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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 A.D., C.C., L.G., and C.R., by Carol
10 Coghlan Carter, and Dr. Ronald Federici,
11 their next friends; S.H. and J.H., a married
12 couple; M.C. and K.C., a married couple;
13 K.R. and P.R., a married couple; for
14 themselves and on behalf of a class of
15 similarly-situated individuals,

16 **Plaintiffs,**

17 v.

18 Kevin Washburn, in his official capacity as
19 Assistant Secretary of Indian Affairs,
20 Bureau of Indian Affairs; Sally Jewell, in
21 her official capacity as Secretary of the
22 Interior, U. S. Department of the Interior;
23 Gregory A. McKay, in his official capacity
24 as Director of Arizona Department of Child
25 Safety,

26 **Defendants.**

No. CV-15-01259-PHX-NVW

ORDER

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Before the Court are the Motion of the Gila River Indian Community to Intervene as Defendant (Doc. 47) and the Amended Motion to Intervene by the Navajo Nation (Doc. 198). Defendants Kevin Washburn and Sally Jewell (“Federal Defendants”) consent to the motions, Defendant Gregory McKay (“State Defendant”) takes no position, and Plaintiffs oppose the motions. Oral argument was heard on September 28, 2016.

1 **I. BACKGROUND**

2 Plaintiffs filed this action on behalf of themselves and all off-reservation Arizona-
3 resident children with Indian ancestry and all off-reservation Arizona-resident foster,
4 preadoptive, and prospective adoptive parents in child custody proceedings involving
5 children with Indian ancestry. Plaintiffs seek a declaration that provisions of the Indian
6 Child Welfare Act (“ICWA”), specifically 25 U.S.C. §§ 1911(b), 1912(d), 1912(e),
7 1912(f), 1915(a), 1915(b), and the 2015 Guidelines issued by the Bureau of Indian
8 Affairs, §§ A.2, A.3, B.1, B.2, B.4, B.8, C.1, C.2, C.3, D.2, D.3, F.1, F.2, F.3, F.4, violate
9 the United States Constitution, federal civil rights statutes, and Title VI of the Civil
10 Rights Act. They seek to enjoin the Federal Defendants from enforcing these provisions
11 and the State Defendant from complying with and enforcing these provisions. In
12 addition, Plaintiffs allege that ICWA exceeds the federal government’s power under the
13 Indian Commerce Clause and the Tenth Amendment, but do not expressly seek a
14 declaration that all of the provisions of ICWA are unconstitutional.

15 Plaintiff C.C. is an enrolled member of the Navajo Nation. Parental rights of
16 C.C.’s birth parents were terminated, and adoption of C.C. by Plaintiffs M.C. and K.C.
17 was finalized by the state court in November 2015.

18 Plaintiff A.D. is an enrolled member of the Indian Community. Plaintiff C.R. is
19 eligible for membership in and is a child of a member of, or is already an enrolled
20 member of, the Indian Community. Plaintiff L.G. is C.R.’s half-sibling and is not eligible
21 for membership in the Pascua Yaqui Tribe of Arizona. Parental rights of A.D.’s, C.R.’s,
22 and L.G.’s birth parents have been terminated by the state court, which is treating C.R.’s
23 and L.G.’s cases as one.

24 The Gila River Indian Community (“Indian Community”) and the Navajo Nation
25 are both federally recognized tribes and seek to intervene as of right as defendants in this
26 case and, in the alternative, to intervene permissively.

1 **II. INTERVENTION OF RIGHT**

2 **A. Legal Standard**

3 On timely motion, the court must permit anyone to intervene who “claims an
4 interest relating to the property or transaction that is the subject of the action, and is so
5 situated that disposing of the action may as a practical matter impair or impede the
6 movant’s ability to protect its interest, unless existing parties adequately represent that
7 interest.” Fed. R. Civ. P. 24(a)(2). “Courts are guided primarily by practical and
8 equitable considerations.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003).

9 “[A]n applicant for intervention as of right must demonstrate that: (1) the
10 intervention application is timely; (2) the applicant has a significant protectable interest
11 relating to the property or transaction that is the subject of the action; (3) the disposition
12 of the action may, as a practical matter, impair or impede the applicant’s ability to protect
13 its interest; and (4) the existing parties may not adequately represent the applicant’s
14 interest.” *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) (citations omitted). The
15 requirements are broadly interpreted in favor of intervention. *Citizens for Balanced Use*
16 *v. Montana Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011). However, “[f]ailure to
17 satisfy any one of the requirements is fatal to the application.” *Perry v. Proposition 8*
18 *Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

19 Timeliness. Three factors are considered to determine whether an intervention
20 motion is timely: (1) the stage of the proceeding when the motion is filed; (2) the
21 prejudice to other parties; and (3) the reason for and length of the delay. *League of*
22 *United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997).

23 Interest. To demonstrate a related significant protectable interest, the applicant
24 must show an interest that is protectable under some law and there is a relationship
25 between the legally protected interest and the claims at issue. *Arakaki*, 324 F.3d at 1084.
26 The “relationship” requirement generally is satisfied only if the resolution of the
27 plaintiff’s claims actually will affect the applicant. *Id.* The applicant may not inject
28 unrelated issues into the pending litigation. *Id.* The applicant need not establish a

1 specific legal or equitable interest, but an economic stake in the outcome of the litigation
2 is not sufficient. *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993).

3 Potential impairment of interest. “The question of whether protectable interests
4 will be impaired by litigation must be put in practical terms rather than in legal terms.”
5 *Akina v. Hawaii*, __ F.3d __, 2016 WL 450186, *5 (9th Cir. Aug. 29, 2016) (citation
6 omitted). Where the applicant remains free to bring a separate action or pursue
7 alternative means of achieving its ultimate objective, the disposition of the action may not
8 impair or impede the applicant’s ability to protect its interest. *See id.* “Speculative
9 possibility” of future impairment of an interest does not outweigh the interjection of
10 unnecessary and distracting considerations by an intervenor. *United States v.*
11 *Washington*, 593 F.3d 790, 801 (9th Cir. 2010) (treaty tribes were not entitled to
12 intervene in recognition proceedings even though a newly recognized tribe might assert
13 treaty rights in the future). However, a court must consider whether factual and legal
14 determinations made in the current proceeding, when upheld by an appellate ruling, may
15 impair the applicant’s interest by a *stare decisis* effect in any parallel or subsequent
16 litigation. *United States v. State of Or.*, 839 F.2d 635, 638 (9th Cir. 1988).

17 Adequacy of representation. “The burden on proposed intervenors in showing
18 inadequate representation is minimal, and would be satisfied if they could demonstrate
19 that representation of their interests ‘may be’ inadequate.” *Arakaki*, 324 F.3d at 1086.
20 Three factors are considered in determining adequacy of representation by the existing
21 parties: “(1) whether the interest of a present party is such that it will undoubtedly make
22 all of a proposed intervenor’s arguments; (2) whether the present party is capable and
23 willing to make such arguments; and (3) whether a proposed intervenor would offer any
24 necessary elements to the proceeding that other parties would neglect.” *Id.* The most
25 important factor is how the interest of the prospective intervenor’s interest compares with
26 the interests of existing parties. *Id.* If the prospective intervenor’s interest is identical to
27 that of an existing party, a compelling showing is required to demonstrate that
28 representation is inadequate. *Id.* “When an applicant for intervention and an existing

1 party have the same ultimate objective, a presumption of adequacy of representation
2 arises.” *Id.*

3 “There is also an assumption of adequacy when the government is acting on behalf
4 of a constituency that it represents.” *Id.* “In the absence of a very compelling showing to
5 the contrary, it will be presumed that a state adequately represents its citizens when the
6 applicant shares the same interest.” *Id.*; see *League of United Latin Am. Citizens*, 131
7 F.3d at 1305-06 (governor and state attorney general’s vigorous defense of challenged
8 initiative both in court and in the political arena demonstrated they were ready, willing,
9 and able to protect prospective intervenor’s asserted interest in upholding the initiative).

10 To make a compelling showing that the government will not provide adequate
11 representation in defending its statute, a prospective intervenor must demonstrate more
12 than that it is a beneficiary protected by the statute, *Stuart v. Huff*, 706 F.3d 345, 353 (4th
13 Cir. 2013), or that it has greater firsthand knowledge of the impact of legislation on
14 private individuals than does the government, *Prete*, 438 F.3d at 958 n.13. But a
15 prospective intervenor may make a compelling showing by demonstrating that its
16 interests are narrower than, and not subsumed in, that of the government. *Californians*
17 *For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th
18 Cir. 1998) (union members’ interests were potentially “more narrow and parochial” than
19 the interests of the public at large); *Mille Lacs Band of Chippewa Indians v. State of*
20 *Minn.*, 989 F.2d 994, 1001 (8th Cir. 1993) (counties’ and landowners’ interests in land
21 value were “narrower and more parochial” than the state’s interest in protecting fish and
22 game).

23 Where a tribe requested that the government place certain lands in trust for its
24 benefit, and the government had an obligation to represent the tribe’s interests, a “merely
25 theoretical risk of conflicting duties” did not demonstrate that the government was unable
26 to adequately protect the tribe’s interests in the litigation. *South Dakota ex rel. Barnett v.*
27 *U.S. Dep’t of Interior*, 317 F.3d 783, 786 (8th Cir. 2003). To establish inadequacy of
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1 representation, the tribe needed to identify specific tribal interests that could only be
2 protected by the tribe’s intervention. *Id.*

3 In determining whether the government will adequately defend a statute, the
4 government’s willingness to suggest a limiting construction that is narrower than that of
5 an intervention applicant may be considered. *California ex rel. Lockyer v. United States*,
6 450 F.3d 436, 444 (9th Cir. 2006). To overcome the presumption of adequacy of
7 representation, the applicant must demonstrate the likelihood—more than mere
8 theoretical possibility—that the government will abandon or concede a potentially
9 meritorious interpretation of the statute. *Id.* at 444-45 (the presumption of adequacy of
10 representation was rebutted by direct evidence the government would take a position that
11 actually compromised protection of the proposed intervenors’ interest); *Freedom from*
12 *Religion Foundation, Inc. v. Geithner*, 644 F.3d 836, 842 (9th Cir. 2011) (presumption
13 was not rebutted where prospective intervenor had presented no evidence the government
14 actually had urged a narrow interpretation and it was unclear whether a narrow
15 interpretation responsive to the constitutional challenge existed).

16 **B. Analysis**

17 Timeliness. Both motions to intervene were filed at an early stage of this case;
18 motions to dismiss the amended complaint by the Federal Defendants and the State
19 Defendant have not yet been decided. The timing of intervention will not cause prejudice
20 to other parties.

21 Significant and protectable interest and potential impairment of the interest. The
22 Indian Community and the Navajo Nation have significant protectable interests in the
23 welfare of their members who are named as plaintiffs in this case and in laws that protect
24 their relationship with all of their minor citizens. If Plaintiffs prevail, the Indian
25 Community and the Navajo Nation would be unable to enforce the challenged provisions
26 of ICWA. State court child custody proceedings would be significantly affected by
27 invalidation of ICWA provisions that protect the Indian Community’s and the Navajo
28 Nation’s interest in maintaining their relationship with their minor citizens, such as the

1 requirement that active efforts be made to provide remedial services and rehabilitative
2 programs to prevent the breakup of the Indian family before foster care placement or
3 termination of parental rights; the burden of proof required for determining that the
4 continued custody of a child by the parent or Indian custodian is likely to result in serious
5 emotional or physical damage to the child; and preferences that favor placement with a
6 member of the Indian child's tribe or foster home approved by the tribe.

7 In addition, the Indian Community and the Navajo Nation have a legal interest in
8 defining their membership requirements. But there is no such issue in this suit. As
9 conceded at oral argument, none of the 22 recognized Indian tribes in Arizona has a
10 membership requirement of less than one-quarter Indian blood. That is valid under any
11 view of implicit federal law limits on tribal membership criteria for ICWA or otherwise.
12 Plaintiffs challenge as racially discriminatory specific provisions of ICWA regardless of
13 the affected children's quantum of Indian blood.

14 Adequacy of representation by existing parties. A presumption of adequacy of
15 representation arises because the Indian Community and the Navajo Nation share with
16 the governmental defendants the same ultimate objective, *i.e.*, to uphold ICWA against
17 Plaintiffs' constitutional challenge, and because the governmental defendants are acting
18 on behalf of a constituency that they represent. Although the Indian Community and the
19 Navajo Nation have made arguments that the governmental defendants have not made, no
20 one disputes that the governmental defendants are capable and willing to make those
21 arguments. No one contends that the governmental defendants are likely to suggest a
22 limiting construction of ICWA or to concede a potentially meritorious interpretation of
23 ICWA. No one contends that the governmental defendants have conflicting obligations.
24 Although the Indian Community and the Navajo Nation each have a particular interest in
25 maintaining its relationship with its individual members who are named as plaintiffs,
26 their interest in protecting the tribal-child relationship for every Indian child is shared by
27 the governmental defendants. The fact that the Indian Community and the Navajo Nation
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1 have information regarding specific children and tribal laws does not rebut the
2 presumption that the governmental defendants adequately represent their interests.

3 Therefore, the Indian Community and the Navajo Nation are not entitled to
4 intervention of right under Federal Rule of Civil Procedure 24(a)(2).

5 **III. PERMISSIVE INTERVENTION**

6 **A. Legal Standard**

7 On timely motion, the court may permit anyone to intervene who “has a claim or
8 defense that shares with the main action a common question of law or fact.” Fed. R. Civ.
9 P. 24(b)(1)(B). To obtain permissive intervention, an applicant must show: (1)
10 independent grounds for jurisdiction, (2) the motion is timely, and (3) the applicant’s
11 claim or defense and the main action have a question of law or fact in common. *League*
12 *of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). “In
13 exercising its discretion, the court must consider whether the intervention will unduly
14 delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P.
15 24(b)(3).

16 **B. Analysis**

17 Jurisdiction. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331
18 and 1346 of this action against federal defendants, challenging a federal statute as
19 violative of the United States Constitution, federal civil rights statutes, and Title VI of the
20 Civil Rights Act. The Indian Community and the Navajo Nation seek to intervene only
21 as defendants, not to assert additional claims.

22 Timeliness. The motions to intervene are timely.

23 Common question of law or fact. The Indian Community and the Navajo Nation
24 have questions of law and fact in common with the main action. They seek to defend the
25 constitutionality of the challenged provisions of ICWA, particularly against Plaintiffs’
26 allegations that these provisions create unequal treatment based solely on the race of the
27 child and the adults involved. Indeed, the adequacy of the existing parties’ representation
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1 of the Indian Community and the Nation's interests, which the Court has already found,
2 could not even arise if there were not common questions of fact and law.

3 Undue delay or prejudice to the adjudication of the original parties' rights. The
4 Court finds that permitting intervention by the Indian Community and the Navajo Nation
5 will not cause any undue delay or prejudice to the adjudication of the existing parties'
6 rights. During oral argument, counsel for the prospective intervenors stated they did not
7 anticipate making discovery requests and they would abide by any limitations on
8 discovery that the Court may impose to mitigate possible burden on the existing parties.
9 Counsel further stated that Intervenors-Applicant want to participate in this case as
10 parties only for as long as their children members continue as named Plaintiffs. Further,
11 if the Indian Community and the Navajo Nation are permitted to intervene, other tribes
12 likely will not be allowed to intervene in the future because other tribes will be doubly
13 adequately represented by the governmental defendants and by these two intervenor
14 tribes. *See Arakaki*, 324 F.3d at 1087 (intervention by native Hawaiians denied where a
15 group of native Hawaiians already had successfully intervened as party).

16 Therefore, the Court will exercise its discretion to grant permissive intervention to
17 the Indian Community and the Navajo Nation under Federal Rule of Civil Procedure
18 24(b)(1)(B). If the Indian Community's or the Navajo Nation's participation as
19 intervenors should evidence the kinds of problems that weigh against permissive
20 intervention, such as expansion of issues or unwarranted burdens on existing parties, the
21 Court may reconsider this order in the future.

22 IT IS THEREFORE ORDERED that the Motion of the Gila River Indian
23 Community to Intervene as Defendant (Doc. 47) and the Amended Motion to Intervene
24 by the Navajo Nation (Doc. 198) are denied with respect to intervention of right and
25 granted for permissive intervention.

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