federal Defendants failed to raise any arguments that tribal membership—and, therefore, Indian status under ICWA—is a political, not a racial, classification. Although the federal Defendants made this argument in their Motion to Dismiss in another recent case challenging the constitutionality of ICWA, they have not done so in this case. *Cf.* Federal Defendants' Motion to Dismiss and Memorandum of Points and Authorities, *A.D. by Carter v. Washburn*, No. CV-15-01259-PHX-NVW, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017) (Dkt. 42 at 20–26).

The Nation has an interest separate and apart from the United States in making sure its enrollment requirements are not deemed unconstitutional by the federal courts. That the federal Defendants failed to make this argument in their Motion to Dismiss in this case illustrates that

the federal Defendants might not make all the arguments the Nation will make to protect the Nation's rights under ICWA in this case. Additionally, as the Tribes note, the Nation cannot be assured that federal Defendants' current position will remain unaffected by unanticipated policy shifts within the Department of Interior or the Department of Health and Human Services. *See* Dkt. 42 at 10 n.3.

Finally, the federal Defendants consented to intervention as a matter of right for the Tribes. By doing so, the federal Defendants recognized that they do not adequately represent the Tribes in this case. If the federal Defendants do not adequately represent the intervenor Tribes, who do not have an enrolled member involved in the case, then federal Defendants certainly cannot adequately represent the interests of the Nation here, where the Nation does have an enrolled member as the subject of this case.

IV. CONCLUSION

Pursuant to Rule 24(a)(2), the Nation has a right to intervene in this suit. Accordingly, the Nation respectfully requests that the Court grant mandatory intervention.

Dated: April 26, 2018

Respectfully submitted,

By: */s/ Maria Wyckoff Boyce*

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, I electronically filed the foregoing motion with the Clerk of the court for the U.S. District Court, Northern District of Texas. Notice of this filing will be sent electronically to counsel of record using the Court's electronic notification system.

/s/ Maria Wyckoff Boyce
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