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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROSEBUD SIOUX TRIBE,

Plaintiff,

v.

ANTANELLE DUWYENIE, an unmarried
woman; PETER J. DENINNO, JUDGE
PRO TEMPORE, GILA COUNTY
SUPERIOR COURT, SUPERIOR COURT
OF THE STATE OF ARIZONA,

Defendants.

NO. CV 09-01660-PHX-MHM

**DEFENDANT ANTANELLE
DUWYENIE'S MOTION TO
DISMISS PURSUANT TO 12(B)(1)
AND 12(B)(5)**

Defendant, Antanelle Duwyenie, requests that this Court dismiss the Complaint with prejudice pursuant to Rule 12(b)(1) and (5) Fed. R. Civ. P. as this Court lacks subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine and Plaintiff fails to state a claim that can be granted. This Motion is supported by the following memorandum of points and authorities.

DATED this 4th day of November, 2009.

THE CAVANAGH LAW FIRM, P.A.

By: s/Scott A. Salmon

Scott A. Salmon
Attorneys for Defendant Antanelle Duwyenie

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Summary of the Case**

3 Plaintiff/Rosebud Sioux Tribe is seeking a determination that the Arizona Superior
 4 Court of Gila County did not have subject matter jurisdiction to establish custody,
 5 parenting time and support orders in the paternity case between Father/William Moran
 6 and Defendant/Mother Antanelle Duwyenie. Plaintiff asserts that even though the case
 7 was a custody case between parents, the Indian Child Welfare Act applies, as does its
 8 exclusive jurisdiction. In doing so, Plaintiff asserts that the correct jurisdiction was with
 9 the Rosebud Sioux Tribal Court in South Dakota who also had simultaneous proceedings
 10 regarding the same child. Father, who is a member of the Rosebud Sioux Tribe, has
 11 appealed this jurisdictional issue to the Arizona Court of Appeals, who affirmed the trial
 12 court decision on February 11, 2009 in the decision *Duwyenie v. Moran*, 220 Ariz. 501,
 13 207 P.2d 754 (App.2009).¹ Father did not file a petition for review with the Arizona
 14 Supreme Court.

15 **Background**

16 Antanelle Duwyenie ("Mother") and William "Chris" Moran ("Father") began a
 17 relationship in the State of Arizona in late 2003. On August 30, 2004, Mother gave birth
 18 to a male child, out of wedlock, namely Christopher James Moran ("CJ") at Cobre Valley
 19 Community Hospital in Globe, Arizona. The parties have never been married and both
 20 parties have tribal membership – Mother with the San Carlos Apache Tribe in Arizona,
 21 and Father with the Rosebud Sioux Tribe in South Dakota.

22 During their entire relationship both parties resided in Globe, Arizona off of any
 23 Indian reservation. Specifically, in late July 2004, just prior to the birth of CJ, the parties
 24 moved into a mobile home located at 1421 South Monterey Drive in Globe, Arizona
 25 under a lease signed by William Moran. On or about September 3, 2006, Mother and

26 ¹ See copy of decision attached as Exhibit 1.

1 Father mutually agreed to end their relationship and decided to share custody of their two-
2 year-old son. That same day, Father moved out of the parties' mutual residence and in
3 with his parents while the minor child remained with Mother. The verbal agreement
4 between the parties was to share the minor child on a week on/week off basis. The
5 following day, Father requested that he be allowed to have parenting time with the minor
6 child for the first week and that he be allowed to take the minor child to Phoenix, Arizona
7 to go to the zoo, see a movie, etc. Mother agreed.

8 On September 5, 2006, Father telephoned Mother and told her that he would be
9 staying in Phoenix for another evening because the paternal grandmother had an
10 appointment the next day. Without Mother's knowledge or consent, Father and the
11 paternal grandmother, Janet Moran, subsequently absconded with the minor child to the
12 Rosebud Sioux Indian Reservation in the State of South Dakota. Father promptly filed a
13 petition for sole custody in the Rosebud Sioux Tribal Court ("RSTC") on September 6,
14 2007.²

15 On September 6, 2007, Father also filed a Motion for Interim Custody and Child
16 Support and the RSTC granted Father's request. On September 11, 2007, Mother was
17 served with the RSTC Interim Order granting Father custody of the minor child. On
18 October 5, 2006, the San Carlos Apache Tribe filed a Petition for Intratribal Judicial
19 Conference with the San Carlos Tribal Court. On October 6, 2006, Mother also filed a
20 Petition for Sole Custody and Guardianship in the San Carlos Tribal Court. On October
21 24, 2006, Chief Judge Edd Dawson of the San Carlos Tribal Court and Judge Patrick
22 Donovan of the RSTC held an Intratribal Judicial Conference to discuss jurisdiction.

23 On October 25, 2006, Judge Donovan of the RSTC dismissed the action in a
24 Memorandum Decision that stated in pertinent part:

25
26 ² See Father's Complaint for Paternity, Custody and Child Support attached as Exhibit 2.

1 Plaintiff failed to mention that the parties and the child resided in
2 Gila County, Arizona where the child was born.

3 ***

4 The forum that is best suited to hear a custody dispute is the court
5 where the parties resided with the child. All the witnesses and
6 evidence would be located there. **A party should not remove a
7 child from a jurisdiction by or [sic] deceit in an attempt to get a
8 better result.** A party should be forthright with a court when asking
9 for interim custody and asking the court to take jurisdiction over a
10 custody matter.

11 **The San Carlos Apache Tribal Court would be a better forum to
12 hear this custody dispute.** That is where the parties resided with the
13 child. All the witnesses and evidence is located there.

14 Under the doctrine of forum non conveniens (see 28 USCA Sec
15 1404) the court has discretionary power to decline jurisdiction when
16 convenience of the parties and end of justice would be better served
17 if the action were brought and tried in another forum.

18 **It is hereby ordered, adjudged, and decreed, that for the above
19 stated reasons this case and the interim order of custody are
20 dismissed.**³

21 On October 31, 2006, Father filed a motion for reconsideration in the Rosebud
22 Sioux Tribal Court. Before the tribal court could rule on the motion for reconsideration,
23 at the urging of Father's uncle, the Rosebud Sioux Tribal Council removed the judge and
24 passed an *ex post facto* resolution that the tribal court would have "the sole authority and
25 jurisdiction" to hear such disputes.⁴ The newly appointed judge of the RSTC, Sherman
26 Marshall, then delayed until after the new resolution was passed before it ruled on Father's
Motion for Reconsideration. In its Order dated January 16, 2007, the RSTC issued its
order granting Father's Motion for Reconsideration, relying on the new resolution passed
on December 27, 2006.⁵

³ See Memorandum Decision and Order, dated October 25, 2006 attached as Exhibit 3.
(Emphasis Added).

⁴ See Rosebud Sioux Tribe Resolution No. 2006-327, attached as Exhibit 4.

⁵ See Order from RSTC dated January 16, 2007 attached as Exhibit 5.

1 On February 23, 2007, The RSTC held a hearing on interim custody. On February
2 27, 2007, The Rosebud Tribal Court issued a Memorandum Decision and Order where it
3 ordered in pertinent part:

4 However, the court believes it only fair for the mother to be given the
5 chance to repair her bond with the child that has been torn assunder
6 by the **improper actions of the father**. The Court will therefore
7 grant extensive visitation to mother pending final custody hearing in
8 order to correct the wrong that has been done to her and her family,
**but that visitation must be conditioned on an agreement by her
and her Tribe not to attempt to utilize the San Carlos Apache
Tribal Court to deprive this Court of jurisdiction or to alter this
Court's custody orders.**⁶

9 Mother was forced by this order to withdraw her pending Petition in the San Carlos Tribal
10 Court that she filed on October 6, 2007 if she wanted to have any parenting time with her
11 son under the RSTC's actions of relying upon an *ex post facto* resolution to grant
12 jurisdiction to itself. In its Findings of Fact and Conclusions of Law and Temporary
13 Custody Order filed March 8, 2007, the RSTC judge found that:

14 25. Both Plaintiff and Defendant have been found to be fit parents.

15 13. Defendant shall have visitation **if, and only if**, the RST Court
16 receives an order from the San Carlos Apache Court dismissing any
17 actions related to the custody of CJ Moran with prejudice and
18 receives assurance in writing that Defendant will not attempt to assert
jurisdiction in this matter in any other court of law and submits to the
jurisdiction of the RST Court for all related matters to this case.⁷

19 On March 21, 2007, the RSTC held a telephonic conference where it suspended
20 Mother's parenting time because she had not withdrawn her Petition pending in the San
21 Carlos Tribal Court. Therefore, on April 5, 2007, Mother withdrew her petition in the San
22 Carlos Tribal Court so that she could have parenting time with the minor child. On April
23 9, 2007, Mother filed a Motion to Lift Order Suspending Visitation to Rosebud Tribal
24 Court for that purpose, which Father opposed.

25 ⁶ See Order attached as Exhibit 6.

26 ⁷ See Findings of Fact and Conclusions of Law and Temporary Custody Order filed
March 8, 2007, attached as Exhibit 7.

1 In the RSTC order, the court found that:

2 ..the Court will make the child a ward of the Rosebud Sioux Tribal
3 Court under 25 USC 1911(a) to ensure its exclusive jurisdiction.⁸

4 In the same Order, the RSTC granted parenting time to Mother on an ongoing
5 basis, including allowing trips with Mother to Arizona. On September 12, 2007, after
6 returning to Arizona with CJ, Mother filed a "Petition for Paternity, Custody, Parenting
7 Time, and Child Support" in Gila County Superior Court rather than with the San Carlos
8 Apache Tribal Court. On September 19, 2007, the Honorable Peter DeNinno of the Gila
9 County Superior Court consulted telephonically with Special Judge B. J. Jones of the
10 RSTC regarding jurisdiction.

11 As shown by the transcript of the proceeding between the two judges, the RSTC
12 judge stated that:

13 And I made the child a ward of the court just to avoid this
14 jurisdictional conflict.⁹

15 With an understanding of the tribal court's position regarding jurisdiction, Judge
16 DeNinno held an evidentiary hearing regarding the jurisdiction of his own court. After
17 hearing the testimony of both parties, the Gila County court found that it had jurisdiction.
18 The overriding reason was that Arizona is CJ's "home state" within the meaning of the
19 Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"). The Gila County
20 court found:

21 We are a nation of laws, and the law is very, very clear . . . that the
22 home state of the child is the determining factor. It's very clear to
23 this Court that the home state of this little boy is Arizona. He was
24 born here. He was raised here. His parents lived here.¹⁰

25 ...
26 ...

⁸ See Order filed April 24, 2007, attached as Exhibit 8. (emphasis added)
⁹ See Hearing Transcript, September 19, 2007, page 10, ll. 15-16, attached as Exhibit 9.
¹⁰ See Hearing Transcript for October 10, 2007, relevant pages attached as Exhibit 10, p. 58.

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1 The court also added:

2 . . . Clearly, Arizona and the Superior Court of Gila County had
3 jurisdiction over this case because this child lived here. The question
4 is whether or not – legal question is whether or not when [Father]
5 took the child – and whatever his motivation was, whether it was
6 because he had some political connection and he thought in Rosebud
7 it would help him, I don't know, and, to me, it doesn't matter. The
8 fact remains that he took the child and he took the child without the
9 consent of the mother.

10 He had no greater right to custody of the child certainly than the
11 mother did. These parties were not married. He took the child and
12 did it in a very surreptitious, underhanded, deceitful manner. He took
13 the child, and he went and he got an order from the court in Rosebud
14 without – without Mrs. – without the mother even knowing about it.
15 He got an ex parte order.

16 The child was not there voluntarily. The child was there
17 surreptitiously and against the wishes of one of his parents. And, in
18 my view, the fact the child was there did not divest the Court of this
19 jurisdiction because the child was not – did not leave Arizona
20 voluntarily.¹¹

21 Given Father's conduct in stealing CJ away to South Dakota, the trial court also
22 could not understand how the RSTC claimed to have jurisdiction, especially when that
23 jurisdiction was purportedly granted by a tribal council resolution:

24 [I]t is very clear to me that the political subdivision in Rosebud or
25 San Carlos or Arizona or anywhere else cannot make rules that divest
26 individuals of their due process rights, and to make a rule that says
that we have exclusive jurisdiction because we say we do, does not
give them that jurisdiction, in my view.¹²

27 Lastly, the trial court rejected Father's contention that Mother consented to the
28 jurisdiction of the Rosebud Sioux Tribal Court. "And it's very clear to me from hearing
29 the mother's testimony today, that the mother was in a position of being under duress
30 when she agreed to the conditions that were placed on her having custody – having
31 visitation with her son. . . . I don't believe that the Court can require a person to, any more
32 than I don't think this Court can say, 'If you want visitation with your child you have to

33 _____
34 ¹¹ *Id.*
35 ¹² *Id.*

1 agree not to contest the jurisdiction of this Court."¹³ That requirement was a violation of
 2 Mother's due process rights.

3 After finding that Gila County, Arizona had jurisdiction under the UCCJEA, a final
 4 Order of paternity, custody, parenting time and support was entered by the Gila County
 5 Court in June 2008. The Order gave Mother sole legal custody, and father parenting time
 6 once he posted a bond. Father was also precluded from leaving the state with the child.
 7 Following entry of the Order, Father appealed the ruling to the Arizona Court of Appeals,
 8 Division Two. The Court of Appeals affirmed the Gila County Court's determination of
 9 jurisdiction and rulings in their entirety.¹⁴ In a published decision, the Court of Appeals
 10 found that Arizona properly exercised jurisdiction under the UCCJEA. The Court of
 11 Appeals noted that the RSTC never had jurisdiction in the first place and specifically cited
 12 to the holding of the RSTC that the resolution passed by the Rosebud Tribe granting
 13 jurisdiction was "probably violative of . . . federal law."

14 Law and Argument

15 **I. All of Plaintiff's claims for jurisdiction in the complaint are barred by the** 16 ***Rooker-Feldman* Doctrine.**

17 The *Rooker-Feldman* doctrine bars a federal court from exercising jurisdiction in
 18 which a party loses in state court and then asserts that the state judgment violates the
 19 losers federal rights.¹⁵ In reviewing whether a claim is barred under this doctrine, the
 20 federal court is to look at the substance of the claims and determine whether the federal
 21 claims are "a defacto appeal" of the state court decision.¹⁶ The Ninth Circuit has held that:

22 [a] federal district court dealing with a suit that is, in part, a forbidden
 23 de facto appeal from a judicial decision of a state court must refuse to
 24 hear the forbidden appeal. As part of that refusal, it must also refuse

25 ¹³ *Id.*

¹⁴ See Exhibit 1.

¹⁵ *Doe v. Mann*, 415 F.3d 1038, 1041 (9th Cir.2005) (emphasis added).

¹⁶ *Id.* at 1041.

1 to decide any issue raised in the suit that is "inextricably intertwined"
2 with an issue resolved by the state court in its judicial decision.¹⁷

3 In the present matter, Plaintiff's claims are not only "intertwined" with the prior
4 state court proceedings, they are the identical claims made in state court by Father, a
5 member of the tribe, regarding jurisdiction. Plaintiff now requests review of what Father
6 already argued and litigated through the Arizona Court of Appeals, that the proper
7 jurisdiction for this matter for custody and parenting time of the child was the RSTC and
8 not Gila County Superior Court. This is the exact type of litigation that is barred under
9 the *Rooker-Feldman* doctrine as discussed by the Ninth Circuit in *Bianchi v. Rylaarsdam*,
10 where it held:

11 Stated plainly, *Rooker-Feldman* bars any suit that seeks to disrupt or
12 'undo' a prior state-court judgment, regardless of whether the state-
13 court proceeding afforded the federal-court plaintiff a full and fair
14 opportunity to litigate her claims.¹⁸

15 Under the language by the Ninth Circuit, it is clear that the term "any suit" is not
16 simply meant one by the same plaintiff. The test is whether the federal suit seeks to
17 "undo" a state court decision, which this case clearly does.

18 Although a federal district court may not review a state court decision, the Ninth
19 Circuit has held that "Federal review can occur, of course, but only in the Supreme Court,
20 on appeal or by writ of certiorari."¹⁹ In the present matter, Father could have filed for
21 review in the Arizona Supreme Court and then the Supreme Court of the United States but
22 failed to do so after he was unsuccessful in the Arizona Court of Appeals. Plaintiff cannot
23 now seek a determination in Federal court as Father failed to exhaust his appeals to the
24 Arizona Supreme Court and the United States Supreme Court. As Father did not petition

25 ¹⁷ *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir.2003).

26 ¹⁸ *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir.2003).

¹⁹ *Confederated Tribes of Colville Reservation v. Superior Court of Okanogan County*,
C.A.9 (Wash.) 1991, 945 F.2d 1138 (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 24,
107 S.Ct. 1519, 1532 (Marshall, J., concurring); *District of Columbia Court of Appeals v.*
Feldman, 460 U.S. 462, 483-84 n. 16, 103 S.Ct. 1303, 1315-16 n. 16, 75 L.Ed.2d 206
(1983); *Elks Nat'l Foundation v. Weber*, 942 F.2d 1480, 1483 (9th Cir.1991)).

1 for a writ of certiorari, Plaintiff is now foreclosed under the *Rooker-Feldman* doctrine
 2 from re-litigating this in Federal Court. Therefore all of Plaintiff's claims should be
 3 dismissed under the *Rooker-Feldman* doctrine for lack of jurisdiction.

4 **II. The ICWA does not apply to custody disputes between parents, and therefore
 5 federal review is not permissible under 25 U.S.C.A 1911 as full faith and credit
 is not given where there was not subject matter jurisdiction.**

6 The Supreme Court has held that “[f]amily relations are a traditional area of state
 7 concern.”²⁰ In its main allegation for jurisdiction with this Court, Plaintiff attempts to
 8 assert that the Indian Child Welfare Act codified as 25 U.S.C.A. §§1901-1963, (“ICWA”)
 9 should apply, as should the jurisdiction of this Court allowed under said statute. Plaintiff
 10 asserts that the RSTC's determination that the child was a “ward” of the Court under 25
 11 U.S.C.A. 1911(A) confers exclusive jurisdiction to the RSTC and therefore allows for this
 12 Court's review under 25 U.S.C.A. 1911(a). Although Mother does not challenge that in a
 13 legitimate case 25 U.S.C.A. 1911(a) confers exclusive “continuing” jurisdiction of a ward
 14 of a tribal court to said court, the child must be an actual ward of the court involved in one
 15 of the listed types of proceedings under the ICWA.

16 The present matter is a custody dispute between biological parents, and therefore
 17 there is no federal supremacy, or possibility of review under the ICWA. Under *Nevada v.*
 18 *Hall*, full faith and credit only applies so long as the tribal court “had jurisdiction over the
 19 parties and the subject matter.”²¹ In this case the child was clearly not a ward of the court,
 20 and any declaration to the contrary is irrelevant. The title of “ward” as given to the child
 21 is clearly illegitimate as the RSTC specifically found that both parents “..have been found
 22 to be fit parents”, which precludes any notion that this is one of the listed actions under
 23 the ICWA.²² There was therefore no subject matter jurisdiction to declare a wardship, and
 24 no jurisdiction in this Court under § 1911(a).

25 ²⁰ *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979).

26 ²¹ *See Nevada v. Hall*, 440 U.S. 410, 421, 99 S.Ct. 1182, 1188, 59 L.Ed.2d 416.

²² *See Exhibit 7.*

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1 The Ninth Circuit has held specifically against the application of the ICWA to
2 parental custody disputes in *Confederated Tribes of Colville Reservation v. Superior*
3 *Court of Okanogan County*, where it stated:

4 In other words, the tribal court enjoys exclusive jurisdiction over all
5 issues relating to “child dependency”-such as the Minor-in-Need-of-
6 Care proceedings. However, “child custody” under the ICWA is
7 strictly defined. See 25 U.S.C. § 1903. It does not include the
8 resolution of the longer-term custody dispute between the parents.²³

9 This coincides with the holding of the Eighth Circuit, which held in *DeMent v.*
10 *Oglala Sioux Tribal Court* that:

11 Although the ICWA gives Indian tribes exclusive jurisdiction to
12 determine the custody of Indian children, the statute only applies to
13 proceedings to determine foster care placement, the termination of
14 parental rights, preadoptive placement and adoptive placement.
15 Exclusive jurisdiction was not given in proceedings to determine the
16 custody of children in a divorce proceeding. 25 U.S.C. § 1903.²⁴

17 This is the same conclusion reached by the Tenth Circuit in *Comanche Indian Tribe*
18 *of Okla. v. Hovis*, where it held:

19 Clearly, the ICWA does not apply to “child custody proceedings”
20 pursuant to divorce proceedings.²⁵

21 This is further established by the House Resolution that created the ICWA. In
22 H.R.Rep. No. 1386, it specifically notes that:

23 FIRST, LET IT BE SAID THAT THE PROVISIONS OF THE BILL
24 DO NOT OUST THE STATE FROM THE EXERCISE OF ITS
25 LEGITIMATE POLICY POWERS IN REGULATING DOMESTIC
26 RELATIONS...²⁶

27 The Court only need examine the Petitions and orders of both courts to determine
28 that this is not an action under the ICWA, despite any illegitimate finding that it is by the
29 RSTC. The case in the RSTC started when Father filed his Complaint for Paternity,

²³ *Confederated Tribes of Colville Reservation v. Superior Court of Okanogan County*,
945 F.2d 1138, 1140(9th Cir. 1991), (emphasis added).

²⁴ *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 (8th Cir. 1989).

²⁵ *Comanche Indian Tribe of Okla. v. Hovis*, 53 F.3d 298, 304 (10th Cir.1995).

²⁶ See H.R.Rep. No. 1386, 95th Cong., 2d Sess. 19, reprinted in 1978 U.S.Code Cong. &
Ad.News 7530, 7540.

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1 Custody and Child Support.²⁷ In the ICWA where jurisdiction is specifically defined as
2 follows:

3 1911(a) Exclusive jurisdiction

4 An Indian tribe shall have jurisdiction exclusive as to any State over
5 any child custody proceeding involving an Indian child who resides
6 or is domiciled within the reservation of such tribe, except where
7 such jurisdiction is otherwise vested in the State by existing Federal
law. Where an Indian child is a ward of a tribal court, the Indian tribe
shall retain exclusive jurisdiction, notwithstanding the residence or
domicile of the child.

8 The definition of a "child custody proceeding" is then defined in § 1903(1) as:

9 (1) "child custody proceeding" shall mean and include--

10 (i) "foster care placement" which shall mean any action removing
11 an Indian child from its parent or Indian custodian for temporary
12 placement in a foster home or institution or the home of a guardian
or conservator where the parent or Indian custodian cannot have
the child returned upon demand, but where parental rights have not
been terminated;

13 (ii) "termination of parental rights" which shall mean any action
14 resulting in the termination of the parent-child relationship;

15 (iii) "preadoptive placement" which shall mean the temporary
16 placement of an Indian child in a foster home or institution after
the termination of parental rights, but prior to or in lieu of adoptive
placement; and

17 (iv) "adoptive placement" which shall mean the permanent
18 placement of an Indian child for adoption, including any action
19 resulting in a final decree of adoption.

20 Such term or terms shall not include a placement based upon an
21 act which, if committed by an adult, would be deemed a crime or
upon an award, in a divorce proceeding, of custody to one of the
parents.

22 The matter addressed and litigated by both parties does not involve any of the
23 preceding types of actions, and therefore the ICWA is inapplicable, and thus the RSTC
24 did not have subject matter jurisdiction to declare the child a ward of the court. Plaintiff's
25 attempt to implicate the ICWA is contrary the specific language of the statute and all

26 ²⁷ See Exhibit 2.

1 available precedent, as well Father's own pleadings. It is clear from the transcript of the
2 proceedings between the RSTC judge and the Gila County judge that the RSTC only
3 declared the child a "ward" of the court to improperly attempt to secure jurisdiction in the
4 custody dispute, as shown when the RSTC judge stated:

5 And I made the child a ward of the court just to avoid this
6 jurisdictional conflict.²⁸

7 The finding that the child is a "ward" for ICWA purposes is a perversion of the
8 intent of the ICWA, which was meant to protect Indian children from being removed from
9 their Indian heritage. It is not an offensive weapon to usurp other states' valid custody
10 jurisdiction.

11 The timing of the RSTC's declaration of wardship also fails to create the intended
12 result – i.e., exclusive jurisdiction over the matter at bar. In *J.D.M.C.*, the South Dakota
13 Supreme Court held that “the only effective way a wardship order can be used to obtain
14 exclusive jurisdiction is to enter the order while the Indian child is domiciled or residing
15 on the reservation and before the proceeding commenced.”²⁹ In a stunning coincidence,
16 the Supreme Court of the State of South Dakota expressly rejected this exact argument for
17 exclusive jurisdiction under the ICWA, made by the same Judge B.J. Jones sitting for the
18 Sisseton-Wahpeton Sioux Tribal Court. Therefore, the Court ruled, the Tribe could not
19 obtain exclusive jurisdiction by declaring J.D.M.C. a ward of the tribal court after the
20 proceedings began.³⁰ In this matter, Father filed his petition for sole custody on September
21 6, 2006 and the RSTC did not declare the minor child a ward of the court until February
22 23, 2007, which clearly shows that the child was not a "ward" of the court prior to the
23 time the custody proceedings commenced. The court was clearly incorrect in the
24

25 ²⁸ See Transcript, p. 10, ll. 15-16, from September 19, 2007, attached as Exhibit 9.

26 ²⁹ *In Re J.D.M.C.*, 739 N.W.2d 796 (SD 2002) (emphasis added).

³⁰ *Id.* at 805. (emphasis added).

1 assumption that the wardship can defeat the PKPA/UCCJEA's home state rule. Under
2 such a ruling, full faith and credit is not necessary.

3 As a result, the invalid declaration of wardship does not give this Court jurisdiction
4 to review the prior determination of the Gila County Court, and Arizona Court of Appeals,
5 that Arizona has jurisdiction under the PKPA/UCCJEA, for the paternity proceedings
6 involving the parties. The present case is similar to that of the Ninth Circuit's decision in
7 *Confederated Tribes of Colville Reservation* where the Court held that the ICWA was a
8 "non-issue" as the dispute was really a long term custody dispute between parents.³¹ In
9 that case, the Ninth Circuit correctly applied the *Rooker-Feldman* doctrine to bar the
10 claims. The same result should occur here.

11 **III. The only federal court that can invalidate a jurisdictional determination made
12 by a state court that the ICWA does not apply, is the Supreme Court.**

13 Even if this case was actually a case under the ICWA, Plaintiff would still be barred
14 from bringing this case in this court under the doctrines of *res judicata* and collateral
15 estoppel. The determination by a state court that the ICWA does not apply, is not
16 reviewable in federal court. As discussed by the Tenth Circuit in *Kiowa Tribe of Okla. v.*
17 *Lewis*, a determination by the state that the ICWA does not apply is binding upon the
18 federal courts. The Tenth Circuit specifically held that:

19 A state court determination that the ICWA does not apply is binding
20 on us unless (1) it is "so fundamentally flawed as to be denied
21 recognition under § 1738," *Kremer*, 456 U.S. at 480, 102 S.Ct. at
22 1897, or (2) unless Congress intended state court judgments
23 concerning the ICWA's applicability to be excepted from § 1738's
24 command of full faith and credit.³²

25 In the present matter, there is no allegation that the state court's decision regarding
26 jurisdiction under the UCCJEA/PKPA was fundamentally flawed, and it is therefore *res*

³¹ *Confederated Tribes of Colville Reservation*, 945 F.2d at 1140, n 3.

³² *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587, 591 (10th Cir.1985).

1 *judicata*. Father appealed the jurisdictional decision to the Arizona Court of Appeals,
2 which upheld the jurisdictional determination.

3 Additionally, In *Comanche Indian Tribe of Okla. v. Hovis*, the Tenth Circuit held
4 that when claims were fully litigated under the ICWA in state court, those claims are
5 precluded from being re-litigated in Federal Court under the same theories.³³ In finding
6 that the federal court was estopped from hearing the case, the Tenth Circuit looked into
7 the procedural history of the case.³⁴ It noted that the case was litigated at the trial court
8 level and fully briefed though the appellate court process.³⁵ The Court specifically found
9 that:

10 Under *Kiowa*, it is clear that § 1914 is not an independent ground to
11 relitigate state court decisions. *Id.* Once the Tribe chose to litigate in
12 State Court, review of the State Court's decision was limited to timely
13 appeal to the state appellate courts and was not "appealable" in
14 federal district court. Under the circumstances presented in this case,
15 we must honor the judgment rendered on the merits by the State
16 Court.³⁶

17 Father has litigated and fully briefed this case not only in the Gila County Superior
18 Court and the Arizona Court of Appeals. In doing so, Plaintiff is now precluded from re-
19 litigating the same issues in Federal Court that were already litigated by the state court.

20 **IV. A decision on jurisdiction for child custody, under the Parental Kidnapping**
21 **and Prevention Act is not reviewable by any federal Court except the Supreme**
22 **Court of the United States.**

23 The Parental Kidnapping Prevention Act of 1980³⁷ ("PKPA"), does not create a
24 cause of action to allow this Court to review the prior state court decision. In *Thompson*
25 *v. Thompson*, the United States Supreme Court reviewed the issue as to whether the PKPA
26 creates an ability for Federal Courts to review a state court's decision regarding competing

33 *Comanche Indian Tribe of Okla. v. Hovis*, 53 F.3d 298, 304 (10th Cir.1995)

34 *Id.*

35 *Id.*

36 *Id.* citing to *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587, 590 (10th Cir.1985).

37 Codified as 28 U.S.C.A. § 1738A

1 child custody orders.³⁸ The Supreme Court held that federal court may not review the
 2 determination of a state court as to jurisdiction, and the district court's decision to grant
 3 the motion dismiss the claim for failure to state a claim in that matter was appropriate.³⁹
 4 In doing so the Supreme Court relied upon the fact that review is always available in the
 5 Supreme Court "... for truly intractable jurisdictional deadlocks.." between competing
 6 jurisdictions.⁴⁰

7 The Eight Circuit utilized this same line of reasoning in *DeMent v. Oglala Sioux*
 8 *Tribal Court*, finding that:

9 Although the PKPA was intended to eliminate custody struggles such
 10 as we have here, the Supreme Court in *Thompson* held that federal
 courts are not the appropriate forum to raise a PKPA claim.⁴¹

11 In this case, Father may not seek federal review of a competing jurisdictional
 12 determination in a custody matter, except in the United States Supreme Court, nor may the
 13 tribe as his surrogate. It is clear from the record of both the RSTC case and the Gila
 14 County case, that this was a jurisdictional dispute under the PKPA/UCCJEA. The first
 15 RSTC judge even specifically cited to the federal statute for change of venue in his
 16 decision to transfer the case back to Arizona noting that Arizona was a more appropriate
 17 jurisdiction.⁴²

18 **V. The bench warrant is invalid as there was never personal jurisdiction over**
 19 **Mother, or subject matter over the custody dispute, and the warrant is**
therefore not entitled to full faith and credit.

20 As stated above, under *Nevada v. Hall*, full faith and credit only applies so long as
 21 the tribal court "had jurisdiction over the parties and the subject matter."⁴³ The RSTC did
 22 not have proper jurisdiction over the child in this case and therefore there was no subject

23 _____
 24 ³⁸ *Thompson v. Thompson*, 484 U.S. 174 (1988).

³⁹ *Id.* at 187.

⁴⁰ *Id.*

⁴¹ *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 513-514 (8th Cir. 1989).

⁴² See Exhibit 3, p. 2.

⁴³ See *Nevada v. Hall*, 440 U.S. 410, 421, 99 S.Ct. 1182, 1188, 59 L.Ed.2d 416.

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1 matter jurisdiction for the case at all. There is no ability to issue a warrant for violating an
2 order of a case that never had jurisdiction to exist in the first place. Secondly, there was
3 never proper jurisdiction over Mother to issue a bench warrant. Prior to Father abducting
4 the child and fleeing to South Dakota, Mother had never set foot in that state, much less
5 on tribal land.

6 Mother's only contact with Rosebud or the State of South Dakota involved special
7 appearances at the Rosebud Tribal Court on two occasions, specifically for the purpose of
8 contesting the court's jurisdiction, and two occasions during which time she exercised her
9 right to visitation with her son pursuant to a court order that such visitation was not to
10 occur outside the State of South Dakota. As previously found by the Gila County Court,
11 Mother did not purposely go to the Rosebud Tribe, but rather she was forced to. Mother
12 has never "purposefully availed" herself of the benefits and protections of the Rosebud
13 Sioux Tribe, and her connections with the Tribe are too limited to constitute minimum
14 contacts. Therefore, the "quality and nature" of her actions are not such that it would be
15 reasonable and fair for her to require her to conduct her defense in that forum.⁴⁴

16 Mother additionally requests her attorney's fees and costs under A.R.S. §§ 12-
17 341.01(c), 12-349 and any other relevant authority, as Plaintiff's actions are clearly
18 unreasonable and groundless.

19 **WHEREFORE** Mother requests that this Court dismiss all of Plaintiff's claims
20 pursuant to Rule 12(B)(1) and 12(B)(5), with prejudice, and award her attorneys fees.

21 DATED this 4th day of November, 2009.

22 THE CAVANAGH LAW FIRM, P.A.

23 By: s/Scott A. Salmon

24 Scott A. Salmon

Attorneys for Defendant Antanelle Duwyenie

25 ⁴⁴ See *Kulko vs. Superior Court of California*, 436 U.S. 84, 92 (1978)(the Supreme Court
26 refused to enforce a California child support decree because father's contacts with the
state were too attenuated to satisfy traditional notions of fair play and substantial justice).

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2009, I electronically transmitted the attached document to the Clerk’s Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Alan L. Liebowitz, Esq.
16042 North 32nd Street, Suite D-10
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s/Susan Albue

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