Exhibit A

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.	§	

THE NAVAJO NATION'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Pursuant to Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure, Intervenor-Defendant Navajo Nation, by and through the undersigned attorneys, submits this Motion to Dismiss Plaintiffs' Second Amended Complaint. The grounds for this Motion are set forth in the accompanying Brief in Support.

For the reasons stated herein in its Brief in Support, the Navajo Nation respectfully requests that the Court grant its Motion to Dismiss Plaintiffs' Second Amended Complaint.

Dated: April 26, 2018

Respectfully submitted,

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Counsel for the Navajo Nation

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
Maria Wyckoff Boyce

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TEXAS, LOUISIANA, and INDIANA	§	
Plaintiffs,	§	
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BRIEF IN SUPPORT OF DEFENDANT NAVAJO NATION'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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I. INTRODUCTION

Congress has recognized the unique interest of federally-recognized tribes with regard to the placement of their children in child-custody proceedings in state court through the enactment of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901 *et seq*. The primary objective of ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." *Id.* at § 1902. The Department of the Interior recently promulgated regulations to further elaborate on the implementation of ICWA in state courts and by state agencies. 81 Fed. Reg. 38, 778 (June 14, 2016) (the "2016 Final Rule") (codified at 25 C.F.R. pt. 23).

Plaintiffs seek a sweeping declaration that ICWA and the 2016 Final Rule are unconstitutional, with no consideration of the unique, legally-protected interests of sovereign Indian nations under ICWA's regime. Intervenor-Defendant Navajo Nation (the "Nation") is a federally-recognized tribe that possesses inherent sovereign authority and the right to self-governance on behalf of its tribal members, and as such, enjoys certain legal rights under ICWA regarding the placement of Navajo children. *See e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959). Not only does this case involve a proceeding in a Texas family court and the placement of an Indian child who is an enrolled member of the Nation, but the case's outcome could also impact interests on a national scale and affect many other Navajo children across the country who are currently subject to ICWA's provisions. Second Amended Complaint, Dkt. 35, ¶¶ 1–3, 8, 12, 19. Given the breadth of Plaintiffs' claims, any ruling in this matter directly implicates the Nation's distinct legal interests as a sovereign Indian nation.

The Nation has an indisputable, legally-protected interest in the fate of ICWA and the 2016 Final Rule and their application in cases involving Navajo children. Congress expressly

recognized this legal standing of Indian tribes through its clear recognition under ICWA that Indian children must have an indelible connection with tribal nations, indeed as a core aspect of tribal sovereignty. *Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 52–53 (1989) (noting the adverse impact of the removal of Indian children from tribes on the future livelihood and longevity of tribal nations). It also is well-established that the Nation is a sovereign entity that enjoys sovereign immunity from suit except where the Nation expressly waives that immunity. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014).

In light of the Nation's well-established interest regarding the application of ICWA in child-custody proceedings involving Navajo children, plus its sovereign immunity from suit without its consent, the Nation moves the Court to dismiss this case under Fed. R. Civ. P. 12(b)(7) for failure to join a required party under Fed. R. Civ. P. 19. As discussed below, under Rule 19, the Nation is a required party who cannot be joined due to its sovereign immunity, and the matter "in equity and good conscience" should not move forward in its absence.

II. FACTS

For purposes of this Motion only, the facts are those alleged in Plaintiffs' Second Amended Complaint. Additionally, since the filing of Plaintiffs' Second Amended Complaint, minor child A.L.M. has been enrolled as a member of the Navajo Nation. *See* Certificate of Navajo Indian Blood, Exhibit 1 to the Navajo Nation's Motion to Intervene (redacted).[1]

[1] In ruling on a Rule 12(b)(7) motion, a court may consider evidence outside the complaint. *Estes v. Shell Oil, Co.*, 234 F.2d 847, 849 (5th Cir. 1956); *Old Am. Cnty. Mut. Fire Ins. Co. v. Shook*, No. 3:12-cv-569-N, 2012 WL 13027060 at *3 (N.D. Tex. Dec. 19, 2012) (citing *Estes*, 234 F.2d at 849).

III. ARGUMENT

The intent of Rule 19 is to bring into a case "all those persons who ought to be there by requiring joinder." *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1308 (5th Cir. 1986). Whether a party is "indispensable" to the case, therefore requiring dismissal of the case if it cannot be joined, "is a highly practical, fact-based endeavor." *Hood ex. rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d. 625, 628 (5th Cir. 2009).

The joinder analysis under Rule 19 involves a two-part inquiry. *Id*. First, the Court must find that the prospective party is "required to be joined" under Rule 19(a). *Id.* Second, if the prospective party cannot feasibly be joined, the Court must decide whether the party is so important to the action that the action cannot "in equity and good conscience" proceed in that party's absence. *Id.* The Court weighs various factors under Rule 19(b) to decide that question. *Id.* The application of this analysis requires this case to be dismissed.

A. The Nation Is a Required Party Under Rule 19(a).

To be a "required party" under Rule 19, a person must claim "an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). "While the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder." *Hood*, 570 F.3d at 628 (internal quotation marks omitted).

Under the facts of this case, the Nation has a clear and direct interest in the subject of the action. This case challenges ICWA and the 2016 Final Rule, as well as their application to a Texas state child custody case involving one of the Nation's enrolled member children, A.L.M. Second Amended Complaint, Dkt. 35, ¶¶ 1–3, 8, 12, 19. This case also generally challenges

ICWA's legal regime, which could adversely impact other custody proceedings as to Navajo children across the country. Plaintiffs' ultimate objective is declaratory and injunctive relief striking down ICWA and the 2016 Final Rule as unconstitutional and enjoining the United States government from applying them. *Id.* at ¶ 18, Prayer for Relief, ¶¶ 1–9. If the case moves forward in the Nation's absence and ICWA and the 2016 Final Rule are declared unconstitutional, the Nation's ability to protect its interest in the welfare of A.L.M and all Navajo children in state child-custody cases throughout the country would undoubtedly be impaired or impeded. Accordingly, the Nation is therefore a "required party" under Rule 19(a). Indeed, "the establishment of negative precedent can provide the requisite prejudice to the absentee." *Pulitzer*, 784 F.2d at 1310 (citation omitted).

B. The Nation Cannot Be Joined Because It Is Immune from Suit.

Although the Nation is a "required party" under Rule 19(a), the Nation cannot be joined because it is immune from suits brought by states and private individuals. *See Bay Mills*, 134 S. Ct. at 2031 ("[T]ribal immunity applies no less to suits brought by states (including in their own courts) than to those by individuals."); *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002); *In re IntraMTA Switched Access Charges Litig.*, 158 F. Supp. 3d 571, 573–75 (N.D. Tex. 2015). Plaintiffs therefore cannot join the Nation without its consent. The Nation's intervention in this lawsuit does not constitute consent. *See Vann v. Kempthorne*, 534 F.3d 741, 745–48 (D.C. Cir. 2008) (ruling that the Cherokee Nation's sovereign immunity had not been abrogated through "explicit and unequivocal language to the contrary" where the tribe had been granted leave to intervene for the limited purpose of challenging a suit under Rule 19 then moved to dismiss the suit "on the grounds that although it was a necessary and indispensable party, sovereign immunity barred its joinder.").

C. In Equity and Good Conscience This Case Should Not Continue in the Nation's Absence.

Because the Nation is a required party under Rule 19 and cannot be joined without its consent, the Court must "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). The factors to be considered include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). The Court's decision whether to proceed "will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 863 (2008). The analysis "must be based on factors varying with the different cases, some such factors being substantive, some procedural, *some compelling by themselves*, and some subject to balancing against opposing interests." *Id.* (emphasis added) (internal quotation marks omitted).

1. The Unique Issue of Sovereign Immunity Is a Primary Consideration for Dismissal.

When the required party is a government protected by sovereign immunity, several countervailing considerations affect the analysis of the specific factors in Rule 19(b). There is a

"strong policy that has favored dismissal when a court cannot join a tribe because of immunity." *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999). When a required sovereign is immune from suit, "there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (internal quotation marks omitted) (quoting *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (citations omitted)).

Accordingly, if a sovereign party should be joined in an action, but cannot because of sovereign immunity, the entire case should be dismissed if there is any potential for the interests of the sovereign to be injured. *See Pimentel*, 553 U.S. at 867. As a result, courts have dismissed suits under Rule 19(b) where the tribe is an indispensable party, based in part on "the need to protect tribal sovereignty." *Kescoli v. Babbitt*, 101 F.3d 1304, 1310–11 (9th Cir. 1996); *see also Wichita & Affiliated Tribes*, 788 F.2d at 774; *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 95–97 (Fed. Cl. 2012). In *Wichita*, the D.C. Circuit explained that dismissal was appropriate because "society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." 788 F.2d at 777; *see also Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) ("Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity."). The Nation's sovereign interest in the jurisdictional defense of immunity risks being injured if the case moves forward.

Dismissal is also appropriate in this case due to the Nation's sovereign interests in the welfare of its children, and in the continued identity of those children as linguistically and culturally-distinct Navajo tribal members who are able to ensure the continued existence of

Navajo people and the Navajo Nation into the future. Congress expressly 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." 25 U.S.C. § 1901(3). ICWA fulfills this directive by establishing and defining "minimum federal standards" for the removal and placement of Indian children, which include provisions that recognize the unique sovereign status of tribes in child custody proceedings. *Id*. at § 1902. ICWA requires state courts to provide notice to the applicable Indian tribe when an Indian child is involved, *id*. at § 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. *See also* 25 C.F.R. §§ 23.101, *et seq.* (implementing regulations designed to "ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families."). The Supreme Court likewise has recognized the sovereign interest of Indian tribes in their children, stating that ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." *Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, Section 103, at *7546 (1978)).

Together and separately, the Nation's sovereign interests are "compelling by themselves." *See Pimentel*, 553 U.S. at 863. Accordingly, the potential injury to those interests requires dismissal.

2. The Four Factors of Rule 19(b) Also Support Dismissal.

Even if the factors of Rule 19(b) were to be considered independent of the unique sovereign considerations, these factors likewise weigh in favor of dismissing this case.

a. The First Factor: Prejudice

Under the first factor, the Court considers the "extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties." Rule 19(b)(1). This prejudice test is essentially the same as the inquiry under Rule 19(a), *Confederated Tribes*, 928 F.2d at 1499, and evaluates whether "continuing the action without a person will, as a practical matter, impair that person's ability to protect his interest relating to the subject of the lawsuit." *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1282 (10th Cir. 2012).

As discussed above, the Nation's interests in the welfare of its children in state child-custody proceedings, the continued identity of those children as members of the Navajo Nation, and the continued enforceability of ICWA will be affected by this case. Moreover, ICWA provides procedural and substantive standards that protect the legal interests of tribes, such as the requirements that state courts provide notice to the applicable Indian tribe when an Indian child is involved, 25 U.S.C. § 1912; that tribal court jurisdiction apply when a child is domiciled on the tribe's reservation, *id.* at § 1911; and that important adoptive placement preferences be implemented to ensure state engagement with tribes to identify prospective tribal or Indian homes eligible for placement, *id.* at § 1915(a).

As such, the first factor clearly weighs in favor of dismissal.

b. The Second Factor: Inability to Tailor Relief in Order to Avoid Prejudice

The second factor requires the Court to consider "the extent . . . to which any prejudice could be lessened or avoided by tailoring the judgment or relief in some way." *Id.* (internal quotation marks omitted). The relief sought by Plaintiffs is a declaration that ICWA is unconstitutional and an injunction prohibiting the United States from enforcing them. As such, there is no way to lessen or avoid the prejudice to the Nation, as ICWA could be declared

unconstitutional, regardless of whether the Nation is directly enjoined along with the United States. Accordingly, there can be no tailoring of relief.

The second factor also weighs in favor of dismissal.

c. The Third Factor: Inadequacy of a Resolution

The third factor is "whether a judgment rendered in the person's absence would be adequate." Fed R. Civ. P. 19(b)(3). This factor is "not intended to address the adequacy of the judgment from the plaintiff's point of view." *Harnsberger*, 697 F.3d at 1283 (citations omitted). "Rather, the factor is intended to address the adequacy of the dispute's resolution," that is, "the interest of the courts and the public in complete, consistent and efficient settlement of controversies." *Id.* (citations omitted). This factor refers to the "public stake in settling disputes by wholes, whenever possible." *Id.* (citations omitted).

In this case, a sweeping declaration that ICWA is unconstitutional, if issued in the Nation's absence, would pose a significant risk of legal defect, because the declaration would lack essential input from the third sovereign in this unique, multi-sovereign legal regime. The Nation has its own rights and interests under ICWA that arise independently of the United States' administration of the statute, such as the Nation's sovereign authority to make determinations of tribal membership, the Nation's rights to challenge adoptions made in contravention of ICWA, and its administration of ICWA programs and procedures as part of its tribal governmental apparatus. Rendering a decision on the legality of ICWA in the absence of the Nation under these circumstances would not ensure the delivery of an adequate resolution for all affected parties. Furthermore, if an injunction were issued without the Nation as a party, the injunction would only apply to the United States, not to the Nation. The ultimate dispute would then not be settled between the States and the Nation by simply preventing the United States from applying ICWA.

The third factor weighs in favor of dismissal.

d. The Fourth Factor: Lack of Adequate Remedy

The final factor considers "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(4). If this lawsuit were dismissed, the State Plaintiffs, and those private Plaintiffs with ongoing child custody proceedings, could still present their challenges to ICWA in state court. This federal action is wholly unnecessary for such claims to be raised. *Cf.* Memorandum in Support of Defendants' Motion to Dismiss, Dkt. 57, at 34–35. Indeed, the United States aptly points out that all of the Plaintiffs lack standing and fail to identify any specific injury arising from the federal government's role under ICWA. Therefore, this case in this Court is not the proper forum for the Plaintiffs to seek a remedy. Dkt. 57, U.S. Memorandum in Support of Defendant's Motion to Dismiss, pp. 19–23. Furthermore, "[w]hen viewed in light of the Tribe's sovereign immunity and the first three Rule 19(b) factors," *Harnsberger*, 697 F.3d at 1283 (internal quotation marks omitted), this final factor alone does not justify continuing the case in the Nation's absence, even if all of the Plaintiffs lacked an adequate remedy. Indeed, sovereign immunity may result in the lack of a remedy, but that concern is outweighed by the damage to the sovereign government's interests if the case is allowed to move forward. *See Harnsberger*, 697 F.3d at 1283–84; *Pimentel*, 533 U.S. at 867.

IV. CONCLUSION

For the foregoing reasons, the Navajo Nation respectfully requests that the Court dismiss this case.

Dated: April 26, 2018

Respectfully submitted,

By: */s/ Maria Wyckoff Boyce*

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ORDER GRANTING THE NAVAJO NATION'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Before the Court is the Navajo Nation's Motion to Dismiss Plaintiffs' Second Amended Complaint. The Court has considered the Motion, all briefing, and the arguments of counsel, and finds that the Motion should be and is hereby GRANTED and this case is hereby DISMISSED.

SO ORDERED this _____ day of _____, 2018

_____
HON. REED O'CONNOR
UNITED STATES DISTRICT JUDGE