EXHIBIT 11

FOR PUBLICATION

IN THE COURT OF APPEALS FOR THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON

FIRST SPECIALTY INSURANCE CORPORATION, PARADIGM FINANCIAL SERVICES, INC., and MARK SIZEMORE, Appellants/Respondents, v. THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, Appellee/Petitioner.	Case Number A-05-09-001 Trial Court Case Number C-04-08-003 OPINION

Appeal from the Trial Court for the Confederated Tribes of the Grand Ronde Community of Oregon

Suzanne Ojibway Townsend, Acting Tribal Court Judge

Argued on June 14, 2006

Decided October 31, 2006

Kimberly D'Aquila, Tribal Attorney's Office for Appellee; Gregory A. Chaimov, Attorney for Appellant First Specialty Insurance Corp.; Walter E. Barton, Attorney for Appellants Paradigm Financial Services, Inc., and Mark Sizemore

Before: Miller, Chief Justice; Johnson, Associate Justice; and Easton, Justice *pro tempore*

MILLER, Chief Justice

First Specialty Insurance Corporation, Paradigm Financial Services, Inc., and Mark Sizemore ("Appellants") appeal an August 5, 2005 order of the trial court which vacated that part of an arbitration award granting Appellants attorney fees and costs against the Confederated Tribes of the Grand Ronde. American Arbitration Association Case No. 75 Y 181 00066 03JRJ. We have jurisdiction pursuant to Tribal Code § 310(h)(2), and we *affirm* in part and *reverse* in part.

I. Facts and Procedural Posture

In 1992, Strategic Wealth Management, Inc. ("SWM"), through its president and CEO Patrick Sizemore, signed an Investment Advisory Agreement ("1992 Agreement") with the Confederated Tribes of the Grand Ronde. The 1992 Agreement provided: "All controversies which may arise between Client [Grand Ronde Tribe] and Advisor [SWM] concerning any transaction or the construction, performance or breach of this or any other agreements between them . . . shall be determined by arbitration." 1992 Agreement § 11(h). The Tribal Council enacted Tribal Resolution No. 002-92 authorizing various tribal officials to execute this Agreement.

Pursuant to the agreement, SWM and Patrick Sizemore provided financial advice and training sessions between 1992 and 2001 to tribal employees and tribal council members on the Grand Ronde Reservation and through correspondence and telephonic communications. In early 1998, SWM began presenting new investment opportunities to the Tribe consisting of loans or notes that were brokered by Paradigm Financial Services, Inc. ("Paradigm"). The President of Paradigm is Mark Sizemore, the brother of Patrick Sizemore. Apparently, Paradigm and Mark Sizemore never communicated directly with tribal employees or officials and never set foot on the Grand Ronde Reservation. The Paradigm loans the Tribe invested in through SWM were brokered "to SWM." ER 38 & 51. There is testimony in the record that "Paradigm Financial Services, Inc. and Mark Sizemore brokered and assigned to the Tribe 28 of the 37 notes." SER 17.

In 2001, the Tribe terminated its relationship with SWM and then sued SWM, Patrick Sizemore, Paradigm, and Mark Sizemore in the Oregon Circuit Court for Multnomah County under an Oregon securities law. All Defendants moved to compel arbitration pursuant to section 11(h) of the 1992 Agreement and the state court ordered arbitration between SWM, Patrick Sizemore, and

the Tribe. The attorneys for the Tribe, Paradigm, and Mark Sizemore then filed a stipulation in December 2002 ("2002 Stipulation") in the Circuit Court agreeing to arbitrate their dispute in conjunction with the pending arbitration between the Tribe and SWM and Patrick Sizemore. ER 3.

A twenty-one day arbitration was then held in 2004 before a panel of the American Arbitration Association ("AAA") in Seattle, Washington. The panel denied all of the Tribe's claims against all respondents and also denied all of the respondents' counterclaims against the Tribe. ER 62. However, even though the panel expressly noted that "[t]he 1992 Agreement has no attorneys' fees clause authorizing an award of fees to a party that successfully defends a claim of breach in court[,]" ER 61, it granted SWM, Patrick Sizemore, Paradigm, and Mark Sizemore attorney fees, litigation costs, and arbitration costs under the Oregon securities law and various AAA rules. ER 62-63. The panel rejected the Tribe's argument that it was protected from these items by sovereign immunity. ER 64-72. The panel then awarded SWM and Patrick Sizemore $1,273,395 in fees, costs of $158,007, and arbitration costs of $39,621.79; and awarded Paradigm and Mark Sizemore $145,375 in fees, costs of $6,485, and arbitration costs of $99,057.41. ER 75-77.

The arbitration panel filed its Final Award on August 13, 2004. The Tribe filed its Petition to Vacate Arbitration Award in Tribal Court on August 16, 2004. On December 20, 2004, the trial court denied a motion to dismiss filed by SWM, Patrick Sizemore, Paradigm, and Mark Sizemore, and on August 5, 2005 the trial court vacated that portion of the arbitration award that had granted them attorney fees and costs. This appeal followed.

In December 2005, in response to the motion of First Specialty Insurance Corporation ("FSIC"), FSIC was substituted into this appeal in

place of SWM and Patrick Sizemore by order of this Court. FSIC acquired the same status, rights, and obligations as SWM and Patrick Sizemore.

II. Standard of Review

The issue of the extent and meaning of a tribal waiver of sovereign immunity is a legal question that we review de novo. *See Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir. 2004).

We are mindful that this case concerns the review of an arbitration award and we must also decide the standard of review that Grand Ronde courts will use in reviewing arbitration awards. The U.S. Congress has mandated that federal courts are to be very deferential in reviewing arbitration awards. 9 U.S.C. § 10. We are well aware of the beneficial policies behind promoting mediation and arbitration as alternative dispute resolution methods, and for providing for deferential court review of arbitration awards. We recognize that positive public policies are served by promoting the arbitration process and, for example, the peacemaker courts that are utilized by many Indian Nations. Consequently, we hold that the review of arbitration awards by Grand Ronde courts is a limited one. We will only reverse or modify arbitration awards when, to borrow a phrase from the Eighth Circuit, the arbitration award "is completely irrational or evidences a manifest disregard for the law." *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 854 (8th Cir. 2001).

III. Discussion

A. Sovereign Immunity

The principle behind sovereign immunity is that a government cannot be sued without its consent. *See Nevada v. Hall*, 440 U.S. 410, 415 (1979). This is a worthy policy because sovereign immunity protects the public treasury and the financial integrity, autonomy, decision making ability, and sovereign capacity of governments. *Alden v. Maine*, 527 U.S. 706, 750-51

(1999). "It is well settled 'that Indian tribes possess the same common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Missouri River Services*, 267 F.3d at 852 (citation omitted); *accord United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940).

The United States government, for example, cannot be sued without its express consent and even then it can only be sued according to the explicit terms of its consent. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (citing cases). Similarly, "[s]uits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *accord Val-U Constr. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 576 (8th Cir. 1998). And, as with the United States, a tribe can define the exact terms and conditions on which it consents to be sued and the manner in which the suit can be conducted. *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)).

There is a "strong presumption" against finding a waiver of sovereign immunity. *Demontiney v. U.S. ex rel. Dep't of Interior*, 255 F.3d 801, 811 (9th Cir. 2001); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989); *Big Valley Band of Pomo Indians v. Superior Court*, 35 Cal. Rptr. 3d 357, 364 (Cal. Ct. App. 2005). In addition, courts must strictly and narrowly construe alleged waivers. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-86 (1999) (citing cases); *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). "In general, . . . waivers of sovereign immunity are narrowly construed in favor of the sovereign and are not enlarged beyond what the language requires." *Big Valley Band*, 35 Cal. Rptr. 3d at 364-65 (quoting *World Wide Minerals v. Republic of*

Kazakhstan, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (internal quotation marks omitted)).

Sovereign immunity is such an important principle that tribal governments can file law suits and still not be deemed to have consented to the filing of compulsory or permissive counterclaims by the defendants. *Oklahoma Tax Com'n*, 498 U.S. 505; *United States Fidelity*, 309 U.S. at 513; *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 773-74 (D.C. Cir. 1986); *Ramey Construction*, 673 F.2d at 319-20. "The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests . . . ." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 893 (1986). Consequently, tribes do not waive their sovereign immunity to suits or counterclaims simply by filing a law suit.

B. Did the Grand Ronde Tribe waive its immunity for attorney fees and costs?

Under the case law discussed above, we must determine whether the Tribe clearly and expressly waived its sovereign immunity for attorney fees, litigation costs, and arbitration costs. And, we must construe any alleged waiver strictly and narrowly while applying the strong presumption against finding a waiver.[1]

Appellants do not point us to any language in the 1992 Agreement or the 2002 Stipulation that addresses these issues. In fact, there is none.

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[1] The strict interpretation of alleged waivers should be well known to business persons who deal with federal, state, or tribal governments and run into immunity issues. The question of sovereign immunity and how to handle it is not a new topic. Appellants in this case could have negotiated for a tribal waiver to attorney fees and costs in the 1992 Agreement if they had wanted one. *See, e.g., American Indian Agric.*, 780 F.2d at 1379 ("Tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish.").

Instead, FSIC argues that the Tribe waived its sovereign immunity for fees and costs in the 1992 Agreement because the Tribe agreed to arbitrate "[a]ll controversies which may arise between Client [Grand Ronde Tribe] and Advisor [SWM] concerning any transaction or the construction, performance or breach of this or any other agreements between them . . . ." 1992 Agreement § 11(h). In turn, Paradigm and Mark Sizemore allege that the 2002 Stipulation filed in state court constituted a waiver of immunity to fees and costs because the Tribe's attorneys consented to arbitrate the Tribe's claims against Paradigm and Mark Sizemore in conjunction with the arbitration against SWM and Patrick Sizemore. Paradigm and Mark Sizemore rely on the 1992 Agreement even though they were not parties to that Agreement.

Appellants claim that since the Tribe agreed to arbitrate and then brought its arbitration claims against them under an Oregon law that allowed for the entry of attorney fees to the prevailing party that the Tribe is deemed to have waived its immunity because of the Oregon statute and also under the relevant AAA rules. They also rely on *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

1. The 1992 Agreement

The arbitration clause in the 1992 Agreement does not expressly address or even refer by implication to attorney fees and litigation costs. The arbitration panel recognized this point. ER 61. That fact alone goes a long way towards compelling a holding that the Tribe did not waive its immunity on these issues since courts must strictly and narrowly construe even expressly stated waivers and must apply a strong presumption against finding a waiver. Moreover, there are other reasons mandating a decision that the 1992 Agreement did not waive the Tribe's immunity to fees and costs.

First, several courts have narrowly interpreted waivers of tribal sovereign immunity to arbitrate. These courts have read general arbitration

clauses only to be a waiver for purposes of compelling a tribe to arbitrate or for allowing the non-tribal entity to be granted a court judgment on the ultimate arbitration award. *See Tamiami Partners Ltd. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1224-25 (11th Cir. 1999); *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1048-49 (11th Cir. 1995); *Big Valley Band*, 35 Cal.Rptr.3d at 364. In other words, a tribal agreement to arbitrate does not open the door to every possible claim against a tribe. *Id.* at 365. Consequently, the specific issues and damages that a party wants to raise must also be clearly and expressly waived in the agreement along with the tribe's waiver to arbitration. We agree that an agreement to arbitrate does not automatically waive a tribe's immunity to every form of claim, damage, recovery, or issue a party might allege.

Second, Appellants' rights to fees and costs do not even implicitly fall within the waiver of immunity to arbitrate that the Tribe granted in the 1992 Agreement. The Tribe agreed to arbitrate "[a]ll controversies . . . concerning any transaction or the construction, performance or breach of" the 1992 Agreement. Attorney fees and costs are not disputes about a transaction or the performance or breach of the Agreement. Alleged rights to fees and costs are ancillary issues that only arise after a law suit or arbitration has already been decided in one parties' favor, they are not claims or controversies in their own right. Fees and costs are also not controversies about the construction of the 1992 Agreement because we do not have to construe or interpret the meaning of the Agreement to discover that it did not address these subjects. *See, e.g., Huberdeau v. Desmarais*, 467 P.2d 624, 628 (Wash. Ct. App. 1970) ("Where their intentions are clear from the writing itself, there is nothing to construe and courts should not under the guise of interpretation rewrite or create contracts that the parties did not make

themselves."), *aff'd*, 486 P.2d 1074 (Wash. 1971); *accord Berg v. Hudesman*, 801 P.2d 222, 229 (Wash. 1990); Grant County Const. v. Lane Corp., 459 P.2d 947, 953 (Wash. 1969). The Agreement does not mention these items, as the arbitration panel expressly recognized, and there is no language in the Agreement that even raises the issues by implication.

Third, the American rule states that attorney fees are not allowed unless specifically agreed to by the parties or provided by statute. That rule carries extra force in this situation where we have to find an express waiver of the Tribe's immunity to fees before we could allow such a claim. Here, the Tribe did not clearly or expressly waive its immunity and, as is discussed in the next section, the Oregon law granting attorney fees to a prevailing party could not defeat the Tribe's sovereign immunity protection. Under the guidance of the American rule, therefore, a contract must contain an express provision providing for attorney fees if that is what the parties intended and the tribe must expressly waive its immunity to that issue.

To summarize, the 1992 Agreement expressly waived the Grand Ronde Tribe's sovereign immunity to arbitrate some contract disputes, but it did not address nor did it waive the Tribe's immunity for any and all issues Appellants might raise in an arbitration, including attorney fees and costs. Applying the legal standard, and in light of the absence of any reference to fees and costs in the 1992 Agreement, we hold that the Tribe did not waive its sovereign immunity to claims by the Appellants for these items.[2]

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[2] Paradigm and Mark Sizemore point to their 2002 Stipulation with the Tribe's attorneys as a waiver of the Tribe's immunity to fees and costs. But their argument is identical to that of SWM and Patrick Sizemore and it fails for the same reasons. In addition, the 2002 Stipulation was signed only by the Tribe's attorneys and could not constitute a waiver of immunity on any subject unless that act was authorized in advance or was subsequently ratified by the appropriate tribal officials with the constitutional authority to do so. *See Chance v. Coquille Indian Tribe*, 963 P.2d 638, 640-42, 327 Or. 318 (1998). It is well recognized that the conduct or statements of tribal attorneys cannot by themselves expand the scope of a tribe's waiver of immunity. *See United States Fidelity*, 309 U.S. at 513; *Missouri River Services*, at 852.

2. Oregon securities law and the AAA rules

Appellants also allege the Tribe waived its immunity to attorney fees by filing suit under the Oregon securities law that allows fees for prevailing parties. In stark contrast, the case law holds that tribal governments do not waive their sovereign immunity by filing law suits, not even as to compulsory counterclaims. *See, e.g., Oklahoma Tax Com'n*, 498 U.S. 505; *Wold Engineering*, 476 U.S. at 893; *United States Fidelity & Guar.*, 309 U.S. at 513; *McClendon*, 885 F.2d at 630; *Ramey Construction*, 673 F.2d at 319-20. Furthermore, these cases apply with even more force in this appeal because demands for attorney fees and costs are not counterclaims. A party does not normally file a law suit just for attorney fees and litigation costs unless they have already litigated and won a case. Fees and costs are better defined as rights that arise only after a party wins a suit and only if they are provided for under a statutory or contract provision. In this case, the 1992 Agreement does not mention fees or costs and the Oregon statutory provision did not automatically apply to the Tribe just because it filed suit under that statute. We hold that the Oregon securities law did not waive the Tribe's immunity to fees and costs.

Appellants also argue that the AAA rules waived the Tribe's immunity. Once again, we analyze this argument by narrowly and strictly construing any alleged waiver and by applying the strong presumption against waivers.

The Tribe did agree in the 1992 Agreement that "[a]ny arbitration shall be in accordance with the rules then applying of the American Arbitration Association, New York Stock Exchange or the National Association of

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We also doubt whether Paradigm and Mark Sizemore can even rely on the 1992 Agreement. The 2002 Stipulation does not mention the 1992 Agreement, does not make Paradigm and Mark Sizemore parties to that Agreement, nor could they be defined as third party beneficiaries of that contract. We need not address that question, however, to decide this appeal.

Securities Dealers, at Client's election." ER 90. The Tribe's attorneys selected the AAA and its rules when they brought the arbitration against the Sizemores and SWM and Paradigm. The AAA rules in 1992 and in 2001 apparently allowed awards of fees and costs. But we must decide if those rules applied only to the issues that the Tribe agreed could be part of "any arbitration."

Notwithstanding the broad reference to the AAA rules, we have already held that the 1992 Agreement did not clearly or expressly waive the Tribe's immunity to an award of fees and costs. Hence, those issues could not be raised in or be a part of "any arbitration" that was authorized by the 1992 Agreement. The Tribe simply did not waive its immunity for fees and costs and did not agree to allow those issues to be arbitrated. The issues of fees and costs, then, could not be and were not part of an arbitration that was subject to the AAA rules. The provision in the 1992 Agreement referencing the AAA rules does not stand for anything more remarkable than that the Tribe agreed to apply the AAA rules to the specific items it agreed to arbitrate, and had waived its immunity to, in the 1992 Agreement.

The mistake in Appellants' argument is that they skip the vital first step of answering exactly what issues the Tribe agreed to arbitrate and to which issues the AAA rules applied. The Tribe did not agree in the 1992 Agreement to arbitrate the issue of fees and costs. Thus, those items could not be part of "any arbitration" that would be subject to the AAA rules.[3]

In addition, the AAA rules did not and could not on their own constitute an express and clear waiver of tribal immunity for issues that the Tribe had clearly agreed not to arbitrate. Just as when a tribe files a law suit but that action does not constitute a waiver of sovereign immunity to

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[3] For example, Appellants would not have been allowed to arbitrate issues such as the political existence of the Grand Ronde Tribe or to define the boundary lines of the Reservation because the Tribe had not waived its immunity to have such issues raised in any arbitration.

compulsory counterclaims neither does the act of filing an arbitration constitute a clear and express waiver of immunity to whatever issues might be addressed in the arbitration rules.

The Appellants cite *C & L Enterprises v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) as support for their argument that the AAA rules waived the Tribe's immunity to fees and costs. We discuss *C & L Enterprises* more fully in the next section.

In *C & L Enterprises*, the Supreme Court addressed the issue of whether the Potawatomi Tribe had waived its sovereign immunity to have an arbitration award enforced against it by a subsequent suit in state court. 532 U.S. at 414. The Supreme Court cited the AAA rules in support of two separate clauses in the "express contract" that provided for state court enforcement of any arbitral award. *Id.* at 414-15, 418-20, 423. The Court mentioned the AAA rules only to support its analysis of the express language of the arbitration agreement at issue in that case.[4]

Consequently, *C & L Enterprises* does not stand for the proposition that arbitration rules can waive tribal sovereign immunity on their own. That Court was not faced with the issue of the effect of the AAA rules on immunity and it did not make any statements on that point. *Cf. Ginns v. Savage*, 61 Cal.2d 520, 524 n.2 (1964) ("an opinion is not authority for a proposition not therein considered."). *C & L Enterprises* did not address or change the relevant legal principle that waivers of immunity require a voluntary action by tribal officials with the constitutional authority to waive immunity and that it must be done by clear statements.

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[4] Interestingly, the *C & L Enterprises* Court noted that the arbitration rules referenced in that case were "[f]or governance of arbitral proceedings[.]" *Id.* at 419. That statement supports our view that the reference to the AAA rules in the 1992 Agreement only applied the AAA rules to the issues the Tribe had agreed to arbitrate.

As we have already held, the Tribe did not waive its immunity on the issues of fees and costs. The AAA rules then could not on their own waive that immunity and contradict the clear intent of the 1992 Agreement. The reference to the AAA rules was not an express or clear waiver of tribal sovereign immunity so as to overcome the strong presumption against waivers and the clear intent in the Agreement not to waive immunity to claims for fees and costs. Thus, those issues could not be part of "any arbitration" arising from the 1992 Agreement and those issues were not subject to the AAA rules. We hold that the Tribe did not waive its immunity on the issues of fees and costs in the 1992 Agreement by referencing the AAA rules. Furthermore, the case law holds clearly that the Tribe did not waive its immunity to counterclaims or disputes of any type over fees and costs by filing its law suit and arbitration under the Oregon securities law.

3. *C & L Enterprises*

Appellants rely heavily on *C & L Enterprises*. They argue that, even though the 1992 Agreement does not mention fees or costs, the Agreement is still a "clear" waiver of the Tribe's immunity as to those items.

In *C & L Enterprises*, the Supreme Court addressed the issue of how clear and explicit the language of an agreement had to be to determine whether a tribe had "clearly" waived its immunity. The Court explained that a contract does not have to contain some specific language (for example, Tribe A waives its sovereign immunity to x, y, and z) to possibly constitute a clear waiver of immunity. The Court instead held that other language that might not even use the words "sovereign immunity" or "waiver" might still be a clear waiver. 532 U.S. at 414.

In that case, the Citizen Band of Potawatomi Indian Tribe contracted with a non-Indian to install a roof on a building owned by the Tribe and located off-reservation on fee simple land. The Tribe proposed a standard

form contract to C & L that contained an arbitration clause. The Tribe ultimately selected another contractor and C & L initiated an arbitration in which the Tribe chose not to participate. When C & L filed suit in Oklahoma state court to enforce its arbitration award, the Tribe moved to dismiss on sovereign immunity grounds. *Id.* at 414-17.

The only issue addressed by the Court was "whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C&L relating to the contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards 'in any court having jurisdiction thereof.'" *Id.* at 414. The Court then held, even though the contract did not contain the words "waiver" or "sovereign immunity," that "by the clear import of the arbitration clause, the Tribe is amendable to a state-court suit to enforce an arbitral award in favor of contractor C&L." *Id.* The Tribe had "with the requisite clarity" waived its immunity for a state court suit to enforce the arbitration award. *Id.* at 418.

C & L Enterprises is not on point with the present appeal. The sole issue presented in *C & L Enterprises*, whether the Potawatomi Tribe had waived its immunity to enforcement of an arbitration award against it in state court, is not at issue in the present appeal. The Grand Ronde Tribe does not contend that it did not waive immunity to arbitrate certain issues under the 1992 Agreement. Instead, the issue in this appeal is the scope of the waiver, that is, what specific damages, recoveries, and issues did the Tribe allow to be arbitrated. As a California court recently stated: "The analysis in *C & L Enterprises* does not suggest that acceptance of an arbitration clause constitutes a broader immunity waiver." *Big Valley Band of Pomo Indians*, 35 Cal. Rptr. 3d at 364. That same court also noted that the *C & L Enterprises* Court had expressly limited its holding to the facts and the issue before it:

> Because *C & L Enterprises* involved an action to enforce an arbitration award, the Supreme Court had no occasion to consider whether the immunity waiver extends beyond actions to compel arbitration or enforce an award. The Court was careful to describe the effect of the arbitration clause as limited to a consent to arbitrate and enforce any award in state court.

Id. at 364 n.6 (citing *C & L Enterprises*, 532 U.S. at 423). We agree with that reading of *C & L Enterprises*. It does not address the issue before us.

In response, Appellants argue that *C & L Enterprises* does address fees and costs because the Court noted that the arbitration award being enforced in that case included "attorney's fees and costs." 532 U.S. at 416. That is, however, the only reference to fees and costs in the entire opinion. Fees and costs were not at issue in that case and they were not discussed by the Court or raised by either party. *C & L Enterprises* provides no assistance on the issue before us.

The only real guidance we glean from *C & L Enterprises* is its strict adherence to the language and terms of the contract before it. *Id.* at 418-19. That is the same method of analysis that we have employed.

In conclusion, we note that the 1992 Agreement said that controversies about contract transactions or the construction or performance or breach of the Agreement could be arbitrated. But we do not need to construe or interpret the contract to decide whether the 1992 Agreement allows the recovery of attorney fees and costs. The Agreement is completely silent on the subject and we do not have to interpret it to reach that decision. Fees and costs are not part of the 1992 Agreement. In view of this situation, and the requirement that we narrowly and strictly construe alleged waivers, we hold that the Tribe did not expressly waive its immunity to fees and costs in the Agreement; it did not do so by implication by allowing the AAA rules to be applied to the issues it agreed to arbitrate; and it did not do so by bringing suit under the Oregon securities law.

C. Tribal court jurisdiction over SWM and Patrick Sizemore

The Grand Ronde Tribal Court Ordinance provides:

> "Subject Matter Jurisdiction: The Court shall have jurisdiction over all civil actions where there are sufficient contacts with the Grand Ronde Reservation upon which to base jurisdiction, consistent with the Constitution and laws of the Tribe and the United States. It is the intent of this paragraph to authorize the broadest exercise of jurisdiction consistent with these limitations. Without limiting the foregoing, the Court shall have jurisdiction over the following matters: . . . contracts to which the Tribe is a party . . . ." Tribal Code § 310(d)(1)(A).

Under tribal law, we have subject matter jurisdiction of issues regarding the 1992 Agreement because it is a "contract[] to which the Tribe is a party." The parties have not cited any provision in the tribal or federal constitutions or laws that prevent us from exercising subject matter jurisdiction over the 1992 Agreement, and we are aware of none.

We also must address our personal jurisdiction over each Appellant.[5] FSIC acquired all the rights and obligations of SWM and Patrick Sizemore, so we will examine the issue of personal jurisdiction in regards those two entities. The Tribal Code provides:

> "Personal Jurisdiction: The scope of the Court's civil jurisdiction over any person or entity shall extend to any person or entity who has sufficient contacts with the Grand Ronde Reservation upon which to base jurisdiction consistent with the Constitution and laws of the Tribe and the United States. It is the intent of this paragraph to authorize the broadest exercise of jurisdiction consistent with these limitations." Tribal Code § 310(d)(1)(B).

SWM and Patrick Sizemore engaged in more than nine years of financial advising and business dealings with the Grand Ronde Tribe, its officials, and employees under the 1992 Agreement they signed with the Tribe. SWM and Patrick Sizemore visited the Reservation many times to conduct trainings and

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[5] Appellants characterize this appeal as a challenge to the conduct of the private arbitrators and that it is their contacts with the Grand Ronde Reservation that we must analyze. *See, e.g.*, FSIC Opening Brief, at 10-15; Paradigm Opening Brief, at 7. We reject this argument. Federal and state appellate courts do not consider their personal jurisdiction over trial judges, intermediate appellate judges, or private

to confer with tribal officials and employees. They also corresponded with officials and employees on the Reservation numerous times over the nine-year period of their work with the Tribe. There can be no question that we possess personal jurisdiction over SWM and Patrick Sizemore under tribal and federal law based on their voluntary and numerous contacts with the Grand Ronde Tribe and Reservation over this extensive period of time. *See, e.g., International Shoe v. Washington*, 326 U.S. 310 (1945).

The United States Supreme Court has held on numerous occasions that tribes have civil authority to regulate and tax non-Indians who come onto reservations to engage in business relations with tribal governments. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (mandating exclusive tribal regulatory jurisdiction over hunting and fishing by non-tribal members within the reservation); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding the tribe had authority to impose a tax on oil and gas production by non-Indians on reservation land); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 153 (1980) (holding a tribe could impose cigarette taxes on non-Indians entering the reservation: "Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity").

We raise the issue of a tribe's regulatory and taxing authority in analyzing our jurisdiction over SWM and Patrick Sizemore because the Supreme Court has stated, in a different factual setting, that a tribal court's adjudicatory jurisdiction over non-Indians and their on-reservation activities does not exceed the tribe's regulatory, legislative authority over such persons. "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate v. A-1*

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arbitrators. They only consider their jurisdiction over the parties to the lower court or arbitration decision that is being appealed. We will do the same.

Contractors, 520 U.S. 438, 453 (1997). SWM and Patrick Sizemore regularly conducted their activities under the 1992 Agreement on the Grand Ronde Reservation on tribally owned trust lands. These facts and the Supreme Court cases cited above demonstrate that the Grand Ronde tribal government had regulatory and legislative authority over SWM and Patrick Sizemore and thus the Grand Ronde tribal court system possesses adjudicatory jurisdiction over them. We have personal jurisdiction over SWM and Patrick Sizemore and can decide their rights under the 1992 Agreement and the arbitration award arising from that Agreement.[6]

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[6] We have not discussed *Montana v. United States*, 450 U.S. 544 (1981) and do not apply it to SWM, Paradigm, or the Sizemores. That might seem strange since *Montana* is the leading federal case on the question of tribal civil jurisdiction. It was an important part of the *Strate* decision, of course, so in that sense we have applied *Montana*. But we do not believe that the case is directly applicable to the factual situations presented in this appeal and thus we do not address it at length.

Montana concerned a tribe's regulatory jurisdiction over the actions of non-Indians on non-Indian owned fee lands within a reservation. *Montana* does not apply directly to SWM and Patrick Sizemore because their relevant conduct took place on reservation trust lands owned by the Grand Ronde Tribe, and the case is not applicable to Paradigm and Mark Sizemore because all their conduct occurred off-reservation.

Several justices of the U.S. Supreme Court have opined, however, that the *Montana* test should apply to all lands within a reservation whenever a tribe seeks to exercise civil jurisdiction over non-Indians. *Nevada v. Hicks*, 533 U.S. 353, 375-76 (2001) (Souter, J., concurring). The only time the Court has applied the *Montana* test to non-Indian conduct on tribally owned reservation lands was in *Hicks* when state officials were enforcing the state's interest in investigating violations of state criminal laws that had occurred off reservation. The majority of the Court expressly stated that they were only addressing the specific facts before them and that they were "leav[ing] open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* at 358 n.2; *see also id.* at 386 (Ginsburg, J., concurring). Consequently, we have no direct answer from the Supreme Court whether the *Montana* test applies to the situation where a tribe seeks to exercise civil jurisdiction over the conduct of non-Indians on reservation lands owned by a tribe.

If, however, we were to apply *Montana* to this appeal, we would still hold that the Tribe has civil jurisdiction over SWM and Patrick Sizemore to adjudicate their rights under the 1992 Agreement and the subsequent arbitration. According to *Strate*, and its discussion of tribal adjudicatory jurisdiction, "*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions[.]" *Strate*, 520 U.S. at 446. The two exceptions that recognize situations where a tribe does possess civil jurisdiction over non-Indians for their activities on non-Indian owned fee lands within a reservation were defined in *Montana*, 450 U.S. at 565-66:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases,

D. Tribal court jurisdiction over Paradigm and Mark Sizemore

In *Strate*, 520 U.S. 438, the U.S. Supreme Court held that a tribal court's adjudicatory jurisdiction does not exceed the tribe's regulatory authority. We must answer, then, whether the Grand Ronde Tribe has regulatory and legislative authority over Paradigm and Mark Sizemore to determine the question of our adjudicatory jurisdiction.

The facts governing our adjudicatory jurisdiction over Paradigm and Mark Sizemore stand in stark contrast to those regarding SWM and Patrick Sizemore. Paradigm and Mark Sizemore did not have a contract or any agreement with the Tribe. The record contains no evidence that they ever visited the Grand Ronde Reservation or conducted business there or even conducted business with tribal officials or employees by communications directed to the Reservation. Apparently, they worked only with SWM and Patrick Sizemore and it was SWM who then worked with the Tribe on the loans and notes that Paradigm and Mark Sizemore brokered. These are crucial factors in determining our jurisdiction. *Cf. Strate*, 520 U.S. at 453; *Ford Motor Company v. Todecheene*, 394 F.3d 1170, 1181 (9th Cir. 2005) (holding the Navajo Nation's court system did not have jurisdiction over the off-reservation company); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) ("The operative phrase is 'on their reservations.' Neither *Montana* nor its progeny purports to allow Indian

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> or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. (Citations omitted).

SWM and Patrick Sizemore voluntarily entered a contract with the Grand Ronde Tribe and the Tribe is exercising civil jurisdiction over them in relation to that very contract. This situation meets the first exception of *Montana* and the tribal court system has jurisdiction over those parties under that test. As we will discuss regarding Paradigm and Mark Sizemore, all of their conduct occurred off the Grand Ronde Reservation and we do not think *Montana* has any relevance to that situation.

tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations.*") (Emphasis in original).[7]

The only contrary facts in the record are that Paradigm and Mark Sizemore "brokered and assigned [some notes] to the Tribe," SER at 17, and that they entered the 2002 Stipulation with tribal-attorneys, off the reservation, to arbitrate the Tribe's suit against them. These facts are insufficient to establish that the Tribe had regulatory and legislative authority over them. That conclusion and the *Strate* decision, then, require us to hold that the tribal court system does not have adjudicatory jurisdiction to rule on their alleged rights to fees and costs in the arbitration proceeding.

It perhaps seems ironic that even though we have held the 1992 Agreement did not waive tribal sovereign immunity for attorney fees and costs, and we have vacated the arbitration award for those items in favor of SWM and Patrick Sizemore, that we cannot apply that same holding to Paradigm and Mark Sizemore. But, because they did not operate on the Grand Ronde Reservation and apparently had no contact with tribal employees and officials, we do not have adjudicatory jurisdiction over them and cannot issue a ruling that impacts their rights under the arbitration award.

Our ruling is based only on the facts and the case before us. We leave it for the future and for other cases to develop whether the Grand Ronde court system has any long-arm jurisdiction beyond the borders of the Reservation. On the facts before us, we hold that the Grand Ronde tribal court system does not have adjudicatory jurisdiction to decide the rights and obligations of Paradigm and Mark Sizemore. The trial court erred in not separately analyzing the different factual situations of the various

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[7] We realize that there are factual differences between *Strate* and the present appeal. There is a tribal interest present here that was not present in *Strate*. Furthermore,

appellants. It lost sight of the differences between the conduct and the location of the activities of SWM and Patrick Sizemore on the one hand, and of Paradigm and Mark Sizemore on the other. We reverse the decision of the trial court as to the latter appellants.

IV. Conclusion

We *affirm* the trial court decision vacating the award of attorney fees and litigation and arbitration costs to SWM and Patrick Sizemore and thus to their successor in interest FSIC. The arbitration panel showed a manifest disregard for the law when it decided that the Grand Ronde Tribe had waived its sovereign immunity on these issues. The tribal court system has personal and adjudicatory jurisdiction over SWM and Patrick Sizemore and thus over their successor FSIC.

We *reverse* the decision of the trial court as to Paradigm and Mark Sizemore. The tribal court system does not have adjudicatory jurisdiction over them.

IT IS SO ORDERED.

/s/ Robert J. Miller
Chief Justice

I CONCUR:

/s/ Lea Ann Easton
Associate Justice, *pro tempore*

JOHNSON, Associate Justice, concurring in part and dissenting in part:

I agree that we do not have personal jurisdiction over appellants Paradigm or Mark Sizemore and that the trial court's judgment must be reversed with respect to them. With respect to appellant First Specialty

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Paradigm and Mark Sizemore knowingly engaged in business involving the Tribe.

Insurance Corporation (FSIC), I am concerned that both the trial court and the majority in this court lose sight of the deferential standard of review that should be applied to arbitration decisions. Each court has proceeded directly to elucidate its own views of the underlying sovereign immunity question, rather than reviewing the decision made by the arbitrators on its own merits. For my part, I cannot conclude that the arbitrators' decision "is completely irrational or evidences a manifest disregard for the law." *See Missouri River Services, Inc., v. Omaha Tribe of Nebraska*, 267 F.3d 848, 854 (8th Cir. 2001).

I begin, as we must, with the language of the 1992 Investment Advisory Agreement and with *C & L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). The agreement states, in pertinent part:

> All controversies which may arise between [Tribe] and [FSIC] concerning any transaction or the construction, performance or breach of this or any other agreements between them whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration. Arbitration is final and binding on the parties. * * * Any arbitration shall be in accordance with the rules then applying of the American Arbitration Association, New York Stock Exchange or the National Association of Securities Dealers, at [Tribe]'s election.

C & L Enterprises teaches that this language expressly incorporates the rules of the American Arbitration Association (AAA) into the parties' agreement, and that such language can work a waiver of sovereign immunity even though the waiver is not expressly stated in the contract. 532 U.S. 419 & n. 1.

The arbitration panel reached its decision by way of two crucial conclusions about the contract language set forth above. First, that the phrase "*all* controversies which may arise * * * concerning *any* transaction" (emphasis added) is very broad. Is this irrational? No, it is correct. Second, that AAA Rule R-43(d)(ii), which is incorporated by reference into the parties' agreement, empowers the arbitrators to award attorney fees whenever

they are "authorized by law." It is the latter conclusion that is at issue here.

The trial judge found the application of current AAA rules to this controversy "untenable," slip op. at 26, but *C & L Enterprises* makes it clear that those rules do apply. The majority of this court reasons, in a circular way, that the parties' agreement incorporating the AAA rule on attorney fees cannot authorize an award of attorney fees allowed by law because the Tribe did not agree to arbitrate the issue of attorney fees. Whatever may be the merits of that position, it avoids the question placed before us for decision. Did the arbitrators act irrationally or in manifest disregard for the law by concluding otherwise? I cannot say that they did.

Although the trial court and this court's majority have fixed on the issue of sovereign immunity—which, without question, is an important issue to the Tribe and to any governmental entity—the issue presented here is one of contract interpretation: Did the Tribe agree to an award of attorney fees in a dispute with FSIC whenever such an award might be "authorized by law"? Issues of contract interpretation are committed to the arbitrators by the explicit language of the parties' agreement. The arbitrators have concluded that the contract authorizes this award, and their decision—whether we agree with it or not—is a rational one.

I would reverse the trial court's decision and confirm the arbitrators' award with respect to respondent FSIC while dismissing the action with respect to respondents Paradigm and Mark Sizemore.

/s/ Mark Johnson
Associate Justice

IN THE TRIBAL COURT OF APPEALS FOR THE CONFEDERATED TRIBES

OF THE GRAND RONDE COMMUNITY OF OREGON

In the Matter of:	) Case No.: A-05-09-001
	) Trial Court Case No.: C-04-08-003
FIRST SPECIALTY INSURANCE CORPORATION; PARADIGM FINANCIAL SERVICES, INC., and MARK SIZEMORE,	) CERTIFICATE OF SERVICE
Appellants,	
v.	
THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON,	
Appellee.	

FILED

OCT 31 2006

TRIBAL COURT OF APPEALS

I, Stephanie Grim, herby certify that I served true copies of the attached **Opinion, dated October 31, 2006,** upon the parties listed below, by placing the same with the United Postal Service at Grand Ronde, Oregon, postage prepaid, certified mail, return receipt requested, (except that service was by hand delivery as to the Tribal Attorney's Office), this 31st day of October, 2006.

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