

2009

## Failure to Object: Tribal Waiver of Immunity by Participation in Arbitration

Christopher McMillin

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Christopher McMillin, *Failure to Object: Tribal Waiver of Immunity by Participation in Arbitration*, 2009 J. Disp. Resol. (2009)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss2/11>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Failure to Object: Tribal Waiver of Immunity by Participation in Arbitration

*Oglala Sioux Tribe v. C & W Enterprises, Inc.*<sup>1</sup>

## I. INTRODUCTION

In *Oglala Sioux Tribe v. C & W Enterprises, Inc. (Oglala)*, the U.S. Court of Appeals for the Eighth Circuit dealt with whether a tribe's affirmative participation in the arbitration process waived its sovereign immunity as to arbitration and enforcement of an arbitration award in state court.<sup>2</sup> Previously, courts have maintained that the existence of an arbitration clause in a commercial contract was sufficient to waive tribal immunity, but they relied on the explicit wording of the agreement itself.<sup>3</sup> In the instant decision, this precedent applied to three construction contracts that contained an explicit choice of law provision, but the real difficulty lay in a fourth construction contract that did not compel arbitration or specify where an arbitration agreement could be enforced.<sup>4</sup>

The Eighth Circuit ruled that the commercial contracts between the Oglala Tribe and C & W Enterprises that contained choice of law provisions waived the Tribe's immunity.<sup>5</sup> The fourth contract did not contain a choice of law provision. The court ruled that not objecting to arbitration but instead raising its own counterclaims waived the Tribe's immunity.<sup>6</sup> The Eighth Circuit held that by submitting to arbitration, the Tribe also submitted to the rules governing the arbitration.<sup>7</sup> The court ruled that since the arbitration rules allowed for enforcement of the arbitration agreements in any court in the jurisdiction, the Tribe had waived its sovereign immunity to state court enforcement.<sup>8</sup> Congress has repeatedly urged courts to recognize the bounds of tribal sovereignty, but with this decision, the Eighth Circuit delved into the conduct of the Tribe rather than the terms to which the parties had agreed.<sup>9</sup> The expansion of tribal waiver to cover the conduct of the Tribe continues to erode the doctrine of tribal sovereignty.<sup>10</sup>

Additionally, by allowing a state court to enforce an arbitration agreement where no explicit language in the contract provided for one, the Eighth Circuit

---

1. 542 F.3d 224 (8th Cir. 2008).

2. *Id.* at 230-31.

3. *See C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418-19 (2001).

4. *Oglala*, 542 F.3d at 227, 229.

5. *Id.* at 231.

6. *Id.*

7. *Id.*

8. *Id.* at 231-32.

9. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

10. *See Demontiney v. U.S. ex rel. Dep't. of Interior*, 255 F.3d 801, 811 (9th Cir. 2001) ("There is a strong presumption against waiver of tribal sovereign immunity.").

expanded waiver to the act of proceeding with the arbitration.<sup>11</sup> The result is that by allowing such a broad interpretation of waiver, the dispute was forced to be resolved entirely off the reservation. A suitable alternative would be to explore tribal remedies rather than exposing the Tribe to further state and federal liability.<sup>12</sup>

## II. FACTS AND HOLDING

In 2002, the Oglala Sioux Tribe<sup>13</sup> (Tribe) and C & W Enterprises, Inc.<sup>14</sup> (C & W) entered into four contracts for road construction on the Pine Ridge Reservation.<sup>15</sup> The contracts were designated the Multi-Gravel project, Manderson to Wounded Knee project (Manderson), Cuny Table project (Cuny), and the Base and Blotter project.<sup>16</sup> The Multi-Gravel, Manderson and Cuny projects each provided clauses stating the Tribe waived its immunity in connection with disputes arising from the contracts<sup>17</sup> and clauses stating that the Tribe agreed to a specified Claims Resolution Process.<sup>18</sup> The Base and Blotter contract provided that disputes under that contract would be governed by Tribal law; if no such laws exist, "then the Tribal Court will apply South Dakota law as a guide."<sup>19</sup>

Disputes arose over performance of the contract, and the parties submitted the dispute to non-binding mediation by the Tribal Executive Committee.<sup>20</sup> The Committee was unable to resolve the dispute and consequently, in January 2006, C & W filed claims with the American Arbitration Association (AAA) on all four contracts for the sum of \$6 million.<sup>21</sup>

---

11. *Oglala*, 542 F.3d at 233.

12. Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 181-82 (2004).

13. The Oglala Sioux Tribe receives funds through the Bureau of Indian Affairs and is a federally-recognized Native American tribe. *Oglala*, 542 F.3d at 226.

14. C & W Enterprises, Inc. is a Native American-owned business. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* The waiver read:

The Oglala Sioux Tribe grants a limited waiver of its immunity for any and all disputes arising from this Contract, including the interpretation of the agreement and work completed or to be completed under the Contract; provided, however, that such waiver extends only to the Oglala Sioux Tribe and Transportation's specific obligations under the Contract; and further provided that such waiver shall extend only to the extent necessary to permit enforcement by the Subcontractor.

*Id.*

18. *Id.* The Claims Resolution Process required the parties to first bring any claims to the Tribe's Executive Committee for non-binding mediation; if it was not resolved at this point, then any claims were to be brought to the South Dakota Federal District Court. *Id.* If the Federal District Court lacked jurisdiction, the contract provided that the claims would be submitted to an arbitrator under Construction Industry Arbitration Rules and that the arbitration award "shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof." *Id.* There is also a provision that if the Construction Industry Arbitration Rules are not complied with in a timely matter, the party waives the right to arbitration and judgment will be entered in the amount of the dispute. *Id.* at 226-27.

19. *Id.* at 227.

20. *See id.*

21. *Id.*

The tribe agreed to arbitrate all four contracts and asserted a breach of contract counterclaim on the Base and Blotter contract for \$1.8 million.<sup>22</sup> The Tribe moved to dismiss multiple claims through sovereign immunity, but immunity was not asserted for the Base and Blotter contract.<sup>23</sup> The Tribe wrote a legal memorandum to the arbitrator that stated that the limited waiver only applied to the Tribal Court, but they were willing to resolve the Base and Blotter contract on the merits.<sup>24</sup> It was not until June 23, after five months of arbitration, that the Tribe moved to dismiss the Base and Blotter claims through sovereign immunity.<sup>25</sup> The arbitrator found that the Tribe's participation in the arbitration of the Base and Blotter contract waived its immunity.<sup>26</sup>

On August 21, the Tribe filed in the U.S. District Court for the District of South Dakota to enjoin the arbitrator from hearing claims related to the Base and Blotter contract.<sup>27</sup> The case was dismissed due to lack of federal jurisdiction, and the Eighth Circuit affirmed.<sup>28</sup>

The arbitration resumed on August 30, 2006, in Sioux Falls, South Dakota.<sup>29</sup> On January 29, the arbitrator entered a final judgment in favor of C & W for \$1,250,552.58.<sup>30</sup> On the same day, C & W filed in South Dakota state court to confirm the award in conformance with the state's Uniform Arbitration Act.<sup>31</sup> The Tribe did not answer after being served; a default judgment was entered on May 29, 2007.<sup>32</sup> C & W tried to collect on the judgment by obtaining executions on Tribe property located elsewhere in South Dakota.<sup>33</sup> On April 30, 2007, the Tribe filed a motion to vacate the award in Oglala Sioux Tribal Court.<sup>34</sup> C & W attempted to defend the judgment, but on July 26, 2007, the award was vacated.<sup>35</sup> On March 29, 2008, the Supreme Court of the Tribe affirmed the vacating the award, but it remanded back to the Tribal Court concerning the arbitrability of the Base and Blotter contract.<sup>36</sup>

On March 16, 2007, the Tribe filed in the U.S. District Court for the District of South Dakota on the grounds that the state court did not have jurisdiction.<sup>37</sup> On August 16, the Tribe moved to stay C & W's suit, and on September 10, the district court found that the state court did not have jurisdiction and issued an injunc-

---

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 227-28. The Arbitrator had the ability to determine jurisdiction and arbitrability under Construction Industry Arbitration Rule R-8(a). *Id.* at 227. "A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection." *Id.*

27. *Id.* at 228.

28. *Id.* (citing *Oglala Sioux Tribe v. C & W Enters.*, 487 F.3d 1129, 1130 (8th Cir. 2007)).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* They sought a declaratory judgment stating that the state court did not have jurisdiction to confirm the award; injunctive relief preventing state court action; a declaration that the Tribal Court had exclusive jurisdiction; or that the U.S. District Court vacate the award. *Id.*

tion against any future action.<sup>38</sup> The district court stated that the parties must exhaust their Tribal Court remedies first.<sup>39</sup> C & W appealed the district court's findings to the Eighth Circuit.<sup>40</sup>

The Eighth Circuit held that the Tribe waived its sovereign immunity in all four contracts by the explicit contract provisions and by active participation in the arbitration process and that industry rules stated the state court had jurisdiction to confirm the award and enter judgment.<sup>41</sup>

### III. LEGAL BACKGROUND

#### A. Sovereign Immunity Generally

The United States has normally granted Native American tribes sovereign immunity to allow them to function as independent states.<sup>42</sup> This immunity protects the tribe from a wide range of disruptive lawsuits and even extends outside of Indian Country.<sup>43</sup> A tribe has immunity unless the tribe waives its immunity or Congress has abrogated the immunity.<sup>44</sup>

One of the earliest cases to explore tribal immunity was *Turner v. United States*.<sup>45</sup> In this case, the Creek Nation made a law that its citizens could enclose a one square-mile property without charge, but any larger enclosure was prohibited.<sup>46</sup> Turner formed an agreement with 100 Creeks, which was approved by the Tribal judge, for 256,000 acres with an eighty-mile enclosure.<sup>47</sup> Members of the Tribe were displeased with the large enclosure and interfered with Turner's building the fence.<sup>48</sup> The Tribe refused to pay any claims to Turner so he brought suit in the Court of Claims.<sup>49</sup> The case reached the U.S. Supreme Court, which ruled that the Creek Nation not only was free from liability due to "mob violence" but also for failure to keep the peace.<sup>50</sup>

The branch of government most directly responsible for issues of tribal sovereignty was discussed in *Santa Clara Pueblo v. Martinez*.<sup>51</sup> Julia Martinez, a

---

38. *Id.* at 228-29.

39. *Id.* at 229.

40. *Id.*

41. *Id.* at 233.

42. See Theresa R. Wilson, *Nations Within a Nation: The Evolution of Tribal Immunity*, 24 AM. INDIAN L. REV. 99, 100 (2000); 1-4 MATTHEW BENDER, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01 (1997).

43. 1-7 MATTHEW BENDER, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05 (1997).

44. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); COHEN'S HANDBOOK, *supra* note 43, § 7.05.

45. 248 U.S. 354 (1919).

46. *Id.* at 355.

47. *Id.* at 355-56.

48. *Id.* at 356.

49. *Id.* at 357. Turner brought suit for damage to the fence caused by "mob violence" and the failure of the Creek nation to prevent this destruction. *Id.* The Court of Claims is the former name of the U.S. Court of Federal Claims, which handles claims against the government. See U.S. COURT OF FED. CLAIMS, UNITED STATES COURT OF FEDERAL CLAIMS: THE PEOPLE'S COURT 2, available at [http://www.uscfc.uscourts.gov/sites/default/files/court\\_info/Court\\_History\\_Brochure.pdf](http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf).

50. *Turner*, 248 U.S. at 357-58.

51. 436 U.S. 49 (1978).

member of the Santa Clara Pueblo, married a Navajo.<sup>52</sup> The Santa Clara Pueblo Tribe passed an ordinance that prevented their children from becoming part of the Tribe even though they lived on the reservation.<sup>53</sup> Martinez filed suit in U.S. district court, but the court found for the Tribe on the merits.<sup>54</sup> The Supreme Court stated, “Congress’ authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.”<sup>55</sup> The Court found that unless Congress clearly intended to abridge tribal sovereignty, tribal sovereignty should be upheld.<sup>56</sup> The notion that tribal sovereignty should be abrogated by Congress and not the courts has played a large role in subsequent judicial opinions.<sup>57</sup>

Further, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court again strengthened the doctrine of tribal immunity.<sup>58</sup> The Potawatomi Tribe owned a convenience store that sold cigarettes, but it did not collect the state’s cigarette tax.<sup>59</sup> The Oklahoma Tax Commission demanded \$2.7 million for taxes on cigarette sales, but the Tribe filed in U.S. district court to enjoin this action.<sup>60</sup> The Commission counterclaimed to prevent the Tribe from selling cigarettes, but the Tribe moved to dismiss based on sovereign immunity.<sup>61</sup> When the Commission asked the Supreme Court to abandon sovereign immunity, the Court reaffirmed Congress’ role in tribal relations.<sup>62</sup> The Court found that only Congress had the power to eliminate or narrow the tribal immunity doctrine, and not the courts.<sup>63</sup> This was another indication that the Supreme Court was unwilling to reduce tribal sovereignty.<sup>64</sup>

### B. Tribal Waiver of Sovereign Immunity

In *Dillon v. Yankton Sioux Tribe Housing Authority*,<sup>65</sup> the Eighth Circuit looked at how a tribe could waive its own tribal sovereignty.<sup>66</sup> Golman Dillon worked for the Yankton Sioux Housing Authority modernizing tribal housing and was terminated.<sup>67</sup> He brought a suit claiming that his termination was due to the

---

52. *Id.* at 52.

53. *Id.*

54. *Id.* at 54.

55. *Id.* at 72.

56. *Id.*

57. See Erik S. Laakkonen, *Up in Smoke? Narragansett, Hicks, and the Erosion of Tribal Sovereign Immunity*, 11 J. GENDER RACE & JUST. 453 (2008).

58. 498 U.S. 507 (1991).

59. *Id.* at 507.

60. *Id.*

61. *Id.* at 507-08.

62. *Id.* at 510.

63. *Id.* “Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine.” *Id.*

64. See Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 697 (2002).

65. 144 F.3d 581 (8th Cir. 1998).

66. *Id.* at 582.

67. *Id.*

fact that he was white.<sup>68</sup> Dillon claimed that the Tribe waived its tribal sovereignty by a Tribal Resolution.<sup>69</sup> He also said that they waived sovereign immunity to civil rights violations by accepting federal funding.<sup>70</sup> The Eighth Circuit held that neither the Tribe's agreement with Housing and Urban Development nor the Tribe's resolution explicitly waived the Tribe's immunity and dismissed the case.<sup>71</sup>

The doctrine of waiver was explored further in *Kiowa v. Manufacturing Technologies, Inc.*<sup>72</sup> The Kiowa Tribe bought stock from Manufacturing Technologies, and the chairman of its business committee signed the promissory note in the Tribe's name.<sup>73</sup> The note did not specify what law would govern a conflict, and when the Kiowa defaulted, Manufacturing Technologies brought suit in state court.<sup>74</sup> The Kiowa moved to dismiss the suit due to sovereign immunity, but the district court entered judgment for Manufacturing Technologies.<sup>75</sup> The Oklahoma appellate court affirmed, and the case eventually reached the U.S. Supreme Court.<sup>76</sup> The Supreme Court stated that tribal immunity may no longer be appropriate in modern times due to the emergence of tribal enterprises.<sup>77</sup> The Court found that there may be "a need to abrogate tribal immunity," but that only Congress could act on these concerns.<sup>78</sup> The result in *Kiowa* has been explained as deriving from the Court's distaste for the doctrine.<sup>79</sup> The Supreme Court had deferred to Congress' authority over Indian tribes, but over time it has become weary of tribal immunity.<sup>80</sup>

### C. Tribal Sovereignty and Arbitration

The U.S. Supreme Court built upon the *Kiowa* decision in *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe*.<sup>81</sup> The Potawatomi Tribe entered into a construction contract with C & L Enterprises [C & L] to install a roof on a build-

---

68. *Id.*

69. *Id.* The Tribal Resolution read:

The Committee hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have, but the Tribe shall not be liable for the debts or obligations of the Authority.

*Id.* at 582-583.

70. *Id.* at 583.

71. *Id.* at 584.

72. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751 (1998).

73. *Id.* at 753. The stock purchased from Manufactured Technologies was not its own issue, but was issued by Clinton, Sherman Aviation, Inc. *Id.*

74. *Id.* at 754.

75. *Id.*

76. *Id.* The case reached the U.S. Supreme Court only after the Oklahoma Supreme Court denied review. *Id.*

77. *Id.* at 758.

78. *Id.*

79. See Wilson, *supra* note 42, at 127-28.

80. *Id.*; see Andrea M. Seielstad, *The Recognition of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 711-12 (2002).

81. 532 U.S. 411 (2001).

ing outside of the reservation.<sup>82</sup> The contract said that “all claims or disputes between Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or breach thereof, shall be decided by arbitration . . . .”<sup>83</sup> It also said that disputes should be decided in accordance with construction arbitration rules.<sup>84</sup> There also was a choice of law provision that stated the contract would be governed by the law of the area in which the project was located.<sup>85</sup>

The Tribe sought out a different company, and C & L submitted a demand for arbitration.<sup>86</sup> The Tribe asserted sovereign immunity but informed the arbitrator, however, that it had defenses to C & L’s claim.<sup>87</sup> The arbitrator ruled in favor of C & L, and C & L sought enforcement in Oklahoma state court.<sup>88</sup> The Tribe again claimed immunity, but the district court entered judgment and the state court of appeals affirmed.<sup>89</sup> *Kiowa* was decided during this time, and the court of appeals concluded that the immunity had not been waived with sufficient clarity in consideration of that case.<sup>90</sup>

The U.S. Supreme Court granted certiorari.<sup>91</sup> The Court said that the Tribe’s waiver must be clear in order to relinquish its immunity.<sup>92</sup> The Supreme Court also stated, “the contract’s choice-of-law clause makes it plain enough that a ‘court having jurisdiction’ to enforce the award in question is the Oklahoma state court in which C & L filed suit.”<sup>93</sup> The Supreme Court held that under the agreement, the Tribe had waived its sovereign immunity.<sup>94</sup>

In *Big Valley Band of Pomo Indians v. Superior Court*,<sup>95</sup> employees of a Pomo Tribe casino were dismissed allegedly without cause.<sup>96</sup> The employees brought suit for breach of contract.<sup>97</sup> Each one of their contracts contained an arbitration clause and was signed by the general manager of the tribal casino in which they worked.<sup>98</sup> The employees alleged that these arbitration clauses waived the Tribe’s immunity.<sup>99</sup> The California appellate court stated that the Tribe did

---

82. *Id.* at 414-15.

83. *Id.* at 415.

84. *Id.* The Construction Industry Arbitration Rules of the American Arbitration Association are the rules specified in the Contract. *Id.*

85. *Id.* “The contract shall be governed by the law of the place where the Project is located.” *Id.*

86. *Id.* at 416.

87. *Id.* The court’s opinion does not address what those defenses may have been. *Id.*

88. *Id.*

89. *Id.* at 417.

90. *Id.* The Court relied on the *Kiowa* decision to determine the sufficient amount of clarity. *Id.*

91. *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 531 U.S. 956 (2000).

92. *C & L Enterprises*, 532 U.S. at 418.

93. *Id.* at 419.

94. *Id.* at 418.

95. 35 Cal. Rptr. 3d 357 (Cal. Ct. App. 2005).

96. *Id.* at 359.

97. *Id.*

98. *Id.* at 359-60.

Any claim or controversy arising out of or relating to any provisions of this Agreement, or breach thereof, shall upon written demand be resolved by arbitration under the rules of the American Arbitration Association in San Francisco, California, and judgement [*sic*] on any award by the arbitrators may be entered in any court having such jurisdiction. Arbitration costs shall be paid, one-half by each party and the party losing the award will reimburse the prevailing party their half.

*Id.* at 364.

99. *Id.* at 359.



not consent to arbitrate a breach of contract claim that arose out of the contract.<sup>100</sup> The court additionally held that failing to respond to arbitration demands was not sufficient to waive tribal immunity.<sup>101</sup>

In *Ameriloan v. Superior Court*,<sup>102</sup> the California Department of Corrections ordered five payday loan corporations that claimed they were wholly owned by Indian tribes to cease doing business in the state for violating state law.<sup>103</sup> The department filed suit in Los Angeles County Superior Court and received injunction relief against the corporations.<sup>104</sup> The Miami Tribe of Oklahoma appeared in Tribal Court claiming the payday loan companies were immune under tribal sovereignty.<sup>105</sup> One of the Department's arguments against the Tribe was that the payday loan companies had waived tribal sovereignty by placing an arbitration clause in each of their customer contracts.<sup>106</sup> The California appellate court rejected this claim because they said that the arbitration clause only applied to parties to the contract.<sup>107</sup> The court also stated that the clause only provided consent for an arbitration action and not for an action in state court.<sup>108</sup>

California's narrow reading of waiver is in sharp contrast to what the Eighth Circuit Court of Appeals decided in *Oglala*.

#### IV. INSTANT DECISION

In *Oglala Sioux Tribe v. C & W Enterprises, Inc.*,<sup>109</sup> the Court of Appeals for the Eighth Circuit began its review of the case by deciding a number of procedural issues.<sup>110</sup> The court determined it had jurisdiction over the case through 28 U.S.C. § 1292(a).<sup>111</sup> The court applied an abuse of discretion standard of review.<sup>112</sup> In

---

100. *Id.* at 365.

101. *Id.* at 365-66.

102. 86 Cal. Rptr. 3d 572 (Cal. Ct. App. 2008).

103. *Id.* at 575-76.

104. *Id.* at 576.

105. *Id.* In support of its argument, the Tribe argued that the companies in question were wholly owned by the Tribe and that all profits from the companies were used to fund essential governmental services to the Tribe's members. *Id.*

106. *Id.* at 577. The arbitration clause read:

Arbitration of All Disputes. You and we agree that any and all claims, disputes, or controversies between you and us . . . regarding this loan or any other loan you previously or may later obtain from us . . . shall be resolved by binding individual (and not joint) arbitration by and under the Code of Procedure of the National Arbitration Forum. . . . This agreement to arbitrate all disputes shall apply no matter by whom or against whom the claim is filed. . . . Judgment upon the award may be entered by any party in any court having jurisdiction.

*Id.* at 577 n.4.

107. *Id.* at 584.

108. *Id.*

109. 542 F.3d 224 (8th Cir. 2008).

110. *Id.* at 229-30.

111. *Id.* at 229. "Except as provided in subsection (c) and (d) of this section, the court of appeals shall have jurisdiction of appeals from: 1) Interlocutory orders of the district courts of the United States . . ." 28 U.S.C. § 1292(a) (2006).

112. *Oglala*, 542 F.3d at 229. "An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (quoting *Lankford v. Sherman*, 451 F.3d 496, 503-04 (8th Cir. 2006)).

order to receive a permanent injunction, the court said that the party must show “actual success on the merits.”<sup>113</sup>

The court of appeals found that whether the Tribe had shown actual success on the merits depended on whether the state court had jurisdiction.<sup>114</sup> The court began by deciding if the tribe had voluntarily waived its immunity.<sup>115</sup> The court of appeals in *Oglala* used *C & L Enterprises* as a comparison point to determine whether there was a waiver.<sup>116</sup> In applying *C & L Enterprises*, the court found that the explicit waivers of immunity in three of the contracts were clear.<sup>117</sup> In the Base and Blotter contract, the court of appeals stated that there was no contractual waiver of immunity.<sup>118</sup> The court said that the Tribe only consented to suit in Tribal Court and that it was within the Tribe’s power to limit its waiver of immunity.<sup>119</sup> The court then looked at the conduct of the Tribe.<sup>120</sup> The fact that the Tribe raised no objection when confronted with the arbitration weighed against the Tribe, according to the court.<sup>121</sup> Additionally, the court found that the by raising its own arbitral counterclaims, the Tribe showed that they were participating in the arbitration.<sup>122</sup>

Taking these facts into consideration, the U.S. Court of Appeals for the Eighth Circuit held that by actively participating in the arbitration and raising its own claims, the Tribe voluntarily waived its immunity on that issue.<sup>123</sup> The court also said that it would be unfair if, after an adverse decision, the Tribe was then able to assert its immunity.<sup>124</sup>

Finding that the Tribe waived its immunity in all four contracts, the court of appeals turned to the issue of whether the South Dakota state court had jurisdiction to enforce the arbitration.<sup>125</sup> It decided that the parties made the decision to use arbitration and so were bound by the applicable AAA Rules.<sup>126</sup> The AAA rules provide that the parties consent to federal or state enforcement of any arbitration decision; furthermore, the three contracts stated that judgment will be entered in any court having jurisdiction.<sup>127</sup> The court said that the contracts indicate that the Tribe waived all immunity, not just to the Tribal Court, and provided no express limitation to show otherwise.<sup>128</sup> The court stated that in agreeing to arbitrate, the Tribe waived any immunity that it had.<sup>129</sup>

---

113. *Oglala*, at 229.

114. *Id.*

115. *Id.*

116. *Id.* at 230-31.

117. *Id.* at 231.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 231-32.

127. *Id.*

128. *Id.* at 232.

129. *Id.*

The court of appeals then addressed the Tribe's argument that their contracts did not have the choice of law provisions present in *C & L Enterprises*.<sup>130</sup> The Eighth Circuit said that the Supreme Court's decision in *C & L Enterprises* did not rely on the existence of a choice of law provision, as shown by the fact that it cited other court decisions that did not include such a provision.<sup>131</sup> The Eighth Circuit also found that there was no ambiguity in the contract to necessitate a look into the limitations of state waivers of immunity.<sup>132</sup> It also stated that the fact that the work took place on reservation land did not change whether the tribe waived its immunity and whether the state court had jurisdiction.<sup>133</sup>

After considering all of these arguments, the U.S. Court of Appeals for the Eighth Circuit stated that the state court had jurisdiction to enforce the arbitration findings.<sup>134</sup> The Eighth Circuit vacated the permanent injunction and remanded for further proceedings because the Tribe had waived its sovereign immunity in all four contracts; therefore, South Dakota had the power to enforce the arbitrator's decision.<sup>135</sup>

## V. COMMENT

### A. *Balancing Tribal Interests and Policy Interests*

Throughout American history, sovereignty has served as a way for the tribe to maintain some form of independence while surrounded by a different set of laws and beliefs.<sup>136</sup> In order to continue to operate as independent states, tribes must be immune from frivolous lawsuits that would disrupt their self-governance.<sup>137</sup> The same concerns are shared by U.S. states and foreign powers, and as such they also maintain sovereign immunity.<sup>138</sup> On the other hand, the expansive scope of tribal sovereign immunity has become a growing concern.<sup>139</sup> The doctrine no longer extends solely to activities on the reservation but also activities off the reservation that affect a tribe.<sup>140</sup> These concerns indicate why courts recently are more willing to carve exceptions out of the sovereign immunity doctrine.<sup>141</sup>

130. *Id.*

131. *Id.* at 232-33 (citing *C & L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 417-23 (2001)). The cases cited by the Supreme Court in *C & L Enterprises* to note that the existence of an arbitration agreement alone is dispositive were *Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560, 562 (8th Cir.1995); *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 661 (7th Cir.1996); and *Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz. Ct. App. 1985). *C & L Enters.*, 532 U.S. at 417.

132. *Oglala*, 542 F.3d at 233.

133. *Id.*

134. *Id.*

135. *Id.*

136. See COHEN'S HANDBOOK, *supra* note 43, § 7.05.

137. Wilson, *supra* note 42, at 99-100.

138. COHEN'S HANDBOOK, *supra* note 43, § 7.05

139. Seielstad, *supra* note 64, at 681. "The result is that the sovereign immunity and sovereign authority of American Indian tribes is reinforced by this decision, possibly to the extent acknowledged by the dissent, that tribes may enjoy broader immunity than states, the federal government, and foreign nations." *Id.*

140. COHEN'S HANDBOOK, *supra* note 43, § 7.05

141. Wilson, *supra* note 42, at 101, 127. "Although the Court has to this point been hesitant to smite its creation, it is clear the justices are losing their patience." *Id.* at 128. "If there was any doubt about

Courts generally have left the issue of sovereign immunity to Congress, but they have placed broad hints that the doctrine needs to be curbed.<sup>142</sup> Even though Congress has not acted, it is unlikely that courts will attempt broad sweeping action, but will instead continue to cut back on the doctrine out of policy concerns.<sup>143</sup> In *Oglala*, the Eighth Circuit accomplished this by limiting tribal waiver of its immunity.<sup>144</sup> The court found that allowing the Tribe to assert immunity after it had begun the arbitration process brought up legitimate policy concerns.<sup>145</sup> For the Tribe, it would be a win-win situation because, in the event of an adverse decision, they could back out claiming immunity. At the same time, this erodes the process itself. The Eighth Circuit simply made sure that when the Tribe committed to a dispute resolution process, it was not later able to disengage from the process if it were no longer favorable.<sup>146</sup> By no means does this mean that tribal sovereign immunity lacks teeth: any waiver must still be clear and explicit.<sup>147</sup> A tribe has the power to limit its waiver to certain claims or contracts.<sup>148</sup> In fact, there is generally a strong presumption that a tribe has not waived its immunity.<sup>149</sup> A tribe is no longer able to accept the advantages of the dispute resolution process without evoking some of the fundamental risks in the process.

Following *C & L's* precedent, the court in *Oglala* found that a tribe could waive its sovereign immunity without stating those explicit words.<sup>150</sup> Although there is a belief that the judiciary should remain distant from issues of tribal sovereignty,<sup>151</sup> in this case the Eighth Circuit's decision to find a waiver by conduct is consistent with decisions in other realms.<sup>152</sup> Unlike *Big Valley Band of Pomo Indians v. Superior Court*, where the Tribe failed to respond to arbitration demands,<sup>153</sup> in this case the Tribe took affirmative action to participate in the process.<sup>154</sup>

---

the Court's sympathies in relation to tribal interests, the 2001 Term resolved those doubts with great clarity—tribal interests would find no quarter in the Supreme Court." Matthew L. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 588 (2008).

142. Seielstad, *supra* note 64, at 711-12.

143. *See id.* at 713-14.

144. *See Oglala Sioux Tribe v. C & W Enters.* 542 F.3d 224, 231 (8th Cir. 2008).

145. *Id.* "If a tribe were allowed to operate under AAA rules, and after an adverse decision assert sovereign immunity and then walk away, it would convert sovereignty from a shield into a sword." *Id.*

146. *Id.*

147. *See C & L Enters.*, 532 U.S. 411, 418 (2001) ("Similarly, to relinquish its immunity, a tribe's waiver must be 'clear.'"); *see also* *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 584 (8th Cir. 1998).

148. *Oglala*, 542 F.3d at 231.

149. *See Demontiney v. U.S. ex rel. Dep't. of Interior*, 255 F.3d 801, 811 (9th Cir. 2001). "There is a strong presumption against waiver of tribal sovereign immunity." *Id.*

150. *Oglala*, 542 F.3d at 231.

151. *See Joseph William Singer, Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 664 (2003). "The Court does not need to strip tribes of their sovereignty without congressional authorization or tribal consent. Such attacks on tribal sovereignty are contrary to American values and longstanding legal principles." *Id.* at 668.

152. *See State ex. rel. Comm'rs of Land Office v. Jones*, 176 P.2d 992, 999 (Okla. 1947).

153. *See Big Valley Band of Pomo Indians v. Super. Ct.*, 35 Cal. Rptr. 3d 357, 365-66 (Cal. Ct. App. 2005).

154. *Oglala*, 542 F.3d at 227-28.

### B. Tribal Court Remedies and Alternative Dispute Resolution

The U.S. District Court for the District of South Dakota originally ruled that the parties must exhaust Tribal Court remedies before the state court could confirm the arbitration award.<sup>155</sup> The Eighth Circuit stated that once the Tribe waived its immunity by participating in arbitration, it also waived its immunity to state court enforcement.<sup>156</sup> The U.S. Supreme Court has stated that tribal exhaustion does not apply to state courts.<sup>157</sup> Still, in ruling that the waiver to undertake arbitration extended to state court enforcement, the Eighth Circuit might have taken the matter out of the appropriate forum.<sup>158</sup> The choice of law provision states that “judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof.”<sup>159</sup> In following *C & L*, the Eighth Circuit stated that this was sufficiently clear for waiver.<sup>160</sup> In the instant case, the Base and Blotter contract contained no indication that a judgment can be enforced anywhere else besides the Tribal Court.<sup>161</sup> The Court of Appeals for the Eighth Circuit stated that because the Tribe participated in the arbitration, it in turn agreed to the AAA arbitration rules, which then resulted in the tribe agreeing to state court enforcement.<sup>162</sup> Each additional step of logic in this chain seems to be without precedent.

Previously, the Supreme Court held that waivers must be “unequivocally expressed” and cannot be implied.<sup>163</sup> Here the tribe waived its sovereign immunity by acquiescing to AAA arbitration rules through participation in arbitration.<sup>164</sup> This seems like an implied waiver and far from an unequivocal expression. In *Dillon*, the Eighth Circuit stated that a tribe that receives federal funding and had a contract with the Department of Housing and Urban Development that required it to comply with civil rights laws and still had not waived its tribal sovereign immunity in a civil rights case.<sup>165</sup> In circumstances much like the facts in this case, the court held that agreeing to comply with certain regulations did not waive the tribe’s sovereignty for a later action.<sup>166</sup> Just because the tribe appeared in the arbitration should not mean that the waiver should apply in a subsequent proceeding in a different forum.<sup>167</sup>

An equitable resolution for the Base and Blotter contract would have been to enforce the arbitration in tribal court. Tribal courts provide an environment that

---

155. *Id.* at 228-29.

156. *Id.* at 232.

157. *Meyer & Assocs., Inc. v. Coshatta Tribe*, 992 So. 2d 446, 450 (La. 2008) (“As related by the court of appeal, the United States Supreme Court has never held that the exhaustion of tribal remedies doctrine applies to the states.”).

158. *See Oglala*, 542 F.3d at 233.

159. *Id.* at 226.

160. *Id.* at 233.

161. *Id.* at 227.

162. *Id.* at 231-32.

163. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

164. *Oglala*, 542 F.3d at 232.

165. *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 584 (8th Cir. 1998).

166. *Id.*

167. *See Ameriloan v. Super. Ct.*, 86 Cal. Rptr. 3d 572, 584 (Cal. Ct. App. 2008).

seems a perfect forum for alternative dispute resolution (ADR) proceedings.<sup>168</sup> A tribal court, much like an ADR proceeding, provides a relaxed environment where the parties can work out an equitable agreement.<sup>169</sup> Also, the tribal court would not be bound by precedent in the same way as a state court.<sup>170</sup> In this case, the tribal judge would have been able to take into account the parties' negotiations and the fairness of the process itself to discover whether there was a waiver. Historically, courts hearing cases by their own sovereign bodies have provided a neutral playing field.<sup>171</sup> In fact, tribal courts may be even more likely to enforce an arbitration award.<sup>172</sup> This means that C & W Enterprises could have brought the enforcement action in Tribal Court without fear that the Tribal Court would be fixed against their interests.

Having the enforcement action in Tribal Court rather than state court may also prevent the strain on future business relationships.<sup>173</sup> Maintaining a future relationship is a key advantage of ADR, and it seems a worthy cause to seek this continued relationship in later proceedings.<sup>174</sup> This would be beneficial to both parties. Deferring action to tribal courts would not be an entirely new concept. Through the "tribal exhaustion doctrine," federal courts generally require that all tribal remedies be exhausted before bringing action in federal court against tribes.<sup>175</sup> With the benefits that tribal courts can provide in the ADR context, the parties would have been best served by pursuing the enforcement action in Oglala Tribal Court. Rather than implying that the Tribe submitted to AAA rules, requiring the parties to pursue the enforcement action in Tribal Court would have better followed the contract's language and furthered public policy objectives.<sup>176</sup>

---

168. See Pat Sekaquaptewa, *Tribal Courts and Alternative Dispute Resolution*, 18 BUS. L. TODAY 23, 25 (2008).

169. See George D. Watson, Jr., *The Oglala Sioux Tribal Court: From Termination to Self-Determination*, 3 GREAT PLAINS RES. 61, 82 (1993), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1084&context=greatplainsresearch>. "The Oglala tribal court is very informal compared to off-reservation courts. While judges recently began wearing robes and the main court room has an appearance of formality, most of the proceedings are conducted in an atmosphere that is relaxed and flexible." *Id.*

170. See Sekaquaptewa, *supra* note 168, at 23; see Watson, *supra* note 169, at 83. "The court is not heavily bound by any body of precedent which allows the court to exercise broad discretion and latitude in reaching its decisions." *Id.* at 83.

171. See Struve, *supra* note 12, at 179.

The history and current framework of state and federal government waivers of immunity belie the notion that a sovereign's courts will necessarily be impermissibly biased: Both the federal government and the states have chosen to waive immunity only in their own courts, and, in many instances, only in courts specially designated for the purpose of hearing claims against the government.

*Id.*

172. See Sekaquaptewa, *supra* note 168, at 24. "Because tribal leaders and judges tend to view mediation and arbitration as similar to traditional authority dispute resolution processes, they are inclined to enforce settlements and awards as a matter of public policy." *Id.*

173. See *id.* at 25. "Many tribal judges view ADR solutions as in line with custom and tradition. Non-Native clients that live in or do business in Indian Country seek to maintain long-term working relationships in the tribal community. The use of tribally supported and enforced ADR actively furthers both clients' long-term interests and tribal sovereignty." *Id.*

174. See Charles P. Lickson, *The Use of Alternative Dispute Resolution in Intellectual Property, Technology-Related or Innovation-Based Disputes*, 55 AM. JUR. TRIAL §73 (2008).

175. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987).

176. See Struve, *supra* note 12, at 181-82.

## VI. CONCLUSION

The U.S. Court of Appeals for the Eighth Circuit in *Oglala* continued the Supreme Court's path of chipping away at the tribal sovereignty doctrine by extending waiver to tribal participation in the legal process.<sup>177</sup> Additionally, the court ignored possible traditional tribal forums that could have reviewed the arbitration award and allowed tribal issues, generally considered a federal concern, to be enforced in state court.<sup>178</sup> While advocates indicate that tribal sovereign immunity is essential to a Tribe's independent government, recent cases show that courts are willing to apply the doctrine narrowly.<sup>179</sup> Even as the courts narrowly apply the doctrine, they are unlikely to overthrow the entirety of the doctrine and the precedent established over many years.<sup>180</sup> In order to maintain the courts' policy objectives and keep a tribe involved in issues that affect its own, courts should look at tribal courts as potentially receptive forums.<sup>181</sup> *Oglala* is just one indication that courts are still continuing to try and flesh out how far tribal immunity will stretch.<sup>182</sup> As long as there remains uncertainty, inconsistent decisions in differing jurisdictions are likely to impair tribal functions.<sup>183</sup>

CHRISTOPHER McMILLIN

---

The increasing availability of tribal-court remedies against tribal entities might well escape the notice of the Supreme Court, which lacks the resources, and perhaps the inclination, to investigate the rich variation in tribal judicial remedies and proceedings. Congress, however, has the capacity to gather data on the development of tribal governments; if the political impetus to abrogate tribal immunity resurfaces, it is to be hoped that Congress will make use of that capacity and will not abrogate tribal immunity from suit in non-tribal court in instances where tribes provide appropriate remedies in their own courts."

*Id.*

177. *Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 231 (8th Cir. 2008).

178. *Id.*

179. See Laakkonen, *supra* note 57, at 511. "The First Circuit demonstrates the possible trend toward abrogation of tribal immunity, with Justice Scalia's opinion in *Hicks* being the means to do so." *Id.*

180. See Seielstad, *supra* note 64, at 713-714.

However, in light of the historical development of the doctrine, including the consistent way in which it has been integrated into the federal common law and the context in which the court rendered its opinion in *Kiowa Tribe*, it is reasonable to conclude that the doctrine is an intrinsic part of the jurisprudence of tribal sovereignty and likely to resist dramatic change in the hands of the federal judiciary. *Kiowa Tribe* and its predecessors reflect the federal government's long-time recognition of tribal sovereignty and its inherent attributes and are enduring proof of the strength and durability of tribal sovereignty.

*Id.*

181. See generally Sekaquaptewa, *supra* note 168.

182. See generally Thomas P. McLish, Note, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 COLUM. L. REV. 173 (1988); Kenton Keller Pettit, Note, *The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and Alaska Supreme Court*, 10 ALASKA L. REV. 363 (1993).

183. See *Ogden v. Iowa Tribe*, 250 S.W.3d 822, 827 (Mo. Ct. App. 2008) (discussing the contrary results that courts have reached on whether a "sue and be sued" provision waives a tribes immunity); see also Ann K. Wooster, *Application of the Indian Reorganization Act*, 30 A.L.R. FED. 2D 1 (2008).