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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

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

Plaintiff cannot cite to a single case where there is jurisdiction under the ICWA for a custody dispute between parents. Without the ICWA being implicated, there is no possibility of federal review of any kind, as jurisdictional custody disputes can only be reviewed by the United States Supreme Court. Defendant/Mother replies to Plaintiff's Response as follows:

DATED this 14th day of December, 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 **I. Plaintiff incorrectly states that Defendant's sole ground for dismissal is the**
3 ***Rooker-Feldman* doctrine, as well as misstates what occurred in the Gila**
4 **County Superior Court.**

5 In its Response, Plaintiff asserts that Mother's only ground in the Motion to
6 Dismiss is the *Rooker-Feldman* doctrine. Plaintiff also asserts that the Gila County Court
7 never dealt with the ICWA issue. Both of these claims are inaccurate. First, although
8 Mother did assert that the *Rooker-Feldman* doctrine bars Plaintiff claims, Mother also
9 asserted lack of subject matter jurisdiction and failure to state a claim. Although it is
10 admitted that the technical plaintiff in this matter is different than the Father in the Gila
11 County case, they are intrinsically intertwined, as they have the same motivations and
12 goals. Coincidentally they also share the exact same lawyer. The RSTC is only acting on
13 Father's behalf due to his connections within the tribe itself. The RSTC in this matter is a
14 surrogate plaintiff for Father in an attempt to attack this matter in a different method, as
15 Father already failed in his state court appeal.

16 Second, contrary to plaintiff's assertion, the Gila County Court did deal with and
17 implicitly find that the ICWA did not apply in this matter. One page 2 of Plaintiff's
18 Response it states that:

19 *The ICWA was neither raised nor argued, never mind the Gila
20 County Superior Court reaching any such determination as alleged
21 by the Defendant, in Duwyenie v. Moran.*

22 This statement could not be more patently false, and Plaintiff's lawyer is completely
23 ignoring the previous pleadings that he himself filed on Father's behalf.¹ First, as is
24 shown by the transcript of the proceedings between the Gila County judge and the RTSC
25 judge, there was discussion that the RSTC made the child a "ward" of the RSTC.² Father,
26 who had the same lawyer in the Gila County proceedings as Plaintiff does now, also

¹ See Reply Brief filed by Father, attached hereto as Exhibit 1. See also Father's Motion to Dismiss filed in Gila County October 9, 2007 attached as Exhibit 2.

² See Exhibit 9 from Motion to Dismiss previously filed.

1 attached multiple orders to his pleadings from the RTSC showing that it had applied the
 2 ICWA to the matter.³ Father even sent a letter to the Gila County Superior Court dated
 3 September 16, 2007 arguing that 25 U.S.C.A § 1911(a) applied since the child was a
 4 "ward" of the RSTC.⁴ The letter included the order from the RSTC that stated the RSTC
 5 had exclusive jurisdiction. Mother also discussed the issue of the ICWA, after Father
 6 raised it, in her legal memorandum filed on October 5, 2007.⁵ Although the Gila County
 7 Court did not explicitly make a written finding that the ICWA did not apply, it did
 8 implicitly find that it did not apply by continuing with the custody case after the issue was
 9 raised. The Gila County judge correctly found that the case between Mother and Father
 10 was a custody dispute between parents. Of course, when Father filed the case in the
 11 RSTC, he also filed it as a custody case.

12 As the ICWA was litigated in state court, this court is precluded from review of the
 13 decision that the ICWA does not apply.⁶ In *Comanche Indian Tribe of Okla. v. Hovis*, the
 14 Tenth Circuit held that when claims were fully litigated under the ICWA in state court,
 15 those claims are precluded from being re-litigated in Federal Court under the same
 16 theories.⁷

17 **II. Plaintiff has no claim or cause of action if the ICWA does not apply, and**
 18 **Plaintiff cannot cite to any case that applied the ICWA to a custody dispute.**

19 Simply put, Plaintiff only has a sustainable federal claim if the RSTC had
 20 jurisdiction under the ICWA in the first place. All of Plaintiff's jurisdictional basis for
 21 this Court revolve around the order of the RSTC making the child a "ward" of the Court
 22 under 25 U.S.C.A § 1911. Without jurisdiction in the first place, there is no order to
 23 enforce, and no basis for federal jurisdiction. The problem with Plaintiff's claim is that

24 ³ See Exhibit 2 (specifically Exhibit C within Exhibit 2)

25 ⁴ See Letter attached as Exhibit 3.

26 ⁵ See Exhibit 4, pp. 14-21.

⁶ *Comanche Indian Tribe of Okla. v. Hovis*, 53 F.3d 298, 304 (10th Cir.1995).

⁷ *Id.*

1 there is no possible circumstance that the RSTC ever had jurisdiction under the ICWA,
 2 and therefore there is no corresponding jurisdictional ground for review by this Court. As
 3 more comprehensively discussed in Mother's original Motion, the ICWA has been found
 4 over and over again, by every federal appellate court that has dealt with the issue, to not
 5 apply in custody disputes between parents.⁸

6 In its Response, Plaintiff discusses the *DeMent* case from the Eighth Circuit as an
 7 "analogous situation." The reasoning and holding in *DeMent* are based upon the Indian
 8 Civil Rights Act ("ICRA"), which has no bearing on this case. Plaintiff also completely
 9 ignores the fact that the Eighth Circuit took only one paragraph to quickly affirm the
 10 holding of the District Court that the ICWA was inapplicable as it was a custody dispute
 11 between parents.⁹ *DeMent's* relevance in this matter is limited to the holding that custody
 12 disputes fall outside the ICWA. It is noteworthy, however, that the tribe in *DeMent*
 13 argued and did the exact same thing that the RSTC did here, which was to make the
 14 children "wards" of the tribal court and then claim the ICWA applied. Like the Eighth
 15 Circuit Court did, this Court should also quickly see through that claim a sham and find
 16 that the ICWA does not apply.

17 **III. Plaintiff's claims for jurisdiction in the Complaint are barred by the *Rooker-***
 18 ***Feldman* Doctrine.**

19 As stated above, although technically Plaintiff was not a party to the Gila County
 20 action, the relief requested is a de-facto appeal of the Gila County Court's ruling and is
 21 therefore barred by the *Rooker-Feldman* doctrine. The federal court is to look at the
 22 substance of the claims and determine whether the federal claims are "a defacto appeal" of
 23

24 ⁸ See *Confederated Tribes of Colville Reservation v. Superior Court of Okanogan County*,
 25 945 F.2d 1138, 1140(9th Cir. 1991), (emphasis added); *DeMent v. Oglala Sioux Tribal*
 26 *Court*, 874 F.2d 510, 514 (8th Cir. 1989); *Comanche Indian Tribe of Okla. v. Hovis*, 53
 F.3d 298, 304 (10th Cir.1995); and H.R.Rep. No. 1386, 95th Cong., 2d Sess. 19, reprinted
 in 1978 U.S.Code Cong. & Ad.News 7530, 7540.

⁹ *DeMent*, 874 F.2d at 514.

1 the state court decision.¹⁰ An examination of the Complaint shows that Plaintiff wants
 2 this Court to find a lack of jurisdiction and enforce the RTSC orders, which is the same
 3 thing Father argued. This is the exact type of litigation that is barred under the *Rooker-*
 4 *Feldman* doctrine as discussed by the Ninth Circuit in *Bianchi v. Rylaarsdam*, where it
 5 held:

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

10 Under the language by the Ninth Circuit, it is clear that the term "any suit" is not
 11 simply meant one by the same plaintiff. The test is whether the federal suit seeks to
 12 "undo" a state court decision, which this case clearly does. Plaintiff specifically requests
 13 that this Court find that Gila County never had jurisdiction over the child.

14 **IV. A decision on jurisdiction for child custody is not reviewable by any federal
 15 Court except the Supreme Court of the United States.**

16 Without a claim under the ICWA, this case reduces to what it actually is, a
 17 jurisdictional custody dispute. In that situation there is no federal review outside of the
 18 Supreme Court. In *Thompson v. Thompson*, the United States Supreme Court reviewed
 19 the issue as to whether the PKPA creates an ability for Federal Courts to review a state
 20 court's decision regarding competing child custody orders.¹² The Supreme Court held that
 21 a federal court may not review the determination of a state court as to jurisdiction, and the
 22 district court's decision to grant the motion dismiss the claim for failure to state a claim in
 23 that matter was appropriate.¹³ In doing so the Supreme Court relied upon the fact that
 24 review is always available in the Supreme Court "... for truly intractable jurisdictional
 25 deadlocks.." between competing jurisdictions.¹⁴

26 ¹⁰ *Id.* at 1041.

¹¹ *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir.2003).

¹² *Thompson v. Thompson*, 484 U.S. 174 (1988).

¹³ *Id.* at 187.

¹⁴ *Id.*

1 This case is nothing more than an inter-jurisdictional child custody dispute that just
2 happens to involve an Indian tribe. If the dispute was between Arizona and Florida under
3 the same scenario, there is no question that there would be no federal jurisdiction for
4 review, outside the Supreme Court.

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

7 DATED this 14th day of December, 2009.

8 THE CAVANAGH LAW FIRM, P.A.

9 By: s/Scott A. Salmon
10 Scott A. Salmon
Attorneys for Defendant Antanelle Duwyenie

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that on December 14, 2009, I electronically transmitted the attached
13 document to the Clerk's Office using the ECF System for filing and transmittal of a
14 Notice of Electronic Filing to the following ECF registrants:

15 Alan L. Liebowitz, Esq.
16 16042 North 32nd Street, Suite D-10
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18 s/Susan Albue
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