No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Is an arbitration agreement, contained in a contract executed by an Indian tribe for commercial construction outside of reservation or trust land boundaries, enforceable by the proceedings, including suit in state court, provided for in the arbitration agreement?

II. Where the arbitration agreement provides:

> The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof . . . ,

does execution of such an arbitration agreement constitute a waiver of sovereign immunity from a state court suit against the Indian tribe to enforce an arbitration award resulting from such arbitration proceedings?

PARTIES TO THE PROCEEDING BELOW

The Petitioner (Plaintiff/Appellee below) is C&L Enterprises, Inc., an Oklahoma Corporation.

The Respondent (Defendant/Appellant below) is the Citizen Potawatomi Nation, a federally recognized Indian tribe, formerly known as the Citizen Band Potawatomi Indian Tribe of Oklahoma. Respondent was identified in the state court case caption as "Citizen Band Potawatomi Tribe of Oklahoma a/k/a Citizen Band Potawatomi Indians of Oklahoma."

CORPORATE DISCLOSURE STATEMENT

Petitioner, C&L Enterprises, Inc., is a non-governmental corporation. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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The original opinion of the Court of Civil Appeals for the State of Oklahoma, Division 2, filed November 5, 1996, affirming judgments of the District Court of Oklahoma County, Oklahoma, in favor of Petitioner (Pet. App. 12) is not reported. Respondent's Petition to this Court for certiorari to the Court of Civil Appeals of Oklahoma (Case No. 96-1721), was granted by this Court on June 1, 1998, and, on the same date, this Court ordered that the original opinion of the Court of Civil Appeals of Oklahoma be vacated and remanded for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This Court's orders are reprinted at Pet. App. 8, 9. The opinion of the Court of Civil Appeals for the State of Oklahoma, Division 2, reversing, on remand, the judgments of the District Court of Oklahoma County, Oklahoma, filed February 8, 2000 (Pet. App. 2), is not reported. The Order of the Court of Civil Appeals for the State of Oklahoma, Division 2, filed March 27, 2000, denying the Petitioner's petition for rehearing (Pet. App. 10), is not reported.

BASIS FOR JURISDICTION

The opinion and judgment of the Court of Civil Appeals of Oklahoma was filed February 8, 2000. Petitioner's timely petition for rehearing was denied by order filed March 27, 2000. Petitioner's timely petition for writ of certiorari seeking discretionary review by the Oklahoma Supreme Court, the state court of last resort, was

denied May 24, 2000. The petition for a writ of certiorari was filed August 22, 2000 and granted on October 30, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Okla. Stat. tit. 15 § 802 (West 1993) provides:

§ 802. Application of act – Courts – Jurisdiction

A. This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.

B. The term "court" as used in this act means any court of competent jurisdiction of this state. The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

2. Okla. Stat. tit. 15 § 811 (West 1993) provides:

§ 811. Court to confirm award

Upon application of a party to the agreement, the court shall confirm an award, unless

within the time limits imposed herein grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13 of this act.

3. Okla. Stat. tit. 15 § 812 (West 1993) provides:

§ 812. Vacation of award – Grounds

A. Upon application of a party, the court shall vacate an award if:

1. The award was procured by corruption, fraud or other illegal means;

2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the requirements of this act, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 3 of this act and the party did not participate in the arbitration hearing without raising the objection.

B. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

C. An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant. If predicated upon corruption, fraud or other illegal means, the application shall be made within ninety (90) days after such grounds are known or should have been known.

D. When vacating the award on grounds other than stated in paragraph 5 of subsection A of this section, the court may order a rehearing before new arbitrators are chosen as provided in the agreement. In the absence of such provision, new arbitrators shall be chosen by the court in accordance with Section 4 of this act. If the award is vacated on grounds set forth in paragraphs 3 and 4 of subsection A of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 4 of this act. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

E. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

4. Okla. Stat. tit. 15 § 813 (West 1993) provides:

§ 813. Modification or correction of award by court – Grounds

A. Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when:

1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

2. The award is imperfect in a matter of form, not affecting the merits of the controversy; or

3. The arbitrators have made an award upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted.

B. If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as modified and corrected. Absent any modification or correction, the court shall confirm the award as made.

C. An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

D. Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements, may be awarded by the court.

STATEMENT OF THE CASE

On August 25, 1993, Respondent, the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi")

presented to Petitioner, C&L Enterprises, Inc., ("C&L") a proposed contract for C&L's construction of the roof upon a bank building on nonreservation, nontrust land owned by Potawatomi (hereafter the "Contract"). Potawatomi's Contract was made upon an American Institute of Architects form agreement chosen by Potawatomi. Potawatomi and/or its architect drafted the contract terms and provisions not set forth in the form. The Contract contained an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. . . . The award rendered by the arbitrator or arbitrators shall be final, and *judgment may be entered upon it* in accordance with applicable law in any court having jurisdiction thereof. . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein *shall be specifically enforceable under applicable law in any court having jurisdiction thereof.*

(Pet. App. 46, Article 10.8) (emphasis added).

After execution of the Contract, Potawatomi decided to change the type of roof and entered into a contract with another company in breach of the Contract with C&L. The breach occurred before the bank construction had progressed to the point of installing the roof and prior to C&L being given a notice to proceed under the Contract. C&L gave notice to the architect and

Potawatomi of its damages – lost profits – and its demand for arbitration as provided by the Contract. (Pet. App. 34, Article 2.1).

Potawatomi was represented by counsel and repeatedly corresponded to the American Arbitration Association ("AAA") setting forth its arguments and claimed authorities regarding the factual issues and arguments alleging sovereign immunity from suit. In the arbitration hearing C&L presented exhibits, testimony and argument to prove its claim as noted in the Arbitration Award and as required by Rule 30 of the Construction Industry Arbitration Rules of AAA which provides:

> An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.[1]

After conclusion of the arbitration hearing and consideration of the evidence submitted, the arbitrator rendered its award in favor of C&L in the amount of $25,400.00 plus attorney's fees of $2,230.00, costs of $34.67 and arbitration fees of $750.00. (Pet. App. 61).

C&L sued in the District Court of Oklahoma County to confirm the arbitration award consistent with Oklahoma law and the terms of the arbitration agreement. (Pet. App. 28).

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[1] *See* JT. App. 18-25; Rule 30, American Arbitration Association Construction Industry Arbitration Rules, November 1, 1993 (Record at 47-48).

Potawatomi brought a motion to dismiss the state court action asserting sovereign immunity. C&L responded asserting: that because the Contract between Potawatomi and C&L was executed outside of Indian trust or reservation land, sovereign immunity never attached; that the terms of the arbitration agreement explicitly waived any sovereign suit immunity from arbitration and suit to enforce the Contract; and that the Contract was otherwise properly enforceable by arbitration and state court suit to enforce the arbitration award. (Record at 29-33).

The District Court of Oklahoma County denied Potawatomi's motion to dismiss and denied Potawatomi's subsequent motion to reconsider. (Pet. App. 24-26).

Potawatomi failed to make application for an order vacating, modifying or correcting the Arbitration Award within ninety (90) days after delivery of a copy of the Award to Potawatomi as required by 15 Okla. Stat. tit. §§ 812, 813. C&L then filed its Motion for Confirmation of Arbitration Award giving Potawatomi notice of the Motion and scheduled hearing. Potawatomi chose not to appear or otherwise oppose the motion and the trial Court accordingly entered Judgment confirming the Award as mandated by 15 Okla. Stat. tit. § 811. (Pet. App. 21).

C&L later filed original and amended fee applications with detailed supporting time statements. Notwithstanding notice of the application and hearing date, Potawatomi again chose not to appear or otherwise

respond. Judgment granting the application was entered by the Oklahoma County District Court. (Pet. App. 18).

Potawatomi appealed to the Supreme Court of Oklahoma which referred the appeal to the Court of Civil Appeals of Oklahoma. C&L again argued that sovereign immunity never attached and that, assuming sovereign immunity had attached, it was expressly waived by the Potawatomi's agreement to arbitration and consent to enforcement of any arbitration award in the Oklahoma state courts. Without reaching the question of whether execution of the arbitration agreement constituted a waiver of sovereign immunity, the Oklahoma Court of Civil Appeals affirmed the District Court judgments based on the ruling in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 U.S. 1675 (1996).

Potawatomi petitioned this Court for writ of certiorari to the Court of Civil Appeals of Oklahoma (Case No. 96-1721). This Court granted the petition on June 1, 1998 and ordered that the original opinion of the Court of Civil Appeals of Oklahoma be vacated and remanded for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

On remand, the Court of Civil Appeals for the State of Oklahoma, Division 2, addressed the waiver of sovereign immunity issue but nevertheless reversed the judgments of the District Court of Oklahoma County, Oklahoma on February 8, 2000 and denied the C&L's petition for rehearing on March 27, 2000. C&L's petition for writ of certiorari seeking discretionary review by the Oklahoma Supreme Court was denied May 24, 2000.

Mandate has issued from the Oklahoma Supreme Court but its effectiveness had been suspended pending the resolution of this appeal. (Pet. App. 11).

SUMMARY OF ARGUMENT

This Court has described Indian tribes as "domestic dependent nations" rather than foreign sovereigns. However, the Court has clearly stated that Indian tribes have no greater rights than foreign sovereigns and, indeed, enjoy less than the full attributes of the sovereignty. Therefore, consistent with the rule applied to other sovereigns, the Court should find a waiver of immunity by the explicit terms of the arbitration agreement executed by Potawatomi. *See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 47, 55, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978).

The Potawatomi waived sovereign immunity from the suit brought by C&L. The waiver of immunity from suit is explicitly stated in the arbitration provisions of the Contract drafted by Potawatomi. The agreement provides for mandatory binding arbitration and states that the arbitration award " . . . shall be final, and judgment may be entered upon it. . . . " (Pet. App. 46, Article 10.8).

As set forth below, other state or federal courts have reviewed similar arbitration provisions involving Indian tribes. Without exception, where the arbitration provisions provided for entry and enforcement of the arbitration award as a "judgment," courts have found a waiver of sovereign immunity from suit to enforce the contract.

Such authorities are consistent with the rule applied to foreign sovereigns.

ARGUMENT

I. Even Accepting That the Potawatomi Generally Enjoy Sovereign Immunity from Suit, They Hold less than the Full Attributes of the Sovereignty Possessed by Foreign Nations and States.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), this Court acknowledged its previous pronouncements that Indian tribes are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754, 118 S.Ct., at 1702.

However, the Court recognized in *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), that all entities enjoying sovereign immunity do not have identical sovereign rights. The Court stated:

> Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.

Id. at 323, 98 S.Ct., at 1086. (citation omitted).

Therefore, a determination of whether sovereign immunity has been waived logically requires consideration of the origin and extent of the immunity enjoyed in the first instance. In *Kiowa*, the Court noted that the

"doctrine of tribal immunity developed almost by accident." *Kiowa*, 523 U.S., at 756, 118 S.Ct., at 1703. The Court acknowledged that, rather than originating by legislative act, the doctrine was birthed from *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919).

In *Turner*, the Court stated:

> . . . in 1890, [the Indian tribe] . . . then *exercised* within a defined territory the powers of a sovereign people, having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial.

Id. at 355, 39 S.Ct., at 109. (emphasis added).

Turner did not state that the tribe held or was entitled to hold sovereign immunity from suit. Instead the Court merely recognized that prior to its dissolution the Indian tribe had "exercised" those self-government functions which are typical of a sovereign people. The genesis of the doctrine of tribal sovereign immunity was the language, later quoted from *Turner*, where the Court stated:

> The fundamental obstacle to recovery is *not the immunity of a sovereign to suit*, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace.

Id. at 358, 39 S.Ct., at 110. (emphasis added).

As the Court stated in *Kiowa*:

> The quoted language . . . is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine.

Kiowa, 523 U.S., at 757, 118 S.Ct., at 1704.

This Court's analysis of *Turner* rings true. *Turner* may also be read as affirmatively stating that there was no sovereign immunity obstructing recovery. Despite the *Turner* Court's characterizations of the tribe as exercising the powers of a sovereign people and being "like" other governments, "municipal as well as state," it passed over the opportunity to say the tribe had sovereign immunity. Indeed, the only time the Court mentioned immunity was in its statement that sovereign immunity from suit was *not* an obstacle to recovery. *Turner*, 248 U.S., at 358, 39 S.Ct., at 110.

Nevertheless, the judicially created doctrine of tribal immunity stands balanced today on the "slender reed" of *Turner*. In *Kiowa*, the Court recognized that tribal immunity from suit, at least in the context of commercial activities off of the reservation, "extends beyond what is needed to safeguard tribal self-governance." Though the Court was not asked to abrogate tribal immunity and chose to defer to Congress to confine it to on-reservation or noncommercial activities, it did recognize that the Court had taken the lead in drawing the bounds of tribal immunity. Despite its deference, the Court did not say it lacked the power to further restrict the doctrine it had created. *Kiowa*, 523 U.S., at 757, 118 S.Ct., at 1704.

Even without attempting a comprehensive review of case law, a trend is evident. This Court's opinions demonstrate a marked movement away from a view of Indian reservations as distinct nations with full sovereign rights equal to foreign nations, the United States, or individual states, toward broader exertion of jurisdiction over Indian tribes. This is especially apparent in actions concerning commercial activities off of the reservation.

In *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), where the Court reviewed an Alaska Supreme Court decision regarding fishing rights, this Court stated:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. . . . State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation.

Id. at 75, 82 S.Ct., at 571.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115 (1973), regarding a tribe's protest of New Mexico's use tax assessment, the Court stated:

> At the outset, we reject – as did the state court – the broad assertion that the Federal Government has exclusive jurisdiction of the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise '[w]hether the enterprise is located on or off tribal land.' Generalizations on this subject have become particularly treacherous. . . .
>
> But tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' *Organized Village of Kake, supra*, 369 U.S., at 75, 82 S.Ct., at 571. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

Mescalero, 411 U.S., at 147-149, 93 S.Ct., at 1270.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 47, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the Court again examined the quasi-sovereign status of Indian tribes:

> Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. Although *no longer 'possessed of the full attributes of sovereignty,'* they remain a 'separate people, with the power of regulating their internal and social relations.'

Id. at 55, 98 S.Ct. 1675. (emphasis added) (citations omitted).

Against this backdrop, the Court in *Kiowa* recognized that "there are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity from suit. *Id.* at 758, 118 S.Ct., at 1704. Considering the judicial genesis of the doctrine of tribal sovereign immunity, the "slender reed" upon which the doctrine is balanced, and the power and practice of this Court to draw increasingly narrow bounds of tribal sovereign immunity, expansion of tribal immunity today would be a significant departure from the course laid by the Court.

This Court would indeed be charting a new course if it were to now condition a waiver of immunity, from suit on a simple contract, upon the incantation of specific words such as advocated by Potawatomi. Past rulings of this Court, of circuit courts of appeal and of state supreme courts outside Oklahoma, counsel adoption of a

standard for waiver which, at most, is no more strict than that applied to foreign sovereigns, states and the United States.

II. The Potawatomi Clearly and Explicitly Waived Sovereign Immunity from Suit to Enforce the Contract.

Potawatomi expressly waived its limited sovereign immunity from suit to enforce the arbitration award when it executed the Contract with C&L. The Contract, an American Institute of Architects form agreement, was prepared and proposed by Potawatomi. The Contract terms and provisions not set out in the form were drafted by Potawatomi and its architect. The Contract contains an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. . . . The award rendered by the arbitrator or arbitrators shall be final, and *judgment may be entered upon it* in accordance with applicable law in *any court* having jurisdiction thereof. . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein *shall be specifically enforceable under applicable law in any court having jurisdiction thereof.*

(Pet. App. 46, Article 10.8) (emphasis added).

In addition, Article 19.1 of the Contract states "[t]he contract shall be governed by the law of the place where

the Project is located." (Pet. App. 56). The project was located off of tribal land, in Shawnee, Oklahoma. (Pet. App. 33)

The Oklahoma Uniform Arbitration Act, 15 Okla. Stat. tit. 1978 § 802.B., provides:

> The term "court" as used in this act means any court of competent jurisdiction of this state. The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

Therefore, by the execution of an arbitration agreement within the state of Oklahoma, by specific choice of Oklahoma law and by execution of a contract outside of reservation or trust land but within the State of Oklahoma, it is clear that Oklahoma law governs the contract.

By operation of the Oklahoma Uniform Arbitration Act, 15 Okla. Stat. tit. 1978 §§ 801-818, and by the terms of the Contract and arbitration agreement, jurisdiction was properly exercised by the Oklahoma State Court.

Where other courts have considered arbitration agreements such as the one at issue here, they have consistently found a waiver of sovereign immunity from suit. In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983), the agreement between the parties contained an arbitration clause with terms virtually identical to the clause at issue herein providing that the agreement:

> . . . shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Id. at 758.

Discussing the effect of the arbitration clause, the Alaska Supreme Court stated:

> . . . we believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful . . . The arbitration clause in Eyak's contract with GC Contractors would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed.

Id. at 760.

In ruling that the arbitration agreement constituted a waiver of suit immunity, the Alaska Court considered *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). There, the court held that an Indian tribe's agreement, to submit all disputes which could not be resolved by negotiation to the Oregon Federal District Court, constituted an express waiver of sovereign suit immunity. *Id.* at 1016.

In *Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz.App. 1985), *cert. denied*, 474 U.S. 920, 106 S.Ct. 250 (1985), the Pascua Yaqui Tribe entered into an agreement with Val/Del, Inc., to manage the tribe's bingo operation. The court first determined that the tribe was generally

entitled to sovereign immunity. In addition, the court applied a standard that waivers of sovereign immunity could not be implied but must be unequivocally expressed. *Id.* at 508.[2]

On this foundation, the court turned to the arbitration clause contained in the contract between the parties. Again, the substantive provisions of the clause considered were virtually identical to the provisions of the clause at issue herein. The agreement provided:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association, and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Id.

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[2] The court cited *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978) as authority for this waiver standard. However, *Santa Clara* quoted the standard from *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976) and *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969). Although the authorities cited herein by C&L applied this same standard, and although the waiver at issue herein meets the standard, both *Testan* and *King* were reciting a standard for determining whether the United States has waived sovereign immunity to suit in the specific context of an action in the Court of Claims. Given the distinctions between the sovereign rights of the United States and the quasi-sovereign status of Indian tribes, this Court may determine that a less strict standard for waiver by Indian tribes is appropriate.

The *Val/Del* court cited, with approval, both *Native Village of Eyak v. GC Contractors* and *United States v. Oregon* discussed above. The court further stated:

> Before entering into the arbitration agreement, the respondent tribe was free from suit by Plaintiff. However, *after agreeing that any dispute would be arbitrated and the result entered as a judgment* in a court of competent jurisdiction, we find that *there was an express waiver of the tribe's sovereign immunity*. . . . Having expressly waived its sovereign immunity, civil jurisdiction would properly lie with the State of Arizona. . . .

Val/Del, at 509. (emphasis added).

Both *Val/Del* and *Native Village of Eyak v. GC Contractors* considered arbitration clauses in contracts with Indian tribes otherwise assumed to possess sovereign immunity. The clauses were virtually identical to the arbitration agreement herein and were no more explicit or unequivocal in waiving sovereign immunity. In both cases, the courts specifically found the arbitration agreement was a "clear" "unequivocal" and "express" waiver of immunity.

Later, in *Hydaburg CO-OP v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992), the Supreme Court of Alaska reviewed *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989) (cited below by Potawatomi) as well as its prior ruling in *Eyak*. The court assumed for argument that the appellant CO-OP was entitled to tribal sovereign immunity based upon its historical tribal status. The court went on to state that the CO-OP waived sovereign immunity from suit by entering into an arbitration agreement. *Id.* at 754.

As to *Pan American*, the *Hydaburg* court distinguished it from *Eyak* as follows:

> Unlike *Native Village of Eyak*, *Pan American* did not involve a suit to compel arbitration or enforce an arbitration award. Instead, by challenging the validity of a tribal ordinance, *Pan American* directly attacked the tribe's authority to regulate affairs on its reservation.

Id.

The Potawatomi argue that a waiver must specifically recite the magic words of "waiver," "Indian" and "immunity" and that absent such an incantation, a waiver can only be inferred. No authority stands for this proposition. Indeed, none of the authorities cited by either party supports such a restrictive and mechanical view. As defined by *Black's Law Dictionary*, 1417 (rev. 5th ed. 1979), "Express Waiver" is simply "[t]he voluntary, intentional relinquishment of a known right."

Clearly, the arbitration agreement proposed by Potawatomi and agreed to by both parties constitutes a voluntary, intentional relinquishment of any sovereign immunity from suit to enforce the arbitration agreement or arbitration award.

Despite Potawatomi's strained effort below to characterize the present arbitration clause as a waiver of suit immunity "by inference" only, the clause could not be more explicit. Indeed, no inference is required from the provisions of the clause that *"judgment may be entered upon"* the arbitration award and that the arbitration agreement *"shall be specifically enforceable under applicable law in any court having jurisdiction thereof."* The arbitration

clause is clearly an express waiver of immunity by the Potawatomi as was correctly determined by the trial court below.

More recent cases directly on point have echoed the analysis and findings of the authorities discussed above. Indeed, recent authorities are even clearer that language essentially identical to or even less explicit than the arbitration agreement at issue herein does constitute an explicit waiver of sovereign immunity from suit.

In *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1995), the Eighth Circuit Court of Appeals found a clear waiver of sovereign immunity from an arbitration clause which simply stated that all disputes would be decided by arbitration under the Construction Industry Rules of the American Arbitration Association.

Unlike the agreement in the case at bar, the *Rosebud* agreement did not even contain the specific language stating that judgment may be entered upon any award rendered. Rather, the court looked to Rule 47(c) of the AAA Construction Industry Rules (also specifically chosen in the arbitration clause at issue herein) which provides:

> Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in *any federal or state court* having jurisdiction thereof.

Id. at 562. (emphasis added).

Responding to protests of the tribe that the agreement only implied a waiver, the Eighth Circuit Court of

Appeals stated there was no authority requiring the "invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." *Id.* at 563.

On remand, the district court granted summary judgment to the contractor and entered judgment in the amount of the arbitration award. The tribe appealed and the issue was again addressed in *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998). There, the Eighth Circuit Court of Appeals reaffirmed its previous finding that the arbitration clause was an explicit waiver of sovereign immunity from suit.

The Court went on to explain how its decision in *Rosebud Sioux Tribe* was consistent with its previous ruling in *American Indian Agricultural Credit v. Standing Rock Sioux Tribe*, 780 F.2d 1374, at 1380 (8th Cir. 1985). The court distinguished the two cases stating that in *Standing Rock* the promissory note did not specifically designate an arbitral forum to settle all disputes and did not include a consent to judicial enforcement of the arbitration award. *Val-U Construction* at 577.

A waiver of sovereign immunity from suit by consent to arbitration was also found in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996). There, an Indian tribe sued to invalidate an architectural services contract for lack of approval by the Bureau of Indian Affairs while the architect proceeded to arbitration seeking recovery for services rendered under the contract.

The arbitration went forward without the tribe's participation resulting in an award in favor of the architect. An action to confirm the arbitration award was stayed

while the court considered whether sovereign immunity had been waived. Again, the arbitration agreement at issue contained language that was virtually identical to the agreement between Potawatomi and C&L. It provided:

> 'Claims, disputes or other matters' arising out of or related to the contract 'shall be subject to and decided by arbitration in accordance with the [rules] . . . of the American Arbitration Association' . . . that the agreement to arbitrate 'shall be specifically enforceable in accordance with applicable law in any court having jurisdiction' and that 'judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction thereof.'

Id. at 659.

Considering whether the arbitration agreement was a clear waiver of sovereign immunity, The court stated:

> *There is nothing ambiguous about this language.* The tribe agrees to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law. *To agree to be sued is to waive any immunity one might have from being sued.*

Id. (emphasis added).

Continuing, the Seventh Circuit Court of Appeals stated:

> The arbitration clause could not be much clearer. . . . No one reading this clause could doubt that the effect was to make the tribe suable. The waiver is at least as perspicuous as the statement – perhaps the only statement – that would satisfy the tribe's current lawyer as constituting an explicit waiver of sovereign immunity: 'The tribe will not assert the defense of sovereign immunity if sued for breach of contract.' The term 'sovereign immunity' is a technical legal term, and anyone who knows what it means can also understand the arbitration clause.

Id. at 660.

III. Finding a Waiver of Immunity by the Agreement to Arbitration is Consistent with the Rule Applied to Other "Sovereigns."

In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) the Court reviewed an Indian tribe's suit against the state of Idaho over ownership of the submerged land and bed of a lake. Discussing the state's immunity from suit by the tribe, the Court stated:

> Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity.

Id. at 268, 269, 117 S.Ct., at 2034.

In *Hydaburg CO-OP v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992), discussed above, the Alaska Supreme court specifically compared waivers of sovereign immunity by Indian tribes to waivers by foreign sovereigns. The court cited § 456 of the Restatement of the Foreign Relations Law of the United States:

(2) Under the law of the United States:

. . .

(b) an agreement to arbitrate is a waiver of immunity from jurisdiction in

(i) an action or other proceeding to compel arbitration pursuant to the agreement; and

(ii) an action to enforce an arbitral award rendered pursuant to the agreement;[3]

Restatement (Third) of the Foreign Relations Law of the United States § 456(2)(b) (1987); *Hydaburg*, at 754.

The court then proceeded to set forth a number of authorities applying this principal to arbitration agreements with foreign sovereigns. While it acknowledged that federal courts have explicitly held Indian tribes are not foreign states, the *Hydaburg* court stated that:

> Nevertheless, the rationale of the cases relating to waiver of immunity by foreign sovereigns is equally applicable to waiver of sovereign immunity by Indian tribes.

Hydaburg, at 754.

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[3] The comment to § 456 states "If a waiver of immunity does not refer to any particular court or place of adjudication, it is treated as applicable to all appropriate courts." Restatement (Third) of the Foreign Relations Law of the United States § 456 comment a (1987). The instant contract chose Oklahoma law. Pursuant to Oklahoma law and the rules of the American Arbitration Association, the arbitration award was enforceable in any state or federal court in Oklahoma.

The Seventh Circuit Court of Appeals in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996), directly addresses the arguments raised by Potawatomi and followed by the Oklahoma Court of Civil Appeals. The *Sokaogon* court stated:

> *The waiver in this case is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity.' No case has ever held that.* The examples are not limited to Indian law. When states or the federal government waive sovereign immunity, as in the Federal Tort Claims Act or the Tucker Act, they do not say they are waiving 'sovereign immunity'; they create a right to sue, just as in the arbitration clause here.

Id. (emphasis added).

The Court in *Sokaogon*, citing *Prima Paint Corporation v. Flood & Conklin Mfg.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), further stated:

> Although the arbitration clause is contained in a contract that the tribe contends is illegal, the tribe rightly does not argue that the illegality of the contract infects the arbitration clause.

Sokaogon at 659.

As discussed above, the Court has recognized that Indian tribes enjoy less than the full attributes of sovereignty. Therefore, the Seventh Circuit Court of Appeals and the Alaska Supreme Court were correct in looking to foreign relations law for the standard to apply to waivers of tribal sovereign immunity from suit. Indeed, the authorities discussed above support a more liberal standard.

In its Opinion, the Oklahoma Court of Civil Appeals agreed that C&L "makes a persuasive argument that the language providing for arbitration, and the enforcement of arbitrator's award, clearly indicate Tribe's agreement to suit in Oklahoma courts." The Court of Appeals went on to state that *Native Village of Eyak, supra,* was directly on point. *See* Pet. App. 5.

Despite conceding that the logic of *Native Village of Eyak* was "unassailable," and that the arbitration agreement and contract language "indicate a willingness on Tribe's part to expose itself to suit on the contract," the Oklahoma Court of Civil Appeals nevertheless found that the "leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression." *See* Pet. App. 7.

It is simply nonsensical to state that the contract expresses a willingness to be sued but that it does not waive sovereign immunity from suit. It is evident that the Oklahoma Court of Civil Appeals misunderstood the issue and incorrectly followed Potawatomi's argument that a waiver must utter the incantation "we waive sovereign immunity from suit" in order to effectively waive immunity.

The Opinion of the Oklahoma Court of Civil Appeals squarely conflicts with the unanimous opinions of courts having addressed this issue in the context of arbitration agreements with Indian tribes. Opinions directly on point from the Seventh Circuit Court of Appeals, Eighth Circuit Court of Appeals, Alaska Supreme Court and Arizona Supreme Court have, as discussed above, consistently found an explicit waiver of sovereign immunity from

language essentially identical to or even less explicit than the arbitration agreement at issue herein.

If this agreement – that all claims or disputes "shall be decided by arbitration" and that "judgment may be entered" upon the award – is not a clear and explicit waiver of immunity from suit to enforce an arbitration award, then the contract terms are meaningless. Under this interpretation, an agreement to have a judgment entered would not include an agreement to be sued and an agreement to be bound by an arbitration award would not include an agreement to submit to arbitration.

Potawatomi's argument raises the obvious question: what specific language is required? If the words "we waive sovereign immunity" are required, then every court other than the Oklahoma Court of Civil Appeals is not following such a rule.

Finally, Potawatomi attempts to establish that not only are its contracts unenforceable, but even its agreements to arbitrate disputes are meaningless. Although likely to be dismissed by Potawatomi as "unsolicited paternalism," C&L submits that Potawatomi's argument is shortsighted and in direct conflict with federal policy promoting economic advancement and assimilation of Indians as full and equal participants in commerce.

CONCLUSION

The Court should reverse the judgment of the Oklahoma Court of Civil Appeals and remand with instructions to affirm the previous judgments of the District Court of Oklahoma County.

Respectfully submitted,

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