UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE , Plaintiff, vs. C&W ENTERPRISES, INC., Defendant.	CIV. No. 07-5024 **DEFENDANT'S BRIEF IN RESISTANCE TO TRIBE'S REQUEST FOR INJUNCTION**

Defendant C&W Enterprises, Inc. submits this Brief in Resistance to Tribe's Request for an Injunction. On March 25, 2009, the Oglala Sioux Tribe filed a motion before this Court seeking a temporary restraining order to enjoin C&W from proceeding with its efforts to enforce its state court judgment. The Court entered an order granting the motion and set an evidentiary hearing for April 3, 2009. The Court also requested briefing from the parties on the merits of the motion as well as on the issues of jurisdiction and abstention. In accordance with the Court's request, C&W submits this brief.

BACKGROUND

The background of this dispute is well known by the Court and has been previously detailed in its Order Granting Temporary Restraining Order issued on March 25, 2009. (doc. 87). C&W instituted arbitration before the American Arbitration Association on January 17, 2005, on four road construction contracts. On August 30, 2006, after more than eighteen months of pre-arbitration litigation, discovery, and briefing, the arbitration hearing began. The hearing lasted approximately two weeks. On January 29, 2007, following extensive post-hearing briefing by the parties, the Arbitrator entered his final award of $1,250,552.58 in favor of C&W.

After receiving the arbitration award, C&W brought an action in South Dakota State Circuit Court seeking to have the arbitration award confirmed pursuant to SDCL Chapter 21-25A. The Tribe failed to appear and did not make any motion in state court either contesting its jurisdiction or to modify, vacate or correct the arbitration award. On May 29, 2007, the Circuit Court for the State of South Dakota entered an order confirming the arbitration award and a judgment in favor of C&W for $1,291,666.64, representing the arbitration award and accrued interest.

Rather than appearing in state court to contest jurisdiction the Tribe instead chose to file an action in this Court seeking 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. The Court ruled that the state court lacked jurisdiction over the Tribe and that its judgment was not valid. (doc 63) This decision was reversed by the Eighth Circuit Court of Appeals. *See Oglala Sioux Tribe v. C&W Enterprises*, 542 F.3d 224 (8th Cir. 2008). The Eighth Circuit held that the Tribe had waived sovereign immunity on all four contracts and that the waiver extended to state court. *Id.* All appeals of this decision have been exhausted. Therefore, the Eighth Circuit's ruling that the State of South Dakota properly exercised jurisdiction over the Tribe in confirming the arbitration award, and that its judgment is valid, is final and binding on the parties and the Court.

In addition to the federal court litigation, the Tribe also pursued an action in the Oglala Sioux Tribal Court seeking to have the award of the arbitrator vacated. On April 30, 2007, three months after C&W instituted state court proceedings to have the arbitration award confirmed, the Tribe filed its tribal court complaint. C&W resisted the Tribe's motion and sought leave to take discovery regarding issues raised by the Tribe's motion to vacate. The tribal court did not permit

C&W to conduct any discovery and instead entered an order vacating the entire arbitration award on July 26, 2007. C&W appealed the tribal court's ruling to the Oglala Sioux Supreme Court, and the tribal high court affirmed the trial court's decision not to enforce the arbitration award but remanded the case to permit C&W to take discovery on the question of whether the Tribe waived its sovereign immunity under the fourth contract and consented to arbitrate that contract. No action has been taken in tribal court since the Oglala Sioux Supreme Court's ruling.

It is undisputed that the State of South Dakota exercised jurisdiction over this matter before the tribal court did so. In cases of concurrent state and tribal court jurisdiction, the case is properly adjudicated by whichever court system first obtains valid jurisdiction over the parties. *See Harris v. Young*, 473 N.W.2d 141,145 (S.D. 1991); *State v. Keckler*, 628 N.W.2d 749, 752 (S.D. 2001). In this instance, the Eighth Circuit has ruled that the State of South Dakota validly exercised jurisdiction over the parties, and the State of South Dakota did so before the tribal court action began. C&W had a final judgment in state court before the tribal court took any action on its case. In fact, the state court judgment was entered before C&W even filed its answer in the tribal court action.

After the Eighth Circuit's ruling, the Tribe moved this Court to order the parties to participate in alternative dispute resolution and represented that it would make every effort to secure the involvement of the Bureau of Indian Affairs in the process. C&W did not object to this request on the condition that the BIA participate in the mediation, and the Court entered an order granting the request. (doc. 81); *See also* Affidavit of Janklow, ¶8. Three days before the mediation was to occur, C&W was informed by United States Magistrate Judge Veronica Duffy's chambers that the BIA would not be participating in the mediation. *Id.*, at ¶9. Given

this fact, Judge Duffy's chambers inquired as to whether C&W still desired to proceed with the mediation. *Id.* C&W declined. *Id.*

After it became apparent that the Tribe was not going to willingly pay the judgment entered by the state court, C&W availed itself of the only option it had left: collection efforts. On March 17, 2009, C&W served a garnishment summons on the Bureau of Indian Affairs requesting any property belonging to the Tribe; served an execution on personal property, accounts, and any state revenue the Tribe may be owed by the South Dakota Department of Revenue; and served a levy on First National Bank. The Tribe then filed a motion in the present action seeking a temporary restraining order from this Court enjoining C&W from executing and levying tribal funds. The Court entered a temporary restraining order on March 25, 2009.

ARGUMENT

I. This Court lacks Jurisdiction to Enjoin the State Court Proceedings.

A. In light of the Eighth Circuit's ruling that the state court has jurisdiction, the remaining claims in this case have been rendered moot.

In its Amended Complaint, the Tribe asserted three causes of action. First, the Tribe asked this Court to extend comity or full faith and credit to the orders of the Oglala Sioux Tribal Court, which vacated the arbitration award. Alternatively, the Tribe asked this Court to vacate the arbitration award. Secondly, the Tribe sought declaratory and injunctive relief against the state court proceedings and a finding that the state court lacked jurisdiction. Now that the Eighth Circuit has ruled that the state court has jurisdiction over this dispute and that the Tribe waived its sovereign immunity, however, the remaining claims in the Tribe's complaint are moot.

With regard to the Tribe's first claim requesting that this Court grant comity or full faith and credit to the tribal court's orders, this Court can do neither. The United States Court of Appeals for the Eighth Circuit has ruled that the State of South Dakota had jurisdiction to

confirm the arbitration award. *Oglala Sioux Tribe v. C&W Enterprises*, 542 F.3d 224 (8th Cir. 2008). This ruling is the law-of-the-case and is binding on the Court and the parties.

The law-of-the-case doctrine has been described as a means to prevent the relitigation of a settled issue in a case. *See United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir.1995). The doctrine "requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy." *Id.* In other words, the doctrine " 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' " *United States v. Carte*r, 490 F.3d 641, 644 (8th Cir.2007) (quoting *Arizona v. California*, 460 U.S. 605, 618, (1983)). The doctrine applies to decisions made by appellate courts. *See First Union Nat'l Bank v. Pictet Overseas Trust Corp., Ltd*., 477 F.3d 616, 620 (8th Cir.2007). Accordingly, the Eighth Circuit's decision that the state court has jurisdiction in this matter is the law-of-the-case and governs this subsequent proceeding. Thus, the Court cannot rule in any manner that conflicts with that previous determination. Granting comity or full faith and credit to the tribal court judgment would violate the law-of-the case doctrine because it would directly conflict with the valid, final state court judgment.

Furthermore, since a valid state court judgment now exists, the Court is compelled under the full faith and credit statute, 28 U.S.C. §1738, to extend full faith and credit to that judgment. That statute provides that judgments "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *Id.* Here the judgment of the state court is valid and would be afforded full faith and credit under the laws of the State of South Dakota. The Tribe may argue that full faith and credit should not be extended in this

case because the judgment is a default judgment.[1] The law of the South Dakota is that a default judgment is res judicata, defeating this position. *See Schmidt v. Zellmer,* 298 N.W.2d 178, 180 (S.D. 1980). Therefore, since this Court is obligated under the full faith and credit statute to recognize the state court judgment, it cannot also recognize the tribal court judgment.[2] The two judgments are contradictory. One confirms the arbitration award entered between the parties and the other vacates it. It is clear that both cannot be given effect. Since the jurisdiction of the state court to enter its judgment has been conclusively established, the mandate of the full faith and credit statute is invoked and the Tribe's first claim is now moot.

The Tribe's alternative claim seeking to have this Court vacate the arbitration award is likewise moot. Res judicata prevents this Court's consideration of the arbitration award.[3] "The law of res judicata or claim preclusion is well established; a final judgment on the merits bars further claims by parties or their privities based on the same cause of action." *See Kapp v. Naturelle, Inc.,* 611 F.2d 703, 707 (8th Cir. 1979). This preclusive effect is extended to a default judgment as long as it was entered by a court having jurisdiction over the parties and the subject matter and no fraud or collusion occurred. *Id.* Here, the jurisdiction of the state court has been established by the Eighth Circuit's decision and no fraud or collusion has occurred or even been alleged. Therefore, under the doctrine of res judicata, as well as the law-of-the-case doctrine, this Court cannot rule on the Tribe's alternative claim to vacate the arbitration award because the state court has already confirmed that award and entered a valid and final judgment on the issue.

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[1] While the judgment entered in state court was technically a default judgment because the Tribe failed to appear, the merits of the underlying action were fully litigated by the parties in the arbitration proceeding.

[2] Tribal court judgments are not entitled to full faith and credit under 28 U.S.C. § 1738. *See Wilson v. Marchington,* 127 F.3d 805 (9th Cir. 1997); *MacArthur v. San Juan County,* 566 F.Supp.2d 1239 (D. Utah 2008).

[3] Additionally, there is no basis for federal jurisdiction over this claim. It is well settled that the FAA does not provide an independent basis for federal jurisdiction. *See Gaming World Int'l Ltd. v. White Earth Band of Chippewa Indians,* 317 F.3d 840, 847 (8th Cir. 2003); *Calvello v. Yankton Sioux Tribe,* 899 F.Supp. 431, 434 (D.S.D. 1995). Rather, a federal district court only has subject matter jurisdiction under the FAA if the court would have jurisdiction over the underlying civil action that is being arbitrated. *See Calvello,* 899 F.Supp. at 434; *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.,* 276 F.3d 683, 685 (5th Cir. 2001).

The full faith and credit statute is an additional bar to the Court ruling on the Tribe's claim seeking to vacate the arbitration award. Pursuant to 28 U.S.C. § 1738, federal courts must give preclusive effect to state-court judgments whenever the courts of the State from which the judgment emerged would do so. *See Hanig v. City of Winner,* 527 F.3d 674 (8th Cir. 2008). As stated above, South Dakota applies res judicata in the context of default judgments, such as the one obtained in this instance, and thus this Court is required to do the same. *See Schmidt v. Zellmer,* 298 N.W.2d 178, 180 (S.D. 1980). Therefore, the Tribe's alternative claim seeking to have this Court vacate the arbitration award is barred.

The only remaining claim in the Tribe's complaint has already been conclusively determined by the Eighth Circuit Court of Appeals. The Tribe sought a declaration and an injunction that the state court lacked jurisdiction over the arbitration award. Since that claim is now finally determined in favor of state court jurisdiction, there is no further action that this Court can take on that claim. Accordingly, the Tribe's entire case has either been conclusively decided against the Tribe or rendered moot by the Eighth Circuit's decision. Accordingly, the Court should dismiss this case with prejudice and allow the state court proceedings to continue.

B. The Court lacks jurisdiction over the substance of the Tribe's request for a restraining order.

Even if the Court does not dismiss this case, it lacks jurisdiction to enjoin C&W's state court efforts to enforce its judgment. Since the issue of state court jurisdiction over this dispute has already been decided, the federal question that this Court originally found in this action no longer exists. The Tribe's argument that the state court's exercise of jurisdiction over it impugns its tribal sovereignty has been decided against the Tribe. All that remains is the Tribe's argument that C&W's efforts to collect its judgment are improper because the state collection proceedings allegedly violate tribal sovereignty. This, however, is merely a defense to C&W's

collection efforts. It is not an affirmative claim for relief. Thus, the present motion of the Tribe falls under the rubric of the well-pleaded complaint rule and this Court does not have subject-matter jurisdiction over it. *See Oglala Sioux Tribe v. C&W Enterprises, Inc.*, 487 F.3d 1129 (8th Cir. 2007).

As the Eighth Circuit instructed in *Oglala Sioux Tribe,:*

> We will normally consider a claim to have arisen under federal law if a federal cause of action appears on the face of a well-pleaded complaint. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 840-41, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989). Under 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. *Id.* **The existence of a tribal immunity defense, for example, will not convert a claim based on state law into a federal cause of action, even though tribal immunity is a matter of federal common law and even if it might potentially resolve the case**. *Id.* at 841, 109 S.Ct. 1519. As the Supreme Court held in *Graham*, which also involved tribal immunity, "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.* (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936)).

Id. at 1131 (emphasis supplied). In this case the Tribe has alleged tribal immunity as a defense to the pending state collection proceedings. This claim does not arise under federal law and thus does not give rise to federal jurisdiction.

In *Oglala Sioux Tribe,* 487 F.3d 1129, the Eighth Circuit went on to explain that: "[w]here the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court." *Id.* (citation omitted). "When a court inquires into the nature of the action, it must examine the realistic position of the parties." *Id.* (citation omitted). "In so doing, the court may realign the parties, if necessary, to determine whether the declaratory plaintiff affirmatively

asserts a federal claim, or seeks in effect, to establish a defense against a cause of action which the declaratory defendant might assert in state court." *Id.* (citation omitted).

The nature of the state court action is that of a collection action in which C&W is the plaintiff/creditor with a valid state court judgment, and the Tribe is the defendant/debtor. Therefore, the true nature of the Tribe's claim in this action is that of a defense of tribal sovereignty rather than a claim for affirmative relief and under *Oklahoma Tax Commission v. Graham* and its progeny, there is no federal jurisdiction in such a case. Therefore, this Court should deny the Tribe's motion to enjoin the state court proceedings in this instance and instead dismiss the pending case in its entirety.

C. The Rooker-Feldman Doctrine prohibits this Court from exercising jurisdiction to enjoin the state court proceedings.

The Rooker-Feldman doctrine stems from two Supreme Court decisions, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Colombia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The principle of Rooker-Feldman is that of all federal courts, only the United States Supreme Court has appellate jurisdiction over state court judgments. *Id.* As the Eighth Circuit had succinctly recognized, "[t]he Rooker-Feldman doctrine prohibits lower federal courts from exercising appellate review of state court judgments." *Skit International, Ltd. v. Dac Technologies of Arkansas, Inc.*, 487 F.3d 1154 (8th Cir. 2007). "Rooker-Feldman is indicated in that subset of cases where the losing party in a state court action subsequently complains about the judgment and seeks review and rejection of it." *Id.* at 1157 (internal citations omitted).

When this Court entered its initial injunction in this case, it held that the Rooker-Feldman doctrine did not apply because the federal action was instituted before the judgment was entered in the state court. *See* Doc. 63 (citing *Exxon Mobil Corp. v. Saudi Basic Indus.*, 544 U.S. 280,

284 (2005)). While this is true with regard to the Tribe's complaint, the instant motion seeking to enjoin the state court collection proceedings was not filed before the state court judgment became final. Therefore, Rooker-Feldman is a bar to enjoining these currently pending state court proceedings.

The test under Rooker-Feldman is whether the proceeding sought to be enjoined is "inextricably intertwined" with the claims asserted in state court. *See Charchenko v. City of Stillwater,* 47 F.3d 981, 983 (8th Cir. 1995) (citation omitted). "A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Id.* In *MSK Eyes, Ltd. v. Wells Fargo Bank, National Association,* 546 F.3d 533 (8th Cir. 2008), the Eighth Circuit recognized that the Rooker-Feldman doctrine does not typically bar claims premised upon activities regarding the enforcement of a state court judgment because in the usual case those issues can be determined without disturbing the underlying judgment. *Id.* at 539. That is not the case in this particular situation.

In entering its judgment, the state court ruled that it had jurisdiction over the Tribe. The Tribe now seeks to have this Court enjoin state court enforcement proceedings on the grounds that the state court lacks jurisdiction to enforce its judgment against off-reservation assets of a sovereign such as the Tribe. If this Court were to grant such relief, it would render the state court judgment a nullity within the bounds of the state's own borders. Thus, in this instance, the issues are inextricably intertwined and Rooker-Feldman bars the relief the Tribe seeks and divests this Court of jurisdiction over this matter.

II. The Anti-Injunction Act Prohibits this Court from Enjoining the State Court Proceeding to Collect on a Valid State Court Judgment.

Embodying fundamental precepts of federalism and comity between federal and state courts, the Anti-Injunction Act provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

See 28 U.S.C. § 2283. The Supreme Court has "expressly rejected the view that the anti-injunction statute merely states a flexible doctrine of comity, and [has] made clear that the statute imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, in the absence of one of the recognized exceptions...." *Mitchum v. Foster,* 407 U.S. 225, 228-29, (1972). The exceptions are "narrow and are not to be enlarged by loose statutory construction." *Chick Kam Choo v. Exxon Corp.,* 486 U.S. 140, 146, (1988).

When the Court issued its original injunction in this case enjoining the state court proceedings, the Court determined that the second exception applied, i.e. that the injunction was necessary in aid of its jurisdiction. (Doc. 63) Like the other legal issues in this case, the subsequent Eighth Circuit opinion, finding that the state court has jurisdiction, compels a different result.

As the Eighth Circuit has recognized, the second exception to the Anti-Injunction Act was intended to apply in cases of *in rem* jurisdiction. *See In re Federal Skywalk Cases,* 680 F.2d 1175, 1183 (8th Cir. 1982) (citations omitted). In cases of *in personam* jurisdiction, the exception is not to be applied. *Id.* The court noted that, "the traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to Section 2283 was intended to alter this balance." *Id.* The court explained the circumstance of parallel litigation as follows:

> (A)n action brought to enforce (a personal liability) does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata ....

Id. (citations and internal quotation omitted). Here, the action before the Court is not *in rem*. It is simply *in personam* jurisdiction. Therefore, the second exception to the Anti-Injunction Act is not applicable and the state court proceedings should not be enjoined. Additionally, since the state court judgment is now final, this Court is barred from considering these issues under the principles of res judicata as discussed above.

Furthermore, the Court's previous reliance on *Bowen v. Doyle,* 880 F.Supp. 99 (W.D. N.Y. 1995) and *White Mountain Apache Tribe v. Smith Plumbing Co., Inc.*, 856 F.2d 1301 (9th Cir. 1988) to enter an injunction of the state court proceedings is no longer proper. In its previous decision, the Court stated:

> The second clause of the Act, allowing a court of the United States to stay proceedings "where necessary in aid of its jurisdiction is applicable in this case. "This exception has been expressly held to permit Indian tribes to bring federal court suits to enjoin state court proceedings **where the threshold issue is whether the state court has jurisdiction over the subject matter of the dispute**." *Bowen v. Doyle,* 880 F.Supp. 130 (W.D.N.Y. 1995) (collecting cases). Without the ability to enjoin the state court from acting, this court would be unable to exercise its jurisdiction to "preserve the integrity of tribal court claims." *See White Mountain Apache Tribe v. Smith Plumbing Co., Inc.*, 856 F.2d 1301 (9th Cir. 1988)

See Oglala Sioux Tribe, at 1048 (emphasis supplied). Now that it has been conclusively determined that the state court has jurisdiction over the arbitration award at issue in this case and that its judgment is valid, there is no basis for this Court to enjoin the state court proceedings as necessary to aid its jurisdiction. Accordingly, the Ant-Injunction Act prevents this Court from enjoining the state court proceedings.

III. This Court Must Abstain from Enjoining the State Court Proceedings under the Doctrine of *Younger* Abstention.

"Under *Younger v. Harris,* 401 U.S. 37 (1971), federal courts should abstain from exercising jurisdiction in cases where equitable relief would interfere with pending state

proceedings in a way that offends principles of comity and federalism." *Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir. 2004). *Younger* abstention is appropriate when (1) the federal action would disrupt an ongoing state judicial proceeding; (2) which implicates important state interests; and (3) which provides an adequate opportunity to raise constitutional challenges. *See Cormack v. Settle-Beshears*, 474 F.3d 528 (8th Cir. 2007) (citation omitted). This case satisfies all three elements and abstention is required.

First, there is an ongoing state proceeding. *In the Matter of the Arbitration between C & W Enterprises vs. Oglala Sioux Tribe*, Civ. No. 07-389 is pending in the Second Circuit Court of the State of South Dakota. It is this action in which the state court entered its judgment confirming the arbitration award and it is pursuant to this judgment that C&W is attempting to collect the monies it is owed. Clearly there is an ongoing state proceeding that implicates these issues.

Second, important state interests are implicated in this matter, as the United States Supreme Court has recognized that states have an important interest in enforcing their judgments. In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14 (1987), the Supreme Court held that *Younger* abstention required the district court to abstain from hearing constitutional claims presented by a judgment debtor when that debtor had not presented its claims in the pending state court action. *Id.* In *Pennzoil,* the judgment debtor sued the creditor in federal court contending that Texas law requiring the debtor to file a supersedeas bond in order to suspend execution of the judgment pending appeal violated its rights under the Constitution and various federal statutes. *See Id.* at 6. The Supreme Court held that the federal court was required to abstain. *Id.*

In reaching this decision, the Supreme Court relied upon its earlier decision in *Juidice v. Vail*, 430 U.S. 327 (1977) where it had held that federal courts could not interfere with the

contempt power of a state court. The *Pennzoil* Court then extended this reasoning to a judgment in state court when it observed the following:

> The reasoning of *Juidice* controls here. That case rests on the importance to the States of enforcing the orders and judgments of their courts. There is little difference between the State's interest in forcing persons to transfer property in response to a court's judgment and in forcing persons to respond to the court's process on pain of contempt. Both *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.

Pennzoil, 481 U.S. at 13-14.

This Court must stay its hand as well. The State of South Dakota has entered a valid, binding and final judgment in favor of C&W Enterprises and against the Oglala Sioux Tribe. The State of South Dakota has an important interest in enforcing that judgment, and this Court should abstain from interfering in that process.

Third, the state court proceedings provide an opportunity for the Tribe to raise its issues. As stated in the Affidavit of Brett Shelton, the Tribe has previously appeared in state court to contest C&W's attempt to levy on tribal assets. *See* Affidavit of Brett Lee Shelton, ¶ 2. The Tribe can once again go into state court and make its arguments. There are post-judgment remedies available in state court that the Tribe has not pursued. The state courts involved in this matter certainly provide avenues for the Tribe to raise its issues. Therefore, all three prongs of *Younger* abstention are satisfied, and the Court must abstain in this proceeding.

If the Tribe attempts to argue that the state court does not provide an adequate opportunity to litigate its issues, this allegation should carry no weight before this Court. As the *Pennzoil* court directed:

> denigrations of the procedural protections afforded by [state] law hardly come from [plaintiff] with good grace, as it apparently made no effort under [state] law to secure the relief sought in this case. Where a litigant has not attempted to present his federal claim in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.

Pennzoil, 481 U.S. at 15. The Tribe can offer no evidence that the state court cannot provide an adequate forum to hear its defenses to C&W's efforts to collect. Accordingly, abstention is appropriate in this matter.

The Ninth Circuit examined a case very similar to the case at bar and dealt with many of the same issues that this Court is currently facing. In *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244 (9th Cir. 1992), a federally recognized tribe had entered into a contract with a private party regarding the construction of a casino. *Id.* at 246. The contract called for arbitration before the American Arbitration Association. *Id.* at 247. When a dispute arose between the parties, the contractor instituted AAA arbitration. *Id.* The tribe, however, failed to participate in the arbitration. It appeared specially to argue that the AAA lacked jurisdiction over the Tribe. *Id.* The arbitrator found that he/she had jurisdiction over the tribe and ruled against the Tribe on the merits of the dispute, albeit without the tribe's participation in the merits of the hearing. *Id.* The contractor then proceeded to state court to confirm the arbitration award. *Id.* The tribe again appeared specially to contest jurisdiction, but the state court found that it properly had jurisdiction and confirmed the award. *Id.* During this same time frame, the tribe brought an action in federal court seeking a temporary restraining order seeking to enjoin enforcement of the arbitration award. The federal court denied the motion and dismissed the action. *Id.* at 247-48. The tribe appealed to the Ninth Circuit.

The Ninth Circuit ruled that the state court judgment confirming the arbitration award was final and binding on the federal court pursuant to the full faith and credit clause. *Id.* at 250-

51. The court further held that under the doctrine of *Younger* abstention the federal court would be prohibited from interfering in state court proceedings regarding enforcement of the judgment. *Id.* at 253. The court wrote:

> First of all, enforcement would have to be sought from the [state] courts, and they could consider the [tribe]'s arguments. Second even if enforcement were sought it would be exceedingly disruptive were we to step in. As the Supreme Court has insisted, we should not interfere with state court proceedings. **That is even so where the effect of those proceedings might be disastrous for one of the parties.** *See Pennzoil v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987)… Instead of taking advantage of the obvious opportunity to seek state appellate review of that judgment, [the tribe] has tried to take its appeal to the federal courts. It cannot.

Id. at 253. (emphasis supplied). Here, C&W has sought to enforce its judgment in state court, as it must. As in *Borneo,* the state court is available to hear the arguments of the Tribe. Moreover, the federal court cannot step in despite the Tribe's assertion that C&W's collection efforts will produce dire financial consequences for the Tribe. The prudential doctrines of abstention and res judicata bar the federal court's involvement. *Id.* at 254.

IV. Even if this Court Finds that it has Jurisdiction Over this Matter, the Tribe's Motion Should be Denied on the Merits.

The Tribe contends that C&W's collection efforts in this case are "brazenly illegal." *See Plaintiff's Legal Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order,* p. 3 (doc. 85). This is simply not the case. C&W has attempted to collect monies that it is owed on a valid state court judgment by levying on off-reservation assets of the Tribe. C&W has not tried to reach into the sovereign lands of the reservation and have its judgment enforced. Instead, it has limited its efforts to those assets that the Tribe has chosen to locate off-the reservations in other jurisdictions. C&W has followed the law and procedures of those jurisdictions in seeking to collect the money it is entitled to and any assertion that it has acted illegally is unsupported.

The Tribe's primary authority in support of its contention that C&W is acting in violation of federal law is the Tenth Circuit's decision *Joe v. Marcum,* 621 F.2d 358 (10th Cir. 1980). That case, however, does not control the issue before this Court. In *Joe v. Marcum,* the creditor attempted to garnish wages of the debtor by serving a garnishee summons on the debtor's on-reservation employer. *Id.* at 360. The court held that allowing the garnishment proceeding to stand would impugn tribal sovereignty. *Id.* at 361. The court noted that under the laws of the Navajo Tribe, garnishment of wages was not permitted. *Id.* The court stated, "the basic tenet of the Navajo Treaty of 1868 is that the Navajo Tribe is a sovereign entity and that *upon the reservation,* the tribe possesses the right of self government. *Id.* (emphasis supplied). The court further recognized that the garnishment res was located on the reservation and that the garnishee was served on the reservation. *Id.*

Here, C&W is seeking to recover from *off-reservation* assets. Furthermore, the United States Court of Appeals for the Eighth Circuit has explicitly ruled that the state court has jurisdiction over the Tribe and that the Tribe waived its sovereign immunity. Therefore, allowing C&W to collect on its judgment by looking to off-reservation in no way "impugns tribal sovereignty" as the court found in *Joe v. Marcum.*

The Tribe's reliance on *Annis v. Dewey County Bank,* 335 F.Supp. 133 (D.S.D. 1971) is likewise misplaced. As in the case of *Joe v. Marcum,* the judgment creditor there was attempting to enforce its state court judgment on the Indian reservation. *Id.* Here, C&W is doing nothing of the sort.

Additionally, the Tribe's reliance on *One Feather v. Oglala Sioux Tribe Public Safety Commission,* 482 N.W.2d 48 (S.D. 1992) is unavailing. In *One Feather,* the plaintiff was attempting to collect on a tribal court judgment in state court against restricted funds that the

tribal court had previously ruled that the plaintiff could not levy against. *Id.* The South Dakota Supreme Court ruled that the state court could not recognize the tribal court judgment and then reverse the tribal court's decision regarding whether certain funds were available for levy by the plaintiff. *Id.* The court stated that once an order or judgment is recognized under the principles of comity, the state court cannot thereafter directly or indirectly reverse or vacate that order or judgment.

One Feather does not present a bar to C&W's action in this case. C&W is not attempting to enforce its judgment in tribal court and thus the issues of comity do not apply. Moreover, C&W is not seeking to have any court reverse or vacate any order of the State of South Dakota in its attempts to enforce its judgment. Unlike the plaintiff in *One Feather,* C&W is not attempting to rely on its South Dakota judgment while at the same time challenging any ruling attendant to that judgment. C&W's conduct in this matter is wholly consistent with all rulings from the jurisdiction providing its judgment.

Pursuant to Fed. R. Civ. P. 69, this Court applies South Dakota law in determining whether C&W's collection efforts are proper. That rules provides:

> A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution--and in proceedings supplementary to and in aid of judgment or execution--must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

Fed. R. Civ. P. 69(a). C&W has complied with South Dakota law in its efforts to collect on its judgment and any assertion to the contrary is unpersuasive.

South Dakota law that provides that property held by a municipality or county is exempt from execution. *See* SDCL § 7-18-7, SDCL § 9-24-6. The Tribe, however, is not a municipality or a county and thus cannot avail itself of the protection afforded by these statutes. Even assuming that the Tribe could establish that assets of a tribal government are immune from

execution, the Tribe has contractually waived its immunity in this instance. Three of the contracts at issue in this case contain an explicit waiver of tribal sovereign immunity which clearly extends to execution efforts. Specifically, the contracts contain the following clause:

> As a condition precedent to the parties being bound by the terms and conditions of this Contract, the Oglala Sioux Tribe of the Pine Ridge Reservation shall pass a resolution stating in material respects the following: (1) for the purpose of insuring the successful completion of the work and related matter, in order to provide the greatest social and economic benefits for the Oglala Sioux Tribe, the Oglala Sioux Tribe grants a limited wavier 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…

See Exs. E, F, and G to Tribe's Complaint (Doc. 1). This waiver expressly states that it is made by the Tribe as a whole and not merely the Transportation Department of Tribe, and thus the assets of the Tribe as a whole, and not merely those of the Transportation Department, are subject to execution. Furthermore the waiver clearly states that it extends the Tribe and Transportation's Department's specific contractual obligations. It is these contractual obligations that were the subject of the arbitration between the parties, and C&W was awarded damages solely under these contracts by the arbitrator. Thus, the monies that C&W is attempting to collect fit squarely within the bounds of the Tribe's waiver of sovereign immunity. Moreover, the contracts explicitly reference enforcement of these rights by the subcontractor, C&W, and such enforcement is not limited in any way, such as to specific assets of the Tribe. Additionally, given the Eighth Circuit ruling that the Tribe waived sovereign immunity on the fourth contract, it should be treated just like the others.

By contracting for arbitration and explicitly waiving sovereign immunity to "the extent necessary to permit enforcement by the [C&W]," the Tribe cannot now seek to avoid paying the

arbitration award by contending that its assets are immune from execution. *See Cherokee Nation v. Nations Bank, N.A.*, 67 F.Supp.2d 1303 (E.D. Okla. 1999) (finding that tribe was not immune from state court garnishment proceedings); *Ledford v. Housing Authority of the Sac & Fox Tribe of Missouri*, 609 F.Supp. 211 (D.Kan. 1985) (holding that mechanics lien was available to contractor under Kansas law because of housing authority's contractual waiver of sovereign immunity). The Tribe has clearly and unequivocally waived any such immunity. If the Tribe had sought to limit enforcement to a particular source of funds, it likely could have done so under the law, but did not. *See Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848 (8th Cir. 2001) (holding that tribal waiver of sovereign immunity that limited entry of judgment and execution to property or profits from specific casino was enforceable); *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 517 F.2d 508 (8th Cir. 1975) (finding that tribal organization did not relinquish general immunity from levy and execution but did contractually relinquish such immunity as to all funds received from HUD). Arguably, the Tribe may have even been able to exclude all it assets from execution and levy. *See Maryland Casualty Co. v Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 520 (5th Cir. 1966) (holding that tribe was immune from garnishment proceedings because its waiver of immunity contained within its bylaws was expressly qualified and excluded from the waiver the levy of any judgment, lien or attachment against tribal property). In this instance, however, the Tribe unconditionally waived sovereign immunity and granted C&W the right to enforce such waiver without reservation. Therefore, the Tribe's motion seeking to enjoin these state court proceedings should be denied.

C&W recognizes that "state officials have no jurisdiction on Indian reservations either to serve process on an enrolled Indian or to enforce a state judgment." *Annis v. Dewey County*

Bank, 335 F.Supp. 133, 136 (D.S.D.1971); *Martin v. Denver Juvenile Ct.,* 177 Colo. 261, 493 P.2d 1093 (Colo 1972). C&W further acknowledges that an Indian reservation constitutes a sovereign nation separate from a state and a " 'reservation Indian's domicile on the reservation is not an in-state contact which grants jurisdiction to state courts.' " *Byzewski v. Byzewski,* 429 N.W.2d 394, 397 (N.D.1988) (quoting *State ex rel. Flammond v. Flammond,* 190 Mont. 350, 621 P.2d 471, 473 (Mont 1980)). In this instance, however, C&W is merely attempting to enforce a state court judgment as to off-reservation assets by state court executions. Such procedure is proper. *See Dixon v. Picopa Construction Co.,* 772 P.2d 1104, 1113, n.15 (Ariz. 1989) (recognizing that state court judgments against tribal entities have to be enforced either in tribal court *or* by execution or garnishment against the defendant's off-reservation assets); *Wippert v. Blakfeet Tribe,* 654 P.2d 512 (Mont. 1982) (state court may enforce a tribal court judgment outside the exterior boundaries of an Indian reservation).

The state court clearly has authority to enforce its judgment. It has been a long standing doctrine that any court having jurisdiction to render a judgment also has the power to enforce that judgment through any order or writ necessary to carry its judgment into effect. *See Riggs v. Johnson County,* 6 Wall. 166, 18 L.Ed. 768 (1868). In *Riggs*, the United States Supreme Court stated:

> [j]urisdiction is defined to be the power to hear and determine the subject matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree. . . Express determination of this court is that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment is satisfied.

Id. Specifically with regard to executions, the United States Supreme Court instructed:

> [t]he award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and

> nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties.

See Pam-to-Pee v. United States, 187 U.S. 371, 383 (1902). Here, the state court had jurisdiction to enter the judgment and certainly has the authority to enforce it within its jurisdiction. Absent that authority, the state court judgment would be a nullity.

The Montana Supreme Court was faced with the opposite situation to the one presented here. In *Anderson v. Engelke,* 954 P.2d 1106, 1110 (Mont. 1998), the court was confronted with the question of whether a Montana state court could enforce a tribal court judgment within the exterior bounds of the reservation via state law and state execution proceedings. *Id.* The court held that the state lacked such authority and ruled that the judgment creditor would have to utilize tribal court enforcement procedures to collect its tribal court judgment within the bounds of the reservation. *Id.* The court commented, "[i]t is axiomatic that a court has the power to enforce its judgments within its own jurisdiction." *See Anderson v. Engelke,* 954 P.2d 1106, 1110 (Mont. 1998). "However, no legal judgment has any effect, of its own force, beyond the limits of sovereignty from which its authority is derived. Because state and Indian tribes coexist as sovereign governments, they have no direct power to enforce their judgments in each other's jurisdictions." *Id.*

The teaching from *Anderson* is that in order to execute on these off-reservation assets of the Tribe to enforce its state court judgment, C&W was required to utilize state court executions. Just as state court enforcement proceedings have no force in Indian Country, tribal court enforcement mechanisms have no power off the reservation. Thus, C&W has attempted to execute on these off-reservation assets by using the only means available to it, i.e. state court

enforcement proceedings. Clearly the state court is the proper forum to issues these executions, and its jurisdiction to do so is apparent.

In essence, the Tribe is arguing to this Court that C&W cannot collect on assets that are tied to the reservation in any significant way. Given that the debtor in this case is the Tribe itself, this argument proves too much. Presumably, all funds held by the Tribe, whether on-reservation or off, are linked to the reservation in some manner. If C&W were prohibited from executing on any such assets, then its judgment would be a nullity. This simply cannot be the case.

CONCLUSION

As the Supreme Court recognized in *C & L Enterprises*, 532 U.S. at 422, 121 S.Ct. 1589, there is "a real world objective" to the contracts that C&W and the Tribe signed. *Id.* The arbitration clauses provided therein were intended to provide relief to the aggrieved party upon breach by the other party. They were "not designed for regulation of a game lacking practical consequences." *Id.* "And to the real world end, the contract[s] specifically authorize[d] judicial enforcement of the resolution arrived at through arbitration." *Id.* We are now at that point in this long and tortured journey. C&W prevailed at the arbitration more than two years ago and successfully had that award confirmed and a judgment entered upon it in state court. The Eighth Circuit has confirmed that the state court had jurisdiction and that its judgment is valid. It is now time for the Tribe to face the "real world end" envisioned when the contract was executed, i.e. it is time for the Tribe to pay C&W the monies caused by its breach of the construction contracts. Any other result would allow the Tribe to "with impunity, thumb its nose at authority to which it had voluntarily acquiesced. Sovereignty does not extend so far." *Oglala Sioux Tribe v. C&W Enterprises*, 542 F.3d 224 (8th Cir. 2008).

WHEREFORE, C&W Enterprises respectfully requests that the Oglala Sioux Tribe's motion for an injunction be denied and that this Court dismiss this action with prejudice.

Dated this 31st day of May, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **Defendant's Brief in Resistance to Tribe's Request for an Injunction** was served electronically upon the following:

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