CASE NO. 10-6239

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHRISTOPHER YANCEY,
Appellant,
v.
TIMOTHY THOMAS and TAMMY THOMAS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
DISTRICT COURT CASE NUMBER CIV 09-597 C
HONORABLE ROBIN CAUTHRON, DISTRICT JUDGE

APPELLEES' BRIEF

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February 7, 2011

Oral Argument Not Desired

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CERTIFICATE OF INTERESTED PARTIES

In accordance with 10th Cir.R.46.1, the undersigned appears as counsel for the Appellees/Defendants, Timothy Thomas and Tammy Thomas.

Further, the undersigned certifies that the Honorable Gary Bonner, Associate District Judge of Cleveland County, Oklahoma, was interested in a related legal proceeding entitled *Yancey v. Bonner*, United States Court of Appeals, 10th Circuit, Case No. 08-6220.

PRIOR OR RELATED APPEAL

Yancey v. Bonner, Case No. 08-6220

STATEMENT OF CASE

I. Nature of Case, Course of Proceedings and Disposition Below.

The parties will be referred to as they appeared in the court below. This is an appeal from the Order (Aplt. App. 156-158 (and judgment) (Aplt. App. 3, Dkt. Entry No. 16)) of the United States District Court for the Western District of Oklahoma, both of which were entered on September 20, 2010. Thereby, the District Court determined (1) that 25 U.S.C. § 1914 does not provide a mechanism for District Court review of a final state court decision, (2) that § 1914 does not trump the Full Faith and Credit Clause of the United States Constitution and/or the principles of comity outlined in 28 U.S.C. § 1738, and, (3) Plaintiff's action was precluded under the Doctrine of *Res Judicata* and/or the Rooker-Feldman Doctrine. The court determined that since those doctrines were dispositive of the issues, no amendment could cure the defect in the Plaintiff's case. Accordingly, the case was dismissed with prejudiced and a separate judgment was entered thereon.

This case was commenced by the filing of a Complaint on May 20, 2010. (Aplt., App. 4.) Responsive thereto, Defendants moved to dismiss the case pursuant to Rule 12(b)(1), Fed.R.Civ.P., due to the absence of subject matter jurisdiction under the

Rooker-Feldman Doctrine.[1] In their motion, Defendants also contended that, even if Rooker-Feldman did not apply, the case was precluded by the Doctrine of *Res Judicata* based on *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985). (Aplt. App. 49.)[2] Submitted as part of the Defendants' motion were several documents including two slip orders of the Supreme Court of Oklahoma denying extraordinary relief (Aplt. App. 18 and 19), the Opinion of the Court of Civil Appeals of Oklahoma filed August 17, 2007 affirming a trial court order which found good cause to deviate from the placement preferences in the Indian Child Welfare Act, 25 U.S.C. § 1915(a), (Aplt. App. 20-38), the slip order of the Oklahoma Supreme Court denying further review by certiorari of that order (Aplt. App. 39), the Final Decision of the Oklahoma Court of Civil Appeals filed September 18, 2008 affirming the trial court order holding the minor child, Baby Boy L., eligible for adoption without Plaintiff's consent and disposing of all of the ICWA issues (Aplt. App. 40-50) alleged by the Plaintiff in his original Complaint (Aplt. App. 4-11 at Aplt. App. 10, para. 20). In addition, Defendants provided the District Court with a slip order of the Supreme

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[1]The Doctrine is named after two cases from which it was developed: *Rooker v. Fidelity Trust Co.*, 263 US 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 US 462 (1983).

[2]In its decision, the district court also relied on *Comanche Indian Tribe of Oklahoma v. Hovis*, 53 F.3d 298 (10th Cir. 1995). As will be demonstrated, both cases are in point and dispositive of this appeal.

Court of Oklahoma denying further review by certiorari on the Court of Appeal decision finding Baby Boy L. eligible for adoption without consent, (Aplt. App. 39), the Order of the United States Supreme Court also denying certiorari with respect to the second listed appeal (Aplt. App. 51-68 at 59 [Case No. 08-9005]), and the Order of the District Court of Cleveland County dated May 18, 2010 terminating the parental rights of the Plaintiff with respect to Baby Boy L. and finding that the Indian Child Welfare Act applied and was complied with (Aplt. App. 99), and from which Plaintiff took no appeal in state court. All of these documents were submitted for the purpose of demonstrating to the District Court that the state court proceedings were final and based on the merits of the same issues raised in the action below, and were between the same parties.

The Plaintiff responded to the motion to dismiss and as a part of his response, offered materials outside of the allegations in the Complaint (Aplt. App. 126, "The Psychological Parenting and Permanency Principles in Child Welfare: a reappraisal and critique, 52 Amer.J. Orthopsychiatry (1982)."

As indicated, the Trial Court found the Defendants' arguments persuasive and dismissed Plaintiff's action with prejudice for the reasons set forth therein.

II. Statement of Facts.

A. Standard of Review.

The standard of review is *de novo*. The Defendants' motion was briefed on the issue of subject matter jurisdiction under Rule 12(b)(1) Fed.R.Civ.P. based on the contention that the trial court lacked subject matter jurisdiction under the Rooker-Feldman Doctrine, *supra*. It was also briefed and submitted based on the further contention that Plaintiff's action below was precluded by the Doctrine of *Res Judicata* thus implicating Rule 12(b)(6), Fed.R.Civ.P. The motion to dismiss also included documents outside the four corners of the Complaint thus implicating the summary judgment standard of review as required by Rule 12(c) Fed.R.Civ.P. which provides that, if on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Regardless of the standard of review applied here, the result is the same because the trial court could have gleaned the applicability of *res judicata* from the Complaint itself or from the motion and documents submitted therewith. In *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir., 2004) this Court noted that the Court could convert a motion to dismiss to a motion for summary judgment where both sides had notice of the possibility of conversion and were provided with a fair opportunity to respond. This Court also noted, based on *Wolf v. Preferred Risk Life Insurance Company*, 728 F.2d 1304 (10th Cir., 1984) that if a motion is predicated on the existence of an affirmative

defense (the statute of limitations there), and its applicability as it depends on disputed facts, summary judgment is not appropriate.

In this case the outcome depends on resolution of a pure question of law which is not dependent upon disputed facts. Defendants contend that whether the issues are viewed in light of the plausibility requirement articulated in *Bell Atlantic v. Twomby*, 550 US 544 (2007) or the reasonable fact finder rule under Rule 56, Fed.R.Civ.P., and it is decided *de novo*, the result is the same. The district court properly dismissed this action with prejudice.

B. Material Facts.

Plaintiff's Complaint claims, in substance, that the respective rulings of the District Court of Cleveland County, the Oklahoma Court of Civil Appeals and the Oklahoma Supreme Court, were all incorrect[3] allegedly because those courts failed to dismiss the adoption which is the subject of this action, failed to actively pursue reunification with the father, failed to return custody of the child to the father, failed to transfer this proceeding to the Tribal Court, as well as other alleged violations of the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq. The specific relief he sought was for the District Court to review and invalidate the decisions of those courts. All

[3]Throughout his brief, Plaintiff castigates those Courts for allegedly "ignoring" the ICWA.

of the claims alleged in the Complaint were attempted to implicate the ICWA and issues which were either actually raised or which might have been raised in the adoption proceeding before the state court. "Appellate" relief under 25 U.S.C. § 1914, was not available in federal court because the statute does not provide a mechanism for such review, and, because the decisions under consideration here are precluded by the Doctrine of *Res Judicata*. Accordingly, the relevant facts, as found by the Court of Civil Appeals in its last decision are as follows. Yancey is the natural father of Baby Boy L. and an enrolled member of the Muscogee (Creek) Tribe. Tiffany Leatherman is his natural mother. Ms. Leatherman met the Defendants in this case, Timothy and Tammy Thomas, before the child's birth and agreed to allow them to adopt him. After the child's birth, Leatherman executed a relinquishment of her parental rights and sought to have Yancey's parental rights terminated together with a finding that the child was eligible for adoption without Yancey's consent since Yancey had failed to support Leatherman during the pregnancy.

The state district court initially found that the Indian Child Welfare Act (ICWA) was not applicable because of the "existing Indian family" exception then in effect, and, that the child was eligible for adoption without Plaintiff's (Yancey) consent. The Oklahoma Supreme Court reversed that decision, holding, for the first time, the "existing Indian family" exception no longer applied in Oklahoma. The Supreme

Court also found that the evidence was insufficient to prove that Yancey had failed to support Leatherman during the pregnancy, and it remanded the matter to the state district court. It is not in dispute that in this case, as well as the adoption proceeding below, the parties are the same.

After the adoption was remanded by the Oklahoma Supreme Court, the Thomases' filed a Petition for Adoption and an Application to Determine Child Eligible for Adoption Without Consent of Natural Father and the Termination of Parental Rights on January 24, 2006. On February 14, 2006, the state district court entered an interim custody order leaving the child in the Thomases' custody, all based on evidence that the child would suffer serious emotional harm if removed from the Thomases' home. The Oklahoma Court of Civil Appeals affirmed the trial court on August 17, 2007 (Aplt. App. 20-38). Plaintiff then sought relief by writ of certiorari which was denied by the Oklahoma Supreme Court on November 5, 2007. (Aplt. App. 39.)

The state district court tried the Thomases' (Defendants) Application to Determine the Child Eligible for Adoption Without Consent on February 19, 2008. At the same hearing, the court heard arguments on and denied Yancey's request to transfer the case to Tribal Court. The court found that the Thomases had shown by clear and convincing evidence that Yancey had willfully failed, refused and neglected

to contribute to the support of the child according to his ability for the twelve (12) consecutive months out of the fourteen (14) months preceding the Petition for Adoption. The court further found that the Thomases had shown by clear and convincing evidence that Yancey failed to establish or maintain a substantial and positive relationship with the child for twelve (12) consecutive months out of the fourteen (14) months preceding the Petition for Adoption. The state trial court found that Yancey's consent to adoption was, accordingly, not required.

Plaintiff (Yancey) appealed that order and the same was affirmed by the Oklahoma Court of Civil Appeals on September 18, 2008 (Aplt. App. 40-50). Again, certiorari was denied by the Supreme Court of Oklahoma on November 5, 2007. Thereupon, Yancey filed a Petition for Writ of Certiorari with the United States Supreme Court. That Petition was denied by the court on April 20, 2009. (Aplt. App. 59.)

Following the proceedings outlined above, the District Court of Cleveland County heard the Thomases' Application to Terminate Yancey's Parental Rights on May 14, 2010. Upon review of the evidence which included transcripts from the two previous hearings, the report of the Guardian Ad Litem and both opinions of the Court of Civil Appeals, the court found that the Thomases had met their burden of proof beyond reasonable doubt and that the Indian Child Welfare Act applied and had been

complied with. The court terminated Yancey's parental rights by a written order filed in the District Court of Cleveland County on May 18, 2010. By that time, the court's order finding Baby Boy L. eligible for adoption without consent had become final. The order terminating Yancey's parental rights became final and appealable as a matter of right on June 18, 2010 under the provisions of 10 O.S., 2001, § 7505-7.1(C). Plaintiff failed to take the appeal available to him. Rather than take his statutory appeal, Plaintiff came to the federal district court requesting that it review and invalidate the prior decisions of the state district courts, the Oklahoma Courts of Appeal and seeking mandatory and injunctive relief directing the District Court of Cleveland County to dismiss the underlying adoption and ordering the immediate return of the child who has been in Defendants' custody since 2002.

SUMMARY OF ARGUMENT

Defendants contend that Plaintiff (Yancey) may not institute an action in federal district court after he has lost in state court. 25 U.S.C. § 1914 does not provide an independent ground to re-litigate state court decisions. Plaintiff chose to litigate in state court, and review of the state court's decision was limited to a timely appeal to the state appellate court and was not "appealable" to federal district court. In other words, and under circumstances, the District Court of Cleveland County was the court of competent jurisdiction contemplated by § 1914. Congress clearly foresaw that state

courts would have to determine issues with respect to the Indian Child Welfare Act in the first instance and, a state court determination regarding those issues is binding on the federal court unless (1) the decision is so fundamentally flawed as to be denied recognition under 28 U.S.C. § 1738 or unless Congress intended that state-court judgments concerning the meaning and applicability of the Indian Child Welfare Act be excepted from the Full Faith and Credit requirement provided for therein. In addition, *res judicata* and/or the Rooker-Feldman Doctrine preclude Yancey from re-litigating his claims in federal court.

ARGUMENT AND AUTHORITIES

PROPOSITION I

THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF'S CLAIMS BELOW WERE PRECLUDED FROM RE-LITIGATION IN FEDERAL COURT.

A. *Res Judicata*.

Plaintiff urges in this appeal that the trial court erred in finding that his claims were precluded from re-litigation. With this contention, Defendants respectfully disagree. Despite multiple reviews of this case in the state courts, and despite Plaintiff's contentions to the contrary, the United States District Court has not been vested with "appellate" jurisdiction to review and invalidate pre-existing and final

orders of the state courts under 25 U.S.C. § 1914. Even if it had, and even if the Rooker-Feldman Doctrine does not apply, the Oklahoma Doctrine of *Res Judicata* (Claim Preclusion) applies and required dismissal below.

Oklahoma courts have long adhered to the proposition that a case, once decided by a court of competent jurisdiction, may not be re-litigated between the same parties or those in privy with them. The prohibition against duplicitous claims has taken two forms, one of which is the Doctrine of *Res Judicata* (Claim Preclusion). The doctrine prohibits re-litigation by the same parties of the same cause of action and reaches all issues which were actually raised or which might have been raised in the prior proceeding. *Read v. Read*, 2001 OK 87, 57 P.3d 561, reh. den.; *State, ex rel. Tal v. City of Oklahoma City*, 2002 OK 97, 61 P.3d 234. The elements necessary to invoke claim preclusion are (1) the court in the prior proceeding had jurisdiction of the parties and the subject matter; (2) the prior proceeding involved the same parties or those in privity with them; (3) there is an identity of causes of action and issues which were or which might have been raised in the prior proceeding; and (4) the prior determination is final. *U.S. v. Botefur*, 309 F.3d 1263, on remand, *U.S. v. Davenport's Estate*, 2003 W.D.21791215; *Nealis v. Baird*, 1999 OK 98, 996 P.2d 438.

The pleadings and exhibits before the District Court, and before this Court at Aplt. App. 4-120 plainly establish that all of the required elements necessary to

preclude further litigation are present. No one disputes that the District Court of Cleveland County, Oklahoma, had jurisdiction of the parties and the subject matter. There is no dispute that evidence before the federal district court in this matter established that the prior proceeding and the proceeding before the district court was between the same parties (i.e., Yancey and the Thomases), and in both state and federal cases Yancey sought to invoke the ICWA. Moreover, the same facts form the basis of this case and its predecessors; and Plaintiff seeks the same relief he sought in state court. In short, the issues raised in the District Court of Cleveland County were same issues raised in the present proceeding. Finally, the Order of the District Court of Cleveland County terminating Yancey's parental rights became final on June 18, 2010. The prior decision of the Court of Civil Appeals became final when certiorari was denied by the United States Supreme Court on April 20, 2009. That proceeding found Baby Boy L. to be eligible for adoption without consent *based on proof sufficient to terminate Plaintiff's parental rights*. Therefore, the necessary element of finality has been met.

The district court's reliance upon *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985) was correct. Factually, *Kiowa Tribe* is nearly identical to the present case. The child involved was born out of wedlock. His biological father was an enrolled member of the Kiowa Tribe. The mother was a non-Indian who executed

a voluntary consent to the baby's adoption. After petition for adoption was filed, the state court recessed the proceeding so that the Tribe could be notified. The Tribe filed a motion to intervene and contemporaneously enrolled the child as a member of the Tribe. The state court denied the Tribe's intervention due to the inapplicability of the Indian Child Welfare Act. It also found that the father was an unfit parent and granted the petition for adoption. The Tribe appealed to the Supreme Court of Kansas. The Supreme Court of Kansas affirmed the lower court's judgment.

Thereafter, the Tribe filed suit in the United States District Court for the District of Kansas seeking the same relief sought here by the Plaintiff. The District Court dismissed the suit on the ground that the same was precluded by the Doctrines of *Res Judicata and Collateral Estoppel*.

On appeal, this Court held that federal courts are required to give the same preclusive effect to state court judgments that those judgments would be given in the courts in which they were rendered under 28 U.S.C. § 1738. The court then affirmed the District Court's order saying:

> "We believe the Doctrine of *Res Judicata* precludes the Tribe from re-litigating its claims in this new action. The Kansas courts invoke the *Res Judicata* Doctrine at least when the following criteria are satisfied: '(1) identity in the thing sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made.' (Citing authority.)

> We believe there is here identity in the things sued for – in both suits the Tribe primarily contests its right to intervene under the ICWA. The Tribe is again suing to prevent the termination of its rights over the child they claim is an Indian subject to the ICWA. There is also identity of the cause of action; in both cases the Tribe is seeking to invoke the ICWA. The other two criteria are also present; in both suits the adoptive parents and the Tribe are parties and are aligned as adversaries. There is no material difference in the 'quality' of the parties to the two actions. The same facts form the basis of both suits and plaintiff essentially seeks identical relief in both cases: to invoke the Indian Child Welfare Act and prevent the adoption of this baby."

Later, in *Comanche Indian Tribe of Oklahoma v. Hovis*, 53 F.3d 298 (10th Cir. 1995), this Court reaffirmed its earlier ruling in *Kiowa Tribe* saying: "Under *Kiowa Tribe*, it is clear that § 1914 is not an independent ground to re-litigate state court decisions." In short, Plaintiff apparently wants this Court to ignore or change both decisions, but he provides no legal or factual basis for doing so.

Defendants urge this Court to affirm the trial court decision for the reason that, at the very least, Plaintiff's action here is precluded by *res judicata*. It may also be precluded by the Rooker-Feldman Doctrine also discussed in this brief.

B. Rooker-Feldman Doctrine.

The Rooker-Feldman Doctrine prevents lower federal courts from exercising jurisdiction over cases brought by 'state court losers' challenging 'state court judgments rendered before the district court proceedings were commenced.' *Exxon Mobile Corp. v. Saudi Basic Industry Corp.*, 544 U.S. 280, 284, 125 S.Ct.1517, 16

L.Ed.2d 454 (2005). Rooker-Feldman is a narrow doctrine which precludes subject matter jurisdiction because 28 U.S.C. § 1257 vests federal exclusive jurisdiction to review a state-court judgment in the United States Supreme Court. *Exxon Mobile Corp., supra*.

There are three (3) requirements which must be met in order to invoke the Rooker-Feldman Doctrine:

1. "[T]he party against whom the doctrine is invoked must have actually been a party to the prior state-court judgment or have been in privity with such party";
2. The claims raised in the federal suit must have actually been raised or be inextricably intertwined with the state-court judgment; and
3. The federal claim must not be parallel to the state court claim. *Lance v. Dennis*, 546 U.S. 459, 126 S.Ct. at 1200, 163 L.Ed.2d 1059.

As applied to the circumstances in this case, the Rooker-Feldman criteria have been met. First, Plaintiff, the party against whom the Doctrine is here invoked, was actually a party to the prior state-court judgment. In addition, a perusal of the state court proceeding reveals that all of the issues raised in this matter were either raised or are inextricably intertwined with the state-court claims because they are all based on the same facts and the same law.

Finally, the two lawsuits, i.e., the state court underlying adoption and this case are not parallel. The final judgment of which Plaintiff primarily complains was rendered on the 14th day of May, 2010 and filed of record in the state court on the 18th day of May, 2010. This case was commenced on May 19, 2010. Prior to the District Court's ruling below, all state court decisions became final. Accordingly, the third element, as well as the rationale for Rooker-Feldman, has been met. Plaintiff has now repaired to the federal district court for the express purpose of undoing various prior decisions of the Oklahoma state trial and appellate courts. The Supreme Court noted in *Exxon Mobile Corp., supra*:

> "Rooker and Feldman exhibit the limited circumstances in which this court's appellate jurisdiction over state-court judgments, § 1257, precludes a federal district court from exercising subject-matter jurisdiction *in an action it would otherwise be empowered to adjudicate under a congressional grant of authority*. In both cases, the plaintiffs, alleging federal-question jurisdiction, called upon the district court to overturn an injurious state-court judgment. Because § 1257, as long interpreted, vests authority to review a state-court judgment solely in this court, e.g., Feldman, 460 U.S. at 476, 103 S.Ct.1303, the district courts lacked subject matter jurisdiction, see, e.g., *Verizon N.D., Inc. v. Public Service Comm'n of M.D.*, 535 U.S. 635, 644, m.3 122 S.Ct.753, 152 L.Ed.871."

In addition to the matters discussed above, the action in the court below was an action the district court would otherwise have been empowered to adjudicate under

a congressional grant of authority in 25 U.S.C. § 1914, thus satisfying all of the requirements of Rooker-Feldman.

Significantly, the Supreme Court noted that in parallel cases, where both the state and federal actions pend at the same time, state court claim preclusion would govern the outcome. In other words, whether this Court finds that the actions below were parallel or not, the Plaintiff's action here is precluded either by *res judicata*, Rooker-Feldman, or both. And, ". . . regardless of whether [this court] agree[s] with the [Oklahoma court's construction] of the ICWA [this court] must honor the judgment it has rendered on the subject." (*Kiowa Tribe, supra*, at 592.)

On the question of whether he may pursue appellate remedies in federal court, Plaintiff relies in part on *Doe v. Mann*, 415 F.2d 1038 (9th Cir. 2004) (Plaintiff's brief at p. 15). That authority, however, is distinguishable from the case at bar because the Indian child there was forcibly removed from an Indian reservation by officials of the State of California, thus invoking the exclusive jurisdiction of Tribal Courts under 25 U.S.C. § 1911(a). It also implicated other federal statutes which have no application here including Public Law 280 (18 U.S.C. § 1162[A]) relating to criminal offenses committed by or against Indians and 28 U.S.C. § 1360(a) relating to civil jurisdiction conferred by Public Law 280.

More significantly, however, is the following observation of the 9th Circuit Court:

> "Typically, the *Rooker-Feldman Doctrine* bars federal courts from exercising subject matter jurisdiction over a proceeding in which a party losing in state court 'seeks' what in substance would be appellate review of the state judgment in the United States District Court, based on losing party's claim that the state court judgment itself violates the loser's federal rights."

What the 9th Circuit Court described above is precisely what has happened here. Plaintiff abandoned his appellate remedies in state court and the United States Supreme Court in favor of an ill-advised original action in federal court seeking the equivalent of appellate review. Accordingly, the only federal court which was authorized to review his claims as a result of the state court proceeding was the United States Supreme Court. *Exxon Mobile Corp., supra*.

PROPOSITION II

25 U.S.C. § 1914 DOES NOT AUTHORIZE THE UNITED STATES DISTRICT COURT TO REVIEW AND INVALIDATE PRIOR STATE-COURT DECISIONS.

In *Kiowa Tribe, supra*, this Court also dealt with the question of whether, by enacting the ICWA, Congress intended to create an exception to the rule of Full Faith and Credit under 25 U.S.C. § 1914 which provides:

> "Any Indian child who is the subject of any action for foster care or placement or termination of parental rights under state law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to

> invalidate such action upon a showing that such action violated the provisions of §§ 1911, 1912 and 1913 of this Title."

This Court, while acknowledging the importance of the Tribe's interest in the welfare of Indian children, declined to hold that § 1914 made the Full Faith and Credit provisions of 28 U.S.C. § 1738 inapplicable. The court pointed out that an exception to that statute would not be recognized unless a later statute (here 28 U.S.C. § 1914) contains an express or implied partial repeal, citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). Indeed, this Court held that by conferring jurisdiction to 'any court of competent jurisdiction' in § 1914, Congress intended for it to relate only to the court in which such an action may initially be brought. This Court said:

> ". . . We cannot read § 1914's reference to 'any court of competent jurisdiction' as the type of clear and manifest authorization that federal courts need before they upset the ordinary principles of federal-state comity embodied in 28 U.S.C. § 1738 and the Full Faith and Credit Clause. *It seems rather to state simply where such actions may be initially brought . . .*" (Italics added.)

Finally, there is this: there are only two recognized exceptions to the applicability of the Full Faith and Credit Clause and the preclusive effect of the prior state court judgments. They are (1) the state court judgment was so fundamentally flawed as to be denied recognition under § 1738 (*Kremer v. Chemical Construction Corp., supra*), or (2) this Court finds that Congress intended for state court judgments concerning the

ICWA's applicability to be excepted from § 1738 command of Full Faith and Credit. There is nothing in the record to suggest that either of these exceptions applies. Under *Kiowa Tribe, supra*., this Court stated that in determining whether a prior proceeding was fundamentally flawed, it only examines whether the state court proceeding satisfied the minimum procedural requirements of the Due Process Clause of the Fourteenth Amendment. It requires little argument to support the notion that Plaintiff received every form of due process available in the state court. The exhibits attached to the Motion to Dismiss below and contained in the Appellant's appendix demonstrate that fact including, among other things, the fact that there have been five (5) appellate proceedings concerning the issues in the underlying case, and the fact that all legal issues were pursued at trial, and through appeal at the state court level and then in the United States Supreme Court.

CONCLUSION

In conclusion, Defendants respectfully urge that the trial court's judgment dismissing Plaintiff's action with prejudice was correct. Under the authorities cited above, it is plain that Congress did not intend for the United States District Court to act as an appellate court to review and invalidate prior state-court judgments of record.

Moreover, Plaintiff's action below was clearly precluded by either *res judicata*, the Rooker-Feldman Doctrine, or both. If *res judicata* applies, the result below was properly based on simple state law claim preclusion. On the other hand, if Rooker-Feldman applies, the federal courts lacked subject matter jurisdiction.

For all of the reasons set forth above, Defendants urge that the judgment of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Section 1.

As required by Fed.R.App. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5,672 words.

Complete one of the following:

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[ ] I counted five characters per word, counting all characters including citations and numerals.

s/ Charles F. Alden, III
Charles F. Alden, III

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of February, 2011, a true and correct copy of the Appellees' Brief was mailed, postage prepaid, and to the following:

Jerry L. Colclazier, Esq.
Colclazier & Associates
404 N. Main Street
Seminole, OK 74868

Barbara Smith, Esq.
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Norman, OK 73069

I further certify that on the 7th day of February, 2011, the original and seven true and correct copies of the Appellees' Brief were mailed, postage prepaid, and e-submitted, to:

Mr. Patrick Fisher
Clerk of the Court
United States Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

I further certify that all privacy redactions have been made to the attached document, and with the exception of those redactions, the document submitted in digital form is an exact copy of the written document filed with the clerk, and the digital submission has been scanned for viruses by AVG, and according to the program is free of viruses.

s/ Charles F. Alden, III
Charles F. Alden, III