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4 **IN THE UNITED STATES DISTRICT COURT**
5 **IN AND FOR THE DISTRICT OF ARIZONA**

6 **ROSEBUD SIOUX INDIAN TRIBE,**

7 Plaintiff,

8 vs.

9 **ANTANELLE DUWYENIE, et al,**

10 Defendants.

CASE NO. 2:09 CV01660-PHX-MHM

RESPONSE BY PLAINTIFF TO
DEFENDANT ANTANELLE
DUWYENIE’S MOTION TO DISMISS
COMPLAINT

11 MATTERS OF ACCURACY

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13 The plaintiff in this matter is the Rosebud Sioux Indian Tribe, a federally
14 recognized Indian Tribe. It is a separate and distinct entity from William Moran, an
15 individual. Hence, the appellate case referenced in Defendant Antanelle Duwyenie’s
16 (“Defendant”) Motion to Dismiss (“Motion to Dismiss”), *i.e.*, *Duwyenie v. Moran*, 207
17 P.3d 754, 220 Ariz. 501 (Ariz. App. Div. 2, 2009), p. 2, lines 12 & 13, is irrelevant to
18 these proceedings because the Rosebud Sioux Indian Tribe was not a party to *Duwyenie*
19 *v. Moran* (and is not a state court loser). Accordingly, the *Rooker-Feldman* Doctrine has
20 no application to this case.¹

21 Significantly:

22 (i) Although the Defendant asserts in her Motion to Dismiss at p. 9, line 3, the
23 claims in *Duwyenie v. Moran* “are the identical claims made in state court by [Mr.
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28 ¹ Nor, as alleged in Defendant’s Motion to Dismiss at p.14, lines 13 & 14, is the Rosebud Sioux Indian Tribe bound by the doctrines of collateral estoppel or *res judicata*.

1 Moran],” the claims, as well as the parties, are neither identical nor have similar interests.
2 A review of the pleadings in this case and the papers attached to Defendant’s Motion to
3 Dismiss establishes the inaccuracy of Defendant’s assertion and establishes the claims are
4 unrelated. Nor is the immediately thereafter sentence in Defendant’s Motion to Dismiss
5 accurate, *i.e.*, “Plaintiff now requests review of what Father [William Moran] already
6 argued and litigated through the Arizona Court of Appeals,” Motion to Dismiss at p. 9,
7 lines 4 & 5. With all due respect to opposing counsel, this assertion is simply balderdash.
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9 (ii) In her Motion to Dismiss at p. 14, lines 15 & 16, the pleading states: “The
10 determination by a state court that the ICWA does not apply, is not reviewable in federal
11 court.” If this is an assertion of fact that the Gila County Superior Court made such a
12 determination in *Duwyenie v. Moran*, it is a false statement. The ICWA was neither
13 raised nor argued, never mind the Gila County Superior Court reaching any such
14 determination as alleged by the Defendant, in *Duwyenie v. Moran*.
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17 THE ROOKER-FELDMAN DOCTRINE
18 HAS NO APPLICATION TO THIS CASE

19 In the interest of brevity, the Rosebud Sioux Indian Tribe incorporates by
20 reference the entirety of its Response, including its arguments regarding the *Rooker-*
21 *Feldman* Doctrine, filed of even date herewith to the State Judicial Defendants Motion to
22 Dismiss.
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24 ANTANNELLE DUWYENIE’S SPECIAL APPEARANCE

25 The Defendant asserts in her Motion to Dismiss at p. 7, lines 19 & 20, “the trial
26 court rejected Father’s [William Moran’s] contention that Mother [Antanelle Duwyenie]
27 consented to the jurisdiction of the Rosebud Sioux Tribal Court.” While this asserted
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1 contention is incorrect, “Father’s contention” is also irrelevant. (What is relevant is what
2 actually happened in the Rosebud Sioux Tribal Court.)

3 What is relevant to the matter before this Court is that as asserted in the Rosebud
4 Sioux Indian Tribe’s complaint at paragraphs 18 to 22 (incorporated by reference), the
5 Defendant herself and also through three or four of the six lawyers that represented her
6 appeared before the Rosebud Sioux Tribal Court numerous times. In each such
7 appearance and in the numerous pleadings that were filed, the Defendant and her
8 attorneys on the record made unequivocally clear each time that the appearance was a
9 “special appearance.” Of far greater significance, the Rosebud Sioux Tribal Court
10 acknowledged the “special appearance,” determined that it had jurisdiction and, most
11 importantly, on the record (see the Complaint, footnote 3) acknowledged that the
12 Defendant had preserved her arguments for an appeal (i.e., the Rosebud Sioux Tribal
13 Court lacked jurisdiction).

14 What remains puzzling to this day is why the Defendant, who was represented by
15 at least six attorneys, did not file a special action (or use whatever procedure would be
16 appropriate in the jurisdiction) challenging jurisdiction or an appeal of the Rosebud Sioux
17 Tribal Court’s decision regarding jurisdiction. Instead, seemingly with the approval and
18 cooperation of her attorneys, the Defendant willfully “blew-off” and disobeyed a court
19 order .”

20 It is not necessary to cite authority for the proposition that litigants do not have the
21 privilege of deciding which court orders they like and will obey and which court orders
22 they will disobey. Litigants cannot move the litigation elsewhere because they do not
23 like an order or decision of a court. As former United States Supreme Court Justice
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1 Jackson has stated: "...when [the order] has become final, disobedience cannot be
2 justified by re-trying the issues as to whether the order should have issued in the first
3 place." *Maggio v. Zeitz*, 333 U.S. 56, at 69, 68 S. Ct. 401, at 408, 92 L. Ed. 476 (1948).

4 The very simple answer, we would not be here today if reason and professionalism
5 had prevailed among the Defendant and her six attorneys, is that the Defendant and her
6 attorneys should have utilized local procedure to challenge the decision of the Rosebud
7 Sioux Tribal Court's decision that it had jurisdiction (the equivalent of what we in
8 Arizona call a "special action"). If still unsuccessful, then an appeal to the Rosebud
9 Supreme Court. Finally, if the Defendant and her attorneys were still of the belief that
10 due process was denied, they should have taken the matter to the United States District
11 Court for the District of South Dakota. What they should not have done is willfully
12 disobey a court order and unilaterally decide that the Rosebud Sioux Tribal Court was
13 without jurisdiction. Nor, quite frankly, should they be allowed to *get away with it* after
14 the fact through the extensive use of descriptive adjectives and unsupported allegations of
15 wrongdoing by the Rosebud Sioux Tribal Court.

19 THE EXHAUSTION OF TRIBAL REMEDIES

20 An analogous situation arose in *Dement v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th
21 Cir. 05/03/1989),² a case cited by the Defendant. This case was an appeal from the United
22 States District Court for the District of South Dakota's order finding that the tribal court
23 lacked jurisdiction to adjudicate a custody battle between Redner, an enrolled member of
24 the Oglala Sioux, and her former husband, Henry DeMent. a non-indian. The Eighth
25 Circuit remanded the case with the following statement,

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² The Rosebud Sioux Reservation lies within the Eighth Circuit.

1 We remand the case to the district court. Given the long and tortured
2 history of this obviously bitter dispute, we strongly urge the district court to
3 consider staying the matter pending timely tribal court proceedings, with
4 jurisdiction retained. See *National Farmers Union*, 471 U.S. at 857;
5 *LaPlante*, 480 U.S. at 20 n.14. We believe this would permit a speedy
6 adjudication should the procedures followed or the results attained in the
7 tribal court require further action by the district court.

8 The pertinent facts of *Dement v. Oglala Sioux Tribal Court* are as follows:

9 Henry DeMent and Debra Redner had three minor children.. When DeMent, a
10 non-Indian (the functional equivalent of the Defendant herein who is not a member of the
11 Rosebud Sioux Indian Tribe), and Redner, a member of the Oglala Sioux Indian Tribe,
12 were divorced in Nebraska, a state court granted joint custody to both parents and
13 physical custody to Redner. After numerous court appearances and disputes, the Oglala
14 Indian Tribal Court made the children wards of the tribal court. At a subsequent hearing
15 before the tribal court, DeMent objected to the tribal court's jurisdiction. The tribal court
16 ruled that it had jurisdiction to adjudicate the custody suit based on the domicile of the
17 children on the reservation.

18 DeMent then brought an action in District Court in South Dakota seeking a writ of
19 habeas corpus to regain custody of the children. He alleged that the tribal court had
20 violated his right to due process under the Indian Civil Rights Act (ICRA), 25 U.S.C.
21 1302(8) and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. 1738A, by
22 refusing to enforce the state court custody decree. The tribal court alleged that it has
23 exclusive subject matter jurisdiction under the Indian Child Welfare Act (ICWA), 25
24 U.S.C. 1911(d), over Indian child custody proceedings and all other courts lacked
25 jurisdiction over the children.
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1 The District Court, *inter alia*, found the ICWA inapplicable to child custody
2 proceedings between divorced parents and thus, inapplicable to the present suit. Finally,
3 the District Court held that the tribal court had no personal jurisdiction over DeMent and,
4 thus, had no authority to adjudicate the custody dispute involving his children. The tribal
5 court appealed to the Eighth Circuit Court of Appeals.
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7 The first interesting finding was that the Eighth Circuit concluded the question of
8 whether an Indian tribe has the power to compel a non-Indian to submit to the civil
9 jurisdiction of a tribal court is a federal question under 28 U.S.C. 1331. *National Farmers*
10 *Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852, 105 S. Ct. 2447, 85 L. Ed. 2d 818
11 (1985). Thus, the District Court had federal question jurisdiction in this case.
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13 DeMent then alleged that the tribal court violated his due process rights by failing
14 to enforce what he believes to be a valid state custody decree and by awarding custody of
15 the children to Redner without having personal jurisdiction over him. The Eighth Circuit
16 concluded that DeMent may have had a valid due process claim. Nonetheless, it
17 concluded “a non-Indian plaintiff who disputes the tribal court's jurisdiction over him
18 *must exhaust tribal remedies before seeking federal relief*. The Eighth Circuit went on to
19 hold:
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22 We believe that examination should be conducted in the first instance in the
23 Tribal Court itself. Our cases have often recognized that Congress is
24 committed to a policy of supporting tribal self-government and self-
25 determination. That policy favors a rule that will provide the forum whose
26 jurisdiction is being challenged the first opportunity to evaluate the factual
27 and legal bases for the challenge. 471 U.S. at 855-56 (footnotes omitted).

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26 Regardless of the basis for jurisdiction, the federal policy supporting the
27 tribal self-government directs a federal court to stay its hand in order to
28 give the tribal court a "full opportunity to determine its own jurisdiction....
At a minimum, exhaustion of tribal remedies means that tribal appellate

1 courts must have the opportunity to review the determinations of the lower
tribal courts.

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3 The record indicates that DeMent entered the reservation on three separate
4 occasions with an intent to remove the children... in violation of... a valid
tribal restraining order. Also in the record is a tribal court opinion
5 indicating that DeMent participated in a custody hearing on the
6 reservation.... Furthermore, the tribal court argues that section 48 of the
tribal code which gives a tribal court jurisdiction over child custody
7 disputes in divorce proceedings expands its jurisdictional authority. We
believe that under the factual circumstances of this case, the assertion of
8 jurisdiction did not constitute a patent violation of express jurisdictional
limitations. DeMent should have appealed the tribal court's decision as to
9 jurisdiction to the [tribal] court of appeals as provided by the Revised Code
of the Oglala Sioux Tribe of the Pine Ridge Reservation, Ch. 2, Section 6.3,
10 before seeking... relief in federal court

11 CONCLUSION

12 This court should refrain from ruling on the jurisdiction of the Rosebud Sioux
13 Tribal Court. To do so would be in opposition to the long standing policy of the
14 encouraging tribal self-government. The issue before this court is not whether or not the
15 ICWA applies to the dispute between the Defendant and William Moran, but (i) whether
16 the Defendant is entitled to willfully disobey a court order and (ii) whether a state trial
17 judge can ignore a federal statute that uses the phrase "exclusive jurisdiction."
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19 Respectfully, the Defendant's motion to dismiss should be denied and the Rosebud
20 Sioux Tribal Court granted the relief prayer for in its complaint.

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22 Respectfully, the Defendant's Motion to Dismiss should be denied.

23 Submitted on December 3, 2009.

24 /s/ ALAN L LIEBOWITZ

25 _____
26 Alan L. Liebowitz
27 Attorney for Plaintiff
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CERTIFICATE OF SERVICE

I CERTIFY that on December 3, 2009, I mailed (by first class mail) the above pleading to the parties listed below.

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