

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

TIMOTHY P. DONN and ANNE E. DONN  
*as legal guardians on behalf of C.E.S,*  
V.A.S., and H.M.S, minors,

Plaintiffs,

v.

Case N<sup>o</sup>: 1:15-cv-00982

HON. JANET T. NEFF

HON. LARRY J. NELSON, *in his official capacity as a Leelanau County Family Court Judge*, MATTHEW FEIL, *in his official capacity as Tribal Prosecutor for the Grand Traverse Band of Ottawa and Chippewa Indians*, and HELEN COOK, *in her official capacity as Supervisor of Anishinaabek Family Services for the Grand Traverse Band of Ottawa and Chippewa Indians*,

Defendants.

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**TRIBAL DEFENDANTS' PRE-MOTION CONFERENCE REQUEST**

Pursuant to section IV.A.1.b. (at page 4) of this Court's Information and Guidelines for Civil Practice ("guidelines for civil cases"), Defendants Matthew Feil and Helen Cook (the "tribal defendants") request a Pre-Motion Conference with respect to a FED.R.CIV.P. 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction that the tribal defendants intend to file in lieu of filing a responsive pleading to the first amended complaint.

As authorized by FED.R.CIV.P. 15(a)(1), plaintiffs filed their first amended complaint (ECF No. 35) on October 21, 2015, to which the tribal defendants are required to file a response within 14 days. FED.R.CIV.P. 15(a)(3). The tribal defendants assert tribal sovereign immunity as officers of an Indian Tribe and also absolute immunity to plaintiffs' 42 U.S.C. § 1983 claims.

Therefore the tribal defendants desire to exercise their right under FED.R.CIV.P. 12(b)(1) to file a motion to dismiss for lack of subject-matter jurisdiction in lieu of filing a responsive pleading to the first amended complaint.<sup>1</sup>

Because Rule 12(b)(1) motions are dispositive motions [W.D. Mich. LCivR 7.2(a)], this Court's guidelines for civil cases require a Pre-Motion Conference before filing a Rule 12(b)(1), *see* section IV.A.1.a. (at page 3). Judicial economy would be served by this Court considering and resolving a Rule 12(b)(1) motion challenging subject-matter jurisdiction over the tribal defendants (and possibly over the state court judge as well). "If the court determines at any time it lacks subject-matter jurisdiction, the court must dismiss the action." FED.R.CIV.P. 12(h)(3).

Otherwise, as the Court noted during the October 21, 2015 hearing, there are a series of issues that the Court may have to address, including: whether the foster parents have standing to assert the claims on behalf of the minor children; whether the complaint fails to state a claim upon which relief can be granted [Rule 12(b)(6)] or by virtue of Rule 12(d) whether summary judgment is appropriate under Rule 56; whether failure to join a necessary party under Rule 19 warrants dismissal under Rule 12(b)(7); whether *Younger v. Harris*-type abstention is appropriate because the Tribal Court currently has jurisdiction over the adoption proceeding; whether plaintiffs must exhaust their claims with the Tribal Court before seeking relief in the federal court; and/or whether the Rooker-Feldman doctrine applies because the claim that the challenged state statute violates the Fourteenth Amendment was raised in the state court appeals. If dismissal were granted pursuant to a FED.R.CIV.P. 12(b)(1) motion to dismiss for lack of

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<sup>1</sup> "[C]ommon law immunity ... constitutes a right not to be sued. It is not merely immunity from *liability*. It is immunity from *suit*." 13D Wright, Miller, Cooper and Freer, *Federal Practice and Procedure* §3573.3, at p. 605 (3rd ed. 2008) (emphasis in original).

subject-matter jurisdiction due to the defendants' immunity, none of these other issues would have to be addressed.

Plaintiffs' counsel do not oppose this request. Plaintiffs' counsel request participation by telephone conference due to the distance and travel time required to attend, if this Court permits participation in Pre-Motion Conferences by telephone. The tribal defendants do not object to plaintiffs' counsel participating by telephone, as they are based in Minneapolis.

Respectfully submitted,

Date: October 30, 2015

/s/ John F. Petoskey  
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Date: October 30, 2015

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Date: October 30, 2015

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