No. 00-292

IN THE SUPREME COURT OF THE UNITED STATES

C & L ENTERPRISES. INC.,
Petitioner

v.

CITIZEN POTAWATOMI NATION
Respondents.

BRIEF FOR RESPONDENT

Filed January 18th, 2001

QUESTION PRESENTED

Does a paragraph authorizing arbitration in an 11-page form agreement not tailored in any way for an Indian tribe and signed by tribal officials (without actual authorization or subsequent ratification by the tribal government) that is relative to their lands, constitute, without more, a valid and unequivocally expressed waiver of tribal sovereign immunity?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I, § 8, cl. 3.

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

25 U.S.C. § 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States,

unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any

court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

25 U.S.C. § 177. Purchase or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Citizen Potawatomi Nation Const., art. VII.[1]

Section 1. There shall be a Business Committee which shall consist of the Executive Officers as provided in Article 6, and two Councilmen who shall serve for four year terms and until their successor be qualified and installed in office.

Section 2. Subject to any limitations in this Constitution, and except for those powers expressly reserved to the Citizen Band Potawatomi Indian Council by this Constitution, or delegated to another tribal entity by this Constitution, the Business Committee is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the Citizen Band Potawatomi Indian Tribe of Oklahoma in all matters on which the Tribe is empowered to act now or in the future including the authority to hire legal counsel to represent the Tribe, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior so long as such approval is required by Federal law.

C.P.N. Const., art. XVIII.

Section 1. All final decisions of the Council on matters of temporary interest or matters relating to particular circumstances, officials, or individuals shall be embodied in resolutions. Every resolution of the Council shall begin

[1] On February 29, 1996, the Potawatomi ratified an amendment to the constitution changing the name of the tribe from "Citizen Band Potawatomi Indian Tribe of Oklahoma" to "Citizen Potawatomi Nation." However, references elsewhere in the constitution using the old name were not amended.

with the words, "Now, therefore be it resolved by the Council of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

Section 2. All final decisions of the Business Committee on matters of temporary interest or matters relating to particular circumstances, officials, or individuals shall be embodied in resolutions. Every resolution of the Business Committee shall begin with the words, "Now, therefore be it resolved by the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

Section 3. All final decisions of the Council of the Citizen Band Potawatomi Indian Tribe of Oklahoma upon ongoing matters necessary to the orderly administration of tribal affairs, or having general or continuing application shall be embodied in ordinances, which may be called statutes. Every ordinance shall begin with the words, "Be it enacted by the Council of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

Section 4. All final decisions of the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma upon ongoing matters necessary to the orderly administration of tribal affairs, or having general or continuing application shall be embodied in ordinances, which may be called statutes. Every ordinance shall begin with the words, "Be it enacted by the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

STATEMENT OF THE CASE

Consistent with a July 25, 1993, proposal,[2] C&L Enterprises, Inc. ("C&L"), Petitioner, signed an "Abbreviated Form of Agreement Between Owner and Contractor" (1987 edition)[3] copyrighted by the American Institute of Architects (hereafter "AIA Agreement") to construct for $85,000 a foam roof on a building located on land owned by the Citizen Potawatomi Nation ("Potawatomi").[4] This document was dated August 25, 1993, and was also signed by three Potawatomi tribal officials.[5] However, the AIA Agreement was never approved nor otherwise authorized by the Potawatomi Business Committee.[6] Under the AIA Agreement, construction on the foam roof was not to begin until a "notice to proceed" was issued

[2] App. 59 ("Proposal").

[3] App. 32 ("Plaintiff's Exhibit A").

[4] Although not held in trust by the United States, this land cannot be alienated without the consent of the United States, *i.e.*, the land is restricted. 25 U.S.C. § 177. *See, e.g., Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039 (5th Cir. 1996).

[5] John A. Barrett, Jr., Chairman, Bob F. Davis, Secretary/Treasurer, and Hilton Melot, Councilman, were at the time three of the five members of the Citizen Potawatomi Nation Business Committee. C.P.N. CONST., art. VII, § 1.

[6] The Potawatomi Business Committee is the tribal governing body constitutionally authorized to "enact legislation, transact business and otherwise speak or act on behalf of the Citizen Potawatomi Nation." C.P.N. CONST., art. VII, § 2. The Business Committee acts by adopting ordinances and resolutions. *Id.* art. XVIII. The record contains no tribal resolutions or other evidence that the Business Committee ever took any action on the AIA Agreement.

by the project architect (App. 49, p. 2, art. 2, ¶ 2.1). A notice to proceed with construction never issued.[7]

On March 14, 1994, after learning that birds had eaten holes in a foam roof at another project, the architect determined that the roof should be rubber guard, not foam. Consistent with that determination and the AIA Agreement,[8] on March 14, 1994, the architect issued a "Construction Change Directive."[9]

On April 19, C&L "offered to reduce the contract sum by $6,600."[10] Because C&L could not build a rubber guard roof,[11] C&L simultaneously obtained a bid from another contractor to construct a rubber guard roof for $53,400. The Potawatomi rejected C&L's offer to have another contractor build the roof for $78,400 because C&L would not be performing the work[12] and because C&L was asking $21,616 more than the contractor who submitted the lowest bid and ultimately constructed the rubber guard roof for $56,784.

[7] Cert. Pet. 7; C&L Br. at 6.

[8] *See* App. 49, p. 8, art. 13.

[9] JT. App. 15.

[10] *See* "Objection to Defendant's Motion to Dismiss and Brief in Opposition Thereto" at 2 [*C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, Case No. CJ-95-5204-62 (Okla. Co. Dist. Ct.) (filed Sept. 11, 1995)].

[11] *Id.*

[12] The AIA Agreement (art. 11, ¶ 11.2) contemplates that the contractor will use "subcontractors" (plural), but did not reasonably contemplate a contractor would use a single subcontractor to perform all the work. App. 47. In any event, under the AIA Agreement, the owner had to approve the subcontractors. *Id.* C&L's subcontractor was never approved.

The record contains no evidence that C&L ever took any action with regard to the AIA Agreement other than locating a contractor to construct a roof materially different from that described in the AIA Agreement. C&L never performed any work on the roof.[13] The record does not contain any evidence that C&L ever submitted, or that the project architect ever rejected, any invoices under the contract for materials purchased, payments made or work performed.[14] Nor has C&L submitted any evidence of lost opportunities or any other evidence of damage. By its own admission, C&L's only claim for damages was for "lost profit" on a job never commenced.[15]

On January 24, 1995, C&L submitted the AIA Agreement to an arbitrator. Upon receiving notice of the arbitration, the Potawatomi notified the arbitrator in writing that the Potawatomi were asserting sovereign immunity, had numerous substantive defenses to the arbitration claim,[16] but had no intention of waiving immunity by participating in the arbitration proceedings.

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[13] Cert. Pet. at 7; C&L Br. at 6.

[14] "Objection to Defendant's Motion to Dismiss and Brief in Opposition Thereto," *supra*, at 2-3.

[15] Cert. Pet. at 7; C&L Br. at 7.

[16] The Potawatomi advised the arbitrator that the AIA Agreement "is void and unenforceable for a number of reasons including" sovereign immunity, lack of a 25 U.S.C. § 81 endorsement, lack of tribal authorization, failure of a condition subsequent, lack of approval from the architect, and lack of consideration. JT. App. at 19-20.

On June 30, 1995, the arbitrator entered a default award of $25,400 plus attorney's fees and costs. The arbitration award does not mention tribal sovereign immunity nor discuss the other legal deficiencies noted in the letter from the Potawatomi, nor explain how the amount of the award was computed. App. 61. C&L has subsequently stated[17] that its damages were $31,600, the difference between the original C&L proposal for the foam roof ($85,000) and the amount ($53,400) that C&L's putative subcontractor would have charged to construct the rubber guard roof.

In other words, C&L's claim for damages was not based on expenses incurred by C&L in preparing to construct the foam roof nor on the profits C&L would have allegedly lost if the AIA Agreement had been fulfilled, but rather simply on the differential between the contract price and what a third party would charge to construct a different roof. The arbitration award was apparently based on the differential between C&L's offer to reduce the contract price to $78,600 and the subcontractor's offer to construct the roof for $53,400.[18] Essentially, the arbitrator awarded C&L a finder's fee of 48 percent based on a proposal never accepted. C&L was awarded $25,400 for finding a contractor to construct the roof for $53,400.

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[17] *See, e.g.*, "Answer Brief of Appellee" at 2. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, No. 86,568 (Okla. Sup. Ct. filed July 3, 1996).

[18] The difference between the C&L's offer to lower the price to $78,600 and the subcontractor is $53,000 or $400 less than the arbitration award.

On August 7, C&L filed suit[19] in the District Court for Oklahoma County to confirm the default arbitration award. The Potawatomi specially appeared and moved to dismiss based on sovereign suit immunity.[20]

Without a hearing, the District Court denied the Potawatomi motion to dismiss (App. 25) and a subsequent motion for reconsideration. App. 24. These orders do not articulate any putative basis for the District Court's exercise of jurisdiction over the Potawatomi but simply state: "Overruled" and "Denied." The Potawatomi promptly sought a writ of prohibition from the Oklahoma Supreme Court.[21]

On October 27, a week after the Potawatomi filed for a writ of prohibition, the District Court entered a default judgement against the Potawatomi for $28,414.67. App. 21. Subsequently, the Oklahoma Supreme Court refused to grant a writ of prohibition[22] and the Potawatomi appealed to the Oklahoma Supreme Court.[23]

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[19] *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, Case No. CJ-95-5204-62 (Okla. Co. Dist. Ct. filed Aug. 7, 1995) ("Petition for Confirmation of Arbitration Award"). App. 28.

[20] App. 26. In the supporting brief, the Potawatomi raised both sovereign immunity and the 25 U.S.C. § 81 deficiency. *See* "Brief in Support of Motion to Dismiss," at 5, n. 17 (filed Aug. 25, 1995).

[21] *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Freeman*, No. 86,401 (Okla. Sup. Ct. filed Oct. 20, 1995) (petition for writ of prohibition).

[22] *See id.* at Order, Dec. 13, 1995.

[23] The Potawatomi asserted, *inter alia*, that the District Court erred by purporting to exercise jurisdiction over an unconsenting Indian tribe and in enforcing a contract not endorsed as required by 25 U.S.C. § 81. *See* "Brief of Appellant," at 18. *C&L Enterprises, Inc. v. Citizen Band Potawatomi*, No. 86,568 (Okla. Sup. Ct. filed May 24, 1996).

On March 21, 1996, C&L obtained a second default judgment from the District Court for an additional $10,545 in attorney's fees and costs.[24]

On November 5, the Court of Appeals affirmed the District Court judgments holding that "*Hoover*[25] directly controls on the issue of tribal immunity"[26] and that the Potawatomi waived any other defects in C&L's cause of action or C&L's claim for attorney's fees by allowing judgments to be entered by default. App. 14-15.

The Potawatomi petition to the Oklahoma Supreme Court for review by *certiorari* was denied January 27, 1997. App. 16. On June 1, 1998, this Court granted the Potawatomi petition for *certiorari*, vacated the judgment

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[24] App. 18. This judgment was also appealed. Most of the work allegedly supporting C&L's fees was performed post-judgment in other litigation. Nevertheless, the trial court entered an award for all of the attorney's fees claimed by C&L. Of the fees awarded, 72% ($7,620) were for services allegedly performed post-judgment. The attorney fee judgment is patently untenable coming in a case where no contested hearings were held and judgment was entered by default. Attorney fees were 35% of the judgment entered by the District Court.

[25] *Hoover v. Kiowa Tribe*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 517 U.S. 1188 (1996).

[26] App. 14. "The *Hoover* court held that a 'contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian country.' 909 P.2d at 62."

of the Oklahoma Court of Civil Appeals and remanded the case "for further consideration in light of *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. [751 (1998)]." *Citizen Potawatomi Nation v. C&L Enterprises, Inc.*, 524 U.S. 901 (1998). App. 8.

On February 8, 2000, the Court of Civil Appeals, Division 2, after further consideration, issued an opinion reversing the judgment of the District Court for C&L because:

> In this instance, the contract does not expressly waive Tribe's sovereign immunity. The agreement of Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on Tribe's part to expose itself to suit on the contract. However, the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression.
>
> We conclude that the record does not support a finding of express waiver of immunity on the part of the Citizen Band Potawatomi Indian Tribe of Oklahoma. Therefore, we reverse the judgment of the district court, including the order granting prevailing party attorney fees under 12 O.S. 1991, § 936, and remand with instructions to sustain the motion to dismiss of Tribe.

App. 7 (footnote omitted). The case was remanded with instructions to sustain the Potawatomi motion to dismiss filed August 25, 1995.

After the Oklahoma Supreme Court denied C&L's petition for certiorari on May 24, 2000, C&L petitioned this Court for review by certiorari. On October 30, an order was entered granting certiorari.

SUMMARY OF THE ARGUMENT

The February 8, 2000, Opinion of the Oklahoma Court of Civil Appeals (hereafter, "the opinion below") should be affirmed because it is consistent with this Court's sovereign immunity jurisprudence as expressed recently in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998) and in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). An arbitration clause is not a waiver of immunity from suit. A single paragraph authorizing arbitration in an 11-page, fine print form contract not tailored in any way for an Indian tribe nor signed by any party with actual tribal authority is not an "unequivocal express[ion]" of a waiver from suit, as required by this court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

A 1993 agreement purportedly with an Indian tribe "relative to their lands" that is not endorsed by the Secretary of the Interior is "null and void." *See* 25 U.S.C. § 81. A null and void contract, even one containing an arbitration paragraph, cannot effect a waiver of tribal suit immunity. Congress' enactment of and recent amendment

to section 81 certainly evinces legislative support for this Court's requirement that waivers of tribal sovereign immunity be "unequivocally expressed."

Finally, the laws governing foreign sovereign immunity are not applicable directly or by analogy to Indian tribes. In any event, the application of these laws to this case would not support reversal of the opinion below.

ARGUMENT

C&L's argument begins with a discourse from which one is to infer that the doctrine of tribal sovereign immunity has been gradually diminished by judicial decisions, has outlived its usefulness, and should be administered the *coup de gras* here. This is an audacious suggestion under the circumstances of this relatively insignificant contract case. More importantly, it is based on an inaccurate premise. Although some state courts have sought to diminish tribal sovereign immunity,[27] this Court has consistently upheld it.[28] During the last 10 years, this Court has reiterated the doctrine in at least three cases.

[27] *See, e.g., Hoover v. Kiowa Tribe, supra.*

[28] "In 1940, the United States Supreme Court declared that immunity from suit was part of the retained sovereignty of Indian tribes. *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 84 L. Ed. 894, 60 S. Ct. 653 (1940). **This aspect of tribal sovereignty has been repeatedly upheld and expanded over the past 59 years** on the belief that tribal immunity is 'necessary to preserve the autonomous political existence of tribes and to preserve tribal assets.' *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985)." *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 839 (N.J. Super. Court Law Div. 1999) (emphasis added) (forum selection clause in contract not waiver of immunity).

> Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Kiowa Tribe v. Manufacturing Technologies, 523 U.S. at 760.

> If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the states still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996).

> Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991).

Under this Court's consistent sovereign immunity jurisprudence, tribal sovereign immunity must be clearly abrogated by Congress or unequivocally waived by a tribe itself, that is, a waiver of tribal sovereign immunity is an exclusive legislative prerogative that can only be effected by a legislative act.

Any person transacting business with an Indian tribe (or for that matter with any government) who conducts a modicum of due diligence knows that tribes are immune from suit and that obtaining an explicit waiver of that immunity consistent with the tribal constitution is a prudent business practice. As a New Jersey appellate court recently remarked: "Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the tribe possessed sovereign immunity. The tribe, through its laws, describes how one may obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions."[29] This was certainly true in 1993 when the AIA Agreement was signed.

Although tribal sovereign immunity from suit is often considered to be only 60 years old because the doctrine was first announced by this court in *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), the doctrine is actually older than the United States[30] and has been

[29] *Danka*, at 841. Others have made this common sense observation. "Parties that are aware of the risks either demand an unequivocal waiver or they adjust contract terms to cover the substantial risk of a subsequent immunity defense." Julie A. Clement, *Strengthening Autonomy by Waiving Sovereign Immunity: Why Indian Tribes should be "Foreign" Under the Foreign Sovereign Immunities Act*, 14 T.M. COOLEY L. REV. 653, 654 (1997). Those dealing with the Potawatomi often negotiate lock box arrangements, asset pledges, trust accounts, or waivers effected by tribal resolution. *See, e.g.*, C.P.N. Business Comm. Res. 01-58 (Dec. 8, 2000). Consistent with Sup. Ct. Rule 24, ¶ 1(f), the text of this resolution is set out in an appendix to this brief.

[30] *See, e.g., Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (noting that "tribal sovereignty * * * substantially predates our Constitution").

consistently recognized by the other two branches of the federal government.[31] The British Government, the Government of the Articles of Confederation, and the United States until 1871[32] dealt with Indian tribes through treaties, *i.e.*, as one sovereign would deal with another sovereign. Immunity from suit is an inherent attribute of sovereignty.[33]. Absent suit immunity, sovereignty would pass to the judiciary. State judges, not elected tribal officials, would become the supreme governors of the tribe. The effect of finding a waiver here would be to open the door to State regulation of Indian commerce in contravention of the Constitution. This is why seven states[34] have supported C&L in this case. States understandably do not like having sovereigns within their borders even though most, like Oklahoma,[35] specifically agreed upon entering the Union to respect the federally-protected

[31] The judiciary also recognized tribal sovereignty long before *United States Fidelity & Guar. See, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832).

[32] 25 U.S.C. § 71.

[33] "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without* its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." THE FEDERALIST NO. 81,511 (A. Hamilton) (Belknap Press ed. 1961) (italics in original).

[34] Texas, Alabama, Arkansas, Kansas, Mississippi, Nebraska, and South Dakota have filed an amicus curiae brief in support of C&L. Hereafter these states will be referred to as "State Amici."

[35] *See* Organic Act, 34 Stat. 267, § 1 (June 16, 1906); OKLA. CONST., art. 1, § 3.

rights of Indian tribes.[36] States have consistently sought to end all tribal rights and have been the instigators of most of the federal abrogations of Indian treaties. The effect of removing tribal suit immunity would be to transfer sovereignty from tribes and tribal leaders to state judges, that is, to terminate tribal self-governance. This is a result dramatically at odds with recent Congressional enactments[37] and Presidential proclamations.[38]

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[36] *Atkinson v. Haldane*, 569 P.2d 151, 174 (Alaska 1977) ("There is little doubt that the claims to sovereign immunity have been allowed in the courts in order to protect the limited and irreplaceable resources of the Indian tribes from large judgments.").

[37] For example, the Potawatomi are organized as a self-governing tribe under federal law, the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 196. Federal laws are replete with implicit and explicit recognition of tribal sovereignty. For example:

> Congress finds that – (1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations; (2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes * * * [.]

Tribal Self-Governance Amendments of 2000, 106 Pub. L. No. 260, § 1, 114 Stat. 711 (Aug. 18, 2000); *see also* 25 U.S.C. § 2701. "(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; * * * ." *Id.* § 2703, ¶ (5)(B).

[38] Executive proclamations recognizing Indian sovereignty are bi-partisan from Lyndon Johnson through Ronald Reagan to Bill Clinton. The most recent is Executive Order 13175 of November 6, 2000, republished in 65 Federal Register 67249.

I. The AIA Agreement arbitration paragraph is not an unequivocal waiver of tribal sovereign immunity from suit.

> It is settled that a waiver of sovereign immunity ' "cannot be implied but must be unequivocally expressed." ' *United States v. Testan*, 424 U.S. 392, 399, 47 L.Ed.2d 114, 96 S.Ct. 948 (1976), quoting *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969).

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

Tribal suit immunity was raised by the Potawatomi in a motion to dismiss. Thus, C&L had the burden of proving the tribe waived immunity,[39] *i.e.*, to prove: (1) that

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"Our Nation, under the law of the United States, in accordance with treaties, Statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. * * * The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination." Executive Order § 2, ¶¶ (b) and (c).

[39] "The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations, he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry

the tribe acted, and (2) that the tribe's action clearly and unequivocally waived immunity from suit and immunity of its assets from attachment. C&L's sole and only evidence of such a waiver is a form contract containing a paragraph (10.8) that authorized arbitration. This form contract was not tailored in any way for Indian tribes or, for that matter, for any government and was signed by three men, only one of whom was identified by the tribal office he then held. The phrase "unequivocally expressed" can have no meaning if a standard form arbitration clause that neither mentions Indian tribes, suit immunity, or waiver is considered to be an "unequivocally expressed" waiver of tribal suit immunity.

The cases cited by C&L holding that an agreement to arbitrate is also a unequivocal waiver of tribal sovereign immunity when one of the parties to the agreement is a tribe are factually distinguishable,[40] based on equity considerations,[41] are overreaches by state

throughout the litigation the burden of showing that he is properly in court." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

[40] *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). This is the first reported case cited by C&L supporting a claim that agreeing to arbitration is a waiver of suit immunity. It has been wrongly relied upon by subsequent courts. *See* discussion at pp. 36-37, *infra*. The waiver of suit immunity in *Oregon* arose not because the tribe agreed to arbitration in a contract, but because the tribe intervened in the suit.

[41] *Rosebud Sioux Tribe v. Val-U Co.*, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 516 U.S. 819 (1995); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996).

courts,[42] or proceed from a misunderstanding of the purpose of an arbitration clause. An arbitration clause is what it is: a clause submitting contractual disputes to arbitration. Consistent with extant federal law, it cannot, as C&L and the State Amici argue, become a super clause that serves multiple functions when, *and only when*, one party to an agreement is an Indian tribe.

A. An arbitration clause is what it purports to be.

The purpose of an arbitration clause is to effect a waiver, but not a waiver of sovereign immunity. By agreeing to arbitration, the parties are mutually waiving whatever rights they had to a trial of disputes arising under the contract. Nevertheless, under C&L's theory of the case, a paragraph in the AIA Agreement – a single subparagraph of an Article captioned "Administration of The Contract" – unequivocally waives: (1) the requirement that a tribe acts only as authorized by its constitution, (2) tribal sovereign immunity from suit, (3) all immunity of assets held in the tribe's name even those held in trust, (4) the federal statutory requirement that a contract with an Indian tribe relative to its lands be endorsed by the Secretary of the Interior, *and* (5) the right to a trial of the disputed facts. This is a load that, as the Oklahoma Court of Appeals found, clause 10.8 of the AIA Agreement simply cannot rationally and equitably bear.

[42] *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983); *Hydaburg Coop. Assn. v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz.App. 1985), *cert. denied*, 474 U.S. 920 (1985).

The "magic" words in the paragraph that effects all these waivers are identified as "in any court having jurisdiction thereof." Pet. Br. 16. However, this phrase does not answer but begs the question of what court has jurisdiction. Absent an unequivocal waiver of immunity, Oklahoma courts do not have jurisdiction over an Indian tribe. Every contract is presumably enforceable "in any court having jurisdiction." All an arbitration clause does is make explicit what is implicit, that is, a party may enforce an arbitration award in the same manner as the party may have enforced the contract "in any court having jurisdiction." The magic words are not an explicit waiver of suit immunity and clearly not a grant of jurisdiction to any particular court.

B. The Potawatomi Business Committee never waived immunity.

Even if this phrase has the magic properties claimed, where is the evidence that the tribe has authorized the AIA Agreement and thus effected an unequivocal waiver of suit immunity? The only evidence of record is that three men (*see* note 5, *supra*) signed the AIA Agreement. As with federal, state and local governments,[43]

[43] Though local governments are not sovereigns on a par with Tribes, they would enjoy a broader suit immunity under C&L's theory of the case than Indian tribes. "Municipal corporations may also stipulate in contracts for arbitration of disputes arising thereunder. These powers, based on its capacity to contract and the right to prosecute and defend suits, **may be exercised only by the corporate legislative body**, which has implied power thus to bind the corporation, or by its

corporations, and fictional entities,[44] tribes act only in the manner authorized by the documents creating them.

> It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.

United States v. United States Fidelity & Guaranty Co., 309 U.S. at 513. "We are of the opinion, however, that without legislative action the doctrine of immunity should prevail." *Id.* at 515. *See, e.g., Hydrothermal Energy Corporation v. Fort Bidwell Indian Community Council*, 170 Cal. App. 3d 489 (1985) (reversing a lower court order confirming an arbitration award entered on a contract executed by tribal chairman):

> Thus, [the chairman] could not waive the tribe's immunity, unless the Tribe had expressly delegated that duty to her. Nothing in the Tribe's constitution and bylaws gave her such authority. That document states: "It shall be the duty of the chairman of the community council to preside at all meetings of the council and to carry out all order [*sic*] of the council. The chairman of

agent under expressly delegated authority." 5 AM. JUR. 2d *Arbitration and Award* § 68 (1962) (footnotes omitted) (emphasis added).

[44] "Under the [State] statutes [authorizing arbitration], the court is usually considered to have jurisdiction to enforce the arbitration agreement in all cases except those in which it has no jurisdiction over the parties or over the subject matter of the litigation." *Id.* § 74 (1962) (footnote omitted).

> the council shall also preside at the general community meetings. The chairman shall also be the chief executive officer of the community." Those words do not indicate that the Tribe authorized the chairman to waive its immunity. We therefore find that Ms. Lame Bull's signature did not bind the Tribe to accept jurisdiction before the arbitrator. The arbitrator's decision that the American Arbitration Association had jurisdiction was based on an erroneous finding of waiver by execution of the contract.

Id. at 497 (footnotes omitted).[45]

> Because preserving tribal resources and tribal autonomy are matters of vital importance, the United States Supreme Court has repeatedly stated that a waiver of tribal sovereign immunity " ' "cannot be implied but must be unequivocally expressed" ' " (*id.*, quoting *United States v King*, 395 US 1, 4). Importantly, **to be valid, waivers of tribal sovereign immunity "must be traceable to an official government action (statute, ordinance, resolution)** that expressly and unequivocally waives immunity or empowers particular officers to waive immunity" * * * .

Ransom v. St. Regis Mohawk Educ. & Community Fund, Inc., 86 N.Y.2d 553, 560, 658 N.E.2d 989, 993 (1995) ("sue and be sued" clause not waiver of immunity) (footnote omitted, emphasis added).

The Potawatomi created a government pursuant to federal law by adopting a constitution at a federally-

[45] The constitutional language construed by the California court is similar to that contained in the Potawatomi Constitution.

monitored and approved constitutional election. Under that Constitution, the Business Committee, not three tribal officers, is authorized to transact business for the tribe (*C.P.N.* CONST. art. VII, § 2) and the Business Committee only acts by adopting resolutions for temporary matters such as this AIA Agreement. *Id.* at art. XVIII, § 2. C&L never offered any evidence (and there is none) that the Business Committee approved the AIA Agreement, adopted a resolution relating to the AIA Agreement, or otherwise lawfully acted to waive immunity. Because the Potawatomi have never waived immunity by a legislative act, no waiver of suit immunity could be found consistent with this Court's jurisprudence.

C. Finding a waiver here would be contrary to the general law on sovereigns.

Although State sovereign immunity must be read in context with the Eleventh Amendment, this Court's discussions of State sovereign immunity are instructive.

> While this immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment – an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976). Second, a State may waive its sovereign immunity by consenting to suit. *Clark v. Barnard*, 108 U.S. 436, 447-448, 27 L. Ed. 780, 2 S. Ct. 878 (1883). This case turns on whether either of these two circumstances is present.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669-670 (1999). These are the same tenets this Court applies in evaluating purported waivers of immunity by Indian tribes or by the United States. *See, e.g., Kiowa Tribe*, 523 U.S. at 760. ("Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case"); *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 443-44 (1834). "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it."

The consistent rule that emerges from this Court's sovereign immunity jurisprudence is that a waiver can be effected only by a legislative body. The sovereign, acting through its legislative arm, controls immunity. Waiver of sovereign immunity is a legislative act, not a matter of contract. "The doctrine of governmental immunity has long been the law of this state. If the present policy is to be changed it should be done by the legislature, as representatives of the people, and not by this court." *Spaulding v. Department of Transportation*, 618 P. 2d 397, 398 (Okla. 1980) (quoting *Henry v. Oklahoma Turnpike Auth.*, 478 P. 2d 898, 903 (Okla. 1970). This fact is certainly borne out by the State Amici whose legislatures zealously guard their sovereignty.

Nebraska has enacted the "State Miscellaneous Claims Act," that establishes a state claims board "to receive and investigate miscellaneous claims against the state." Neb. Rev. Stat. § 81-8,295, *et seq.*; *id.* § 81-8,296. Nevertheless, "[n]othing [in the Act] shall be construed to be a waiver of the sovereign immunity of the state

beyond what is otherwise provided by law." *Id.* § 81-8,297. The Act does not waive suit immunity. Nebraska has also enacted the "State Contract Claims Act," whose procedures are a mandatory predicate for a claimant to "initiate an action in the district court of Lancaster County." *Id.* § 81-8,302, *et seq.*; *id.* § 87-8,305, ¶ (3). Nebraska successfully asserted sovereign immunity when a tribe sued to require negotiation of a gaming compact even though Nebraska enacted a statute specifically authorizing the negotiation.

> "While it is true that a state may waive Eleventh Amendment immunity through its conduct, a state official may waive the state's immunity only where specifically authorized to do so by that state's constitution, statutes or decisions." *Santee Sioux Tribe of Nebraska*, 121 F.3d at 431 (citations omitted). Certainly the principles governing the extent to which a sovereign may consent to suit also should be applicable to this tribe. By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, Danka Business Systems and Danka Funding failed to satisfy the conditions necessary for an unequivocal waiver identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58.

Danka, 747 A.2d at 842.

Alabama has firmly embraced suit immunity in its Constitution and its courts have reinforced the principle "That the State of Alabama shall never be made a defendant in any court of law or equity." ALA. CONST. art. I, § 14. The wall of "governmental immunity" is almost invincible, made so by the people through their Constitution as interpreted by the Supreme Court of Alabama.

Hutchinson v. Board of Trustees of Univ. of Ala., 256 So.2d 281, 284 (Ala. 1971). This section not only forbids a suit against the state, but against its officers and agents in their official capacity, when a result favorable to the plaintiff or complaint would directly affect a contract or property right of the state. *Druid City Hosp. Bd. v. Epperson*, 378 So.2d 696, 697-698 (Ala. 1979). The Alabama Legislature may not consent to a suit against the state prohibited by this section. *Armory Comm'n v. Staudt*, 388 So.2d 991, 992 (Ala. 1980). Where a contractor was seeking monetary damages for breach of contract against a state university, appellate court held that this section prohibits a court from exercising jurisdiction over such suit. *Sparks Constr. v. State Bldg. Comm'n*, 664 So.2d 905, 907 (Ala. Civ. App. 1994).

The Arkansas Constitution explicitly provides that "The State of Arkansas shall never be made defendant in any of her courts." ARK. CONST. art. V, § 20. Arkansas has established a State Claims Commission, but even when the state submits to jurisdiction,[46] it shall pay only "actual, but not punitive, damages adjudged by a state or federal court."[47]

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[46] Arkansas is not, however, prohibited from waiving its sovereign immunity or voluntarily entering its appearance in litigation. *Arkansas Game & Fish Comm'n v. Lindsey*, 771 S.W.2d 769, 770 (Ark. 1989). Presumably Arkansas courts would not accept a purported waiver in a contract absent legislative action.

[47] ARK. CODE ANN., § 21-9-203, ¶ (a). *See also*, ARK. CODE ANN. § 21-9-301, ["[C]ounties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be

South Dakota's Constitution provides that: "The Legislature shall direct by law in what manner and in what courts suits may be brought against the state." S.D. CONST., art. III, § 27. The South Dakota Legislature has given that consent but only to the extent of liability insurance purchased. S.D. Codified Laws § 21-32A-1, -2, -3.

Mississippi, Texas and Kansas have also legislatively established the procedures that individuals must follow to assert claims against the state and have set limitations on what kinds of claims may be asserted and the maximum liability that may be awarded. *See* Miss. Code Ann. § 11-46-3 ("The Legislature * * * does hereby declare, provide, enact and reenact that the 'state' and its political subdivisions * * * are not now, have never been and shall not be liable and are, always have been and shall continue to be immune from suit at law * * * ."). TEX. CIV. PR. & REM. CODE ANN. § 101.001, *et seq. See also, Seamans v. Harris County Hosp. Dist.*, 934 S.W.2d 393, 395 (Tex. App. 1996) (tort claims act did not abolish sovereign immunity but merely waived it in certain circumstances); Kan. Stat. Ann. § 75-6101, *et seq., Barger v. Kansas*, 620 F.Supp. 1432, 1438 (D. Kan. 1985) (enactment does not equal evidence that Kansas waived immunity from suit under the Eleventh Amendment).

As the constitutions, statutes and case law of the State Amici demonstrate, State sovereigns through their constitutional and legislative enactments tightly control

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immune from liability and from suit for damages except to the extent that they may be covered by liability insurance."]

any waivers of suit immunity. The same is true of the Potawatomi. *See* C.P.N. note 29, *supra*. Those who specifically negotiate with the tribe for a waiver of immunity *never* obtain more than a limited waiver. Here C&L is asking this Court to find that an unlimited waiver of sovereign immunity to suit and total asset immunity can be inferred from a form arbitration paragraph. This boundless waiver of suit immunity is much greater than any waiver that could reasonably have been obtained from the Potawatomi or the legislative body of any sovereign.

The State Amici argue that affirming the opinion below would result in "a paternalistic brand of immunity that must be protected against a tribe's own efforts to waive it." State Amici Br. at 1-2. This assertion has no merit. The Potawatomi have made no effort to waive their immunity. "Paternalism" has nothing to do with the suit immunity that is an attribute of sovereignty. Affirming the decision of the Oklahoma Court of Appeals would be entirely consistent with sovereign suit immunity jurisprudence including that involving states. What C&L is asking for is a complete reversal of this court's jurisprudence from recognizing tribal suit immunity as an inherent attribute of a government to paternalistically protecting corporations (who can afford to litigate a $25,000 contract case for seven years, but neglect to negotiate an immunity waiver) from Indian tribes.

> We have long recognized that a State's sovereign immunity is "a personal privilege which it may waive at pleasure." *Clark v. Barnard*, 108 U.S. at 447. The decision to waive that immunity, however, "is altogether voluntary on the part of the

sovereignty." *Beers v. Arkansas*, 61 U.S. 527, 20 HOW 527, 529, 15 L. Ed. 991 (1858). Accordingly, our "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985). Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284, 50 L. Ed. 477, 26 S. Ct. 252 (1906), or else if the State makes a "clear declaration" that it intends to submit itself to our jurisdiction, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54, 88 L. Ed. 1121, 64 S. Ct. 873 (1944). *See also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) (State's consent to suit must be "unequivocally expressed"). **Thus, a State does not consent to suit** in federal court merely by consenting to suit in the courts of its own creation. *Smith v. Reeves*, 178 U.S. 436, 441-445, 44 L. Ed. 1140, 20 S. Ct. 919 (1900). Nor does it consent to suit in federal court **merely by stating its intention to "sue and be sued,"** *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 149-150, 67 L. Ed. 2d 132, 101 S. Ct. 1032 (1981) (per curiam), **or even by authorizing suits against it " 'in any court of competent jurisdiction,' "** *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-579, 90 L. Ed. 862, 66 S. Ct. 745 (1946). We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit. *Beers v. Arkansas*, supra. There is no suggestion here that respondent Florida Prepaid expressly consented to

being sued in federal court. Nor is this a case in which the State has affirmatively invoked our jurisdiction.

Florida Prepaid at 675-676 (emphasis added).

> [This Court has] observed (in dictum) that there is "no place" for the doctrine of constructive waiver in our sovereign-immunity jurisprudence, and we emphasized that we would "find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) (internal quotation marks omitted).

Id. at 678.

> The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). "Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393, 81 L. Ed. 1177, 57 S. Ct. 809 (1937). *See also Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307, 81 L. Ed. 1093, 57 S. Ct. 724 (1937) (we "do not presume acquiescence in the loss of fundamental rights"). State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. *Great Northern*, 322 U.S. at 51; *Pennhurst*, 465 U.S. at 98. And **in the context of federal sovereign immunity – obviously the closest analogy to the present case – it is well established that waivers are not implied.** *See,*

> *e.g., United States v. King*, 395 U.S. 1, 4, 23 L. Ed. 2d 52, 89 S. Ct. 1501 (1969) (describing the "settled proposition" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). We see no reason why the rule should be different with respect to state sovereign immunity.

Id. at 681 (emphasis added).

This Court rejected the argument asserted in *Florida Prepaid* that the state had "constructively waived its immunity from suit by engaging in the voluntary and nonessential activity of selling and advertising a for-profit educational investment vehicle in interstate commerce after being put on notice by the clear language of the TRCA that it would be subject to Lanham Act liability for doing so." *Id.* at 680.

> But there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that the State made an "altogether voluntary" decision to waive its immunity. *Beers*, 20 HOW at 529.

Id. at 680-681.

D. Some Circuit and State courts have not properly applied this Court's sovereign immunity jurisprudence.

C&L cites *Rosebud Sioux Tribe v. Val-U Construction* where the Eighth Circuit found that an arbitration clause waived immunity. Pet. Br. at 22-23. The Eighth Circuit's decision in *Val-U Construction* is proof of the adage that "bad facts make bad law." Unlike C&L, Val-U Construction had performed a substantial amount of work for the defendant tribe when the tribe terminated the contract.[48] The Eighth Circuit inappropriately distinguished the *Val-U Construction* decision from its earlier decision in *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*,[49] by stating that the contract in *Val-U Construction*

[48] The decision in *Val-U Construction* is inconsistent with law from the Tenth Circuit and other federal courts. *See, e.g., Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982) (tribal defendants did not expressly waive sovereign immunity of tribal authorities by agreeing to attorney fee clause in construction contract, consenting to partial summary judgment with respect to certain disputed sums owed under the contract, or including "sue and be sued" clause in tribal corporate charter). Where waivers have been found, the waivers have been explicit. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (tribal council passed formal resolution, approved by the Secretary of the Interior, expressly waiving sovereign immunity) and *A. K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 786 (9th Cir. 1986) (tribal bingo agreement expressly "waives sovereign immunity" for actions brought to enforce or interpret contract).

[49] 780 F.2d 1374, 1381 (8th Cir. 1985) (promissory note reserving "rights and remedies provided by law" in favor of lender, providing for attorney fees in the event of a collection action, and containing a conflict of laws provision did not constitute express waiver of promisee tribe's sovereign immunity).

designated an arbitral forum to settle all disputes. *Val-U Construction*, 146 F.3d at 577.

The second case cited by C&L is *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996). Pet. Br. at 23-27. In *Sokaogon*, the non-tribal party was seeking to recover for services rendered to the tribe. The Seventh Circuit found an effective waiver of sovereign immunity in an arbitration clause similar to the one at issue herein probably because of equity considerations.

> Here the only purpose that a requirement of a clear statement could serve would be the admittedly, perhaps archaically, paternalistic purpose of protecting the tribe against being tricked by a contractor into surrendering a valuable right for insufficient consideration. We do not find this or any other purpose articulated in the cases, and **this leads us to doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit**, especially since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions.

Sokaogon, 86 F.3d at 659-660 (emphasis added). The Seventh Circuit's "doubt" about the explicitness required to find a waiver of suit immunity was subsequently put to rest by the decision in *Kiowa Tribe v. Manufacturing*

Technologies, Inc., supra, which vacated a decision by the Oklahoma Supreme Court[50] based on similar reasoning.

C&L principally relies on state cases[51] that misconstrued a Ninth Circuit decision to reach a result that, as the Ninth Circuit subsequently held, is inconsistent with federal law. The Ninth Circuit decision (*see* note 40, *supra*) held that an Indian tribe waives suit immunity "by intervening as a party plaintiff and subsequently entering into a fishing conservation agreement which provided, among other things, that the parties to the agreement would submit all future disputes to the Oregon district court for resolution." *Sycuan Band of Mission Indians*, 884 F.2d at 419. The Ninth Circuit later recognized that state courts (Alaska and Arizona, *see* note 42, *supra*) had misconstrued its pronouncement on arbitration clauses and reiterated that waivers of suit immunity cannot be implied but must be clear and unequivocal. A finding that an arbitration clause is a waiver of tribal sovereignty "runs counter to not only the strong presumption against tribal waivers of immunity, but also generally accepted principles governing the interpretation of contractual arbitration provisions." *Id.* at 419. Because of the "strong presumption against waivers of tribal sovereignty," the Ninth Circuit refused "to imply a waiver of sovereign immunity * * * by entering into * * * [an] arbitration

[50] *Aircraft Equip. Co. v. Kiowa Tribe*, 1997 OK 59, 939 P.2d 1143, 1147 (rejecting the argument "that Oklahoma's judicial power can only be extended over her Indian tribes upon express tribal or congressional consent"); vacated and remanded *sub nom Kiowa Tribe v. Aircraft Equip. Co.*, 524 U.S. 901 (1998).

[51] *See* note 42, *supra*.

clause." *Id.* at 420. The Ninth Circuit specifically noted that a formal resolution expressly waving sovereign immunity was the type of waiver favored by the Supreme Court, citing *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130, * * * (1982). *See Sycuan Band of Mission Indians*, 884 F.2d at 419.

Nothing remotely similar to the situations resolved in these state and circuit decisions occurred here. The Potawatomi have consistently and un-mistakenly asserted their sovereign immunity to the arbitrator, to the state district court, and to the state appellate courts. They never received any goods or services from C&L. They have never intervened in any litigation. In any event, these state cases cannot overrule United States Supreme Court decisions holding that it is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. The Potawatomi do not seek special treatment for Indian tribes, but do ask the Court to continue to apply consistent standards for the waiver of immunity by a sovereign even if that sovereign happens to be an Indian tribe.

II. The AIA Agreement is null and void on its face under federal law.

The AIA Agreement is void on its face under federal law. This fundamental flaw in C&L's claim was never addressed by the Oklahoma courts though they were consistently advised of the issue. *See* notes 16, 20, and 23, *supra*. When the AIA Agreement was executed, 25 U.S.C.

§ 81 (hereafter, "Section 81")[52] made any contract with an Indian tribe "relative to their lands" null and void unless properly endorsed by the Secretary of the Interior. The AIA Agreement was to construct a roof on a building located on land owned by the Potawatomi. C&L performed no construction nor provided any services to the Potawatomi. However, had the contract been performed, C&L's services would clearly have been "relative to" Indian lands.

In *Green v. Menominee Tribe of Indians in Wisconsin*, 233 U.S. 558 (1914), this Court held that a contract with an Indian tribe not endorsed with the approval of the Secretary of the Interior was null and void. Neither the arbitrator nor the Oklahoma courts attempted to justify or explain their enforcement of the C&L agreement despite the lack of Secretarial endorsement. However, C&L has argued that Secretarial approval was not necessary because the land where the contract would have been

[52] In *Kiowa Tribe*, this Court noted that "Congress has taken the lead in drawing bounds of tribal immunity * * * [and] is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Kiowa Tribe*, at 759. In response to or consistent with this language, Congress amended Section 81. Mar. 14, 2000, Pub. L. No. 106-179, § 2, 114 Stat. 46; *see* Senate Rep. 106-150 (Sept. 8, 1999). As now amended, Secretarial approval is only required for an agreement with an Indian tribe that "encumbers Indian lands for a period of seven or more years." Contracts requiring Secretarial approval must contain remedies in case of breach, a reference to tribal law on suit immunity, or an express, limited waiver of suit immunity. 25 U.S.C. § 81 (2000).

performed is not *trust* land,[53] but merely *restricted* Indian land. This distinction is not valid.

> Defendants contend that 25 U.S.C. § 81 pertains only to "tribal land" which they define as being limited to land that is part of the tribe's reservation. However, they have cited no authority in support of that interpretation. Moreover, such a construction appears to be at variance with both the plain language of the statute and with its broad remedial purpose. Thus the statute uses the term "their [the Indians] lands" without differentiating between original tribal lands and those subsequently acquired. Reading into those words the limitation urged by Defendants would distort their plain meaning. Moreover, it also would emasculate the statute and frustrate its purpose by providing a mechanism to regulate Indian land transactions. Indeed, it has been said that the Indian Non-Intercourse Act, 25 U.S.C. § 177, a statute having a similar objective, applies to lands acquired by tribes through purchase as well as through other means. *Alonso v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958).

Narragansett Indian Tribe v. RIBO, Inc., 686 F.Supp. 48, 51 (D.R.I. 1988).

A contract null and void on its face cannot be evidence sufficient to show that a tribe has waived sovereign immunity. Although Section 81 was never discussed by the court below, Congress' enactment of that statute and

[53] Resp. Br. in Opp. to Cert. Pet. 18. Case No. 96-1721.

subsequent amendments thereto evidence clear legislative approval of this Court's requirement that waivers of tribal sovereign immunity be "unequivocally" expressed.

III. Insofar as Relevant, Analogies to Foreign Sovereign Immunities Would Reject an Implied Waiver Here.

Sensing that its assertions may be unavailing if tested against the standard of tribal immunity law, C&L has suggested that the appropriate analogy for this Court's consideration is that of foreign sovereign immunities. Pet. Br. 25-26. The threshold problem with this argument is that the Foreign Sovereign Immunities Act (FSIA) "is inapplicable to federally recognized Indian tribes." *Pezold v. Cherokee Nation Industries, Inc.*, No. 94,054, slip op. at 6 (OK Civ. App. Sept. 1, 2000), *reh'g den.* (Sept. 29, 2000) *pet. for cert. filed* (Oct. 20, 2000). Although a federal statute of general applicability usually applies to Indian Tribes,[54] the FSIA is a statute of specific applicability to "foreign states." 28 U.S.C. §§ 1602, 1330. Indian tribes are clearly legally distinct from "foreign states" under the fundamental law of this country. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831) (noting that the United States

[54] *Federal Power Com. v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). Exceptions to this general rule include where (1) "the law touches the exclusive rights of self governance in purely intramural matters"; (2) "application of the law to the tribe would abrogate rights guaranteed by Indian treaties"; of (3) "there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians or their reservations * * * ." *Donavan v. Coeur d'Alene Tribal Farms*, 751 F.2d 1113, 1115-16 (9th Cir. 1989).

Constitution views Indian Tribes "as entirely distinct"). The Constitution specifically recognizes this distinction: "Congress shall have the Power to * * * to regulate commerce with foreign Nations, and among the several States and with the Indian tribes; * * * ." U.S. CONST., art. I, § 8, cl. 3.

Another problem with this attempted analogy is that it does not support C&L's claim. The law of foreign sovereign immunities has been unequivocal in its skepticism of implied waivers through arbitration agreements, and, moreover, has required a searching review of a purported sovereign agent's authority to waive.

A. FSIA case law should not be applied by analogy to Indian tribes.

In *Kiowa Tribe v. Manufacturing Technologies, Inc.*, this Court found Congress' role in delimiting foreign sovereign immunities as "instructive" as to problems of tribal immunity. 523 U.S. at 759. But this is not the same as saying that the precise modalities of tribal immunity are to be determined by analogy from foreign sovereign immunities. And when the Court in *Idaho v. Coeur d'Alene Tribe of Idaho* indicated that "Indian tribes * * * should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity," 521 U.S. 261, 268 (1997), it was simply to indicate that plaintiff tribes are no different from private suitors in bringing unconsensual suits against States, and not to doctrinally connect tribal and foreign sovereign immunities. Nevertheless, some courts have purported to rigorously apply, by analogy, foreign sovereign immunities to Indian

tribes. *See Hydaburg Coop. Assn. v. Hydaburg Fisheries*, 826 P.2d 751, 754 (Alaska 1992). This effort has been so observed in the academic literature. *See also* John W. Borchert, *Tribal Immunity through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification*, 13 EMORY INT'L L. REV. 247 (1999); Clement, note 29, *supra*.

On the other hand, courts have appeared quite comfortable in asserting that Indian tribes are entitled to the dignity and privileges appertaining to sovereigns, among which is sovereign immunity from unconsented suits in its own tribunals and those of coordinate jurisdictions. The analogy to foreign sovereign immunity has been useful, as this Court intimated in *Kiowa Tribe*, 523 U.S. at 751, in locating the source of this doctrine in federal law and acknowledging that it is subject to the plenary power of Congress under the Indian and Foreign Commerce Clauses. U.S. CONST., Art. I, § 8, cl. 3. C&L's suggestion (Pet. Br. 19, n.2) that Indian tribes should be placed in some rigid hierarchy and categorically held to have immunities inferior to those enjoyed by States of the Union and foreign sovereigns has no Constitutional support and is without merit.

B. The FSIA analogy is no help to C&L in any event.

To the extent that the federal law of foreign sovereign immunities is relevant to the precise question raised here, it actually supports the Potawatomi position: the AIA Agreement was not an effective waiver of the Tribe's immunity. Although C&L's reliance on the *Restatement (Third) of Foreign Relations Law* might be appropriate

under different facts, the critical source for determining the content of federal law on that subject is the 1976 FSIA, 28 U.S.C. §§ 1601-11, and cases construing its provisions. The Act provides an exception for the presumptive immunity of foreign sovereigns where "the foreign state has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1), and where an action is brought to confirm an award made pursuant to an agreement to arbitrate. *See id.* § 1605(a)(6).

Nevertheless, this Court has held that arbitral agreements that might notionally constitute implied waivers of immunity must be narrowly construed. In *Argentine Republic v. Amerada Hess Shipping Corp.*, this Court observed, "Nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." 488 U.S. 428, 442-43 (1989). Other courts have emphatically held that implied waivers should be construed narrowly and that the crucial feature of such a waiver – in order to be effective – is that the foreign sovereign's words or conduct evince a willingness to be sued in a particular forum. *See Creighton Ltd. v. Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999); *In re Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999); *Hilao v. Estate of Marcos*, 94 F.3d 539, 546-48 (9th Cir. 1996); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1386 (8th Cir. 1993); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990). Even more specifically, courts have found that a general agreement to arbitrate, without a particular expression of willingness to have enforcement or confirmation proceedings in

a particular jurisdiction, does not constitute a waiver of sovereign immunity for suits brought in that jurisdiction. *See Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 577 (2d Cir. 1993); *Creighton Ltd. v. Qatar*, 181 F.3d at 122; *see also Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) ("[M]ost courts have refused to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States").

Extending the analogy of these authorities to this case, it is manifest that the arbitration clause in the AIA Agreement, could not constitute a valid waiver of the Tribe's immunity. No situs is established for the arbitration in Oklahoma, nor, indeed, in any State. There is thus no *lex loci arbitrii* to constitute an implied invitation to litigate contract disputes in a State court. C&L places substantial reliance on the language that "judgment may be entered upon it [the arbitral award] in accordance with applicable law in any court having jurisdiction thereof [and] * * * enforceable under applicable law in any court having jurisdiction thereof." Pet. App. 46. But as the foreign sovereign immunity cases make clear, unless the applicable law is that of the ostensible forum and is specifically selected in the contract, this cannot operate as an effective waiver of sovereign immunity. *See Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1102 n. 13 (D.C. Cir. 1982); *Creighton Ltd. v. Qatar*, 181 F.3d at 122-23. Needless to say, the AIA Agreement did not designate Oklahoma law as the law of the contract. Under foreign sovereign immunity principles, the

arbitration clause in the AIA Agreement was not an effective waiver of the Tribe's immunity to suit in Oklahoma courts.

C. The absence of governmental action is still fatal.

Even if the AIA Agreement is construed as an effective waiver, that still leaves the question of its validity insofar as the signatories acting for the Tribe did not have authority to waive the Tribe's immunity. (Such authority was Constitutionally vested in the Tribe's Business Committee, the authority of which C&L should be charged with notice.) Moreover, under the AIA Agreement itself, Pet. App. 49, the required formal "notice to proceed" was never issued by the project architect. Cert. Pet. 7. While the question of authority to waive has been considered above, it is worth reiterating here that under foreign sovereign immunity principles the law to be applied to such a question is that of the foreign sovereign, as understood consistent with the FSIA. *See First Nat'l City Bank v. Banco Para el Commercio*, 462 U.S. 611, 621-22 (1983); *Aquamar S.A. v. Del Monte Fresh Produce, N.A.*, 179 F.3d 1279, 1293-94 (11th Cir. 1999); *Jota v. Texaco, Inc.*, 157 F.3d 153, 162-63 (2d Cir. 1998).

The laws of some foreign States forbid waivers of immunity by individual officials acting alone or as with the Potawatomi do not authorize officials to waive. These restrictions have been respected by U.S. courts applying foreign sovereign immunities. As a matter of agency law, this would be a question of actual authority under the law of the sovereign.

To complete the analogy, the law of the "foreign" sovereign (the Potawatomi) controls the question of whether the three tribal officials had the authority to waive the tribe's sovereign immunity. The answer is that they did not. Under the Potawatomi Constitution, the business Committee has the power to act for the tribe by adopting resolutions or ordinances. Section 6 of the Potawatomi Code of Civil Procedure provides that "Nothing contained in this Act shall be construed to be a waiver of the sovereign immunity of the Tribe, its officers, employees, agents, or political subdivisions or to be a consent to any suit **beyond the limits now or hereafter specifically stated by Tribal law.**" (emphasis added) Thus, under Potawatomi law, absent adoption of an ordinance or resolution by the Potawatomi Business Committee waiving sovereign immunity, the tribe cannot be sued. As confirmed by the Potawatomi Supreme Court, nothing in the constitutional or statutory law of the Potawatomi authorizes suit immunity to be waived by tribal officials or by contract.

> The Citizen Band Potawatomi Indian Tribe of Oklahoma, like each Indian tribe, is exempt from suit without Congressional authorization. This is the doctrine of sovereign immunity. The Tribe has not expressly waived its sovereign immunity, and Tribes are immune not only from direct legal action against them without consent, but also they are immune from indirect attempts to sue them by naming their officers as defendants.

Sulcer v. Barrett, 17 Ind. Law Rptr. 6139, 1990 WL 655878 (Cit. B. Potawatomi), 2 Okla. Trib. 76, 81 (Cit. B. Potawatomi 1990); *see also Sulcer v. Davis*, 986 F.2d 1429

(10th Cir. 1993) [slip op. reprinted at 1993 U.S. App. LEXIS 3457], *cert. denied*, 510 U.S. 870 (1993).

Thus, if the Court looks to the law of foreign sovereigns as urged by C&L and the State Amici, the Court should find that C&L failed to meet its burden under a motion to dismiss because it failed to produce evidence that suit immunity was waived as required under Potawatomi law, *i.e.*, that the Potawatomi Business Committee waived the tribe's immunity as claimed.

CONCLUSION

The Opinion of the Oklahoma Court of Civil Appeals should be affirmed.

Respectfully submitted,

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CITIZEN POTAWATOMI NATION

RESOLUTION # 01-58

A RESOLUTION APPROVING A LOAN AGREEMENT AND ATTACHED EXHIBITS ON BEHALF OF THE CITIZEN POTAWATOMI NATION, AUTHORIZING THE CHAIRMAN AND VICE-CHAIRMAN TO SIGN SAID AGREEMENT AND ATTACHED EXHIBITS, AND GRANTING A LIMITED WAIVER OF SOVEREIGN IMMUNITY

WHEREAS, the Citizen Potawatomi Nation is a federally recognized tribe of American Indians with constitutional authority under the Thomas-Rogers Oklahoma Indian Welfare Act of June 26, 1936, (49 Stat. 1967); and

WHEREAS, the Citizen Potawatomi Nation, the largest of the Potawatomi Indian Tribes, has, through a continuation of Potawatomi history and organized self government since time immemorial, sovereign powers inherent in tribal tradition and recognized by treaties with the United States and in the United States Constitution; and

WHEREAS, the Citizen Potawatomi Nation Constitution and By-Laws provide that the Business Committee is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the Citizen Potawatomi Nation in all matters on which the Tribe is empowered to act now or in the future; and

WHEREAS, the Citizen Potawatomi Nation is constructing Firelake Discount Foods and wishes to obtain long-term permanent financing; and

WHEREAS, the Citizen Potawatomi Nation Business Committee has directed Chairman John A. Barrett, Jr. and Vice-Chairman Linda Capps to negotiate documents necessary to obtain financing to construct and equip Firelake Discount Foods; and

WHEREAS, First Capital Group, Inc., has agreed to loan $5,050,000 to the Citizen Potawatomi Nation to finance said construction;

NOW THEREFORE, BE IT RESOLVED that the Business Committee of the Citizen Potawatomi Nation hereby approves the attached Loan Agreement and the exhibits attached thereto; authorizes Chairman John A. Barrett, Jr. and Vice-Chairman Linda Capps to sign said

CITIZEN POTAWATOMI NATION

agreement and exhibits on behalf of the tribe; and waives, limits and modifies the sovereign immunity of the Citizen Potawatomi Nation from suit solely to the extent necessary and as hereinafter limited to permit First Capital Group, Inc., to obtain a judgment in the jurisdictions as set forth in Section 7 of the Loan Agreement for obligations imposed by said Loan Agreement and attached exhibits when they are signed as herein authorized and to collect such judgments. The Business Committee also hereby waives asset immunity as to the collateral identified in said Loan Agreement and exhibits as therein provided. If First Capital Group, Inc., obtains said judgment and any amount thereof remains owing after First Capital Group, Inc., has used commercially reasonable efforts to foreclose its lien on or security interest in said assets and apply the proceeds thereof to the loan and to pursue its remedies against any guarantors, then, in that event, the Business Committee also waives asset immunity as to other tribal assets that are not held in trust nor whose management and disposition is reserved to the Citizen Potawatomi Nation Indian Council by the Constitution. This limited waiver of sovereign immunity by the Citizen Potawatomi Nation may not be construed as authorizing any other suit or kind of action by First Capital Group, Inc., or anyone else against the Citizen Potawatomi Nation.

CERTIFICATION

We, the members of the Business Committee of the Citizen Potawatomi Nation do hereby certify that the above is a true and exact copy of Resolution POTT # 01-58 as approved on the 8th day of December, 2000, with 5 voting for, 0 opposed and 0 absent.

John A. Barrett, Jr., Chairman

Gene Bruno, Secretary-Treasurer