

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

JANE DOE; et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 15-CV-471-JED-FHM
)	
SCOTT PRUITT, in his official)	
capacity as as Oklahoma Attorney)	
General; et al.,)	
)	
Defendants.)	

**REPLY OF DEFENDANT ED LAKE TO
PLAINTIFFS' RESPONSE TO MOTION TO DISMISS**

I. Statement of the Case

Currently before the Court is the Motion to Dismiss and supporting brief (Doc. #39) of Defendant Ed Lake in which he seeks dismissal of this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In support of his Motion, Defendant Lake contends the Plaintiffs' "Amended Verified Complaint" (Doc. #22) fails to state a viable claim against him claim upon which any relief can be granted as a matter of law because the Plaintiffs have not alleged that Defendant Lake has acted or is threatening to act in a manner to deprive the Plaintiffs of due process or is enforcing any law in derogation of their due process and equal protection rights in the private adoption proceeding for Baby Doe that gave rise to this case. Nor does the Amended Complaint allege that Director Lake has any authority to enforce (or that he has taken any action pursuant to) the specific provisions of the Oklahoma Indian Child Welfare Act (OICWA) challenged in this case (10 O.S. §40.3, §40.4 and §40.6).

In their Response (Doc. #41) in opposition to Defendant Lake's Motion to

Dismiss, the Plaintiffs assert that their Amended Complaint does state a claim against Defendant Lake because the Plaintiffs' allegations (when taken as true) show they have standing to bring this action as they have personally suffered an "injury in fact" traceable to the actions of Defendant Lake that can be redressed by a favorable decision from this Court. Defendant Lake respectfully disagrees and submits that dismissal of the Plaintiffs' Amended Complaint is indeed warranted under Rule 12(b)(6).¹

II. Argument and Authorities

As Defendant Lake noted in his brief in support of his Motion to Dismiss, the Plaintiffs' only specific allegation made against him in the Amended Complaint is that he is authorized by 10 O.S. §40.7 "to enter into agreements with Indian tribes in Oklahoma regarding care and custody of Indian children as authorized by ICWA." Doc. #22 at ¶10. The Plaintiffs have not otherwise alleged (nor can they establish) that Defendant Lake as the Director of Human Services for the State of Oklahoma has authority or ability under Oklahoma law to enforce the provisions of 10 O.S. §40.3, §40.4, or §40.6 in a private adoption proceeding such as the one at issue in this case in which the adoptive child was not in the custody of the Oklahoma Department of Human Services. Nevertheless, the Plaintiffs assert in their Response (and argued at the hearing on the Defendants' Motions to Dismiss) that Executive Order 2013-37 empowers Defendant Lake to enforce the federal Indian Child Welfare Act (ICWA) and OICWA and makes him the "Tsar of ICWA" in Oklahoma.

¹ The additional grounds for dismissal of this action warranted by the Younger abstention doctrine as raised by Defendant Todd Hembree in his Motion to Dismiss (Doc. #23) and persuasively argued by his counsel (Dean Luthey) at the hearing on the Defendants' pending Motions to Dismiss held by this Court on January 12, 2016, are equally applicable to the Plaintiffs' claims against Defendant Lake (as well as those against Defendant Scott Pruitt) and need not be reiterated here.

Review of Executive Order 2013-37 (a copy of which is attached as Exhibit “A” hereto) reveals it gives Defendant Lake no powers beyond those already granted him by the Oklahoma Constitution or the Oklahoma statutes. See Doc. #39 at page 3, footnote 1. Instead, through this Executive Order the Governor of the State of Oklahoma merely directed Ed Lake as Director of Human Services to:

- (1) Work collaboratively and collectively when able for the benefit of all children of both sovereigns;
- (2) Share any and all information relating to reports and investigations of child abuse to the extent allowable by federal, state, and tribal law;
- (3) Maintain open channels of communications between State and Tribal child welfare departments; [and]
- (4) Adhere to any and all Tribal-State Child Welfare agreements that have been or will be properly executed and agreed to by each sovereign.

Nowhere in this Executive Order is there any directive imbuing Defendant Lake with the power to ensure and enforce compliance with either ICWA or the OICWA. Moreover, it has long been established that executive orders in Oklahoma are devoid of the force of law. See Russell Petroleum Co. v. Walker, 1933 OK 75, ¶19, 19 P.2d 582, 587 (“Under the provisions of article 6 and section 1, article 4, of the Constitution, no order, proclamation, or decree of the Governor of the state, as the Chief Executive thereof, has the force of law, the law-making power of the state being vested exclusively elsewhere.” (Emphasis added).). Thus, at the end of the day, Plaintiffs cannot advance any set of facts demonstrating Defendant Lake has or imminently will enforce the challenged provisions of the OICWA in their private adoption proceeding because he is plainly without any power to do so. This lack of power certainly lays bare Plaintiffs

suggestion that Defendant Lake is the “Tsar of ICWA” in Oklahoma” and renders dismissal of the instant action appropriate.

III. Conclusion

The Plaintiffs’ Amended Complaint fails to state a claim upon which any relief can be granted against Defendant Lake in this case because the Plaintiffs cannot establish that he has or will enforce the challenged OIWCA provisions to the detriment of the Plaintiffs. Defendant Lake clearly has no power under Oklahoma law to do so and thus it is impossible for him to have violated the Plaintiffs’ due process and equal protection rights as they allege. As a result, dismissal of the Plaintiffs’ “Amended Verified Complaint” is warranted under Rule 12(b)(6) and therefore the Court should grant the instant Motion and dismiss this action in its entirety as to Defendant Lake.

Respectfully submitted,

s/ RICHARD W. FREEMAN, JR.

Richard W. Freeman, Jr. (OBA #3130)
Assistant General Counsel
Department of Human Services
Legal Services
P. O. Box 25352
Oklahoma City, OK 73125-0352

Telephone: (405) 521-3638
Facsimile: (405) 521-6816
Email: Richard.Freeman@okdhs.org

Attorneys for Defendant Ed Lake.

Certificate of Service

☒ I hereby certify that on (date) January 20, 2016, I electronically transmitted the

attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on

file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants: (insert names)

Paul E. Swain (pswain@swainlaw.com)

Rebecca Ann Murphy (murphy.becki@gmail.com)

Attorneys for Plaintiffs.

Mithun S. Mansinghani

(mithun.mansinghani@oag.ok.gov)

Attorney for Defendant Scott Pruitt.

David E. Keglovits (dkeglovits@gablelaw.com)

Graydon D. Luthey, Jr. (dluthey@gablelaw.com)

Amelia A. Fogelman (afogleman@gablelaw.com)

and

Chrissi R. Nimmo (chrissi-nimmo@cherokee.org)

Attorneys for Defendant Todd Hembree.

☐ I hereby certify that on (date) _____, I served the attached document by

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following, who are not registered participants of the ECF System: (insert names and addresses)

Richard W. Freeman, Jr.

s/ Attorney Name