UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ALLTEL COMMUNICATIONS, L.L.C.,	)	
Plaintiff,	)	CIV. No. 10-5011
v.	)	DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS
OGLALA SIOUX TRIBE,	)	
Defendant.	)	

Comes now Defendant Oglala Sioux Tribe, by and through counsel undersigned, and in support of its Motion to Dismiss, respectfully shows the Court as follows:

ARGUMENT

I. The Tribe Gave Only A Limited Consent To Suit In Federal Court, Applicable Solely To Suits Brought By The Original Contracting Parties Against Each Other.

It is well established that a Tribe's waiver of sovereign immunity from suit "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir.), *cert. denied*, 516 U.S. 819 (1995). This principle applies with equal force to contract actions. *See American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (2d Cir. 1965) (rejecting, on the basis of overwhelming precedent alone, district court's conclusion that tribal sovereign immunity "need not be expressly waived, but can be waived by implication, in contract actions"). As the Eighth Circuit recognized in *American Indian Agricultural Credit*,

"Indian tribes have long structured their commercial dealings upon the justified expectation that absent an express waiver their sovereign immunity stood fast":

> Relaxation of the settled standard invites challenge to virtually every activity undertaken by a tribe on the basis that the tribal immunity has been implicitly waived. Moreover, a waiver of immunity by tribal action represents a substantial surrender of sovereign power and therefore merits no less scrutiny than a waiver based on congressional action. As the Fifth Circuit stated, "To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and the property of tribes * * *." *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918, 17 L. Ed. 2d 143, 87 S. Ct. 227 (1966).

780 F.2d at 1378. Thus, despite the observation that "the express waiver standard can unfairly deprive contracting parties of the benefit of their bargains," the Eighth Circuit in *American Indian Agricultural Credit* held that, even in contract actions, "*Santa Clara Pueblo* and its lineage compel us to conclude that nothing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation." *Id.* at 1379.

Furthermore, waivers of tribal sovereign immunity "are to be strictly construed in favor of the Tribe." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995); *accord, Ransom v. St. Regis Mohawk Education and Community Fund, Inc*., 86 N.Y.2d 553, 561, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995); *see also Seneca-Cayuga Tribe. v. Oklahoma*, 874 F.2d 709, 715 (10th Cir. 1989) ("While tribal sovereign immunity is not absolute, waivers of sovereign immunity are strictly construed."). Because a waiver of immunity "'is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d at 1378 (quoting *Beers v. Arkansas*, 61 U.S.

527, 529 (1857)); *see also Oglala Sioux Tribe v. C&W Enterprises, Inc.*, 542 F.3d 224, 231 (8th Cir. 2008) ("A sovereign tribe has full authority to limit any waiver of immunity to which it consents."). "In addition, if a tribe 'does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied.'" *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001), *cert. denied*, 535 U.S. 1053 (2002) (quoting *Namekagon Dev. Co. v. Bois Forte Reservation Housing Auth.*, 517 F.2d 508, 509 (8th Cir. 1975)).

In this case, the contract contains a limited waiver of the sovereign immunity of the Tribe to allow certain court actions. Thus, Paragraph 17(A) provides as follows:

> Nothing in this Agreement shall be deemed to be a waiver of the OGLALA SIOUX TRIBE's sovereign immunity from suit, except that the OGLALA SIOUX TRIBE hereby provides a limited waiver of sovereign immunity and consents to be sued should an action be commenced to determine and enforce the obligations of the Parties under this Agreement or the Other Agreements, and provided further that the OGLALA SIOUX TRIBE's consent to suit is only as to arbitration and court action initiated consistent with this Agreement and the Other Agreements. OGLALA SIOUX TRIBE agrees not to take any action that would result in the revocation or modification of the limited waiver granted by this Paragraph 17.

Service Agreement, ¶ 17(A).

Thus, Paragraph 17(A) states that the Tribe has made "a *limited* waiver of sovereign immunity," that it "consents to be sued should an action be commenced to determine and enforce *the obligations of the Parties* under this Agreement or the Other Agreements," and that the Tribe's consent to suit "is *only as to* arbitration and *court action initiated consistent with this Agreement* and the Other Agreements." (Emphasis added.) Otherwise, "[n]othing in this Agreement shall be deemed to be a waiver of [the Tribe's] sovereign immunity from suit[.]"

A "limited" waiver is one that is "[r]estricted; bounded; prescribed," "[c]onfined within positive bounds," or "restricted in duration, extent or scope." *See* Black's Law Dictionary 1077 (4th ed. 1968) (definition of "limited"). One such "restriction" or "positive bound" is that the Tribe's waiver of sovereign immunity and consent to suit is "only as to . . . court action initiated *consistent with"* the Service Agreement. "Consistent with" means in harmony with. Black's Law Dictionary 381 (4th ed. 1968). Thus, the terms of the Service Agreement, including its arbitration clause, must be examined to determine whether Alltel's federal court action is consistent with or in harmony with the Service Agreement.

Paragraph 17(A) of the Service Agreement provides that the Tribe "consents to be sued should an action be commenced to determine and enforce *the obligations of the Parties* under this Agreement[.]" Service Agreement, ¶ 17(A) (emphasis added). The term "Parties" is defined by the Service Agreement as follows: "Western Wireless and OGLALA SIOUX TRIBE are sometimes referred to individually as a '**Party'** and collectively as the '**Parties**.'" Service Agreement, p. 1, Introductory Paragraph (emphasis in original). Thus, the term "Parties" is not defined as including successors or assigns of a Party, but rather refers solely to the original contracting parties themselves. Furthermore, Paragraph 17(B) specifically provides for "the right of either Party" to bring suits for "Ancillary Remedies." Service Agreement, ¶ 17(B). Finally, Paragraph 17(C) provides for enforcement of judgments "through other courts as necessary to enforce the Party's rights against the judgment Party's properties and assets." Service Agreement, ¶ 17(C).

Thus, when the "limited" waiver of sovereign immunity set forth in Paragraph

17(A) of the Service Agreement, as well as the conditional limitations imposed on that consent to suit, are strictly construed in favor of the Tribe, it can readily be seen that the waiver only allows suits brought by one original contracting party against the other original contracting party. Nothing in Paragraph 17 clearly, unequivocally, or explicitly allows an assignee to bring an action against the Tribe. In particular, Paragraph 17 cannot be read to allow an assignee to bring an action against the Tribe to compel compliance with the arbitration clause, since that clause only applies to disputes, claims or controversies "between them [, i.e., the original contracting Parties]." Service Agreement, ¶ 17(B).

Nor can a waiver of sovereign immunity be implied from the clause of the contract governing assignments. Paragraph 20 (J) of the Service Agreement provides as follows:

> Assignment by Western Wireless. Subject to OGLALA SIOUX TRIBE's approval, which shal1 not be unreasonably withheld or delayed, Western Wireless may assign this Agreement upon written notice to OGLALA SIOUX TRIBE, to any person controlling, controlled by, or under common control with Western Wireless, or any person or entity that, after first receiving all necessary regulatory agency approvals, acquires Western Wireless's radio communications business and assumes all obligations of Western Wire1ess under this Agreement. Upon such assignment, Western Wireless shall be relieved of all liabilities and obligations hereunder and assignee shall assume all liabilities and obligations hereunder. OGLALA SIOUX TRIBE shall look solely to the assignee for performance under this Agreement and all obligations hereunder unless OGLALA SIOUX TRIBE reasonably determines that the assignee is not of equal or substantially similar credit worthiness. Western Wireless may otherwise assign this Agreement upon written approval of OGLALA SIOUX TRIBE, which approval shall not be unreasonably withheld or delayed.

Service Agreement, ¶ 20 (J).

Nothing in Paragraph 20 (J) either expressly or clearly and unequivocally provides that an assignee of Western Wireless will have the benefit of the waiver of sovereign

immunity and consent to suit contained in Paragraph 17(A). Paragraph 20(J) merely provides that an "assignee shall assume all liabilities and obligations hereunder." It could be implied from this language that, since the assignee is bound by the obligations of the Service Agreement, it also obtains the benefits thereof, including the benefit of the Tribe's waiver of sovereign immunity and consent to suit set forth in Paragraph 17(A). Such a construction, however, would necessarily imply a waiver of the sovereign immunity of the Tribe that exceeds the "limited" express waiver of tribal sovereign immunity set forth in Paragraph 17 of the Service Agreement, which express waiver only applies to the original contracting parties. Such a waiver, or extension of a waiver, by implication is not permitted, even in contract cases.

Furthermore, Paragraph 17(A) expressly provides that "[n]othing in this Agreement shall be deemed to be a waiver of the OGLALA SIOUX TRIBE's sovereign immunity from suit [except the limited waiver set forth in Paragraph 17]." Service Agreement, ¶ 17(A). The word "deemed" is used in the sense of "construed." *See* Black's Law Dictionary 504 (4th ed. 1968) (defining "deem" as meaning "[t]o hold; consider; adjudge; condemn; determine; treat as if; *construe*") (emphasis added). Consequently, nothing in Paragraph 20 (J), allowing assignments of the contract by Western Wireless, can be "deemed" or construed to constitute a waiver of the Tribe's sovereign immunity so as to allow an assignee to sue the Tribe to enforce its obligations under the Service Agreement.

With regard to construction of the contract in question here, the Service Agreement provides that "[t]his Agreement will be construed according to OGLALA SIOUX TRIBE and federal laws, or in the absence of such laws, the laws of the State shall be used as guidance, without giving effect to conflict of law principles." Service

Agreement, ¶ 20(D). In interpreting a contract, a court seeks to ascertain and give effect to the intention of the parties; at the same time, to find the intention of the parties, the court relies on the contract language they actually used. *Carstensen Contracting, Inc. v. Mid-Dakota Rural Water Sys., Inc.*, 653 N.W.2d 875, 877 (S.D. 2002). To ascertain the intent of the parties to a contract, a court relies on the contract's language and must attempt to give meaning to all of the provisions of the contract. *Prunty Construction, Inc. v. City of Canistota*, 682 N.W.2d 749, 755 (S.D. 2004).

The intent of the parties to the Service Agreement as expressed in Paragraph 17 was to provide only a limited waiver of tribal sovereign immunity to provide for court actions between the original contracting parties. To extend that waiver by implication to allow assignees to bring an action against the Tribe would be contrary to that expressed intent.

In sum, as a purported assignee of Western Wireless, Alltel cannot bring an action in federal district court to compel the Tribe to arbitrate disputes arising between Alltel and the Tribe, as any action to compel such arbitration (1) does not fall within the bounds or restrictions of the Tribe's limited waiver of immunity set forth in Paragraph 17 of the Service Agreement and is therefore barred by tribal sovereign immunity and (2) is contrary to and not "consistent with" the terms of the Service Agreement, as properly construed.

II. Because The Tribe Did Not Consent To The Assignment From Western Wireless to Alltel, Any Waiver of Sovereign Immunity To Allow Suits By Assignees Against The Tribe Does Not Apply To Alltel.

Even assuming that the limited waiver of sovereign immunity set forth in Paragraph 17 would permit an action by an assignee against the Tribe to enforce its obligations under the Service Agreement, including the obligation to engage in arbitration,

enforcement of an arbitration clause by an assignee against one of the original contracting parties requires a valid assignment. *See I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986) (assuming a valid assignment, assignee could enforce an arbitration provision entered into by the assignor); *Nissan Motor Acceptance Corp. v. Ross*, 703 So.2d 324, 326 (Ala. 1997) (because a valid assignment gives the assignee the same benefits, rights, and remedies that the assignor possesses, Nissan, as an assignee, had the right to compel arbitration).

In this case, the assignment by Western Wireless to Alltel is not valid because Western Wireless did not first obtain the approval of the Tribe for the assignment as required by Paragraph 20 (J) of the Service Agreement. Paragraph 20 (J) provides that Western Wireless's right to assign the agreement is "subject to" the Tribe's approval, or that it may assign the agreement "upon the written approval" of the Tribe. "Subject to" means subservient or subordinate to and embodies the command that the act shall not be effective until the condition is complied with. *State ex rel. Nagle v. Stafford*, 97 Mont. 275, 289, 34 P.2d 372, 379 (1934). Thus, it has been held that where certain acts of parties are made by contract "subject to approval" or "subject to confirmation," the language creates a condition precedent and the contract is not complete until such approval or confirmation is secured. *Johnston v. Landucci*, 21 Cal. 2d 63, 69, 130 P.2d 405 (1942) (collecting cases). In this case, the "subject to" language created a condition precedent, and the assignment of the Service Agreement by Western Wireless to Alltel was therefore not complete or valid until the Tribe's approval was secured. Since the Tribe's approval was never secured for the assignment, the assignment was invalid, passed nothing to Alltel, and Alltel does not possess the right, as an assignee, to bring a

court action to compel the Tribe to submit to binding arbitration of disputes.

Consequently, since Alltel did not receive a valid assignment of the Service Agreement, any waiver of tribal sovereign immunity to allow suits by assignees to enforce the obligations of the Tribe does not apply to Alltel. Thus, the Tribe did not waive its sovereign immunity so as to allow Alltel to suit the Tribe in federal court.

CONCLUSION

The Tribe enjoys sovereign immunity from suit in this case, because (1) the limited waiver and consent to suit set forth in Paragraph 17(A) of the Service Agreement applies solely to actions brought by the original contracting parties against each other, and (2), even if the limited waiver applied to allow assignees of Western Wireless to sue the Tribe, Alltel did not receive a valid assignment because the Tribe never approved the assignment. The Tribe's Motion to Dismiss should therefore be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a on this 30th day of March, 2010, I served a true and correct copy of the Motion to Dismiss and Brief in Support of Motion to Dismiss via United States District Court ECF filing system to the following:

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