IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-3269

OGLALA SIOUX TRIBE,

Plaintiff and Appellee,

-vs-

C & W ENTERPRISES, INC.,

Defendant and Appellant,

AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

HON. KAREN E. SCHREIER

BRIEF OF THE APPELLANT

Ronald A. Parsons, Jr.
A. Russell Janklow
Shannon R. Falon
JOHNSON, HEIDEPRIEM, JANKLOW, ABDALLAH & JOHNSON, L.L.P.
431 N. Phillips Ave – Suite 400
Sioux Falls, SD 57104
Telephone: (605) 338-4304

Counsel for Appellant
C & W Enterprises, Inc.

SUMMARY OF THE CASE

This appeal concerns the subject matter jurisdiction of the South Dakota state circuit court to enforce an arbitration award entered by the American Arbitration Association (AAA) that resolved claims arising from four construction contracts between the Oglala Sioux Tribe and its contractor, C & W Enterprises. The contracts expressly waived Tribal sovereign immunity and submitted the claims to arbitration before the AAA. The arbitrator issued an award in favor of C&W, and the state court granted the contractor's motion to confirm the award.

The Tribe brought this action to enjoin the state court proceedings and vacate the executions issued by the state court. The district court held that the state court lacked subject matter jurisdiction to confirm the arbitration award, and vacated the judgment and executions that the state court had issued. In this appeal, C&W contends that the district court's determination that the state court lacked subject matter jurisdiction to enforce the arbitration award was in error because SDCL § 21-25A-4, adopted in South Dakota as part of the Uniform Arbitration Act, establishes limited state jurisdiction for the enforcement of any agreement, including the contracts at issue, that provides for arbitration in the forum state.

C & W Enterprises requests twenty (20) minutes for oral argument.

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES:

EIGHTH CIRCUIT CASES:

OTHER CASES:

TABLE OF AUTHORITIES (CONT.)

TABLE OF AUTHORITIES (CONT.)

STATUTES:

STATEMENT OF THE ISSUE

I. Whether the South Dakota state court had subject matter jurisdiction pursuant to SDCL § 21-25A-4 to enforce an arbitration award where the Oglala Sioux Tribe had expressly waived its sovereign immunity, expressly agreed to submit to a final and binding arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association, and actively participated in the arbitration held in the State of South Dakota.

The district court held that the South Dakota state court lacked subject matter jurisdiction to enforce the arbitration award, enjoined the state court from enforcing the arbitration award, and vacated the executions that had been issued by the state court for off-reservation assets located within the State of South Dakota to satisfy the resulting judgment.

C&L Enterprises, Inc. v. Citizen Bank Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001).

Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota, Inc., 50 F.3d 560 (8th Cir. 1995).

L. R. Foy Construction Co., Inc. v. Dean L. Dauley and Waldorf Associates, 547 F.Supp. 166 (D.Kan. 1982).

State ex re. Tri-City Construction Co. v. Marsh, 668 S.W.2d 148 (Mo. Ct. App. 1984).

JURISDICTIONAL STATEMENT

The district court concluded that it had federal question subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. (JA 43). This Court has appellate jurisdiction over this interlocutory appeal from the district court's Order Granting Injunction pursuant to 28 U.S.C. § 1292(a). The Order Granting Injunction was entered by the district court on September 10, 2007 (JA 29), and the notice of interlocutory appeal was timely filed by Appellant C & W Enterprises, Inc. on September 25, 2007. (JA 332).

CORPORATE DISCLOSURE STATEMENT

C & W Enterprises, Inc. is a privately held corporation incorporated under the laws of the State of South Dakota. Its sole owner is Mr. Warren Barse of Sioux Falls, South Dakota. No publicly held corporation owns ten percent or more of its stock. C & W Enterprises. Inc. has no parent corporations or subsidiaries. It was previously incorporated under the name of C & W Excavating, Inc.

STATEMENT OF THE CASE

This action has its genesis in four construction contracts between the Oglala Sioux Tribe and its contractor, C & W Enterprises, Inc. After the Tribe declined to pay for work performed on those contracts, C & W Enterprises filed an arbitration demand with the American Arbitration Association on January 17, 2006. The Tribe filed its answer and counterclaims. After months of discovery and the resolution of preliminary issues, the arbitration was held in Sioux Falls, South Dakota in August of 2006. Following a two-week hearing and extensive briefing, the arbitrator issued an award in favor of C & W Enterprises on January 29, 2007. C&W subsequently filed a petition in state court to confirm the award pursuant to South Dakota's Uniform Arbitration Act, SDCL Ch. 21-25A. The Tribe declined to appear at the state court hearing on C&W's motion to confirm the arbitration award. The state court granted the motion and entered judgment in C&W's favor in the amount of the award. In order to satisfy its judgment against the Tribe, C&W subsequently obtained executions issued by the state court to be levied against any off-reservation funds located within the State of South Dakota.

On March 16, 2007, the Tribe filed the present action in federal district court. (Doc. 1). The case was assigned to the Honorable Karen E. Schreier, Chief Judge, United States District Court for the District of South Dakota. In response,

C&W filed a motion to dismiss for lack of federal subject matter jurisdiction. (Doc. 10). On August, 13, 2007, the district court denied the motion to dismiss, holding that the present action stated a federal question. (JA 33). As the basis for its ruling, the district court explained, "[b]y seeking declaratory and injunctive relief to prevent the state court from adjudicating the underlying action, OST is essentially arguing that the tribal court has not been divested of jurisdiction over the underlying action. This claim by OST requires reference to federal law in the same manner as a claim that a tribal court has been divested of jurisdiction. The action therefore arises under federal law and confers federal question jurisdiction upon this court." (JA 41).

The Tribe then filed an amended complaint. (JA 67). In addition, the Tribe filed a motion to stay the state court proceedings that had been initiated by C&W to confirm the arbitration award. (JA 45). The district court indicated that the motion would be treated as a request for injunctive relief. On September 10, 2007, the district court granted the motion, holding that the state court had lacked subject matter jurisdiction to confirm the arbitration award. (JA 23-25). First, the district court explained that "[t]his court has found that it has jurisdiction under 28 U.S.C. § 1331 to determine whether the state court is vested with the power to adjudicate the contractual disputes at issue in this case." (JA 13). Next, the district court

agreed with C&W that the Tribe had expressly waived its sovereign immunity and agreed to submit three of the four contract claims to the arbitration that was held in South Dakota: "The dispute resolution clauses explicitly contemplate a limited waiver of OST's sovereign immunity for purposes of the contracts at issue, and the court agrees with C & W's contention that OST waived its sovereign immunity with regard to the three contract clause claims." (JA 20).[1]

Nonetheless, the district court concluded that "despite this waiver of sovereign immunity, the dispute resolution clauses do not confer jurisdiction on the state court." (JA 20). In so doing, the district court distinguished the United States Supreme Court's seemingly contrary decision in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), and rejected C&W's argument that the contracts' incorporation of the Construction Industry Arbitration Rules of the American Arbitration Association operated to confer limited subject matter jurisdiction upon the South Dakota courts to confirm the arbitration award pursuant to SDCL § 21-25A-4. (JA 20-25). As a result, the district court concluded that the state court had lacked subject matter jurisdiction to

[1] For purposes of its decision, the district court also assumed, without deciding, that the Tribe had also waived its sovereign immunity on the fourth construction contract (Base and Blotter) that was included in the arbitration with the three other contracts that contained an express waiver of sovereign immunity. (JA 15, 19).

confirm the arbitration award, enjoined the state court from enforcing the arbitration award, and vacated the executions that had been issued by the state court for off-reservation funds located within the state of South Dakota. (JA 28). This interlocutory appeal followed. (JA 332).

STATEMENT OF THE FACTS

As must already be exceedingly apparent, this dispute has a protracted and complicated history. Appellant C & W Enterprises, Inc. is a construction firm located in Sioux Falls, South Dakota. C & W Enterprises is owned by Warren Barse, a man of Indian heritage who lives in Sioux Falls and is not a member of the Oglala Sioux Tribe. Because it is Indian-owned, C&W has a tribal preference for contracts authorized by the Bureau of Indian Affairs. (HT 8). Appellee Oglala Sioux Tribe is the Tribal government of the Pine Ridge Indian Reservation located within the borders of the State of South Dakota.

C&W performed work as a contractor for the Tribe on four separate road construction contracts dating back to 2002. (JA 70-71). These construction contracts were known by the parties as: (1) Multi-Gravel project; (2) Manderson to Wounded Knee project; (3) Cuny Table project; and (4) Base and Blotter project. (JA 8). Three of the four construction contracts contained an express, limited

waiver of sovereign immunity covering any disputes arising out of the contract. Specifically, these three contracts provided in part that:

> [T]he Oglala Sioux Tribe grants a limited waiver of its immunity for any and all disputes arising from this Contract, including the interpretation of the agreement and work completed or to be completed under the Contract; provided, however, that such waiver extends only to the Oglala Sioux Tribe and Transportation's specific obligations under the Contract; and further provided that such waiver shall be only to the extent necessary to permit enforcement by the Subcontractor.

(JA 9, 126, 130, 133). In addition, these three contracts contained the following claims resolution provision:

> **Claims Resolution.** The parties agree to bring any and all claims in the first instance to the Oglala Sioux Tribe Executive Committee for non-binding mediation, and thereafter to the South Dakota Federal District Court, and in the absence of Federal Court jurisdiction, the parties agree to arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association in effect at the time of this Contract. In the event there exists no Federal Court jurisdiction and the parties proceed to arbitration, the award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof. In the event either party does not timely comply in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, said party waives its right to arbitration and judgment may be entered in the amount in dispute in accordance with applicable law in any court having jurisdiction thereof.

(JA 10, 127, 130-31, 133-34). Unlike the other three contracts, the Base and Blotter contract did not contain an express waiver of sovereign immunity and provided for dispute resolution before the Oglala Sioux Tribal Court. (JA 10, 138).

Construction Industry Arbitration Rules

The Construction Industry Arbitration Rules of the American Arbitration Association (AAA rules) incorporated by the parties into three of the four construction contracts contain the following material provisions. First, the rules state that by providing for arbitration with the AAA, the parties are deemed to have incorporated the AAA rules into their agreement:

> R-1. AGREEMENT OF PARTIES.
>
> (a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Construction Industry Arbitration Rules. . . .

(JA 308). Next, the AAA rules confer upon the arbitrator the power to rule upon issues of jurisdiction and arbitrability and establish a deadline for making any objections to jurisdiction or arbitrability:

> R-8. JURISDICTION
>
> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.

> . . .
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the object. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

(JA 309). In addition, the AAA rules unambiguously confer upon the arbitrator the "final and binding" power to determine the arbitration locale:

> R-11. FIXING OF LOCALE
>
> The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within fifteen calendar days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.

(JA 310). Finally, the AAA rules confirm that the parties have consented that judgment upon the arbitration award may be entered in "any federal or state court" having jurisdiction:

> R-49. APPLICATIONS TO COURT AND EXCLUSION OF LIABILITY
>
> . . .
>
> (c) 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.

(JA 315). Again, these and all other provisions of the AAA rules are deemed incorporated into the contracts between the parties in this action.

The Tribe's nonpayment and damage to C&W

After the four contracts were approved and executed, C&W began work on the roads that it had contracted to build. Unfortunately, throughout the entire course of the parties' relationship, the Tribe was routinely delinquent in paying C&W for its completed work pursuant to the terms of the contracts. (JA 222). This ongoing problem resulted in substantial cash flow problems for C&W, a small, family-owned contractor. (JA 222). C&W repeatedly requested that the Tribe make timely progress payments on the 1st and 15th of each month as required. (JA 222). The Tribe, however, continued to fail in its obligation to make timely payments. (JA 222). At one point in 2003, the Tribe was delinquent on eight payments under just one of the contracts. (JA 222). On several occasions, C&W was forced to discontinue work in order to secure delinquent payments. (JA 222). After finally being paid for its work, C&W would return to the project only to have the cycle of nonpayment repeat. (JA 222-23). Eventually, C&W determined that it could no longer operate in this fashion and keep its business afloat. (JA 223).

The resources that C&W had to expend to perform under these road construction contracts were substantial, and the cost of its supplies, such as oil and fuel, were on the rise. (JA 223). Since the Tribe was not paying for the work, C&W was sinking deeper and deeper into debt over the course of the performance of the four contracts. (JA 223). The Tribe's nonpayment in turn rendered C&W unable to pay its vendors and virtually unable to pay its own employees. (JA 223). These extreme cash-flow problems also crippled C&W's ability to do work on any other projects because of a lack of resources. (JA 223). In fact, C&W was forced to incur liquidated damages on other construction contracts because it could not staff the projects or secure the necessary supplies from vendors to complete the work. (JA 223). In order to avoid foreclosure by its primary lender, C&W was forced to auction off much of its equipment at below-market prices to pay its lenders, and its creditor relationships are forever damaged. (JA 223). Furthermore, several of C&W's suppliers made claims against its bonds on the Pine Ridge contracts when C&W could not pay them and as a result of those claims, C&W has been unable to secure the bonding necessary for future projects. (JA 223). In sum, the Tribe's failure to honor its contractual obligations to pay C&W for work performed has essentially left the small business in total financial ruin. (JA 223).

Unsuccessful attempts to mediate

The Pine Ridge contracts required C&W to participate in nonbinding mediation with the Oglala Sioux Tribal Executive Committee prior to instituting legal action. (JA 10, 127, 130-31, 133-34). In accordance with these requirements, C&W and its counsel traveled to Pine Ridge on August 31, 2005, for mediation. (JA 223). Unfortunately, the parties were unsuccessful in resolving their disputes. On September 21, 2005, however, the Tribal Executive Committee passed Resolution No. 05-111XB recommending that the Bureau of Indian Affairs pay C&W $47,342.46 on the Multi Gravel contract and $49,699.16 on Route 2 & 41. (JA 224). Unfortunately, C&W still did not receive any payments from the Tribe.

C&W continued to work with the Tribe to attempt to resolve this matter without having to resort to litigation. For a time, it appeared that progress was being made. On December 8, 2005, the Tribal Finance Committee voted to pay C&W $10,083.79 on the Wounded Knee to Manderson contract, $122,159.92 on Route 2 & 41 Cuny Table contract, and $621,905 on the Base and Blotter contract. (JA 224). The following day these same payments were approved by the Tribal Economic and Business Development Committee. (JA 224). Despite these votes of the tribal government committees acknowledging the payments due and

agreeing to pay C&W $754,148.74, no payments were ever forthcoming. (JA 224).

Still, the Tribe continued to indicate its willingness to resolve this matter with C&W and to do so in the most cost-effective and efficient manner. To this end, the parties agreed to have their dispute mediated by the Honorable Robert Miller, former Chief Justice of the South Dakota Supreme Court. (JA 224, 228). C&W submitted its claims to Justice Miller, and the parties scheduled a date for the mediation in December 2005. (JA 224, 228). Shortly before the mediation was to occur, the Tribe recanted and chose not to participate. (JA 224, 228). This left C&W with no choice but to institute an arbitration proceeding before the American Arbitration Association pursuant to the claims resolution procedure in three of the four contracts. (JA 10, 127, 130-31, 133-34).

Commencement of AAA arbitration proceeding

C&W's initial arbitration demand was filed on January 17, 2006. (JA 23). To refresh, three of the contracts explicitly required mediation before the AAA and the fourth designated the Oglala Sioux Tribal Court as the proper forum to resolve disputes. In the interest of efficiency and expediency, C&W brought its claims under all four contracts in a single action before the American Arbitration Association. (JA 229). Although it is now disputed by the Tribe, C&W's owner,

Warren Barse, has averred that he was informed by members of the Tribal Council that the Tribe had affirmatively waived its sovereign immunity on the Base and Blotter contract and formally voted to forgo tribal court adjudication of that contract in favor of litigating all four contract claims in a single action before the AAA. (JA 224, 296-97). In any event, the Tribe did not object to the inclusion of the dispute involving the Base and Blotter contract and in fact notified C & W, through counsel, that it was agreeable to arbitrating all four claims in the same AAA proceeding. (JA 229).

Under the arbitration rules, the parties were to agree on an arbitrator from a list of candidates supplied by the AAA. (JA 228). The parties narrowed the field to two potential arbitrators, and C&W allowed the Tribe to make the final selection. (JA 228-29). The Tribe chose Allen Overcash, an attorney from Lincoln, Nebraska, who specializes in construction litigation involving both private and government contracts. (JA 229, 234). Mr. Overcash obtained his legal degree from Harvard Law School and has practiced construction litigation since 1959. He currently teaches construction law as an adjunct professor at the University of Nebraska Law School. (JA 234).

The Tribe filed an answer with AAA and did not raise sovereign immunity as a defense to any of the claims. (OST's Original Complaint, Ex. O) (Doc. 1). In

its original answer, the Tribe asserted a counterclaim against C&W on the Base and Blotter contract for $111,124. (OST's Original Complaint, Ex. O) (Doc. 1). The Tribe subsequently filed an amended answer and increased its counterclaim on the Base and Blotter contract to $1,784,875.00. (OST's Original Complaint, Ex. O) (Doc. 1). The Tribe filed an initial motion to dismiss certain portions of C&W's damages claims on the ground that they were barred by sovereign immunity, but the Tribe did *not* to assert sovereign immunity under the Base and Blotter contract. (OST's Original Complaint, Ex. O) (Doc. 1). In fact, with respect to sovereign immunity on that contract, the Tribe stated the following in its legal memorandum to the arbitrator:

> In the Base and Blotter contract, the limited waiver of sovereign immunity extends only to the Oglala Sioux Tribal Court. The Tribe has not objected to the claimant's inclusion of the Base and Blotter claim in the Arbitration Demand, however, for the sake of expediency in resolving the dispute on its merits.

(*Oglala Sioux Tribe v. C & W Enterprises, Inc.*, Civ. No. 06-5063 (D.S.D.) (first federal action) (Complaint, Ex. K) (Doc. 4, #11)). Additionally, the Tribe participated in preliminary hearings, filed a position paper as ordered by the arbitrator, and served discovery requests. (OST's Original Complaint, Ex. O) (Doc. 1).

Six months into the arbitration proceeding and after receiving some unfavorable rulings from the arbitrator on preliminary matters, the Tribe decided that it no longer wanted to arbitrate the Base and Blotter contract and moved to dismiss it from the arbitration proceeding (OST's *Original* Complaint, Ex. N) (Doc. 1). This untimely tactic contravened section R-8 of the AAA rules, which provided that "[a] party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the object." (JA 309). The arbitrator denied the Tribe's motion, finding that by actively participating in the arbitration of the Base and Blotter contract, the Tribe had waived its right to have that contract litigated in tribal court. (OST's Original Complaint, Ex. O) (Doc. 1). An arbitration hearing was scheduled for August 30, 2006.

First federal action and appeal

On August 21, 2006, nine days prior to the hearing and seven months after the AAA proceeding was initiated, the Oglala Sioux Tribe filed an "emergency" action in United States District Court, District of South Dakota, seeking to enjoin the arbitrator from including certain claims (including the Base and Blotter contract) in the arbitration on the ground of tribal sovereign immunity. *See Oglala Sioux Tribe v. C&W Enterprises, Inc., United States District Court, District of*

South Dakota, Civ. No. 06-5063 (D.S.D). The district court dismissed the action, holding that it did not have federal subject matter jurisdiction because the Tribe was merely raising a federal immunity defense to common law breach of contract claims, which did not present a federal question under the well pleaded complaint rule and the United States Supreme Court's decision in *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 840-41 (1989).

The Oglala Sioux Tribe appealed from the judgment of dismissal to this Court. This Court affirmed, holding that federal subject matter jurisdiction was lacking. *See Oglala Sioux Tribe v. C&W Enterprises, Inc,* 487 F.3d. 1129 (8th Cir. 2007). As this Court explained, "[u]nder the well-pleaded complaint rule, the existence of a federal cause of action depends upon the plaintiff's claim rather than any defense that may be asserted by the defendant," and "it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law." *Id.* at 1131 (quoting *Graham*, 489 U.S. at 841). The Tribe's status as a plaintiff in the federal litigation was not controlling, moreover, because its declaratory judgment action essentially sought only to interpose a federal defense to C&W's state law claims. *See id.* at 1131-32.

AAA arbitration in South Dakota

Meanwhile, on August 30, 2006, after more than seven months of hearings, discovery, and briefing, the arbitration hearing began before Mr. Overcash at the Holiday Inn in Sioux Falls, South Dakota. (JA 229). C&W was represented by Attorneys A. Russell Janklow and Shannon R. Falon of the law firm of Johnson, Heidepriem, Janklow, Abdallah & Johnson LLP in Sioux Falls. (JA 229). The Tribe was represented by Attorney Peter Capossela of Walterville, Oregon. C&W and the Tribe each presented evidence and witness testimony in support of their respective positions. (JA 229). The hearing lasted approximately two weeks. (JA 229). On January 29, 2007, following months of extensive post-hearing briefing by the parties, the Arbitrator entered a final award of $1,250,552.58 in favor of C&W, an amount that was substantially less than the damages to which C&W believed it was entitled. (JA 109).

State court proceeding to confirm the arbitration award

On January 29, 2007, C&W brought an action in state court seeking to have the arbitration award confirmed pursuant to South Dakota's Uniform Arbitration Act, SDCL § 21-25A *et seq.* (JA 167). The petition was formally served on the Tribe by a process server on February 26, 2007. (JA 236). After the statutory ninety (90) day period for the Tribe to respond passed, C&W brought a motion to

confirm the award. (JA 237). The hearing was set for May 29, 2007, and the notice of that hearing was formally served on the Tribe by a process server on May 14, 2007. (JA 239-40). As a matter of strategy, however, the Tribe declined to appear at the state hearing and did not make any motion in state court either contesting jurisdiction or to modify, vacate or correct the arbitration award. (JA 330). The transcript of this hearing before the state court is reproduced in the Joint Appendix. (JA 325-31). On May 29, 2007, following the state court hearing in which the Tribe declined to participate, the state court entered an order confirming the arbitration award and issued a judgment in favor of C&W for $1,291,666.64. (JA 110). Notice of this state court judgment was served on the Tribe by a formal process server on June 19, 2007. (JA 241).

C&W then initiated efforts to collect on its state court judgment confirming the arbitration award. On June 26, 2007, pursuant to a request from C&W, the Minnehaha County Clerk of Court issued two executions: one to Fall River County and one to Hughes County in South Dakota. (JA 191-92). With respect to the Hughes County execution, C&W sought to recover funds collected by the State of South Dakota on behalf of the Oglala Sioux Tribe that were being held in Pierre by the South Dakota Department of Revenue. With respect to the Fall River County execution, C&W sought to recover tribal funds that were potentially held in a bank

account at Wells Fargo Bank in Hot Springs, South Dakota. The sheriffs of both counties attempted to levy on the assets as instructed, but neither was successful in obtaining any funds. (JA 230). With respect to the Fall River County execution, it was established that no tribal funds were present at Wells Fargo Bank. With respect to the Hughes County levy and execution upon the South Dakota Department of Revenue, the State of South Dakota informed the parties that it intended to hold the funds (approximately $300,000) pending resolution of the dispute regarding the state court's jurisdiction to issue the executions. (JA 230).[2]

On July 10, 2007, the Tribe filed a motion seeking to quash the executions in the state circuit court that had confirmed the arbitration award. (JA 242). C&W filed its response to the Tribe's motion to quash, and a hearing was set on that motion. (JA 253, 270). Contrary to some previous inaccurate assertions by the Tribe's counsel, C&W immediately ceased seeking to have the executions and levies enforced so that the courts could resolve the dispute that was initiated by the Tribe when it filed its motion to quash. (JA 230-31; HT 44). C&W also directed the sheriffs of both Fall River County and Hughes County to take no further action

[2] After the district court issued its ruling granting the injunction in the present action, those funds were released by the South Dakota Department of Revenue to the Oglala Sioux Tribe.

on its behalf to obtain satisfaction of the executions until their validity had been resolved by the courts. (JA 230-31; HT 44).

Current federal action

In addition, the Tribe filed a second action in the United States District Court, District of South Dakota (the present action). In this second federal action, the Tribe sought a declaration that the state court did not have jurisdiction to confirm the arbitration award and an injunction preventing the state court from taking any further action regarding the case. (Doc. 1). The Tribe also sought a declaration that the Oglala Sioux Tribal Court should decide this matter and that its tribal court remedies be exhausted. (Doc. 1). As an alternative to tribal court, the Tribe requested that the federal court vacate the award of the arbitrator. (JA 30). Once again, C&W moved to dismiss this second federal action for lack of federal subject matter jurisdiction. (Doc. 10). This time, the district court denied C&W's motion, holding that it did have federal question jurisdiction over the claims in the Tribe's complaint. (JA 33).

Tribal court action

At the same time, the Tribe was also now pursuing an action in the Oglala Sioux Tribal Court seeking to have the arbitration award completely nullified. On April 30, 2007, three months after C&W instituted state court proceedings to have

the arbitration award confirmed, the Tribe filed a complaint and motion in tribal court seeking to have the *entire* award (not simply the Base and Blotter claim) vacated. (JA 172). C&W filed an answer and resisted the Tribe's motion in tribal court and sought leave to take discovery regarding issues raised by the Tribe's motion to vacate. (JA 272-82). Specifically, C&W requested the opportunity to take discovery regarding the Tribe's actions in choosing to submit the Base and Blotter contract to arbitration for purposes of establishing a waiver of the Tribe's sovereign immunity on that contract. (JA 272-82).

The tribal court did not permit C&W to conduct any discovery and instead adopted each and every one of the Tribe's suggested legal conclusions *in toto* and promptly entered an order vacating the *entire* arbitration award on July 26, 2007. (JA 117). The tribal court further ruled that it had exclusive jurisdiction to review the arbitrator's award. Even though three of the four contracts at issue had express waivers of sovereign immunity and binding arbitration provisions, the tribal court vacated the entire arbitration award on the following grounds: (1) the arbitrator refused to postpone the hearing to allow a deposition to occur; (2) the arbitrator's decision violated public policy; and (3) the arbitrator exceeded his authority and manifestly disregarded the law. (JA 117-24). Although that order is obviously not at issue in this appeal, C&W respectfully suggests that the tribal court greatly

exceeded its own authority and went well beyond the narrow grounds upon which an arbitration award can be vacated under the Federal Arbitration Act.

On August 22, 2007, C&W filed a notice of appeal with the tribal court stating that it was appealing from both the tribal's court denial of its motion to take discovery and from the tribal court's vacation of the arbitration award to the Supreme Court of the Oglala Sioux Nation. (JA 283). As of the time that this present brief was filed, the appeal before the Tribal Supreme Court has been briefed, but not resolved. To the best of C&W's knowledge, there is presently no timetable in place for such a resolution.

The federal injunction

Meanwhile, back in federal court, the Tribe filed an amended complaint on August 17, 2007, asking the district court to grant comity or full faith and credit to the orders of the Oglala Sioux Tribal Court or alternatively that it vacate the arbitration award under the Federal Arbitration Act. (JA 67). The Tribe further sought a declaration from the district court that the South Dakota court had lacked jurisdiction to confirm the arbitration award and a stay to prevent the state court from exercising any further jurisdiction over that action. (JA 79). As discussed above, the district court issued an injunction against the state courts from enforcing or confirming the arbitration award and vacated the executions that had been

issued by the state court against off-reservation property located within the state of South Dakota. (JA 21).

This case accordingly has been litigated in five separate forums. For its part, C&W has initiated only the arbitration in accordance with the dictates of the contracts and the state court action to confirm the award. Meanwhile, the Tribe has filed several actions attempting to derail the arbitration to which it agreed and to prevent C&W's efforts to enforce the resulting arbitration award. C&W has fully complied with the available statutory and judicial procedures at every turn. It simply seeks just enforcement of its contracts with the Oglala Sioux Tribe in accordance with the AAA rules that the parties agreed would govern the resolution of their contractual disputes.

SUMMARY OF ARGUMENT

1. The district court granted an injunction against the South Dakota court from enforcing an award resulting from an arbitration that occurred in Sioux Falls, South Dakota, between the Oglala Sioux Tribe and its contractor, C & W Enterprises. In determining whether the district court properly enjoined the state court from enforcing the arbitration award, the controlling question is whether the district court was correct in holding that the state court lacked subject matter jurisdiction to enforce the award. Tribal sovereign immunity is not at issue in this

appeal, because the Tribe explicitly waived its sovereign immunity for claims arising from three of the arbitrated contracts, and the district court assumed for purposes of its decision that the Tribe also waived sovereign immunity for the fourth contract that did include an express waiver or arbitration provision.

2. The state court had subject matter jurisdiction to enforce the arbitration award pursuant to SDCL § 21-25A-4, which provides for limited subject matter jurisdiction to enforce arbitration agreements and confirm arbitration awards where the parties made an agreement providing for arbitration in the State of South Dakota. This statute is part of the Uniform Arbitration Act that has been adopted in South Dakota. In addition to sovereign immunity waivers, the contracts at issue contain claim resolution procedures that provide for final and binding arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association. Those rules are deemed incorporated into the contracts and are controlling in this dispute arising under the contracts.

3. The AAA rules, as well as the contracts themselves, provide that an arbitration award can be confirmed in any court of competent jurisdiction. The AAA rules also grant the AAA the power to determine the forum in which the arbitration will be held. By agreeing to the AAA rules, the Tribe agreed that the arbitrator's decision regarding the locale of the arbitration would be final and

binding. The AAA determined that the arbitration would be held in Sioux Falls, South Dakota. The Oglala Sioux Tribe subsequently participated in the arbitration in South Dakota, resulting in an award entered in C&W's favor.

4. While the contracts do not state specifically that arbitration is to be held in South Dakota, they do provide that arbitration is to be in accordance with the Construction Industry Arbitration Rules of the AAA. As noted previously, those rules provide that the determination of the location of arbitration, when the location is in dispute, shall be made by the AAA. Thus, the Tribe agreed to be bound by a procedure that resulted in arbitration in the state of South Dakota. Under the prevailing view of the Uniform Arbitration Act as adopted in South Dakota, this agreement to be bound by a process that could and did result in South Dakota as the arbitration forum, fulfills the statutory requirement for jurisdiction that the agreement provide "for arbitration in this state." As a result, the district court improperly enjoined the state court from exercising its proper jurisdiction to enforce the arbitration award.

STANDARD OF REVIEW

A district court has broad discretion when ruling on requests for injunctive relief, and this Court will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of that discretion. *See Goss Int'l Corp. v. Man Roland*

Druckmascinen Aktiengesellschaft, 491 F.3d 355, 362 (8th Cir. 2007); *Heartland Academy Community Church v. Waddle*, 335 F.3d 684, 689-90 (8th Cir. 2003); *Safety-Kleen Systems, Inc. v. Hennkens*, 301 F.3d 931, 935 (8th Cir. 2002). Whether a preliminary injunction should issue involves consideration of (1) the probability of success on the merits; (2) the threat of irreparable harm; (3) the balance between this harm and potential harm to others if relief is granted; and (4) the public interest. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir.1981) (en banc).

ARGUMENT

I. THE DISTRICT COURT'S INJUNCTION RESTRAINING THE STATE COURT FROM ENFORCING THE ARBITRATION AWARD SHOULD BE VACATED.

Although the factual and procedural background is complex and unusually diffuse in this case, the question of law on appeal is actually quite straightforward. In the present action, the primary issue is whether the district court committed an error of law in holding that the state court lacked subject matter jurisdiction to confirm the arbitration award. If that conclusion was incorrect, the injunction and order restraining the state court from confirming the arbitration award and vacating the state executions should be reversed. On the other hand, if the district court was

correct that the state court lacked subject matter jurisdiction to confirm the arbitration award, then the injunction was properly granted.

This question of law has been further distilled by the fact that this case, unlike the majority of similar cases, does *not* turn upon the question of the Tribe's sovereign immunity. As the district court held, the Tribe unquestionably waived its sovereign immunity for three of the four contracts that were the subject of the arbitration award entered in C&W's favor. (JA 9, 126, 130, 133). Significantly, the Tribe's express waiver of its sovereign immunity for claims brought under the contracts was "to the extent necessary to permit enforcement by the Subcontractor." (JA 9, 126, 130, 133). In addition, the district court's injunction was based upon the assumption that the arbitrator correctly ruled that the Tribe also waived its sovereign immunity on the fourth contract (Base and Blotter). (JA 10, 127, 130-31, 133-34). As a result, regardless of how the Tribe may attempt to frame the issues, this case is ultimately not about the Tribe's sovereign immunity at all, but rather is about the subject matter jurisdiction of the South Dakota courts.

A. By incorporating the AAA rules into the construction contracts, the Tribe made an agreement "providing for arbitration in this state" within the meaning of SDCL § 21-25A-4, which in turn conferred subject matter jurisdiction upon the state court to enforce the arbitration award.

C&W respectfully contends that the state court had limited subject matter jurisdiction to confirm the arbitration award at issue in this case under SDCL § 21-25A-4 of South Dakota's Uniform Arbitration Act. That statute provides:

> **Circuit court jurisdiction of proceedings.**
>
> The term, court, means a circuit court of this state. The making of an agreement described in § 21-25A-1 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder.

SDCL § 21-25A-4.[3] C&W respectfully suggests that the district court erred as a matter of law in holding that this statute was insufficient to confer subject matter jurisdiction upon the state circuit court to confirm the arbitration award under the particular circumstances of this case.

[3] As stated in the Historical and Statutory Notes to this statute in the South Dakota Codified Laws, this section is based upon section 17 of the Uniform Arbitration Act (1955). It was adopted by the South Dakota Legislature in 1971 and has never been amended. In 2000, the National Conference of Commissioners on Uniform State Laws drafted the Revised Uniform Arbitration Act to amend the 1955 Uniform Arbitration Act (UAA). However, South Dakota has *not* adopted the Revised UAA.

This is so because the parties also expressly agreed in three of the four construction contracts that were the subject of the arbitration that "the parties agree to arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association," and that "the award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction thereof." (JA 10, 127, 130-31, 133-34). The AAA rules accordingly are incorporated into three of the contracts and are just as binding on the parties as the contractual language itself.

The dispute resolution regime includes the Tribe's agreement to conduct the arbitration in South Dakota, if that is the determination of the AAA pursuant to the final and binding authority delegated by the parties pursuant to the contract's incorporation of the AAA rules. As those rules expressly provide, if the parties are unable to agree on the locale of the arbitration, "the AAA shall have the power to determine the locale, and its decision shall be final and binding." (JA 310). The AAA rules further make clear that "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." (JA 315).

Pursuant to its authority, the AAA determined that the arbitration of the disputes arising out of those contracts would be held in Sioux Falls, South Dakota.

The Tribe subsequently appeared at the arbitration hearing in Sioux Falls and fully participated. Pursuant to SDCL § 21-25A-4, the South Dakota courts accordingly had limited subject matter jurisdiction to confirm the arbitration award because the parties agreed to be bound by the dispute resolution regime established by the AAA rules that resulted in an arbitration held within the State of South Dakota.

The United States Supreme Court's decision in *C&L Enterprises, Inc. v. Citizen Bank Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411 (2001) is the most relevant controlling authority over this dispute. In *C & L Enterprises*, however, the primary question was whether the tribe in question had waived its sovereign immunity against a state court action to enforce an arbitration award by agreeing to arbitrate any dispute arising out of a construction contract pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association. The Supreme Court held that the arbitration provision was itself sufficient to waive the Tribe's sovereign immunity regarding claims to enforce the contracts.[4] As the Supreme Court explained:

> We are satisfied that the Tribe in this case has waived, with the requisite clarity, immunity from the suit C & L brought to enforce its arbitration award.

[4]*See id.* at 418-19. Unlike in *C & L Enterprises*, the contracts in the present action contain an explicit waiver of sovereign immunity in addition to the arbitration provisions.

> The construction contract's provision for arbitration and related prescriptions lead us to this conclusion. The arbitration clause requires resolution of all contract-related disputes between C & L and the tribe by binding arbitration; ensuing arbitral awards may be reduced to judgment "in accordance with applicable law in any court having jurisdiction thereof." App. To Pet. For Cert. 46. For governance of arbitral proceedings, the arbitration clause specifies American Arbitration Association Rules for the construction industry, *ibid.*, and under those Rules, "the arbitration may be entered in any federal or state court having jurisdiction thereof," American Arbitration Association, Construction Industry Dispute Resolution Procedures, R-48(c) (Sept. 1, 2000).[5]

Up to that point in the decision, the Supreme Court's analysis in *C & L Enterprises* tracks identically to the circumstances in the present action.

As the district court correctly recognized, however, there is a distinguishing element between *C & L Enterprises* and the present case. In *C & L Enterprises*, the contract at issue also contained a "choice of law" provision that selected "the law of the place where the Project is located," which happened to be the state of Oklahoma. In the present action, conversely, the three Pine Ridge contracts

[5]*Id.* at 418-19. *See also Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1995) (explaining that "by designating arbitration in accordance with specified arbitration rules as the forum for dispute resolution, the parties clearly intended a waiver of sovereign immunity with respect to resolving disputes under the contract"); *Sokaogon v. Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656 (7th Cir. 1996) (holding that clause in contract stating that the parties agree to arbitration before the American Arbitration Association and that the agreement shall be enforceable "in any court having jurisdiction thereof" constituted an explicit waiver of sovereign immunity).

containing the sovereign immunity waiver and arbitration provision do *not* contain any choice of law provision. As the district court recognized, the Supreme Court relied in part upon the choice-of-law clause in *C & L Enterprises* in concluding that the Oklahoma courts had jurisdiction to confirm the arbitration award under the jurisdictional section of Oklahoma's Uniform Arbitration Act (which is the same in all material respects to South Dakota's parallel statute relied upon by C&W in the present case (SDCL § 21-25A-4)). As the Supreme Court explained:

> The contract's choice-of-law clause makes it plain enough that a "court having jurisdiction" to enforce the award in question is the Oklahoma state court in which C & L filed suit. By selecting Oklahoma law ("the law of the place where the Project is located") to govern the contract, App. To Pet. For Cert. 56, the parties have effectively consented to confirmation of the award "in accordance with" the Oklahoma Uniform Arbitration Act, *id.* at 46 ("judgment may be entered upon [the arbitration award] in accordance with applicable law")' Okla. Stat., Tit. 15, § 802.A (1993) ("This act shall apply to ... a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties").
>
> The Uniform Act in force in Oklahoma prescribes that, when "an agreement ... provid[es] for arbitration in this state," *i.e.*, in Oklahoma, jurisdiction to enforce the agreement vests in "any court of competent jurisdiction of this state." § 802.B. On any sensible reading of the Act, the District Court of Oklahoma County, a local court of general jurisdiction, fits that statutory description.

Id. at 419. In the present action, the district court concluded that since the contracts at issue did not contain a choice-of-law provision selecting South Dakota

law, the South Dakota court must not have had subject matter jurisdiction to confirm the arbitration award. (JA 21-22).

C&W respectfully suggests that the district court misapprehended the holding of *C & L Enterprises* and unduly limited its scope. That decision does *not* stand for the proposition that the only way that a state court can have subject matter jurisdiction to confirm an arbitration award against an Indian Tribe is for the contract to have contained a choice-of-law provision selecting the law of the state in which that court sits to govern the resolution of claims. Rather, as the Supreme Court explained, "[t]he American Arbitration Rules and the Uniform Arbitration Act, however, are not secondary interpretive aides that supplement our reading of the contract; they are prescriptions incorporated by the express terms of the agreement itself." *Id.* at 419 n.1. In other words,

> the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures. *The regime to which the Tribe subscribed includes entry of judgment upon an arbitration award in accordance with the Oklahoma Uniform Arbitration* Act. That act concerns arbitration in Oklahoma and correspondingly designates as enforcement forum "court[s] of competent jurisdiction of [Oklahoma]." *Ibid.* C & L selected for its enforcement suit just such a forum.

Id. at 420 (emphasis supplied). Thus, *C & L Enterprises* stands for the broader principle that when a contract entered into by the Tribe incorporates a dispute

resolution procedure, the terms of that process are contractual and are sufficiently clear to bind the Tribe for purposes of waiving sovereign immunity, establishing state court jurisdiction, or both.

Here, the Tribe agreed to the dispute resolution procedures established by the AAA rules. The Tribe's agreement to the AAA rules included the agreement to grant the AAA the "final and binding" authority to determine the forum in which the arbitration would take place. AAA Rules, § R-11 ("the AAA shall have the power to determine the locale, and its decision shall be final and binding") (JA 310). Pursuant to this authority granted by the parties, the AAA determined that the arbitration would take place in Sioux Falls, South Dakota. The parties did in fact hold the arbitration in South Dakota.

As discussed, SDCL § 21-25A-4 expressly provides that "[t]he making of an agreement described in § 21-25A-1 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder." By agreeing to submit to the claims resolution procedures under the AAA rules that granted the power to the AAA to hold the arbitration in South Dakota, and by subsequently taking part in the arbitration held in South Dakota, the Oglala Sioux Tribe made an agreement "providing for arbitration in that state" pursuant to SDCL § 21-25A-4. As a result, the South

Dakota state court had limited subject matter jurisdiction pursuant to that statute to enforce the arbitration award. The district court accordingly erred in holding that the state court did not have subject matter jurisdiction.

Although there is an unsurprising dearth of cases precisely on point, this essential principle upon which C&W has relied has been recognized by several courts interpreting the jurisdictional provision of the Uniform Arbitration Act as adopted in several states. For example, in *L. R. Foy Construction Co., Inc. v. Dean L. Dauley and Waldorf Associates*, 547 F.Supp. 166 (D.Kan. 1982), the district court interpreted a construction contract that, just as in the present action, contained an arbitration provision that incorporated the Construction Industry Arbitration Rules of the American Arbitration Association. As the district court explained in that case:

> The Court's jurisdiction is based on the Uniform Arbitration Act, which has been adopted by Kansas with minor changes and codified at K.S.A. § 5-401, et seq. Defendants admit that the arbitration agreements in the Mayfield and Artesia contracts are valid under the test promulgated in § 5-401, but deny that this Court has jurisdiction to compel arbitration. The key statutory provision is K.S.A. § 5-416, which reads:
>
> "The term 'court' or 'court of competent jurisdiction' means district court. The making of an agreement described in K.S.A. 5-401, providing for arbitration in this state, confers jurisdiction on the district court to enforce the agreement under this act and to enter judgment on an award thereunder."

> Defendants focus on the words "providing for arbitration in this state." Defendants point out that the Artesia and Mayfield contracts contain no mention of Kansas as the location for arbitration and thus fail to fall within the confines of § 5-416. While this argument has the appeal of simplicity, the Court believes that it is too simple.
>
> While the contract does not state specifically that arbitration is to be held in Kansas, it does provide that arbitration is to be in accordance with the Construction Industry Arbitration Rules of the AAA. As noted previously, said rules provide that the determination of the location of arbitration, when the location is in dispute, shall be made by the AAA. Thus, defendants agreed to be bound by a procedure which could result in arbitration in the state of Kansas. *In the Court's view, this agreement to be bound by a process which could result in Kansas as the site of arbitration, fulfills the statutory requirement that the agreement provide "for arbitration in this state."*

Id. at 169 (emphasis supplied). The district court noted that it had located only one other decision addressing this unique situation at that time:

> Diligent research by the Court has uncovered only one other case dealing with this question. In that matter the contract also provided for arbitration in accordance with the Construction Industry Arbitration Rules of the AAA, providing that the AAA shall determine the locale of arbitration. The Court ruled that the defendants were thus bound by the AAA's decision as to locale, which in turn conferred jurisdiction under the provisions of the Uniform Arbitration Act on the trial court to enter judgment on the arbitration award. *Stancioff v. Hertz*, 406 N.E.2d 1318 (Mass.App.1980).

Id. Since the *Stancioff* and *L. R. Foy Construction* decisions, additional courts have reached similar conclusions when construing a state statute that adopts the model limited jurisdictional provision of the Uniform Arbitration Act. *See, e.g.,*

State ex re. Tri-City Construction Co. v. Marsh, 668 S.W.2d 148, 152 (Mo. Ct. App. 1984) (holding that jurisdiction to confirm arbitration award entered in Missouri was in the Missouri courts); *Kearsage Metallurgical Corp. v. Peerless Ins. Co.*, 418 N.E.2d 580, 584 (Mass. 1981) (holding that although both parties were New Hampshire corporations and the dispute concerned a building in New Hampshire, confirmation in the Massachusetts courts was proper where arbitration occurred in that state); *Dewitt v. Al-Haddad*, 1990 WL 50727 *6 (Tenn. Ct. App. April 25, 1990) (adopting the reasoning of *L. R. Foy Construction*); *cf. Jackson Trak Group, Inc. v. Mid States Port Authority*, 751 P.2d 122, 127 (Kan. 1988); *Washington Mutual Bank v. Crest Mortgage Co.*, 418 F.Supp.2d 860, 861-62 (N.D.Tex. 2006).

It could be argued by the Tribe that a party has not made an agreement "providing for arbitration in this state," *i.e.*, South Dakota, within the meaning of SDCL § 21-25A-4 unless the written arbitration provision in the contract itself specifically designated South Dakota as the arbitration locale. It has been held, however, that such a cramped construction undercuts the essential purpose of the Uniform Arbitration Act. Indeed, that interpretation was expressly rejected by United States Supreme Court in *C & L Enterprises*. In that case, just as in the present action, the written arbitration provision did *not* specifically designate

Oklahoma, or any other locale for that matter, as the arbitration forum. Nonetheless, the Supreme Court held that the binding procedures selected by the contract were sufficient to establish jurisdiction. In fact, the United States, as amicus curiae, explicitly argued that the jurisdictional reach of the Oklahoma UAA should be construed as pertaining only to arbitration agreements that explicitly designated Oklahoma as the arbitration forum. The Supreme Court rejected that argument with dispatch in a critical footnote:

> The United States argues that the Oklahoma Uniform Arbitration Act is inapplicable in this case because it does not reach all arbitrations properly held in Oklahoma, but only those in which the agreement explicitly "provide[s] for arbitration in [Oklahoma]." Tr. of Oral Arg. 47-48 (referring to § 802.B). No Oklahoma authority is cited for this constructed reading of an Act that expressly "appl[ies] to … a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties." § 802.A. *We decline to attribute to the Oklahoma lawmakers and interpreters a construction that so severely shrinks the Act's domain.*

C & L Enterprises, 532 U.S. at 420 n.2 (emphasis supplied).

Prior to *C & L Enterprises*, the district court in *L. R. Foy Construction* prophetically rejected a similar construction of the jurisdictional provision of the Kansas UAA on the same grounds:

> Policy grounds lead the Court to the same conclusion. The purpose of the Uniform Arbitration Act would be severely compromised if defendants' interpretation of § 5-416 was accepted. In essence, agreements to be bound by the Construction Industry Arbitration

> Rules would be meaningless, as none of the twenty-five states which have adopted the Uniform Arbitration Act could compel or enforce arbitration, as the contracts would not specify the particular state.

L. R. Foy Construction, 547 F.Supp. at 169. In *Tri-City Construction*, as well, the Missouri Court of Appeals reached a similar conclusion:

> Every state that has considered the question of jurisdiction to confirm the award has focused on the place of arbitration and not the locus of the contract. On the principle of uniformity, the jurisdiction should lie in the Missouri courts where the parties by common assent undertook to arbitrate.
>
> Any other conclusion would lead to anomalous results. Given the decisions in Kansas, Massachusetts, and New York, contracts having their locus in those states do not confer jurisdiction on the courts. Thus, if Missouri adopted a construction that looked to the locus of the contract for jurisdiction of the award, a Missouri resident contracting in New York, Massachusetts, or Kansas, and arbitrating in Missouri, would have no forum for enforcing the arbitration award.
>
> Additionally, the place of contracting is not always, or even frequently, the convenient location for the arbitration. Modern business operates in a multistate environment, and the parties should be permitted to choose the place of arbitration and confirmation upon consideration of convenience, and not upon artificial concepts of the place of contracting.
>
> Based upon the language of the statute, the Act's direction to construe the Act uniformly and common sense application of the Act to meet the needs of the parties, the statute must be held to confer jurisdiction on the Missouri courts.

Tri-City Construction, 668 S.W.2d at 152. It should be equally presumed that the South Dakota Supreme Court would accord the same construction to the

jurisdiction provision of South Dakota's Uniform Arbitration Act as the United States Supreme Court and other state courts, particularly in light of the South Dakota Legislature's statutory directive that the act "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it." SDCL § 21-25A-36.

As the district court in *L. R. Foy Construction* also noted, the result would presumably be different if the arbitration at issue did not actually take place in the same forum in which confirmation of the resulting award was sought to be enforced. In such cases, the absence of the parties' presence in the forum for the arbitration would raise personal jurisdiction concerns. *See L. R. Foy Construction*, 547 F.Supp. at 169 (explaining that "Defendants' argument that § 5-416 must be narrowly construed, lest the Kansas courts be flooded with arbitration disputes from denizens of distant and exotic locales which have no relation to Kansas, is likewise inapposite, as there would continue to be the requirement of personal jurisdiction in such cases"); *Artrip v. Samons Construction, Inc.*, 54 S.W.3d 169, 173 (Ky. Ct. App. 2001) (holding that Kentucky courts did not have subject matter jurisdiction to enforce arbitration award where arbitration occurred in Ohio). In the present action, however, no such concerns are present, since the arbitration

occurred in the same forum (South Dakota) in which the arbitration award was confirmed, as contemplated by the Uniform Arbitration Act.

B. Where state court jurisdiction is based solely upon the UAA's express grant of jurisdiction to enforce an award resulting from an arbitration held within the state, the fact that the underlying contracts were performed on tribal land is not controlling.

In its order, the district court noted that "because South Dakota has not adopted P.L. 280, the laws of South Dakota do not apply to this dispute that occurred in Indian country." (JA 23).[6] That contention, however, misapprehends the proper inquiry. C&W is not contending that the South Dakota courts have general subject matter jurisdiction—or that the substantive laws of South Dakota apply—to govern disputes occurring on Tribal lands. Nor is C&W contending that the South Dakota courts would have had subject matter jurisdiction to adjudicate the merits of the breach of contract claims between the parties. Rather, C&W simply contends, entirely consistent with *C & L Enterprises*, that where the Tribe has waived its sovereign immunity and agreed to arbitrate a claim in the state of

[6] Public Law 280 authorizes the courts of five enumerated states to assert jurisdiction over certain criminal and civil actions that may arise on designated Indian lands. *See* Pub.L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-90 (1953), *codified as amended at* 18 U.S.C. § 1162 and 28 U.S.C. § 1360. The law also prescribed a procedure by which any other state can extend its adjudicatory jurisdiction to actions arising in Indian country. *See* 25 U.S.C. §§ 1321-22. *And see generally Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 27 (1st Cir. 2006).

South Dakota within the meaning of SDCL § 21-25A-4, then the South Dakota state circuit court in the judicial circuit in which the arbitration occurred has *limited* express subject matter jurisdiction pursuant to that statute to enforce the arbitration award.

For the same reason, the district court's invocation of *Williams v. Lee*, 358 U.S. 217 (1959) is inapposite. (JA 23-24). In that case, the Supreme Court held that the state courts of Arizona were without power to adjudicate a civil action brought by a non-Indian against an Indian in an action to collect upon a debt that was incurred on a reservation. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,* 523 U.S. 751 (1998), however, the Supreme Court subsequently made clear that the question of tribal sovereign immunity does not turn on whether the action stems from governmental or commercial functions or whether the action arose on-reservation or off. *See id.* The Supreme Court explained that a tribe is only subject to suit where Congress has authorized suit or where the tribe has waived its immunity. *See id.* Thus, the relevant inquiry is whether the Oglala Sioux Tribe has waived its immunity, not whether the action stems from an on-reservation or off-reservation construction contract. Because of the Tribe's express waiver of sovereign immunity and agreement to be bound by the dispute resolution regime established by AAA rules, the issues of tribal sovereignty or self-

government are not at issue in the present action. Rather, the question is whether an arbitration award entered as the result of an arbitration that occurred within in the state of South Dakota, not within the boundaries of the Pine Ridge Indian Reservation, will be enforced pursuant to the contractual provisions, including an express waiver of sovereign immunity, to which both parties expressly agreed. The district court's Order Granting Injunction inadvertently clouds the issue by purporting to enjoin the state court "from adjudicating the contractual disputes at issue in this case." (JA 28). In reality, C&W never sought to have the state court "adjudicate the contractual disputes at issue in this case," nor did the state court ever purport to do so. Rather, the state court simply confirmed the arbitration award entered in the state of South Dakota pursuant to the limited subject matter jurisdiction granted pursuant to SDCL § 21-25A-4.

The Supreme Court's decision in *C & L Enterprises* clearly establishes that when a sovereign tribe waives its immunity from suit, it may also freely choose the forum in which the resulting litigation will occur, including state courts. As the Supreme Court emphasized in that case,

> The [arbitration] clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real

> world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration.

C & L Enterprises, 532 U.S. at 422.[7] Here, the Oglala Sioux Tribe expressly waived sovereign immunity "to the extent necessary to permit enforcement by the Subcontractor" for three of the four construction contracts that were the subject of the arbitration and the resulting arbitration award that was confirmed by the state circuit court in the South Dakota county in which the arbitration took place. (JA 9, 126, 130, 133). With its tribal sovereign immunity having been voluntarily waived and accordingly taken out of the picture, the Tribe is the same position, no greater or no less, than any other contracting entity, whether governmental or private, that cannot assert sovereign immunity and has contractually agreed to be bound by the provisions of the Construction Industry Arbitration Rules of the American Arbitration Association.

---

[7] *See also Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir. 1995) (agreement to arbitrate did not contain provision for court enforcement, but this Court nonetheless observed that "disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense"); *Bradley v. Crow Tribe of Indians*, 67 P.3d 306, 308-12 (Mont. 2003) (holding that tribe had waived its sovereign immunity and could be sued in state court by agreeing to state law and to state court jurisdiction in standard construction contract provision on choice of law and venue; *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 404-06 (Colo. Ct. App. 2004) (holding that tribe had waived its immunity and state court had jurisdiction based on legally enforceable contract in which tribe consented to state court jurisdiction).

It is important to note that C&W has not disputed that the Oglala Sioux Tribal Court may also have had concurrent jurisdiction over the arbitration award. Indeed, C&W has appeared in the Tribal court and (unsuccessfully) made its case. However, in circumstances such as these, when a tribal court and state circuit court possess concurrent jurisdiction, the case may be properly adjudicated by the first tribunal to validly exercise jurisdiction. *See State ex rel LeCompte v. Keckler,* 628 N.W.2d 749, 752 (S.D. 2001) (citing *Harris v. Young*, 473 N.W.2d 141, 145 (S.D. 1991)). Here, the state court acted first, and it is the state court that therefore properly adjudicated the case. C&W filed in state court on January 29, 2007, three months before the Tribe filed its action in tribal court. Furthermore, the state court petition was formally served on the Tribe on February 26, 2007. The state court entered its judgment on the award on May 29, 2007, two months before the tribal court vacated the award. Thus, the state court judgment is controlling, and C&W is entitled to collect its judgment

Obviously, the state court judgment is valid only for off-reservation property located within the state of South Dakota. In order for that judgment to be valid on the Pine Ridge Indian Reservation, it would have to be recognized and granted comity in the Oglala Sioux Tribal Court. In any event, for purposes of this appeal, if this Court should conclude that state court *did* have subject matter jurisdiction to

confirm the award, then the district court's order and injunction prohibiting the state court from enforcing the award and vacating the executions for lack of subject matter jurisdiction was legal error and should be reversed.

CONCLUSION

WHEREFORE, Appellant C & W Enterprises, Inc. respectfully requests that the district court's Order Granting Injunction be vacated and reversed.

Dated this 10th day of December, 2007.

JOHNSON, HEIDEPRIEM, JANKLOW, ABDALLAH & JOHNSON, L.L.P.

BY /S/ RONALD A. PARSONS, JR.

Ronald A. Parsons, Jr.
A. Russell Janklow
Shannon R. Falon
P.O. Box 1107
Sioux Falls, SD 57101-1107
(605) 338-4304

Counsel for Appellant C & W Enterprises

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 10, 2006 two true and correct copies of the foregoing **Brief of Appellant,** as well as an electronic version on a computer disk, was served by U.S. Mail, first class, postage prepaid, upon the following:

Brett Lee Shelton
3626 Locust Street
Rapid City, SD 57701

Peter Capossela
P.O. Box 204
Walterville, OR 97489

/S/ RONALD A. PARSONS, JR.
Ronald A. Parsons, Jr.

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Appellant complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner: The Brief was prepared using Microsoft Word, Version 2003. It is proportionately spaced in 14-point type, and contains 10,169 words.

Pursuant to the Eighth Circuit Rules of Appellate Procedure 28A(d), I certify that the disk provided to the Court and opposing counsel have been scanned for viruses, using Symantec Corporate Edition antivirus soft ware, and the diskettes are virus free.

/S/ RONALD A. PARSONS, JR.
Ronald A. Parsons, Jr.

Addendum

1. Order Granting Injunction (September 10, 2007)