Just Say the "Magic Words": Advocating an Arbitration Clause Should Be Held to an Express Waiver Standard for the Doctrine of Indian Sovereign Immunity--C&L Enterprises v. Citizen Band Potawatomi Indian Tribe

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NOTES

JUST SAY THE "MAGIC WORDS": ADVOCATING AN ARBITRATION CLAUSE SHOULD BE HELD TO AN EXPRESS WAIVER STANDARD FOR THE DOCTRINE OF INDIAN SOVEREIGN IMMUNITY — C&L ENTERPRISES V. CITIZEN BAND POTAWATOMI INDIAN TRIBE

Jeremy Clinefelter*

I. Introduction

Under normal circumstances, when two parties agree to an arbitration clause in a construction contract, executed on privately owned land, both parties may reasonably be assured of a speedy resolution to any dispute arising thereon. Circumstances change, however, if one of the parties is a federally recognized Indian tribe. Indian tribes, like States and the Federal Government, possess sovereign immunity from suit, which throws a real wrench into the resolution of any dispute arising from a contract. Nearly a decade after the contract in this case was executed, the parties may finally be nearing a resolution.

In Citizen Band Potawatomi Indian Tribe v. C&L Enterprises,1 the parties executed a roof construction contract. A dispute arose and C&L Enterprises (C&L) sought resolution pursuant to the arbitration clause written into the contract.2 Citizen Band Potawatomi Tribe of Oklahoma (Citizen Band) maintained it was immune from suit by virtue of its sovereign immunity.3 The issue of Citizen Band's immunity from suit progressed to the Supreme Court of the United States, which ultimately resulted in a dismissal of C&L's claim by the state court.4 This dismissal did not end the dispute, however, because the Supreme Court had ruled that an Indian tribe could waive its sovereign immunity and therefore, C&L challenged the state court's ruling on that issue.5

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2. See id.
3. See id.
4. See id.
5. See id., No. 86,568, slip op. at 2.
The Supreme Court must determine whether an arbitration clause in a contract between an Indian tribe and a non-Indian party constitutes waiver of tribal sovereign immunity from suit. To make this determination the Court should also endorse either an express or implied standard of waiver.

This note examines the issue of tribal waiver from suit. Specifically this note argues that waiver of tribal immunity should be unequivocally expressed. This note also proposes that in order to meet an express standard arbitration clauses in contracts between Indian tribes and non-Indians should contain not the "magic words," but the "magic factors" — a written declaration identifying the Indian tribe's consent; a specified forum to resolve disputes; and consent to judgment in the specified forum.

II. Statement of the Case

A. Facts

In August 1993, the Citizen Band and C&L entered into a construction contract. The contract called for C&L to construct a roof on a building already under construction for Citizen Band. The execution of the contract took place outside of Indian country and was determined to be

6. See id.
7. See discussion infra Part IV.B.
8. See discussion infra Part III.B-C., IV.B-D.
9. See discussion infra Part IV.B.
10. See discussion infra Part IV.D, IV.E.
11. See Citizen Band Potawatomi II, No. 86,568, slip op. at 1. The contract was written upon a copyrighted American Institute of Architects form calling for C&L to construct the roof for $85,000. See Respondent's Brief at 6, C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 121 S. Ct. 377 (2000) (No. 00-292). Citizen Band notes that only three of the five Potawatomi Business Committee, which conducts and authorizes business transactions on behalf of the Nation pursuant to the article VII, section 2 of the Citizen Potawatomi Nation Constitution. See Respondent's Brief at 6 n.6, C&L Enterprises (No. 00-292). Citizen Band notes that only three of the five Potawatomi Business Committee, which conducts and authorizes business transactions on behalf of the Nation pursuant to the article VII, section 2 of the Citizen Potawatomi Nation Constitution. See Respondent's Brief at 6 n.6, C&L Enterprises (No. 00-292).
12. See Citizen Band Potawatomi II, No. 86,568, slip op. at 1. Citizen Band is a federally recognized Indian tribe. See id.
13. Congress defines Indian Country as follows:

[T]he term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1994). Although 18 U.S.C. § 1151 defines Indian country for cases disputing criminal jurisdiction, the Supreme Court of the United States has recognized the definition for questions of civil jurisdiction as well. See DeCoteau v. District County Court, 420 U.S. 425, 427

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a commercial endeavor of Citizen Band. After execution of the contract Citizen Band decided on a different roof design. Soon thereafter, Citizen Band awarded the contract to construct the new roof to another contractor. C&L then sought relief through arbitration pursuant to the terms of the contract. After the arbitrator ruled in its favor, C&L brought an action to confirm the award. Citizen Band defended the action by claiming immunity to suit and moved to dismiss. When the state trial court denied the motion to dismiss, Citizen Band generally refrained from appearing in the lawsuit. Citizen Band appealed the trial court's ruling to uphold the arbitrator's award.


15. See id. Citizen Band contends it changed from a foam roof to a rubber guard roof, after it learned birds had eaten holes in a similar foam roof elsewhere. See Respondent's Brief at 7, C&L Enterprises (No. 00-292). Citizen Band further contends it went with a new contractor because C&L could not construct the rubber guard roof and subcontracted the job out resulting in a bid $21,616 more than the contractor with the lowest bid. See id. "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." Petitioner's Brief at 6, C&L Enterprises (No. 00-292).


17. See id. The contract contained an arbitration clause which reads as follows: 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. . . . Petitioner's Brief at App. 46, Art. 10.8, C&L Enterprises (No. 00-292).

18. See Citizen Band Potawatomi II, No. 86,568, slip op. at 2. "The arbitrator awarded C&L approximately twenty-nine percent of the contract price as damages and also awarded attorney fees." Id. "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." Petitioner's Brief at 7, C&L Enterprises (No. 00-292).

19. See id.

20. See id.

B. Oklahoma District Court of Oklahoma County

On August 7, 1995, C&L filed its Summons and Petition for a breach of contract action in the District Court of Oklahoma County.22 Citizen Band moved to dismiss the action on August 25, 1995.23 The trial court overruled Citizen Band's motion on September 22, 1995, after both parties had submitted briefs on the issue of sovereign immunity.24 On October 27, 1995, the district court confirmed the arbitration award for C&L.25

C. Court of Appeals of Oklahoma, Second Division

The Court of Appeals of Oklahoma upheld the ruling of the District Court of Oklahoma County on November 5, 1996.26 In an unpublished decision, the court found Hoover v. Kiowa Tribe27 dispositive of the issue, whether "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country."28 Neither party disputed that the execution of the contract did not take place on either trust or reservation land.29 Thus, in light of Hoover I, the Court of Appeals of Oklahoma affirmed the state trial court ruling in all regards.30

27. 909 P.2d 59 (Okla. 1995) (Hoover I). The Hoover case arrived at the Supreme Court of Oklahoma on appeal from a state trial court's judgment that it could not exercise state jurisdiction over the Kiowa Tribe because of the Tribe's sovereign immunity. See id. at 60-61. The Plaintiff, Robert M. Hoover, filed the action when the Kiowa Tribe failed to make any payments on a promissory note of $142,500, that had been executed off the reservation, for which the Tribe pledged 5000 shares of common stock. See id. at 60. The Supreme Court of Oklahoma reversed and remanded in line with the Supreme Court of New Mexico's ruling in Padilla v. Pueblo of Acoma, 754 P.2d 845 (1988), which "held that the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct was solely a matter of comity." See Hoover I, 909 P.2d at 61. The court reasoned that since Oklahoma permitted breach of contract suits against the state, an Indian tribe's sovereign immunity would not bar suit on a contract executed outside Indian country. See id. at 61. The Court of Appeals of Oklahoma relied on Hoover I to reach two unpublished decisions relevant here — Citizens Band Potawatomi I and Manufacturing Technologies Inc. v. Kiowa Tribe. See Manufacturing Technologies, No. 86,489 (Okla. Ct. App. June 28, 1996), available at http://legal.onenet.net; see also discussion infra Part III.A.2. On remand the trial court ruled against the Kiowa Tribe and the Supreme Court of Oklahoma affirmed, adding detail to its rationale in Hoover I. See Hoover v. Kiowa Tribe, 957 P.2d 81 (Okla. 1998) (Hoover II).
29. See id.
30. See id. Citizen Band filed a complaint in the United States District Court for the Western District of Oklahoma while its appeal to the higher state courts was pending. See Citizen Band

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D. Supreme Court of the United States

On June 1, 1998, the Supreme Court of the United States granted Citizen Band's petition for a writ of certiorari. Moreover, the Court vacated and remanded the case to the Court of Appeals of Oklahoma for further consideration in light of Kiowa Tribe v. Manufacturing Technologies, Inc.

E. Court of Appeals of Oklahoma, Second Division

The Court of Appeals of Oklahoma did not receive the case for review pursuant to the reversal and remand until January 7, 2000. Initially, the court had to review its earlier decision in Potawatomi I in light of the

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At the present time, the state trial court has entered judgment for C&L over the Nation's sovereign immunity objection; the Oklahoma Court of Appeals has affirmed that judgment . . . ; and the Oklahoma Supreme Court has denied certiorari . . . . In short, . . . the substance of the case, in particular the Nation's entitlement to tribal sovereign immunity, has been finally and unequivocally resolved.

See id. at *4. As such, the issue of the district court's abstention order no longer took center stage. See id. Rather, the Tenth Circuit determined that "the current availability of any federal relief for the Nation turns on the preclusive effect accorded the state courts' determination of its sovereign immunity claim . . . ." See id. The Tenth Circuit remanded the cause for a determination on that issue. See Citizens Potawatomi Nation v. Freeman, 113 F.3d 1245 (10th Cir. 1997). Both parties then submitted briefs on the preclusive effect of the state court judgment to the district court. See Freeman, No. CIV-95-1967-TT (W.D. Okla. filed Aug. 1, 1997; Sep. 2, 1997; Sep. 19, 1997). Finally, the district court ordered an administrative closing of the file on January 21, 2000, pending the state court action. Freeman, No. CIV-95-1967-T (W.D. Okla. filed Jan. 21, 2000).


32. 523 U.S. 751 (1998). The Court's decision in Manufacturing Technologies affected several Oklahoma Indian sovereignty cases, including the eventual overturning of Citizens Band of Potawatomi I in Citizens Band of Potawatomi II, but also a series surrounding the Kiowa Tribe's promissory note endeavors. See discussion infra Part II.E; see also Hoover v. Kiowa Tribe, 986 P.2d 516, 517 (Okla. 1999) (Hoover III) (overruling Hoover II after reconsideration of the ruling in Manufacturing Technologies); Aircraft Equip. Co. v. Kiowa Tribe, 975 P.2d 450, 451 (Okla. 1998) (overruling a previous affirmation of state jurisdiction enforcing a money judgment against the Kiowa Tribe in light of Manufacturing Technologies); Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe, 975 P.2d 442, 444 (Okla. 1998) (holding that the Manufacturing Technologies opinion directly contradicts the court's earlier legal approach to sovereign immunity in Hoover II and Aircraft Equipment and therefore, the Kiowa Tribe's sovereign immunity protected it from suit by creditors to recover money on promissory notes).

Supreme Court's decision in Manufacturing Technologies. Faced with that ruling directly on point, the court had little choice but to find the trial court lacked jurisdiction since Citizen Band's sovereign immunity from suit extended to a contract executed outside Indian Country. However, the Manufacturing Technologies decision also provided that a tribe may waive its sovereign immunity. Therefore, the court embarked upon an examination of whether Citizen Band waived its immunity through the arbitration clause in the contract with C&L.

The court held that the record did not support a finding of express waiver of immunity by Citizen Band. In reaching its decision, the court found C&L's argument — that Citizen Band waived its immunity from suit in clear and unequivocal terms through the agreement to arbitrate and the specific language of the contract — "persuasive." Furthermore, the court believed the Alaska Supreme Court's logic in Native Village of Eyak v. GC Contractors, a case directly on point, to be "unassailable." However, the court declined to find an "unequivocally expressed" waiver, as required by the Supreme Court of the United States in Santa Clara Pueblo v. Martinez. C&L urged the Court to follow the United States Court of Appeals for the Ninth Circuit's holding in United States v. Oregon, and find the contract language a sufficient expression of Citizen Band's waiver. Instead, the court cited American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe as a case where other courts refrained from extending the scope of an express waiver to the extent of the Oregon court. Ultimately, although the language of the contract seemed to "indicate a willingness on Tribe's part to expose itself to suit," the court found that willingness based on an "implication" rather than an "unequivocal expression." On this rationale, the Court of Appeals of Oklahoma reversed and remanded to the trial court with instructions to sustain Citizen Band's motion to dismiss.

34. See id.
35. See id.
36. See id.
38. See id.
39. Id.
40. 658 P.2d 756 (Alaska 1983); see also infra Part III.C.1.
41. See Citizen Band Potawatomi II, No. 86,568, slip op. at 3.
42. 436 U.S. 49 (1978); see also infra Part III.A.1.
43. 657 F.2d 1009 (9th Cir. 1981); see also infra Part III.B.3.
44. See Citizen Band Potawatomi II, No. 86,568, slip op. at 3.
45. 780 F.2d 1374 (8th Cir. 1985); see also infra Part III.B.4.
46. See Citizen Band Potawatomi II, No. 86,568, slip op. at 3.
47. Id.
48. See id.
F. Supreme Court of the United States (II)

On October 30, 2000, the Supreme Court of the United States granted C&L’s petition for certiorari to the Court of Civil Appeals of Oklahoma, Second Division.49

III. Background

The issue before the Supreme Court of the United States in Potawatomi II is whether the arbitration clause in the contract between Citizen Band and C&L constituted a waiver of tribal immunity from suit.50 Before focusing on the Potawatomi II issue, it will be helpful for the reader to make a brief acquaintance with the historical and current state of the doctrine of tribal immunity.51 Therefore, this note briefly touches on the doctrine of tribal immunity.52 It then proceeds to a thorough development of the case law involving Indian waiver of immunity from suit.53 Finally, this note sets out in detail the cases asking whether an arbitration clause in a contract between an Indian tribe and non-Indian constitutes tribal waiver of immunity from suit.54

A. Doctrine of Tribal Immunity — Supreme Court of the United States

The Supreme Court has recognized that tribal sovereign immunity is a creation of the judiciary, attributed in several cases to Turner v. United States.55 In 1940, the Court solidified the doctrine of sovereign immunity in United States v. USF&G,56 by recognizing that Indian nations retain immunity from suit.57 The Court ushered the doctrine into the modern era

50. See Citizens Band Potawatomi II, No. 86,568, slip op. at 2. The Oklahoma Court of Appeals stated that "because the Court in Manufacturing Technologies recognized that a tribe may waive its sovereign immunity, this court must determine if such a waiver occurred in this instance." See id.
51. See discussion infra Part IIIA-B.
52. See discussion infra Part IIIA.
53. See discussion infra Part IIIB.
54. See discussion infra Part IIIC.
55. 248 U.S. 354 (1919). In Turner, three bands of Creek Indians tore down an eighty-mile fence constructed at considerable expense by the plaintiff. See id. at 356. The plaintiff sought relief, but the Court noted that "like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace." Id. at 357-58. Furthermore, the Court showed that liability would normally be imposed by statute, but Congress had not addressed such liability for an Indian tribe. See id. at 358. Additionally, the Court opined that the lack of a "substantive right" for plaintiff, not sovereign immunity, was the problem. Id. at 358. Finally, the Court stated, in the phrase which may have sparked the tribal immunity doctrine, "without authorization from Congress, the Nation could not then have sued in any court; at least without its consent." Id.
56. 309 U.S. 506 (1940).
57. See id. at 512. In USF&G, the Court held that an Indian tribe was immune from a cross-
of Indian law in *Santa Clara Pueblo*, oft cited as declaring that immunity can be waived if unequivocally expressed.\textsuperscript{58} Finally, the Court recently reaffirmed the doctrine in *Manufacturing Technologies*, while at the same time questioning the foundation on which it is based and the need for its continued practice.\textsuperscript{59}

1. *Santa Clara Pueblo v. Martinez*

In *Santa Clara Pueblo* the Court faced the issue of whether the Indian Civil Rights Act (ICRA) waived the tribe's immunity from suit in a case of sexual discrimination brought by a tribal member.\textsuperscript{60} The Court held that absent an "unequivocal expression of contrary legislative intent," tribal sovereign immunity bars against suit under the ICRA.\textsuperscript{61} The Court reasoned that since tribes have long-held immunity from suit, subject only to the plenary power of Congress, any waiver of immunity could not be implied, but must be unequivocally expressed.\textsuperscript{62} Accordingly, the Court reversed the decision of the court of appeals.\textsuperscript{63}

2. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*

The Supreme Court clarified its present position on the doctrine of tribal immunity in *Manufacturing Technologies*.\textsuperscript{64} The issue on appeal from the

\textsuperscript{58} See discussion infra Part III.A.1.
\textsuperscript{59} See discussion infra Part III.A.2.
\textsuperscript{60} See Santa Clara Pueblo, 436 U.S. at 58. Respondents filed suit in response to a tribal ordinance which embraced a patriarchal membership plan. See id. at 52-53. The ordinance provided that children whose father was a tribal member and mother was not a tribal member would also be tribal members, but that children whose mother was a tribal member and father was not a tribal member would not be tribal members. See id. at 53 n.2. Respondents contended that the ICRA, enacted to prevent this type of discrimination, implied a waiver of tribal immunity for this kind of action. See id. at 58.

\textsuperscript{61} See id. at 59. The Court also quoted USF&G that "without congressional authorization," the "Indian Nations are exempt from suit." Id. at 58 (quoting USF&G, 309 U.S. at 512). This raised questions for the lower courts down the road as to whether tribes themselves could waive immunity without consent from Congress. See infra notes 75, 92, 129 and accompanying text.


\textsuperscript{63} See id. at 72. The court quickly determined that tribal immunity had not been waived, but then embarked on an extensive examination of the legislative history to determine whether Congress intended for officers of the tribe to be subject suit. See id. at 60-72.

Oklahoma Court of Appeals was whether an Indian tribe could be subject to suit for breach of contract in state court if the parties executed the contract off reservation land. The Court held that "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." In reaching its decision, the Court firmly reiterated that an Indian tribe enjoys immunity from suit, unless Congress expressly authorizes suit or the tribe waives its immunity. Furthermore, the Court rejected Manufacturing's argument to "confine" Indian sovereign immunity if the tribal activities take place outside Indian country, or when the activities are commercial rather than governmental because none of its precedents drew such a distinction.

In addition, the Court veered from its legal endorsement of tribal immunity, which it considered well-settled through judicial precedent, and raised questions in regard to the reasoning of the tribal immunity doctrine's historical foundation. Moreover, the Court suggested that tribes no longer require immunity to promote tribal self-governance and immunity from suit may no longer be fair. However, although the Court recognized that the judiciary

65. See id.
66. Id. at 760.
67. See id. (citations omitted).
68. See id. at 754 (citing Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 167 (1977) (Puyallup III)).
69. See id. at 760. The Court also cited its decision in Oklahoma Tax Commission. See id. at 755. In Oklahoma Tax Commission the Court determined whether tribal sovereign immunity barred Oklahoma from collecting a cigarette tax on goods sold at a reservation store. See Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 507 (1991). The Court affirmed the Tenth Circuit's ruling that the Potawatomi Tribe did not waive its sovereign immunity by seeking an injunction against the Tax Commission's assessment. See id. at 509-10. A reaffirmation of USF&G. See id. at 509. However, the Court also reversed in part by holding that sovereign immunity did not excuse the tribe from assisting in the collection of valid state taxes on non-Indians. See id. at 512 (citing Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980)). The Court further refused Oklahoma's request to limit the doctrine of tribal immunity for tribal business activities or those occurring off reservation lands, instead emphasizing the role of Congress in this regard. See Oklahoma Tax Comm'n, 498 U.S. at 510-11.

70. See Manufacturing Technologies, 523 U.S. at 756. The Court noted that the doctrine of tribal immunity may have originated in Turner, it seemed to have "developed almost by accident." Id. The Court found Turner, "at best, an assumption of immunity . . . ." but admitted that the doctrine had been validated in subsequent decisions. Id. at 757 (citing United States v. USF&G, 309 U.S. 506, 512 (1940)).

71. See id. at 758. The Court stated the doctrine of tribal immunity at one time protected tribal self-government from State encroachment. See id. However, in modern times tribes have increasingly entered into commercial endeavors unrelated to internal government of its members. See id. When a tribe enters into national commerce, the Court opined that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." Id. The Court went on to suggest that for these reasons the abrogation of tribal immunity may be the answer. See id.
shaped tribal immunity, the Court plainly chose to adhere to precedent and clearly indicated any alteration of the doctrine must come from Congress. In light of this reasoning, the Court reversed the decision of the Oklahoma Court of Appeals.

B. Waiver of Tribal Sovereign Immunity — United States Court of Appeals

Following the Supreme Court's holding in Santa Clara Pueblo opposing parties involved in tribal sovereign immunity suits felt secure that immunity could be waived if unequivocally expressed by Congress. However, uncertainty remained as to whether the Indian tribes themselves could waive sovereign immunity and if so, what constituted a waiver.

1. Fontenelle v. Omaha Tribe

In Fontenelle, the United States Court of Appeals for the Eighth Circuit examined whether a "sue and to be sued" clause in the Omaha Tribe's
Corporate Charter opened the Tribe to a quiet title action. The Eighth Circuit held that the Tribe did consent to suit because the clause only expressed exceptions to "sue and to be sued" for a "levy of any judgment, lien or attachment." The Omaha conceded that a quiet title action was none of these. For these reasons, the Eighth Circuit affirmed the ruling of the district court.


In Merrion, the Jicarilla Tribal Council had adopted a severance tax ordinance, in which the Tribe expressly consented to suit in federal district court. The United States Court of Appeals for the Tenth Circuit held that the Jicarilla Tribe waived immunity pursuant to the severance tax ordinance.
In reaching its decision, the Tenth Circuit noted that Congress encouraged tribes to provide for their own welfare under the Indian Reorganization Act of 1934 and found the Tribe's ordinance a clear attempt to do so. The court reasoned that the congressional grant of power in the Act sustained the Tribe's express waiver of immunity from suit under the ordinance, especially since it had been approved by the Secretary of the Interior. Consequently, the Tenth Circuit "reversed and remanded with direction to enter judgment in favor of appellants." The Supreme Court subsequently affirmed the ruling.

3. United States v. Oregon

In Oregon the Yakima Indian Nation appealed the United States District Court's injunction banning it from fishing for chinook salmon in the Columbia River. The Yakima Tribe contended primarily on appeal that it had not waived immunity from suit and therefore, the district court erred by ruling against it. The United States Court of Appeals for the Ninth Circuit first held Indian tribes may consent to suit without express waiver of immunity from Congress. The court based its decision on precedent and policy. In
its ruling, the court noted the "Supreme Court has expressed clearly its position" on whether Indian tribes have the power to waive immunity.\textsuperscript{92} Additionally, the court felt that since Indian tribes retain powers of self-determination, it would be inconsistent with the power of sovereign immunity if the tribes could not waive that right.\textsuperscript{93} Furthermore, the inability to waive immunity would adversely affect tribes in their business dealings since non-Indians would avoid contracting.\textsuperscript{94}

Once the Ninth Circuit determined that an Indian tribe could waive immunity without express consent from Congress, the court proceeded to whether the Yakima Tribe had waived immunity.\textsuperscript{95} The appellees contended the Tribe waived immunity both by intervening in the original suit and consenting in the 1977 agreement to submit all fishing disputes to the district court.\textsuperscript{96} The Ninth Circuit held the Tribe waived immunity under both theories.\textsuperscript{97}

The court noted an intervener subjects itself to the full adjudication of the federal court on the litigated issues.\textsuperscript{98} In this instance the litigated issue involved fishing rights and the Yakima would have been bound by the district court's injunction had one been issued when the Tribe originally intervened.\textsuperscript{99} Therefore, since the Tribe sought equitable relief in the federal courts, it risked an equitable judgment adverse to its position.\textsuperscript{100} The Yakima, however, argued that its intervention paralleled the counterclaim heard by the Supreme Court in \textit{USF&G}.\textsuperscript{101} On that basis the Tribe contended that by joining the suit it risked nothing, because shielded by sovereign immunity, "it was entitled to an injunction in its favor or no relief at all."\textsuperscript{102}

The Ninth Circuit rejected the Tribe's analogy to \textit{USF&G} because the argument did not recognize the likeness between this case and an action in rem.\textsuperscript{103} Under such an action the district court, retaining custody of the res,
has the power to enjoin a party from interfering with that custody.104 Thus, the court determined that the district court had the authority to enjoin the Tribe from fishing for salmon to protect the species.105 Finally, the court pointed out that the dispute over fishing rights was exactly the type of dispute the Tribe submitted resolution to the United States District Court in the 1977 agreement.106 The Ninth Circuit affirmed the grant of the preliminary injunction.107


In Standing Rock, the Eighth Circuit considered an appeal from the district court involving tribal waiver in an action to recover on a promissory note.108 The court examined whether Standing Rock could waive its sovereign immunity through implication in a breach of contract action.109 The Eighth Circuit held that overwhelming precedent alone required waiver of immunity to be expressly and unequivocally stated.110 The court then determined that

Ass'n, 443 U.S. 658, 690 n.32 (1979)).

104. See id. The res in the district court's custody could be termed the fate of "all anadromous fish spawning above the Bonneville Dam." See id. at 1011 n.3. The court opined that here the resource sought to be protected by the Tribe, was the very one in danger. See id. at 1015. Further, the court noted that "the existence of the salmon was inextricably linked to the res in the court's constructive custody." See id.

105. See id. at 1016.

106. See id.

107. See id. at 1017. The Oregon decision also contains the interesting subplot of Justice Kennedy's (then Circuit Judge) authorship because he also penned the Manufacturing Technologies opinion. See id. at 1010; Manufacturing Technologies, 523 U.S. at 753. Certainly no inconsistency permeates the two opinions, rather its interesting because Oregon has been considered to push the envelope of a tribe's express waiver, while Manufacturing Technologies both affirms the tribal immunity doctrine, the tribe's power to expressly waive immunity — all while questioning the very legal foundation immunity from which immunity derives. See infra note 114 and accompanying text; see supra notes 70-72 and accompanying text.

108. See Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1376 (8th Cir. 1985). The Consortium was a non-profit corporation made-up of fifteen Indian tribes, including the Standing Rock Sioux. See id. at 1375. The Tribe borrowed $80,000 to relieve struggling member cattle ranchers, but did not establish a collection program, nor initiate payments to the Consortium. See id. at 1376.

109. See id. at 1378. The note itself stated:

[1]he Bank may, in addition to such other and further rights and remedies provided by law, (1) collect interest on the principle balance . . .; (3) hold as security . . . any property . . . delivered into the Bank . . .; If this note is referred to an attorney for collection, . . . all reasonable attorney's fees and other costs of collection shall be added to such amount of principal and interest ow[ed] . . .; This note and the rights and obligations of all parties hereto shall be subject to and governed by the law of the District of Columbia.

See id. at 1376.

110. See id. at 1378. The court stated that under a standard of implied waiver it would have no difficulty finding waiver in this action considering the language of the contract and the
the clause at hand did not constitute an express waiver because "Standing Rock did not explicitly consent to submit any dispute over repayment on the note to a particular forum, or to be bound by its judgment." In reaching its conclusion, the court compared its case favorably with the Tenth Circuit's decision in Ramey, thinking the plaintiff there had a stronger case. Additionally, the court rejected Consortium's appeal to the Oregon holding, which it interpreted as requiring no specific verbal formula for waiver. The Eighth Circuit also noted the Yakima Tribe's consent to resolve disputes in the federal district court, but continued to opine that Oregon "surely presses the outer boundary of what the Supreme Court intended by its plain statement in [Santa Clara Pueblo]."

The court rejected the argument that a requirement of an express waiver hinders the Tribe's ability to contract with non-Indians. Furthermore, the court felt that a "relaxation of the settled standard invited challenges to virtually every activity undertaken by a tribe on the basis that the tribal immunity had been implicitly waived." Moreover, the court opined that any injustice arising from the ruling did not stem from an express waiver standard, rather it stretched from the doctrine of tribal immunity itself. Finally, the Eighth Circuit found that Standing Rock did not expressly waive immunity in this instance because waiver must be construed narrowly and a finding of express circumstances surrounding it. See id. at 1377.

111. Id. at 1380. The court concluded that it simply asked to much to find an express waiver from the a vague rights and remedies provision, mention of attorney fees, and a choice of law provision. See id.
112. See id. The Tenth Circuit in Ramey examined several contentions raised by Ramey besides the "sue and be sued" clause. See Ramey, 673 F.2d at 319. Those contentions included:
(1) agreeing to an attorneys' fees clause in the contract; (2) entering into a loan agreement with the Bank of New Mexico obligating the Tribe to 'duly pay and discharge ... all claims of any kind ... '; (3) submitting a certificate to the United States Economic Development Agency stating that the contract documents 'constitute valid and legally binding obligations upon the parties ... '; (4) obtaining payment and performance bonds from surety; [and] (5) consenting to partial summary judgment with respect to the contract retainage. Id. The court dismissed the first four grounds as an attempt to imply waiver where none had been expressed. See id. The Tribe's consent to retainage could not act as a waiver in regard to the other contentions, but only bound the Tribe to judgment in the amount of retainage withheld. See id. at 320.
113. See Standing Rock, 780 F.2d at 1380.
114. Id.
115. See id. at 1379. The district court relied on this argument, on which the Oregon court drew attention to as well. See id. at 1378.
116. Id. at 1379.
117. See id. Interestingly, the Eighth Circuit foreshadowed some of the Supreme Court's analysis in Manufacturing Technologies by declaring "it is to late in the day, and certainly beyond the competence of this court, to take issue with a doctrine so well-established." Id.
waiver from the provisions in this contract "simply asks to much." Accordingly, the Eighth Circuit reversed the judgment of the district court.

5. Wichita & Affiliated Tribes v. Hodel

The United States Court of Appeals for the District of Columbia Circuit heard arguments on appeal from the district court on whether an Indian tribe which filed an action may subsequently be subject to the cross-claim of an intervening third party. The D.C. Circuit held that the Wichitas did not waive immunity to the cross-claim because they did not voluntarily become a party to that claim — but were an indispensable party to its adjudication. In its analysis the court joined the other circuit courts which had found Indian tribes capable of waiving immunity from suit. The D.C. Circuit vacated the district court's ruling on the cross-claim because it should have been dismissed.

C. Waiver of Tribal Sovereign Immunity Through an Arbitration Clause — State Courts

The question of whether an arbitration clause in a contract between an Indian tribe and a non-Indian constitutes a waiver of tribal immunity first arose at the appellate level in 1983. The Supreme Court granted certiorari to resolve this

118. Id. at 1380-81.
119. See id. at 1381.
120. See Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 768 (D.C. Cir. 1986). This convoluted dispute arose in 1963 when the Secretary of the Interior returned 2306.08 acres of land set aside for public use in 1891 to the Affiliated Bands. See id. The remnants of the Affiliated Tribes were three separate tribes — the Wichitas, the Caddos, and the Delaware Tribe of Western Oklahoma — all parties to the suit. See id. The land soon produced income, which a joint management group distributed equally to the tribes. See id. at 769. However, at the Caddos urging the Interior Board of Indian Appeals (IBIA) redistributed current and future income relative to current population. See id. at 769-70. The Wichitas filed an action seeking review of the IBIA decision in federal district court. See id. at 771. The Caddos and Delawares intervened as party defendants. See id. The Caddos, the largest tribe designated a 51.13% apportionment, filed a cross-claim seeking retroactive payments, which the Wichitas contended they could not be affected by since they were immune. See id.
121. See id. at 774, 777-78. The court affirmed Oregon's holding by affirming that the voluntary intervention by the Delawares and Caddos subjected them to the possibility of losing "that which [they] already [possessed]." Id. at 773. But "since the Wichitas did not voluntarily become a party to the cross-claim, and could not have been made a party against their will," the court had to determine whether they were indispensable. Id. at 774. If the Wichitas and Delawares were indispensable to the cross-claim, then it would have to be dismissed because they had immunity from suit. See id. at 774. The court noted: "Immunity doctrines inevitably carry within them the seeds of occasional inequities; in this case the Wichitas have used the courts as both a sword and shield. Nonetheless, the doctrine of tribal immunity reflects a societal decision that tribal autonomy predominates over other interests." Id. at 781.
122. See id. at 771-73.
123. See id. at 780-81.
124. See discussion infra Part III.C.1.

https://digitalcommons.law.ou.edu/ailr/vol25/iss2/11
issue in 2000. The majority of courts to hear the topic in the intervening years determined, in about a two to one ratio, that an arbitration clause did represent tribal consent to suit.

1. Native Village of Eyak v. GC Contractors

The Supreme Court of Alaska first heard arguments on whether an arbitration clause signified an Indian tribe's consent to suit. In Eyak, Native Village contracted with GC to build a community center on land leased by the Tribe. On appeal Native Village argued that first, only Congress had the power to waive tribal immunity; second, the arbitration clause was illegal because the Secretary of the Interior did not approve the contract; and third, an arbitration clause does not expressly and unequivocally waive tribal immunity. The Supreme Court of Alaska held that Native Village waived immunity to suit by agreeing to an arbitration clause in the construction contract. The court determined that Indian tribes have the ability to waive...
immunity without congressional authorization based on precedent. Moreover, the court also dismissed Native Village's second contention on the fact that the construction took place on land leased from a third party.

In the court's determination of whether an arbitration clause constitutes waiver, the court noted that no precedent had been cited by the parties, nor had its independent research revealed any decisions on the issue. Forging ahead the court opined "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." The court felt that the terms of a contract should be meaningful and immunity would render the arbitration clause meaningless. In conclusion, the court perceived little difference between the agreement in Oregon — where the parties agreed any dispute would be heard in the federal district court, and in this instance — where any dispute would be decided through arbitration. The Supreme Court of Alaska affirmed the judgment of the lower court based on that rationale.

2. Val/Del, Inc. v. Superior Court

The Supreme Court of Arizona considered the next dispute to surface involving an arbitration clause between an Indian tribe and non-Indian party in Val/Del. Val/Del appealed the ruling of the Pima County Superior Court's dismissal of its complaint, which Val/Del brought pursuant to the arbitration clause in the agreement with the Tribe after a dispute arose. The Supreme Village qualified as a federal recognized Indian tribe in its review of the lower court's decision, which did not consider the arbitration issue because it determined that Native Village was not a recognized Indian tribe. See id. at 757-58.

131. See id. at 758-59. The court distinguished USF&G as a case deciding only the issue of whether Indian tribes possessed immunity. See id. at 758. The court went on to give a favorable analysis of Oregon and also noted the decisions of Ramey, Merrion and Fontenelle. See id. at 759.

132. See id. at 759-60. The court found that the land being lease did not qualify as "services for Indians relative to their lands" as required by federal law. See id. (quoting 25 U.S.C. § 81 (2000)).

133. See id. at 760.
134. Id.
135. See id. (citations omitted).
136. See id. at 760-61.
137. See id. at 761.
138. See Val/Del, Inc. v. Superior Court, 703 P.2d 502, 508 (Ariz. 1985). The court noted that its independent research on this issue found only the Eyak decision. See id.
139. See id. at 503. The parties had entered into an agreement whereby Val/Del would operate the Tribes new bingo operation. See id. The arbitration clause read as follows:

Arbitration. 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.

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Court of Arizona held that the agreement to arbitrate any dispute "in a court of competent jurisdiction" expressly waived the Tribe's sovereign immunity. The court rejected the Tribe's argument that the language of the clause subjected it only to an arbitration proceeding under the jurisdiction of the Pascua Yaqui Tribal Court. Rather, the court found no distinction between the various courts pursuant to the language, and concluded that since the Tribe waived immunity, any court had jurisdiction. The Supreme Court of Arizona then vacated the trial court's ruling and remanded for further proceedings.

D. Waiver of Tribal Sovereign Immunity through an Arbitration Clause — United States Court of Appeals

1. Pan American Co. v. Sycuan Band of Mission Indians

A few years after Val/Del the Ninth Circuit was the first court to determine that an arbitration clause did not constitute tribal waiver. The appeal stemmed from a "Bingo Agreement" dispute between an Indian tribe and a non-Indian contractor, in Pan American. The sole issue before the court was whether the arbitration clause signified the Sycuan Band's express waiver of its sovereign immunity. The Ninth Circuit held that the arbitration clause did not contain an "unequivocal expression of tribal consent" sufficient

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*Id.* at 508. The trial court found that the Tribe had consented to arbitration in tribal court, but the clause did not constitute sufficient waiver of immunity so as to give state courts jurisdiction. *See id.* at 504.

140. *Id.* at 509. In reaching its decision the court agreed with the rationale of Eyak that the arbitration clause would be meaningless if it did not signify express tribal waiver. *See id.* at 508-09. Moreover, the court favorably cited both Fontenelle and Oregon as indicators of the validity of an agreement or contractual clause, in which a tribe consents to suit or submit the dispute to a court with jurisdiction. *See id.* at 509.

141. *See id.*

142. *See id.*

143. *See id.* at 510.

144. *See discussion infra Part III.D.1.*

145. Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 417 (9th Cir. 1989). Similar to Val/Del agreement the parties agreed that Pan Am would construct and operate the Tribe's bingo operation for a percentage. *See id.* Pan Am filed for breach of contract and sought resolution through arbitration after the Sycuan Band passed a tribal ordinance, which effectively raised Pan Am's expenditures $80,000 to continue with the operation. *See id.* The arbitrator dismissed the claim and Pan Am subsequently filed a complaint in federal district court, which the Sycuan Band moved to dismiss for lack of personal and subject matter jurisdiction and failure to state a claim. *See id.* The district court dismissed Pan Am's claim for lack of jurisdiction because it found the Tribe had not expressly waived immunity. *See id.*

146. *See id.* at 418. The arbitration clause reads in pertinent part:

*[I]n the event a dispute arises between its parties . . . either party may seek arbitration of said dispute and both parties do hereby subject themselves to the jurisdiction of the American Arbitration Association and do agree to be bound by and comply with its rule and regulations as promulgated from time to time.*

*Id.* at 419.
to waive sovereign immunity as required by the Supreme Court in Santa Clara Pueblo. The court opined that an express waiver could only come from the terms of the arbitration clause. Therefore, absent such a clear textual waiver the courts have consistently declined to imply one, as Pan Am essentially invited the court to do.

Additionally, the court specifically distinguished these circumstances from those in its Oregon decision. The court noted that not only had the Yakima Tribe in Oregon subjected itself to suit by intervening, but it also expressly agreed to submit future disputes to the federal district court by the terms of the conservation agreement. In contrast, the court eluded to the fact that the Sycuan Band had "steadfastly denied the jurisdiction of both the arbitrator and the federal court" to adjudicate Pan Am's claim. The court found that the Band's circumstances could in "no way be equated" with those of the Yakima. Thus, having found that the language of the arbitration clause did not unequivocally express a waiver of tribal immunity, nor had the Band subjected itself to suit as the Yakima in Oregon, the Ninth Circuit affirmed the district court's dismissal of Pan Am's complaint.

2. Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota, Inc.

A few years later the Eighth Circuit reached the opposite conclusion from Pan American. In Rosebud Sioux, the parties had entered into a $3.6 million construction contract on the Rosebud Sioux Indian Reservation. A dispute arose and the Tribe terminated the contract, after which Val-U sought arbitration pursuant to the arbitration clause. The federal district court held that the arbitration clause did not constitute an explicit waiver of sovereign immunity and Val-U appealed. The Eight Circuit held that the

147. See id. at 419-20.
148. See id. at 418.
149. See id. at 419. The court cited Merrion and Fontenelle as precedent where tribes had expressly consented to suit, while citing Standing Rock and Ramey as examples where tribes had not. See id. All of these references, however, clearly supported the court's understanding that waiver must be unequivocally and expressly indicated. See id. at 418-19 (citing Santa Clara Pueblo, 436 U.S. at 59).
150. See id. at 419.
151. See id.
152. Id. at 420.
153. Id.
154. See id.
155. See discussion infra Part III.D.2.
157. See id. The arbitration clause reads: "All questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." See id. at 562.
158. See id. The Tribe actually sued Val-U for breach of contract, as well as other various claims, after it refused to participate in the arbitration. See id. at 561. Val-U pleaded the arbitration clause as an affirmative defense, then responded with a counterclaim of its own for
arbitration clause manifested a clear expression by the Tribe to waive its sovereign immunity from any dispute arising under the contract. The court admitted that the clause contained "spare" language, but also found it to be "explicit" of the Tribe's intent to submit all disputes arising under the contract to arbitration. Moreover, the court expressed its belief that the "simplicity of the clause" does not undermine "its clarity or explicitness."

Furthermore, the court particularly found the inclusion of the Rules of the American Arbitration Association, as the standard any arbitration proceeding would follow, of significant importance. "Rule 47(c) of those rules states, '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.'" The court opined that by designating the Association's rules as the forum for resolving disputes, the Tribe clearly intended to waive its immunity to claims arising under the contract.

In addition, the court recognized the "strong policy in support of tribal sovereignty" and acknowledged the Santa Clara Pueblo rule that tribal waiver cannot be implied, but must be unequivocally expressed. However, the court pointed out that the Supreme Court has never required an incantation reciting "magic words" explicitly declaring "the Tribe waives its sovereign immunity." Finally, the court compared this waiver issue favorably with its decision in Rupp v. Omaha Indian Tribe, noting that the Tribe in Rupp affirmatively submitted to the district court's jurisdiction by requesting it to compel the defendant's claims. In contrast, the court distinguished its decision in Standing Rock because there, the Tribe had not submitted the repayment dispute to a specified forum, nor had it agreed to abide by any judgment thereon. The arbitration rules provide both in this instance.

Accordingly, the Eighth Circuit reversed the dismissal of Val-U's breach of contract garnished with some side claims. See id. The district court did not rule on the arbitration proceeding and it resulted in an award of $793,943.58 plus interest to Val-U. See id. Eventually, the court held the arbitration award unenforceable and dismissed all claims, except for Val-U's counterclaims arising from the breach of contract. See id. at 561-62. However, the court found those counterclaims barred by the Tribe's immunity beyond the extent of recoupment, from which the dismissal of the Tribe's complaint served to nullify. See id. at 562.

159. See id. at 563.
160. Id. at 562.
161. Id. at 563.
162. See id. at 562.
163. Id.
164. See id.
165. See id. at 562-63.
166. Id. at 563.
167. 45 F.3d 1241 (8th Cir. 1995).
168. See Rosebud Sioux, 50 F.3d at 563 (citing Rupp, 45 F.3d at 1244).
169. See id. (citing Standing Rock, 780 F.2d at 1380-81).
170. See id.
contract counterclaims and remanded to the district court. 171


In Sokaogon Gaming the United States Court of Appeals for the Seventh Circuit considered an appeal from the federal district court ruling that granted partial summary judgment to the Sakaogon Tribe. 172 The parties had agreed on an architectural contract, which contained an arbitration clause, but a dispute arose after the tribal leadership changed hands. 173 The Seventh Circuit held that the arbitration clause clearly manifested the Tribe's consent to suit because it "specified arbitral and judicial fora for enforcement of the rights conferred by the contract." 174 The court found it "extremely implausible" that the language of the clause could have "hoodwinked" an unwary Indian negotiator into waiving tribal immunity. 175

On the contrary, the court interpreted the language to be as least as understandable as the "magic word" phrase advocated by the Tribe. 176 The opinion noted that no court has required an explicit waiver of sovereign

171. See id. at 564.
173. See id. TMI had received $150,000 in payment, but claimed to be owed another $400,000. See id. It sought arbitration, which the Tribe refused to participate in, receiving an award of $500,000, then brought an action in state court to affirm the award. See id. The Tribe, meanwhile, filed this claim in the United States District Court claiming it had not waived immunity and thus, could not be bound by arbitration. See id. The state action was stayed to await the outcome here. See id.
174. Id. at 660. The court had to make an initial determination of whether the appeal fell within the context of an immediate appeal, and found that it did. See id. at 658-59.
175. Id. at 659. Before embarking on its analysis of whether the arbitration clause here constituted an explicit waiver, the court flirted with the argument that tribal waiver need not be explicit at all. See id. at 659-60. The court draws attention to two separate lines of cases — one asking whether Congress has waived tribal immunity and another inquiring whether the tribes themselves have waived immunity. See id. at 659. The former descends from Santa Clara Pueblo and requires explicit waiver, but the latter, often involving contract cases as in this instance, seems to be based on an archaic and paternalistic notion that tribes need protection from devious non-Indian contractors seeking to entice a tribal waiver of immunity. See id. The court expresses its doubt as to the continued need of this protection, especially since a more stringent waiver requirement may hinder tribal business by deterring non-Indian contractors from doing business with the tribes. See id. at 660 (citing Amelia A. Fogleman, Note, Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses, 79 VA. L. REV. 1345, 1364-65 (1993)). The policy argument that tribal immunity should be limited for the economic betterment of the Indian tribes themselves is oft repeated, although rarely if it all by the tribes. See Amicus Curiae Brief of Texas at 5-12, C&L Enters. v. Citizen Band Potawatomi Tribe, 121 S. Ct. 377 (2000) (No. 00-292).
176. See Sokaogan Gaming, 86 F.3d at 660. The court noted the Tribal attorney argued that waiver should only be found if the clause states: "The tribe will not assert the defense of sovereign immunity if sued for breach of contract." Id.
immunity to include the words "sovereign immunity," or thus be rendered implicit. To bolster this rationale, the court points out that neither state nor federal immunity waivers must contain the words "sovereign immunity." Rather, they both merely create the right to sue, as the arbitration clause does here.

The court continued by demonstrating that its decision can be distinguished with *Standing Rock*, since that clause did not specify "how rights were to be enforced and remedies obtained." Moreover, the court recognized the blurred line separating implicit and explicit waiver language as evidenced by the split between *Rosebud Sioux* and *Pan American*. However, the court made it known that this clause does not fall within that debate because it expressly awards the right to sue without redirecting the reader to another source of rules or law. On this reasoning the Seventh Circuit therefore reversed the order granting partial summary judgment to the Tribe.

**IV. Analysis**

This section of the note examines waiver of Indian sovereign immunity and make a determination of whether an arbitration clause may constitute such a waiver. First, however, this note briefly argues that Indian tribes have the power to waive sovereign immunity without authorization from Congress. Although an argument may have existed at one time based on *USF&G*, it clearly has been overwhelmed by several decades of precedent.

Next this note argues waiver of tribal sovereign immunity should be unequivocally expressed as stated in *Santa Clara Pueblo*. The argument that *Santa Clara Pueblo* applies only to congressional waivers relies on an

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177. *Id.*

178. *Id.* The Ninth Circuit specifically referenced the Tucker Act as one source to bolster this statement. *See id.* That Act reads in part:

(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, . . . or upon any express or implied contract with the United States, . . . (2) The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor, . . . including a dispute concerning termination of a contract . . .


179. *See Sokaogon Gaming*, 86 F.3d at 660.

180. *Id.* The specifically noted that it did not necessarily agree with *Standing Rock*, only that it could be distinguished. *See id.*

181. *See id.*

182. *See id.* The right to sue in those clauses had to be inferred by referencing the arbitration rules unlike here. *See id.*

183. *See id.* at 661.

184. *See discussion infra Part IV.*

185. *See discussion infra Part IV.A.*

186. *See discussion infra Part IV.B.*
improper reading of the context of the statement.187 Regardless, the standard has consistently been cited by the lower courts evaluating tribal waiver and should be maintained. Finally, the Court, in Manufacturing Technologies, correctly noted that Congress is better equipped to evaluate policy arguments to limit Indian sovereign immunity.188 Any limitation of the doctrine by endorsing an implied waiver standard should be left for Congress as well.

Third, this note argues tribal waiver cases may be divided into two separate categories — those with procedural waivers; and those with textual waivers.189 Oregon contained both types.190 However, the Ninth Circuit should not have found a procedural waiver based on the Yakima's intervention, but correctly found a textual waiver based on the Tribe's submission to the district court.191 Additionally, Standing Rock correctly required within the text a specified forum to resolve disputes and submission to judgment therein in order to find a waiver.192

This note also argues that Pan American properly ruled a generic arbitration clause — with no mention of the Indian tribe; no specified forum to resolve disputes; and no submission to judgment therein — does not unequivocally express waiver of tribal sovereign immunity.193 The state courts in Eyak and Val/Del relied too heavily on the Oregon decision and incorrectly afforded greater deference to the provision in a generic contract, than ensuring tribal immunity had been expressly waived.194 Similarly, Rosebud Sioux and Sokaogon Gaming, although correctly recognizing waiver does not require specific "magic words," missed that it does require specific textual references to distinguish a generic arbitration clause from a tribal waiver clause.195

Consequently, this note argues the Court of Appeals of Oklahoma correctly refrained from finding an unequivocally expressed waiver in the arbitration clause of Citizen Band Potawatomi II.196 The clause, although clearly written, gave no indication of waiver beyond Citizen Band's willingness to sign the contract, which alone could not be interpreted as an expressed indication of waiver from suit.

Finally, this note proposes referencing three factors in an arbitration clause to effectuate a valid waiver of tribal immunity.197 First, the clause should

187. See discussion infra Part IV.B.1.
188. See discussion infra Part IV.B.2.
189. See discussion infra Part IV.C.1.
190. See supra note 97 and accompanying text.
191. See discussion infra Part IV.C.2.
192. See discussion infra Part IV.C.3.
193. See discussion infra Part IV.D.2.a.
194. See discussion infra Part IV.D.1.
195. See discussion infra Part IV.D.2.
196. See discussion infra Part IV.D.3.
197. See discussion infra Part IV.E.
identify the tribe waiving immunity to ensure it is not simply a generic form commonly used by non-Indian parties. Second, the clause should contain a specified forum under which any disputes or claims may be resolved. Finally, there should be a submission to the judgment of the specified forum. Inclusion of these three factors will ensure tribal waiver has been unequivocally expressed.\textsuperscript{198}

A. Indian Waiver of Immunity — USF&G

There may have been a dispute at one time whether Indian tribes had the authority to waive their sovereign immunity, but this section of the note will clearly show the question has been resolved in favor of tribal waiver because precedent alone wins this argument.\textsuperscript{199} The \textit{USF&G} ruling now represents only a link in the line of cases that developed the doctrine of tribal immunity.\textsuperscript{200}

To be sure, a legitimate argument did exist based on \textit{USF&G}, then subsequently \textit{Santa Clara Pueblo}, that tribes did not have the authority to waive their immunity.\textsuperscript{201} The opinion in \textit{USF&G} repeatedly referred to the role of Congress as the source of waiver, utilizing language such as the suability of the United States and the Indian tribes "depends" on authorization from Congress, or tribes have no exemption from suit "without" statutory waiver. More importantly, unlike \textit{Santa Clara Pueblo} where the parties argued whether an affirmative statutory waiver had been expressed, the issue in \textit{USF&G} centered on a procedural contention.

The Indian tribes picked up on this argument several decades later.\textsuperscript{202} Most notably, the Yakimas advocated the argument, albeit unsuccessfully, in \textit{Oregon}. In the opinion Justice Kennedy trumped the Yakima's contention by citing to \textit{Turner} as precedent that tribes had the authority to waive immunity, ironically to the very phrase he later used in \textit{Manufacturing Technologies} to discredit the foundation of tribal immunity itself.\textsuperscript{203} Native Village also used the argument, again unsuccessfully, in \textit{Eyak} citing directly to \textit{USF&G}.\textsuperscript{204} In response to the argument, the Supreme Court of Alaska incorrectly stated that the Court did not address waiver of immunity.\textsuperscript{205} In fact, the Court had to rule on the contention that a failure to object to the state court's jurisdiction over the cross-claim constituted waiver thereof.\textsuperscript{206} The Court specifically declared the sovereign immunity of both the United States and the Indian

\begin{itemize}
\item \textsuperscript{198} \textit{See discussion infra} Part IV.E.
\item \textsuperscript{199} \textit{See supra} note 75 and accompanying text.
\item \textsuperscript{200} \textit{See discussion infra} Part IV.A.
\item \textsuperscript{201} \textit{See supra} note 57 and accompanying text.
\item \textsuperscript{202} \textit{See supra} notes 88-94 and accompanying text.
\item \textsuperscript{203} \textit{See supra} notes 70, 92 and accompanying text.
\item \textsuperscript{204} \textit{See supra} note 129 and accompanying text.
\item \textsuperscript{205} \textit{See Native Village} of \textit{Eyak} v. GC Contractors, 658 P.2d 756, 758 (Alaska 1983).
\item \textsuperscript{206} \textit{See United States} v. \textit{USF&G}, 309 U.S. 506, 513 (1940).
\end{itemize}
tribes could not be waived by officials. 207

However, the Alaska Court rightly enunciated *USF&G* was really a question of whether tribes had immunity from suit at all. 208 The *Oregon* court cited more Supreme Court precedent than *Turner* alone to support its arrival at a similar conclusion. 209 The Supreme Court without question considered a tribe's ability to waive immunity a foregone conclusion by the time of *Oklahoma Tax Commission*. 210 An argument may have existed at one time that waiver required congressional authorization, but clearly no longer. 211 Thus, *USF&G* should be recognized only as an important step in the development of the tribal immunity doctrine, rather than precedent that Indian tribes do not have authority to waive immunity.

### B. Express or Implied Waiver

The plainly stated express waiver standard in *Santa Clara Pueblo* should be maintained by the Court until altered by Congress. 212 Further, the Supreme Court correctly deferred to Congress on tribal immunity in *Manufacturing Technologies*. 213 Similarly, any weakening of that doctrine with an implied tribal waiver standard should be left to Congress as well. 214

#### 1. Precedent for Express Waiver — *Santa Clara Pueblo*

The express tribal waiver standard enunciated by the Court in *Santa Clara Pueblo* has been followed by the majority of the lower courts. 215 That standard should not be confined to merely a declaration of the congressional waiver standard, as some courts would argue. 216 Rather, it should continue to represent the requirement for both congressional and tribal sovereign immunity waivers. 217 An implied waiver standard should not be adopted by the Court because doing so would open the Indian tribes to suit on virtually all of their activities and in effect, weaken the doctrine of tribal immunity to the point that it should simply be eliminated. 218

The argument that tribal waiver of immunity need not be unequivocally expressed is similar to the one used by Indian tribes to claim immunity could

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207. *See id.*
208. *See Eyak, 658 P.2d at 758.*
209. *See supra note 129 and accompanying text.*
210. *See supra note 69 and accompanying text.*
211. *See supra notes 200-09 and accompanying text.*
212. *See discussion infra Part IV.B.1.*
213. *See supra notes 69-72 and accompanying text.*
214. *See discussion infra Part IV.B.1.*
215. *See supra notes 76-78, 110, 140, 147, 149, 159 and accompanying text.*
216. *See supra note 175 and accompanying text.*
217. *See supra note 62, 147 and accompanying text.*
218. *See supra note 116 and accompanying text.*
not be waived absent congressional authorization. They both rightly argue that Santa Clara Pueblo dealt specifically and only with whether Congress intended to waive tribal immunity when it enacted the ICRA. The Court did not even consider the question of whether the Indian tribes themselves could waive immunity. The Seventh Circuit seized on this distinction to opine that two sets of waiver cases may be found — those in which Congress limits tribal immunity and those in which tribes themselves limit immunity. The court further contended that in the latter cases, the only purpose for requiring express waiver would be based on the archaic and "paternalistic" purpose of protecting the Indian tribes. Certainly, it would not be illogical to argue that since the Indian tribes depend on Congress for the continued vitality of their sovereign immunity, waiver of such a significant power through a third party would need to be expressly stated. Likewise, a reasonable inference could be drawn that the Indian tribe itself would not require an express standard, since a tribe obviously could exercise first-hand control over its own transactions and dealings.

This argument, however, relies on an improper reading of the plain statement in Santa Clara Pueblo. Although Part III of that opinion unquestionable focuses on whether Congress unequivocally expressed waiver of tribal immunity, the sentence setting the standard should be read as a general declaration in the context written. The counter argument also has not recognized that the phrase originated in King, which dealt with whether the United States had waived sovereign immunity from suit. The Court specifically stated "jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed." In Santa Clara Pueblo, the Court directly quoted this phrase and it clearly indicates that the sovereign itself may only waive immunity if unequivocally expressed.

Additionally, the unequivocally expressed standard has been adhered to by the circuit courts. The Ninth Circuit in Pan American stated succinctly

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219. See supra Part IV.A.
220. See supra Part III.A.1.
221. See supra note 61 and accompanying text.
222. See supra note 175 and accompanying text.
224. See supra note 115 and accompanying text.
225. See supra note 62 and accompanying text.
226. See supra notes 60-63 and accompanying text.
227. See King, 395 U.S. at 1.
228. Id. at 5.
229. See supra note 62 and accompanying text.
230. See supra notes 76-78, 110, 140, 147, 149, 159 and accompanying text.
"[w]hile Oregon's finding of waiver probably tests the outer limits of Santa Clara Pueblo's admonition against implied waivers, several post-Oregon Ninth Circuit cases have reaffirmed the principle that tribal consent to suit must be unequivocally expressed." The Eighth and Tenth Circuits have also subscribed to the Santa Clara Pueblo standard. In any event, none of these courts have had trouble finding that tribes expressly waive immunity from suit given the right circumstances. Finally, any weakening of the express standard would increase suits in this area of the law because an implied standard necessarily rests in no-man's-land. In this area of uncertainty Indian tribes and non-Indians would litigate to determine whether just about any activity entered into by tribes would constitute consent to suit. However, since the Court has endorsed the doctrine of tribal immunity, sapping its strength to this extent should be left to Congress. The unequivocally expressed standard of sovereign immunity waiver set forth in Santa Clara Pueblo should not be abandoned because the counter argument rests upon a misreading of that case, the three western circuits have all consistently applied the standard, and to do so would weaken the doctrine of tribal immunity to the point where it should be abandoned entirely.

2. Policy Arguments for Congress — Manufacturing Technologies

The policy arguments on whether tribal sovereign immunity should be limited by adopting an implied waiver standard are better left for Congress, as the Supreme Court stated in Manufacturing Technologies, because it holds a better position than the judiciary to evaluate such a sweeping change in the structure of Indian affairs. Policy arguments for and against an implied waiver standard would be broad in their scope. Indian tribes would argue sovereign immunity has become a symbol of their ability to self-govern, a concept which Congress has overseen and in the modern Indian era supported. However, Indian tribes have increasingly entered into non-government related commercial endeavors such as resorts, casinos or logging, which often may be conducted through a separate tribal business entity and more frequently done of reservation land, as in Potawatomi II.

Another oft repeated policy argument is that limiting tribal immunity from suit would actually benefit the tribes in their business transactions because

232. See supra notes 76, 108-19 and accompanying text.
233. See supra notes 76-107 and accompanying text.
234. See supra note 116 and accompanying text.
235. See supra notes 69-75 and accompanying text.
236. See supra Part IV.B.1.
237. See supra notes 69-75 and accompanying text.
238. See supra note 72 and accompanying text.
239. See supra note 14 and accompanying text.
non-Indians would not be deterred by the spectre of tribal immunity.\textsuperscript{240} Indian tribes, as well, have at least recognized some aspects of the argument as evidenced by "sue and be sued" clauses in their corporate charters.\textsuperscript{241} Congress has limited sovereign immunity in the past when it felt policy considerations so required.\textsuperscript{242} In addition, the Court has consistently deferred to Congress in the past on questions related to Indian affairs. Any relaxation of the express waiver standard used to evaluate tribal immunity should be left for Congress as well.

\section*{C. What Constitutes a Waiver}

Indian waiver of immunity cases may be divided into two different categories — those involving procedural waivers; and those involving textual waivers, usually in the form of a contract.\textsuperscript{243} The Ninth Circuit, in \textit{Oregon}, correctly ruled the Yakima consented to suit in the textual waiver.\textsuperscript{244} The Eighth Circuit's decision in \textit{Standing Rock} also rightly concluded the Standing Rock had not unequivocally expressed waiver of immunity.\textsuperscript{245}

\subsection*{1. Procedural and Textual Waivers}

The circuit courts have generally heard Indian waiver arguments in procedural and textual contexts.\textsuperscript{246} In procedural cases Indian tribes are usually already a party to a lawsuit that has a designated forum.\textsuperscript{247} This was the case in \textit{USF&G, Oregon} and \textit{Wichita}. In those cases, the opposing side argued the Indian tribes had consented to suit since they were in or had entered the lawsuit. A procedural waiver claim rests on a higher degree of implication than a textual case, even if evaluated under the express waiver standard of \textit{Santa Clara Pueblo}, because it necessarily must rely, at least in part, on the assumption that the Indian tribe waived immunity by becoming a party to the suit.\textsuperscript{248}

Textual waivers differ in that the Indian tribe and non-Indian party have negotiated a written agreement. The Indian tribe has not become party to a suit and therefore consent must be expressly found in the language of the textual agreement.\textsuperscript{249} A valid textual waiver should expressly refer to the tribe waiving suit and specify the jurisdictional forum.\textsuperscript{250} Because the

\begin{verbatim}
240. See supra note 175 and accompanying text.
241. See supra notes 76-80 and accompanying text.
242. See supra notes 69-75 and accompanying text.
243. See discussion infra Part IV.C.1.
244. See discussion infra Part IV.C.2.
245. See discussion infra Part IV.C.3.
246. See supra notes 76-123 and accompanying text.
247. See supra notes 57, 88-107, 120-23 and accompanying text.
248. See supra notes 88-107 and accompanying text.
249. See supra notes 76-87, 108-19 and accompanying text.
250. See supra note 111 and accompanying text.
\end{verbatim}
circumstances of the parties in procedural and textual waivers significantly differ, any finding that an Indian tribe procedurally waived immunity should not be construed as precedent that a textual waiver should be anything but unequivocally expressed.251

2. Oregon

Although Oregon has been criticized for pushing the limits of the plain statement required in Santa Clara Pueblo, the Ninth Circuit correctly found the Yakima Tribe had consented to suit in the textual waiver. The court, however, did not reach the correct decision by finding tribal waiver when the Tribe intervened as a party to the suit.252

At first blush, it may seem inconsistent to argue textual waivers require mention of three factors, then argue as well that the Yakima waived immunity in its agreement. The textual waiver in Oregon submitted any problems arising from the management agreement for determination by the federal court.253 It further stated that the United States District Court for the District of Oregon retained jurisdiction over the case, in which the Tribe was a party. However, the agreement made no mention of the Yakima Tribe "waiving immunity" or "consenting to suit." The agreement did not require this because the Yakima were parties in an ongoing suit and the agreement, therefore, unquestionably pertained to the Tribe.254 Oregon was not a case where the parties first initiated contact with each other by negotiating a contract, thereby requiring a textual identification of the Tribe as a party. The agreement signed by the Yakima was made under the ongoing lawsuit's sphere of influence, in which the Tribe was a party. Additionally, the agreement does not specifically state the parties submit to the judgment of the specified forum.255 However, the agreement clearly endorses the jurisdiction of the federal district court the most important aspect of sovereign immunity waiver. Likewise, because the Yakima were already embroiled in the lawsuit as a party, a written declaration submitting the issues to federal court for determination — dare it be said — sufficiently implies consent to the judgment of the district court.

In contrast, the court's ruling that the Yakima procedurally waived immunity by intervening implies all three factors necessary for an express tribal waiver.256 The court based its rationale on a procedural rendition of intervening precedent, which essentially did not recognize the Tribe's status as a dependent sovereign.257 Similarly, the court compared the intervention

251. See supra note 114 and accompanying text.
252. See supra notes 98-102 and accompanying text.
253. See supra note 89 and accompanying text.
254. See supra notes 88-107 and accompanying text.
255. See supra note 89 and accompanying text.
256. See discussion infra Part IV.E.
257. See supra notes 88-107 and accompanying text.
to an action in rem, but again focused on the procedural working of such an action involving non-Indian parties. In essence, the court inferred that since a non-Indian party would be subject to the court’s injunction under these procedural theories, so would an Indian tribe possessing immunity from suit. The *Oregon* intervention decision necessarily rested on an implied standard of tribal waiver because it inferred the Tribe considered itself at risk to suit and judgment of the district court by intervening. A decision resting entirely on implication cannot constitute a waiver under the plain *Santa Clara Pueblo* statement.

3. **Standing Rock**

The Eighth Circuit in *Standing Rock* correctly determined no tribal waiver had occurred by the terms of the promissory note. The clause itself contained references to attorney’s fees, payments, rights and remedies, and even a choice of law clause, but did not contain any of the three express waiver factors. These provisions in no way signified an express intention of the Standing Rock to waive sovereign immunity because the clause could not be distinguished from the language two non-Indian parties would have used. If tribal waiver requires an unequivocal expression, then it stands to reason that the terms of the a waiver clause should at least refer to the sovereign as more than a generic party. Without a phrase identifying the Standing Rock as a party consenting to the terms, the provisions in the clause simply reflect an attempt, as in *Ramey* the court noted, to imply a waiver in order to give every provision meaning. Furthermore, the court correctly noted that the choice of District of Columbia law clause did not equate to determination in a specified forum, nor submission to judgment therein. For the general law clause to be applicable the court would have had to imply submission to the jurisdiction of the District of Columbia courts, but jurisdiction must be unequivocally expressed. The court rightly determined that absent unequivocal expression of consent to suit in a specified forum and submission to judgment therein, the Standing Rock could not have waived sovereign immunity.

258. *See supra* notes 98-102 and accompanying text.
259. *See supra* notes 88-107 and accompanying text.
260. *See supra* notes 98-102 and accompanying text.
261. *See supra* note 62 and accompanying text.
262. *See supra* notes 108-19 and accompanying text.
263. *See supra* note 109 and accompanying text.
264. *See supra* note 112 and accompanying text.
265. *See supra* note 111 and accompanying text.
266. *See supra* note 110 and accompanying text.
D. Arbitration Clause as Waiver

The Alaska and Arizona Supreme Courts erroneously afforded greater significance to ensuring "meaning" in a single contract clause than recognizing the gravity of waiving a sovereign power when they held an arbitration clause constitutes tribal waiver of immunity. Of the three circuit courts to decide the arbitration issue, only the Ninth Circuit reached the correct decision ruling an arbitration clause did not constitute an express waiver of tribal immunity. Finally, in Citizen Band Potawatomi II, the Oklahoma Court of Appeals rightly declined to find an unequivocal expression of tribal waiver in the arbitration clause of the contract between Citizen Band and C&L.

1. State Courts
   a) Eyak

   The Alaska Supreme Court's decision in Eyak can only be described as cavalier. Not only was the court the first to decide waiver of immunity through an arbitration clause, but probably did not even need to address the issue. Rather than first make a determination of whether Eyak was a federally recognized tribe, as the lower court had done thereby rendering the arbitration issue moot, the court assumed "arguendo" Eyak's federal recognition and forged ahead with a determination of waiver. In the court's analysis it correctly cited the need for an unequivocally expressed waiver as required by Santa Clara Pueblo. The court further correctly recognized the arbitration clause in the contract could not resolve the dispute if one of the parties intended to assert sovereign immunity.

   However, the court wrongly considered the coexistence of these conflicting entities an impossibility, and consequently reasoned immunity had been waived because the contractual clause should be found meaningful. This flawed reasoning does not recognize that it is not possible to have a meaningful arbitration clause unless the Indian tribe unequivocally expresses waiver of sovereign immunity by the terms therein. By holding an arbitration clause waives tribal immunity, without even examining the terms of the clause, the court erroneously professes an expressed standard when it applies an implied standard.
Finally, the court erroneously found "little substantive difference" between the textual clause in *Oregon* and the arbitration clause here. The court failed to explain how a designation to a specific forum's jurisdiction equated to resolution of a dispute under an arbitration clause, when it did not even determine whether the clause designated a specific forum. The court also failed to note the different circumstances of the parties when they entered into the respective agreements.

b) Val/Del

The Supreme Court of Arizona relied heavily on the *Eyak* decision, quoting the analogy of the designated forum language in *Oregon*. The court at least examined the terms of the arbitration clause, but incorrectly found the language "in any court having jurisdiction thereof" to constitute an express waiver. The problem with this generality is that no court has jurisdiction to enforce the arbitration clause absent an unequivocal expression by the tribe. In order to ensure the arbitration clause doubles as a sovereign immunity waiver clause it must be distinguishable from the everyday, run-of-the-mill language used by two non-Indian parties. An unequivocally expressed standard requires this specification. Otherwise the Pasqua Yaqui correctly viewed this clause for what it was — a generic arbitration clause no different from one between non-Indian parties — and therefore unenforceable against them because of their immunity from suit.

2. United States Court of Appeals

a) Pan American and Rosebud Sioux

The arbitration clauses in *Pan American* and *Rosebud Sioux* do not contain a catch all jurisdiction provision like Val/Del and Sokaogon Gaming — and more importantly *Citizen Band Potawatomi II*. Oddly enough, both courts reach unexpected conclusions in light of their previous rulings in *Oregon* and *Standing Rock*. Even so, both decisions are very relevant to a determination of the issue at hand.

The Ninth Circuit correctly did not find an "affirmative textual waiver" of tribal immunity in the arbitration clause in *Pan American* because the limited
language could not meet the unequivocally expressed waiver standard.286 An "affirmative textual waiver" ensures a tribe has expressly stated its intent to waive immunity within the terms of the clause.287 The court further notes that tribal immunity remains intact until surrendered in an unequivocally expressed statement as required by Santa Clara Pueblo.288 This recognizes that consent by implication through a generic clause cannot clear an express standard. The court also rightly notes that Indian sovereignty is not a discretionary doctrine, hostage to an equitable outcome of the bargaining process.289 The outcome of a tribal waiver case should focus only on whether the Tribe waived immunity, not on any inequitable result if waiver is not found.290

The Eighth Circuit arrived at the polar opposite of the Ninth Circuit, in Rosebud Sioux.291 Despite acknowledging that tribal waiver can only be found under the Santa Clara Pueblo standard, the court found a one sentence arbitration provision — which contained no mention of the tribe or even a catch-all jurisdiction reference — unequivocally expressed the Tribe's waiver of immunity.292 The court justified the unspecified jurisdiction problem with the arbitration provision's reference to Rule of the American Arbitration Association, which provides a forum in state or federal court.293

However, referencing the AAA Rules poses several problems. All of the arbitration clause cases contain a reference in the text to the Rules of the AAA, except Eyak which did not examine the text of its clause.294 The fact that all the clauses contain a reference to these Rules plainly shows the generic nature of these agreements and emphasizes that consent to a common arbitration clause in no way constitutes an express waiver of Indian immunity. The Rules are certainly relevant to an arbitration clause, but lend no credibility to finding Indian tribal waiver therein. In addition, not only does the reference to the Rules emphasize the generic text of the arbitration clause, but the court's argument completely distorts the Santa Clara Pueblo standard.295 An unequivocally expressed Indian waiver simply cannot be found by reading a one sentence arbitration provision, which then references the reader to another source for a designation of jurisdiction — neither of

286. See supra notes 143-54 and accompanying text.
287. See supra notes 147-49 and accompanying text.
289. See id.
290. See id.
291. See supra notes 155-71 and accompanying text.
292. See supra notes 159-61 and accompanying text.
293. See supra notes 162-64 and accompanying text.
294. See supra notes 17, 139, 146, 157, 181-82 and accompanying text.
295. See supra note 62 and accompanying text.
which provides any mention of an Indian tribe.\textsuperscript{296} In fact, the casual observer or curious law student would not even know by reading either of these sources that an Indian tribe was even involved, let alone that it expressly waived immunity from suit.\textsuperscript{297}

Finally, the court correctly notes the Supreme Court has never required the "magic words" — this Indian tribe waives immunity; but too quickly dismisses the idea that an express standard does require certain textual references.\textsuperscript{298} There is nothing magical about conjuring a reference to the Tribe "agreeing," "consenting," or "submitting" to arbitration within the text of the clause. Nor would any witchcraft be afoot if the clause called for a pinch of specified forum. These are very mundane factors. Textual requirements that clearly indicate an Indian tribe's waiver of sovereign immunity through arbitration should not be dismissed as hocus pocus. Rather, they should be included to ensure all parties understand an unequivocally expressed tribal waiver has occurred.\textsuperscript{299}

\textit{b) Sokaogan Gaming}

In \textit{Sokaogan Gaming}, the Seventh Circuit incorrectly interpreted an arbitration clause nearly identical with the one in \textit{Val/Del}.\textsuperscript{300} The court correctly found nothing ambiguous about the text of the clause.\textsuperscript{301} However, the court did not recognize the unambiguous language made no reference to an Indian tribe, let alone "waiving immunity," "agreeing to arbitration," or "consenting to suit," nor did it name a specific forum to submit the dispute.\textsuperscript{302} Certainly, everything in the clause was clearly written and expresses the desire of non-Indian parties to subject themselves to arbitration.\textsuperscript{303} But a clearly written arbitration clause, without reference to an Indian-tribe or a specified forum with jurisdiction over disputes, should not be considered an unequivocally expressed waiver of Indian sovereign immunity.\textsuperscript{304}

Furthermore, the court rightly rejected the Tribe's argument that any waiver must contain the words "sovereign immunity."\textsuperscript{305} In doing so the court notes the Tucker Act, which does not require the federal government to say "sovereign immunity" in a waiver.\textsuperscript{306} The Tucker Act does, however, directly

\begin{itemize}
\item \textsuperscript{296} See supra notes 161-64 and accompanying text.
\item \textsuperscript{297} See supra notes 157, 161-64 and accompanying text.
\item \textsuperscript{298} See supra notes 166-70 and accompanying text.
\item \textsuperscript{299} See discussion infra Part IV.E.
\item \textsuperscript{300} See supra note 139 and accompanying text.
\item \textsuperscript{301} See supra notes 173-75 and accompanying text.
\item \textsuperscript{302} See Sokaogan, 86 F.3d at 659.
\item \textsuperscript{303} See id.
\item \textsuperscript{304} See discussion infra Part IV.E.
\item \textsuperscript{305} See supra notes 176-79 and accompanying text.
\item \textsuperscript{306} See supra note 178 and accompanying text.
\end{itemize}
identify the United States as a party and specifically designates the United States Court of Federal Claims as the forum with jurisdiction to hear contract claims.

3. Court of Appeals of Oklahoma

In a frugal analysis, the Court of Appeals of Oklahoma correctly held Citizen Band did not waive sovereign immunity in the arbitration clause. The clause was essentially the same as those in Val/Del and Sokaogon Gaming — agreement to submit disputes to arbitration; in accordance with Rules of the AAA; any court having jurisdiction thereof — but the court specifically chose not to charge after the Alaska Supreme Court, in Eyak, declined to find tribal waiver. By not finding a waiver from a clearly stated arbitration clause, the court recognized the need for specific terms relating to the Indian tribe under an express waiver standard. A mere "willingness" on the part of the Tribe to arbitrate required an implied leap to tribal waiver. The court correctly recognized tribal waiver must be unequivocally expressed.

E. An Arbitration Clause Must Reference Specific Factors to Constitute an Unequivocally Expressed Tribal Waiver

In order to constitute an unequivocally expressed tribal waiver of sovereign immunity an arbitration clause must contain an affirmative textual reference to three factors — identifying the Tribe involved; specification of a forum; and submission to judgment therein. There need not be a requirement to say the "magic words," but it is necessary to reference the "magic factors." Doing so will ensure a generic arbitration clause is never confused with an expressed Indian waiver of sovereign immunity.

First, a textual waiver should contain a clear indication of the Indian tribe involved. If the parties simply added a reference to the tribe somewhere in the clause, it would transform the entire context from a generic arbitration agreement, to a recognition of one party's unique status. For example, by inserting the words "Citizen Band Potawatomi Nation agrees" at the beginning of the arbitration clause between Citizen Band and C&L, the provision now expressly indicates the Tribe's presence to the proposed arbitration. A clause, which in all respects appears no different than an agreement between

307. See supra notes 33-48 and accompanying text.
308. See supra notes 41-42, 139, 302 and accompanying text.
309. See supra note 42 and accompanying text.
310. See supra notes 41-48 and accompanying text.
311. See supra notes 166, 176 and accompanying text.
312. See supra note 17 and accompanying text.
two non-Indian parties, should not be construed as an unequivocally expressed waiver of sovereign immunity.\textsuperscript{313}

Second, and most importantly, sovereign immunity is a jurisdictional issue and any waiver must designate a specific forum where the dispute will be resolved.\textsuperscript{314} A general forum specification in an arbitration clause is a hollow provision to an Indian tribe because courts generally do not have jurisdiction over it without tribal waiver of immunity.\textsuperscript{315} However, in the right context, a general forum designation would suffice, for example, in the "sue and be sued" clause of Fontenelle, since the Omaha unilaterally consented to suit with all future parties in the corporate charter.\textsuperscript{316} A general jurisdictional provision in this context could not be mistaken for a general forum provision in an agreement between non-Indian parties.\textsuperscript{317} Finally, the waiver should contain a submission to the judgment of the specified forum.\textsuperscript{318} This requirement is less important and under certain circumstance may blend in with the specified forum element.\textsuperscript{319}

An endorsement of these three factors would ensure an arbitration clause also was intended as an unequivocally expressed Indian waiver of sovereign immunity.

\textbf{V. Conclusion}

Nothing in this note should be read to indicate tribal waiver of immunity cannot be effectuated through an arbitration clause. However, a generic arbitration clause stuck into a construction contract, which in no way differs facially from that used by two non-Indian parties, should not be considered an express waiver of Indian sovereign immunity simply because it has the tribe's signature. The clause should identify the tribe waiving immunity and specifically designate a forum that will have jurisdiction over disputes arising from the contract. Obviously, the endorsement of an express waiver standard is crucial to this argument. If the Supreme Court adopts an implied waiver standard, then an arbitration clause would constitute waiver of immunity. However, such a significant change in the doctrine of sovereign immunity should be left for Congress.

\begin{itemize}
\item \textsuperscript{313} See \textit{supra} notes 17, 139, 146, 157, 181-82, 302-03 and accompanying text.
\item \textsuperscript{314} See \textit{supra} note 111 and accompanying text.
\item \textsuperscript{315} See \textit{supra} notes 62, 111 and accompanying text.
\item \textsuperscript{316} See \textit{supra} notes 76-80 and accompanying text.
\item \textsuperscript{317} See \textit{supra} note 17 and accompanying text.
\item \textsuperscript{318} See \textit{supra} note 111 and accompanying text.
\item \textsuperscript{319} See \textit{supra} note 89 and accompanying text.
\end{itemize}