

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 C & L ENTERPRISES, INC., :

4 Petitioners :

5 v. : No. 00-292

6 CITIZEN BAND POTAWATOMI :

7 INDIAN TRIBE OF OKLAHOMA. :

8 - - - - -X

9 Washington, D.C.

10 Monday, March 19, 2001

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:05 a.m.

14 APPEARANCES:

15 JOHN D. MASHBURN, ESQ., Oklahoma City, Oklahoma; on behalf
16 of the Petitioner.

17 GREGORY S. COLEMAN, ESQ, Solicitor General of Texas,
18 Austin, Texas; on behalf of Texas, as amicus curiae,
19 supporting the Petitioner.

20 MICHAEL MINNIS, ESQ., Oklahoma City, Oklahoma; for
21 the Respondent.

22 GREGORY G. GARRE, ESQ., Assistant to the Solicitor
23 General, Department of Justice, Washington, D.C.;
24 on behalf of the United States, as amicus curiae,
25 supporting the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We'll hear argument now
3 in Number 00-292, C & L Enterprises v. the Citizen Band
4 Potawatomi Indian Tribe of Oklahoma. Mr. Mashburn.

5 ORAL ARGUMENT OF JOHN DAVID MASHBURN

6 ON BEHALF OF THE PETITIONERS

7 MR. MASHBURN: Mr. Chief Justice, and may it
8 please the court:

9 The Potawatomi Indian Tribe on August 25th,
10 1993 presented a contract to C & L Enterprises for the
11 construction of a roof upon a bank building that the tribe
12 was building off of the reservation.

13 The contract contained an arbitration provision
14 specifically adopting the rules of the American
15 Arbitration Association and also specifically providing
16 that the award, the arbitration award in such proceedings,
17 would be enforceable by judgment.

18 There is no question that the arbitration
19 agreement provided that the tribe waived its immunity as
20 to the American Arbitration Association and its
21 arbitration proceedings. There is no --

22 QUESTION: Well, but it didn't use the magic
23 phrase. It didn't say waive immunity.

24 MR. MASHBURN That's correct, Your Honor. And
25 we believe the standard, that no standard has required

1 that it specifically state we waive sovereign immunity.
2 Rather they clearly stated we agree to be brought into the
3 American Arbitration Association and to be subject to
4 arbitration, a binding arbitration.

5 They went further than that and they said in the
6 agreement we agree that a judgment may be entered upon
7 that.

8 QUESTION: I understand.

9 MR. MASHBURN: And the ambiguity that the
10 respondent attempts to raise is regarding which court is
11 being referred to where the phrase recites any court of
12 competent jurisdiction.

13 However, we believe that that argument of
14 ambiguity fails for four reasons. First, the American
15 Arbitration Association Rule 47C, which is incorporated by
16 the very terms of the clause, states that awards under
17 their procedures may be enforced as a judgement in any
18 federal or state court.

19 The contract itself selects Oklahoma law as
20 governing law in addition to this Court's rulings in
21 Mescalero, Oklahoma Tax Commission v. Potawatomi Organized
22 Village of Cocky. All of those saying that when the tribe
23 goes off the reservation, it is subject to the substantive
24 laws of the state.

25 The third reason is the Tribal Court is not

1 mentioned anywhere in the contract. And the fourth reason
2 is we don't believe the Tribal Court would have had
3 jurisdiction to even hear this case under the ruling in
4 Montana v. United States because it is undoubtedly non-
5 Indian not on the reservation.

6 QUESTION: But, what if the non-Indian brought
7 the suit in the Tribal Court? Why wouldn't it have
8 jurisdiction?

9 MR. MASHBURN: Because despite --

10 QUESTION: You must be suing on the arbitration
11 order. It seemed to me you agreed on the objection of
12 tribal jurisdiction if you brought the suit.

13 MR. MASHBURN: We believe that that type of
14 jurisdiction is in fact subject matter jurisdiction
15 because under the ruling in Montana v. United States, the
16 court indicated that tribes don't have jurisdiction to
17 hear matters unless it's been specifically given to them
18 by the Constitution or statute.

19 QUESTION: But, there's a consensual exception
20 to Montana too, is there not, where there's a consensual
21 transaction between the tribe and a non-Indian?

22 MR. MASHBURN: Yes, Mr. Chief Justice. One of
23 the two exceptions that are carved out under Montana is
24 for a party that enters into a consensual agreement.

25 However, Montana doesn't even get to, we

1 believe, those exceptions until you find that it's on
2 reservation activity. All of the activity discussed in
3 Montana and in the cases we've reviewed following that
4 regard on reservation activity.

5 QUESTION: Now, if the very same clause were in
6 a contract that your client entered into with a state, do
7 you think that we would have found a waiver of Eleventh
8 Amendment immunity?

9 MR. MASHBURN: Yes. But, the question is more
10 difficult and if I could explain.

11 QUESTION: I would have thought we wouldn't,
12 that our cases would have said not, that wouldn't be
13 enough to waive sovereign immunity.

14 MR. MASHBURN: Under this Court's ruling in
15 Edelman v. Jordan regarding Eleventh Amendment immunity,
16 the Court stated that the rule is that the waiver, and
17 again this one applies, as you know, to Eleventh Amendment
18 immunity from suit in federal court, but the courts even
19 there stated that the ruling regarding whether a provision
20 waives such immunity is that it must be stated by the most
21 express language or by such overwhelming implications from
22 the text as will leave no room for any other reasonable
23 construction.

24 And in this situation, under the same
25 circumstances, we believe that that standard would find a

1 waiver because there is no other reasonable construction
2 of this clause when you take what the clause incorporates.

3 And in fact, in this Court's ruling in Port
4 Authority v. Feeney, and subsequently in Kimmel v. Florida
5 Board of Regents, the Court recognized that the consent
6 provision may look to other provisions. In the Port
7 Authority, it looked to a venue provision. And in Kimmel,
8 it looked for an ADA claim; it looked to the Fair Label
9 Standards Act and found--

10 QUESTION: Well, do you concede, Mr. Mashburn,
11 that an Indian tribe has the same sort of immunity as the
12 state under the Eleventh Amendment?

13 MR. MASHBURN: No, Mr. Chief Justice, we do not.
14 We believe that that is peculiar to the states and that
15 that at the very most is the highest standard that this
16 Court should apply and we don't believe that that is
17 appropriate for an Indian tribe.

18 QUESTION: Well, in some ways, Indian tribes
19 have been given more immunity than states, hasn't that
20 been the --

21 MR. MASHBURN: There is some discussion of that
22 in the dissenting opinion in Cairo that it appears that
23 that's what the Court is doing. We don't believe that
24 that's what the Court intended to do. And certainly, we
25 don't believe that that's the rule that should be followed

1 here.

2 We believe that the Court should find a waiver
3 if there is simply a clear statement that using the usual
4 rules of contract construction that the tribe agreed that
5 upon a breach it could be brought to court and sued for
6 the breach of that contract.

7 QUESTION: Mr. Mashburn, as this respects
8 foreign sovereigns, Congress in 1988 made the specific
9 provision that if you agreed to an arbitration dispute
10 settlement mechanism, then you have no immunity. The
11 Congress did that by statute and doesn't that imply that
12 when Congress doesn't do it by statute, the immunity
13 persists?

14 MR. MASHBURN: No, Your Honor, we don't believe
15 that it does. First of all, we believe that a distinction
16 has to be drawn. In that instance, Congress was
17 attempting to bring some uniformity to a variation of
18 rules that had been applied.
19 And in fact, as this Court recited the history of
20 foreign sovereign immunity in the Cairo case, there had
21 been a move from virtually no immunity to virtually total
22 immunity under I believe it was the Tate Letter. And
23 then, shrinking back from that, and then applying implied
24 consent from commercial operations.

25 We don't believe that the fact that they acted

1 there to specifically provide that as a waiver indicates
2 where they have not acted that there is no waiver. And in
3 fact, we believe the Court can take guidance from the
4 Foreign Sovereign Immunities Act and from cases leading up
5 to that finding waivers from entering into commercial
6 relations, or in particular arbitration agreements, and
7 find that that is within the appropriate policy that the
8 United States has followed.

9 QUESTION: You don't take the position do you,
10 maybe you do, that any arbitration agreement necessarily
11 implies the waiver of sovereign immunity?

12 MR. MASHBURN: No, Your Honor, I believe you
13 have to look to the specific term here in the arbitration
14 agreement.

15 QUESTION: You're dealing with this one.

16 MR. MASHBURN: That's correct. But, as a
17 general rule, we believe that if the arbitration
18 agreement, first of all, if it incorporates rules, as this
19 one does from the American Arbitration Association, then
20 we think it's perfectly appropriate for the Court to look
21 to those rules and the parties are both on notice that
22 those rules are going to govern the procedures. We also
23 believe --

24 QUESTION: Well, the Foreign Sovereign
25 Immunities Act, of course, was just tracking developments

1 in international law that had generally allowed suit on
2 commercial transactions by states. Why do you think it's
3 open to us to apply such a rule to the sovereign immunity
4 of Indian tribes, which we made up ourselves anyway,
5 right?

6 MR. MASHBURN: That's correct, Your Honor. And
7 it is correct that it was simply a codification of what
8 was the emerging case law in the field. It certainly is
9 appropriate for this Court to draw a waiver rule as
10 lenient as the Foreign Sovereign Immunity Rule, and
11 certainly no more strict than the Eleventh Amendment
12 Waiver Rule. And this Court has complete authority to do
13 that because, as Your Honor has stated, this Court
14 recognized in Cairo that it is a court created doctrine.
15 Especially in the context that it tends to impinge on the
16 state's rights and be court created, we believe there's
17 even more argument for the Court to move cautiously in;
18 certainly in expanding any immunity that has been afforded
19 to Indian tribes.

20 QUESTION: Mr. Mashburn, even if you could --
21 you've agreed the agreement is saying yes, they agreed for
22 arbitration. That's explicit right out there that but
23 they are going to resolve this through arbitration. But,
24 where do you get tied to that, that the Court to enforce
25 the arbitration award would be a state court? There is no

1 explicit agreement due to that by the tribe, is there?

2 MR. MASHBURN: No, Your Honor, we believe that
3 there is and the reason that there is is because first of
4 all it adopts the American Arbitration Association rule
5 which says the award may be enforced in state or federal
6 court.

7 Secondly, it adopts Oklahoma's Arbitration Act,
8 which says that the award may be enforced in any court of
9 the state. And we believe when you combine that with the
10 fact that, in our opinion, the Tribal Court would have had
11 jurisdiction, there is no ambiguity that the court that is
12 being selected is not the Tribal Court.

13 So, the only other alternative would be to argue
14 that the term, that the provision was meaningless and that
15 it was selecting no court. But, we don't even believe
16 that that argument holds water because the parties had
17 adopted Oklahoma law specifically. The parties have
18 adopted the American Arbitration Association rules.
19 And under both of those bodies of law, the forum
20 is either, you know, from a state court or a federal
21 court, not the Tribal Court.

22 QUESTION: The reason that the Tribal Court
23 would not have had jurisdiction is --

24 MR. MASHBURN: Because under the Court's ruling
25 in Montana v. United States, the Court indicated that

1 unless there was specific statute or constitutional
2 provision providing for jurisdiction over civil matters by
3 the Indian tribe, that it did not have jurisdiction over
4 non-Indian off the reservation.

5 QUESTION: So, even if, are there, is there a
6 Tribal Court?

7 MR. MASHBURN: Yes, Your Honor.

8 QUESTION: And has it had any arbitration
9 proceedings?

10 MR. MASHBURN: Not in this case. No parties --

11
12 QUESTION: Have they asserted jurisdiction over
13 arbitration in other cases?

14 MR. MASHBURN: I'm not aware of whether they
15 have or not, Your Honor. No party has attempted to bring
16 any action in Tribal Court in this case at any time.

17 QUESTION: I wouldn't have thought that the
18 Montana case would prohibit a non-Indian from choosing to
19 resort to Tribal Court jurisdiction. I mean, if your
20 client wanted to go into Tribal Court to enforce it, I
21 wouldn't have thought Montana would be a barrier.
22 That arose in the context of a Tribal Court or a
23 Tribal plaintiff trying to force a defendant into Tribal
24 Court. Now, that's a different question.

25 MR. MASHBURN: I agree that's a different

1 question. And if the Court views that as more a personal
2 jurisdiction question, then certainly a non-Indian party
3 could consider it in that court.

4 QUESTION: Well, is there any indication that
5 the tribe would waive its immunity in its own court in
6 this case?

7 MR. MASHBURN: Well, we believe the waiver would
8 also include waiving immunity in the Tribal Court, yes.

9 QUESTION: All right. Assume you lose in this
10 Court on the interpretation of the contract, I take it
11 that the tribe would say that they're immune from suit in
12 their own court as well. Is that correct?

13 MR. MASHBURN: I'm sure that they would assert
14 that they are immune from suit in their court. I need to
15 clarify one matter though for your previous question, Your
16 Honor.

17 There is some question because the agreement
18 incorporates the American Arbitration Association rules
19 and because that makes no reference to bringing an action
20 to enforce the award in anything other than state and
21 federal court. I suppose there could be some question
22 there whether they were consenting to suit in their own
23 court.

24 However, no party has asserted Tribal Court
25 jurisdiction here. No party has attempted to bring any

1 action in Tribal Court.

2 QUESTION: Well, obviously not because you were
3 going to sue them in state court. But, they say the
4 words, we agree to be sued in any court meaning any Tribal
5 Court. Now, what's the answer to that argument? You say
6 they're not able to say that in a contract? Why not?
7 You and your client and they could sign a
8 contract saying we want to be sued in a Tribal Court. Is
9 there a Tribal Court? Yes. What happens if they try to
10 assert immunity in their Tribal Court? You say you signed
11 a promise here not to by your own words. So, what's the
12 problem?

13 I mean, if this were a state, we'd say it meant
14 any state court. This is a tribe, so they're saying by
15 analogy it means any Tribal Court. Now, what's the answer
16 to that? There's a kind of black hole in this case.

17 MR. MASHBURN: If this were a state, we would
18 say that it meant state court because of the Eleventh
19 Amendment. We do not question that the tribe could have
20 said you may sue us, but only in Tribal Court.
21 But, the language of the contract simply does not
22 indicate that. The language of the contract, especially
23 when you incorporate the American Arbitration Association
24 rules that say state or federal court, certainly does not
25 indicate that the Tribal Court is going to be the

1 exclusive court of jurisdiction, if it indicates Tribal
2 Court at all.

3 QUESTION: Mr. Mashburn, you are now retreating
4 from a position that you started out originally because
5 you answered Justice O'Connor's question if we're talking
6 about personal jurisdiction, of course, you can submit to
7 personal jurisdiction.

8 But, before that, you were taking a position
9 about the subject matter jurisdiction of Tribal Courts.
10 You were saying that parties can't confer subject matter
11 jurisdiction on the court. And if we follow that
12 reasoning, then your answer to Justice O'Connor should
13 have been no.
14 These courts are simply powerless to entertain
15 the case where one of the litigants is a non-member and
16 the episode and suit occurred off reservation, you started
17 out, are you abandoning that position?

18 MR. MASHBURN: No, Your Honor, I may not have
19 made myself clear. I was attempting to respond in the
20 sense that if that's the way the Court reviewed what's
21 going on in Montana as personal jurisdiction, I do not
22 believe it is. I believe Montana speaks in terms of
23 subject matter jurisdiction.

24 And I do not retreat from the statement that if
25 it is subject matter jurisdiction, that in the ordinary

1 sense it would not be able to be conferred on the court
2 simply by the parties agreeing to it.
3 And if there are no other questions, I would like
4 to reserve the balance of my time.

5 QUESTION: Very well, Mr. Mashburn. Mr.
6 Coleman, we'll hear from you.

7 ORAL ARGUMENT OF GREGORY S. COLEMAN
8 ON BEHALF OF TEXAS, AS AMICUS CURIAE
9 SUPPORTING PETITIONER

10 MR. COLEMAN: Thank you, Mr. Chief Justice, and
11 may it please the court:

12 Respondent waived its immunity from suit when it
13 entered into a contract expressing its willingness to
14 submit to binding arbitration and judicial confirmation of
15 the arbitration award in state court.

16 We think that the test should be with respect to
17 evaluating a waiver of tribal immunity whether the
18 contract states a waiver by sufficiently expressed
19 language or by overwhelming implication from the text such
20 that by applying the traditional rules of construction,
21 the only reasonable interpretation is that the tribe
22 intended to subject itself to suit on the contract.

23 QUESTION: What about a forum selection clause?
24 Would that comply with your test because you want to know
25 what that says? But, the standard forum selection clause?

1 MR. COLEMAN: I think if the contract otherwise
2 says we agree to be sued, and there is a forum selection
3 clause, that those together certainly would be effective.

4 QUESTION: But, it's not if it just says in any
5 dispute between the parties the laws of the State of New
6 York will apply? That wouldn't do it?

7 MR. COLEMAN: I don't believe that that would do
8 it, Your Honor.

9 QUESTION: Would this clause have sufficed to
10 waive state sovereign immunity for Eleventh Amendment
11 purposes if it were state instead of a tribe?

12 MR. COLEMAN: I believe not, Your Honor, for a
13 couple of different reasons. First of all, the standards
14 that the states have set for waiving their own immunity
15 are matters of state law and the states have adopted a
16 variety of standards so one can't speak of a uniform
17 standard of waiver.

18 But, more importantly, the Eleventh Amendment
19 developed in a different way. This Court in Chisolm said
20 that the states didn't have immunity from suit in federal
21 court. And it took a separate amendment to the
22 Constitution, which now emanates from the federal
23 government to protect the states from suit.

24 It is a federally imposed limitation on the
25 federal court's own jurisdiction that emanates. And

1 therefore, we believe it is somewhat separate and apart
2 from the state's own sovereign immunity with respect to
3 waiver. With that in part --

4 QUESTION: How about cases that have delineated
5 a narrower immunity for tribes, Indian tribes?

6 MR. COLEMAN: This Court has stated a standard
7 from time with respect to waivers. But, the Court has not
8 really been in the position of having been asked
9 specifically what that standard is.
10 So, the language from Santa Clara Pueblo has
11 simply come forward to the state without really being used
12 in any specific case and without being tested. And that
13 is what is at issue today before the Court.

14 QUESTION: You're asking us to adopt a rather
15 confusing body of law. We have one set of standards for
16 when an Indian tribe is deemed to have waived its
17 sovereign immunity and another for the state and, why
18 should we do that?

19 MR. COLEMAN: I think I am asking the Court to
20 adopt this same test, and that is the test set out in
21 Edelman and repeated in the Atascadero, which is it should
22 be sufficiently expressed, or by overwhelming implication
23 from the text --

24 QUESTION: Perhaps I misunderstood. I thought
25 you indicated to Justice O'Connor that this would be

1 insufficient to waive immunity if it were the state that
2 was involved.

3 MR. COLEMAN: Because the Eleventh Amendment
4 contains a specific requirement as to federal court.

5 QUESTION: Yes, but her question didn't just ask
6 you about the Eleventh Amendment. It could be a waiver of
7 sovereign immunity pursuant in the state's own courts?

8 MR. COLEMAN: Let me correct my answer, Justice
9 Stevens. I didn't understand it in that way. If there
10 were authorization to waive a state's immunity in this
11 fashion, then we believe that it could be waived by this
12 kind of language.

13 QUESTION: What's the answer then? That they
14 say the words, this agreement shall be specifically
15 enforceable in any court having jurisdiction means in any
16 Tribal Court having jurisdiction, and why doesn't it mean
17 that? So, why -- I mean that's a possible reading.
18 What's wrong with their argument?

19 MR. COLEMAN: We have two basic arguments. One
20 is that we agree with the petitioner here that the subject
21 matter of jurisdiction of the Tribal Courts is limited by
22 Montana and by Straight.
23 And that therefore, because this is a contract
24 involving off reservation commercial activities, the
25 Tribal Court's jurisdiction cannot extend to this type of

1 activity. And therefore, there could be no expectation by
2 either party that the arbitration confirmation would be in
3 Tribal Court.

4 We also would argue --

5 QUESTION: Let me just interrupt you if I may.
6 What is it that imposes the limit on the Tribal Court's
7 jurisdiction? You talked about Montana. Is it federal
8 law, state law or tribal law or all three?

9 MR. COLEMAN: I believe it's federal law, Your
10 Honor.

11 QUESTION: The federal law prohibits an Indian
12 tribe from accepting -- a Tribal Court from accepting
13 jurisdiction in a case like this? That's your position?

14 MR. COLEMAN: Yes, Your Honor.

15 QUESTION: Thank you.

16 MR. COLEMAN: The --

17 QUESTION: Wait a second, I'd like to get both.
18 You had a second answer. This is in -- I just want to
19 know what your second answer is.

20 MR. COLEMAN: Going back to the basic analysis
21 that this court laid out in Kennecott Copper, it talked
22 about the fact that state courts are courts of general
23 jurisdiction. And in our dual system, the state courts
24 are the only courts of general jurisdiction.

25 And so, with the Eleventh Amendment overlay,

1 there is a question when you say any court of competent
2 jurisdiction that that means state court. But, the Tribal
3 Courts themselves are courts of very limited jurisdiction
4 and it's not clear that saying any court of competent
5 jurisdiction would ratchet down to the Tribal Court, but
6 would rather continue to apply to the state court,
7 particularly when the contract is adopting state law.
8 It incorporates the Oklahoma Uniform Arbitration
9 Act, which defines the only court under that act that can
10 confirm an arbitration award as Oklahoma State Court.

11 QUESTION: It seems rather strange to me that
12 they can agree to an arbitration by the American
13 Arbitration Association, which is a private body, but then
14 they couldn't further agree that the arbitration would be
15 enforceable in an Indian Court.

16 MR. COLEMAN: I think for on reservation
17 activity, there is probably that ability. But, that
18 wasn't done in this case and I have not seen a case where
19 there has been any agreement to do that. I certainly
20 don't think that contractors expect to be brought in to
21 Tribal Court or to be forced to bring their suits to
22 confirm in Tribal Court.

23 QUESTION: Now, you say that you don't want us
24 to get into state court because the arbitration agreement
25 incorporates the State Arbitration Act, which refers to a

1 state court of general jurisdiction, right?

2 MR. COLEMAN: That is one reason.

3 QUESTION: But, the arbitration agreement also
4 incorporates the rules of the American Arbitration
5 Association, which allows them to get into any state or
6 federal court. Now, which one of the two do you want to
7 have been incorporated? Why should we prefer the one
8 rather than the other?

9 MR. COLEMAN: If you sue --

10 QUESTION: Do you think they couldn't get into
11 federal court?

12 MR. COLEMAN: No. I think that they could, but
13 not specifically by suing under the Oklahoma Arbitration
14 Act. That would have to be brought under the Federal
15 Arbitration Act.

16 But, I think under the rules they could have
17 gone into either court. They chose Oklahoma and they
18 chose to come under the Oklahoma act.

19 QUESTION: So, you're not contradicting the
20 assertion that the rules of the American Arbitration
21 Association were incorporated, which refer to both state
22 and federal court?

23 MR. COLEMAN: Absolutely not, Your Honor. We
24 agree that they are directly incorporated by the parties.
25 In fact, if C & L had attempted to confirm its award in

1 Tribal Court, there could have been an objection that they
2 had not followed the arbitration rules which were
3 incorporated which they agreed to.
4 They were bound by those rules as much as the
5 tribe was and they simply could not under their agreement
6 bring that confirmation action in Tribal Court. That is
7 why we think under these circumstances that the tribe
8 waived its immunity as to a confirmation suit in Tribal
9 Court.

10 And we think also that the United States
11 discussion of Finney in its brief suggests that if they
12 were to view the arbitration agreement as more than a
13 simple agreement to arbitrate, but to evaluate the
14 incorporation of those arbitration rules, as was the state
15 statute in Finney and as this court considered by
16 reference in Kimmel, that they too would agree that there
17 has been a sufficient pointing to the court that the
18 action should be brought in, that this agreement taken as
19 a whole and interpreted according to the usual rules of
20 construction, clearly indicates the tribe was willing to
21 subject itself not merely to suit generally, but also to
22 suit or more specifically to suit in Oklahoma State Court
23 for confirmation of an arbitration award.

24 QUESTION: Mr. Coleman, what do you make of the
25 argument that going back even before we get to the

1 arbitration clause, that the people who negotiated this
2 contract had no authority to do so because they didn't
3 officially represent the business council.

4 MR. COLEMAN: The state doesn't have a position
5 on that. But, what we will say is we don't believe that
6 that is an issue before the Court. It may be determined
7 on remand if it's necessary. If the Court determines that
8 there has been a waiver, that there is a waiver in the
9 language, certainly the tribe may want to assert that
10 defense again.

11 But, it comes up before this Court with the
12 presumption that authority existed. And certainly, 25 USC
13 Section 81, which was recently amended, clearly
14 contemplates that the tribe's will and can waive their
15 sovereign immunity in the contracts themselves.

16 QUESTION: Was the authority contested in the
17 Oklahoma Courts from which this case came to us?

18 MR. COLEMAN: There was an initial assertion.
19 That is my understanding. It was asserted, but was not
20 decided.

21 QUESTION: Thank you. Thank you, Mr. Coleman.
22 Mr. Minnis, we'll hear from you.

23 ORAL ARGUMENT OF MICHAEL MINNIS
24 ON BEHALF OF THE RESPONDENT

25 MR. MINNIS: Mr. Chief Justice, and may it

1 please the court:

2 An arbitration clause is just that, it's an
3 arbitration clause. It is not a waiver of sovereign
4 immunity and it's certainly not one by the standards that
5 this Court has adopted, which is clear and unequivocal.

6 QUESTION: Isn't there more here than a mere
7 arbitration clause and let me direct you to the language
8 that concerns me. I'm quoting it from page of the blue
9 brief, page six. The relevant -- page six on the blue
10 brief. The relevant language in the middle of the block
11 quotes is this "The award rendered by the arbitrators",
12 I'm skipping "shall be final and judgment may be entered
13 upon it in accordance with applicable law in any court
14 having jurisdiction thereof".

15 That reference to jurisdiction thereof has to
16 mean jurisdiction to enter judgment on an arbitration
17 award. So, it is describing a court by reference to a
18 certain kind of subject matter jurisdiction that that
19 court has.
20 When they agree that in effect they will
21 be subject to a court, having that subject matter
22 jurisdiction, and when they agree that they are subject to
23 any court having that subject matter jurisdiction, isn't
24 that a pretty clear waiver and doesn't it go beyond
25 certainly merely an agreement to arbitrate? And doesn't

1 it go beyond merely an agreement to be subject to a court
2 with jurisdiction or with competent jurisdiction? Isn't
3 it pretty darn specific in identifying courts by reference
4 to a certain subject matter?

5 MR. MINNIS: No, Your Honor.

6 QUESTION: Why?

7 MR. MINNIS: This language, as we pointed out
8 before, is boiler plate language in an agreement, a
9 standard form agreement between private parties. The
10 language there in the arbitration clause is merely, closes
11 the loop. The first part of the loop is we're waiving in
12 an arbitration clause our right to go in and have a jury
13 trial on the issue of who has got the damages.

14 Any contract is presumably enforceable in any
15 court having jurisdiction thereof. All this does is close
16 the loop and say once your arbitration agreement, once you
17 have your arbitration award, it can be enforced in a court
18 of, any court having jurisdiction.

19 QUESTION: But, it does --

20 MR. MINNIS: Just like the contract could have.

21 QUESTION: But, it does take it out of the ambit
22 of those cases that are merely considered references to
23 courts of competent jurisdiction in which the reference to
24 the jurisdiction in those cases is far less specific than
25 it is here. Isn't that true?

1 MR. MINNIS: In the -- you mean in the language
2 of the courts in the cases that said any court of
3 competent jurisdiction?

4 QUESTION: Yeah.

5 MR. MINNIS: I think it's just the same thing.
6 I think it's said in a different way. I do not agree with
7 the Justice that the language is interpreted. You have to
8 go in and construe it as you did when you announced it.

9 I think this is boiler plate language. It
10 simply made it clear --

11 QUESTION: What does the fact that it's boiler
12 plate language have anything to do with it?

13 MR. MINNIS: Well, because it has -- what it has
14 to do with is the intention of the parties to waive
15 sovereign immunity. And if it's a contract, it's not a
16 contract tailored any way for a government, or any way for
17 an Indian tribe, you're reading it and it seems like a
18 party --

19 QUESTION: Then, the answer is, is it not -- it
20 isn't a severely specific waiver. I don't see why the
21 fact that it's boiler plate cuts one way or the other.

22 MR. MINNIS: Well, Your Honor, let me cite from
23 -- I mean, Mr. Chief Justice, let me cite from *Mastrobuono*
24 *v Shearson Lehman Hutton*, 514 US 52 at 63 where this Court
25 was construing an arbitration clause that spoke about,

1 that specifically said New York law will be controlling in
2 New York law. And that instance allowed punitive damages.
3 The suit was brought in Pennsylvania and they
4 said New York law doesn't -- this is going to be construed
5 under New York law, therefore you cannot get punitive
6 damages.
7 And this Court said, as a practical matter, it
8 seems unlikely that petitioners were actually aware of New
9 York's bifurcated approach to punitive damages or that
10 they had any idea that by signing a standard form
11 agreement to arbitrate disputes they might be giving up an
12 important substantive right.

13 QUESTION: These were customers of a securities
14 firm?

15 MR. MINNIS: Pardon?

16 QUESTION: These were customers of a securities
17 firm?

18 MR. MINNIS: I think that's correct.

19 QUESTION: And does it matter here that
20 apparently, and we are told, and I gather without
21 contradiction, that it was the tribe that prompted this
22 agreement? It was the tribe that proposed using this
23 form.

24 MR. MINNIS: That is correct.

25 QUESTION: Is that correct? And doesn't that

1 make a difference?

2 MR. MINNIS: Under the circumstances, no, I do

3 not think it makes any difference.

4 QUESTION: Does the word in -- and does the word

5 in any court mean in any Tribal Court in your view?

6 MR. MINNIS: It could include a Tribal Court.

7 QUESTION: And what else could it include?

8 MR. MINNIS: Pardon?

9 QUESTION: You say could, what else?

10 MR. MINNIS: Federal court, state court, any

11 court that's out there.

12 QUESTION: Well, if it includes state court,

13 then they have said shall be specifically enforceable in

14 any state court. So, that's the end of this case.

15 MR. MINNIS: No, but Your Honor, it didn't say

16 that. And I --

17 QUESTION: No. I'm saying in your opinion, what

18 does it mean? Does it mean in any Tribal Court?

19 MR. MINNIS: It could mean that, yes.

20 QUESTION: When you say could, what else could

21 it mean?

22 MR. MINNIS: Well, I don't want to divine the

23 intention of a party --

24 QUESTION: Sorry. There are words, in any

25 court.

1 MR. MINNIS: Right.

2 QUESTION: I'm asking a simple question. You

3 say those words do not mean, do not include state court.

4 So, I want to know what in your opinion they do include.

5 MR. MINNIS: Tribal Court.

6 QUESTION: Fine. Now, my next question is, is

7 there a Tribal Court?

8 MR. MINNIS: Yes, Your Honor.

9 QUESTION: All right. My next question is, has

10 that Tribal Court ever considered an arbitration case

11 involving people off the reservation?

12 MR. MINNIS: I am not sure whether they have. I

13 am not aware if they have.

14 QUESTION: Well, do you know that they ever

15 have?

16 MR. MINNIS: No.

17 QUESTION: All right. You're not aware if they

18 ever have?

19 MR. MINNIS: That's correct.

20 QUESTION: All right. Is there an indication

21 they ever considered any arbitration matter?

22 MR. MINNIS: They are a court of general

23 jurisdiction. So, they could consider any case.

24 QUESTION: Are you aware, and you are their

25 lawyer --

1 MR. MINNIS: Yes.

2 QUESTION: -- of any instance in which any case

3 involving arbitration was decided by this particular

4 court?

5 MR. MINNIS: I am not aware.

6 QUESTION: All right. Are you aware of any

7 instance in which any -- I'm doing a little cross

8 examination.

9 MR. MINNIS: I understand.

10 QUESTION: What I'm trying to figure out is why

11 would a contractor sign a contract to go to a court that's

12 never even heard of our -- I mean, never even considered

13 any arbitration matter. I mean, I'm trying to construe

14 these words in any court. And you said they mean any

15 Tribal Court.

16 And after all, contractors are in business.

17 They're businesspeople. If they want to deal with

18 arbitration, it seems highly unlikely that that's what

19 they would have meant or what anybody would have meant.

20 Now, what's the response to that? Because I mean that's

21 what I'm trying to get a response to. This seems so

22 unlikely, your interpretation, and I want a response to

23 it.

24 QUESTION: I would agree with Justice Breyer's

25 perplexity if it were clear to me that tribes say that

1 they consent to jurisdiction in Tribal Court. This is the
2 first time I've understood that. Is it your position that
3 you consent that you waive immunity in Tribal Court?

4 MR. MINNIS: No.

5 QUESTION: So, you don't think it means Tribal
6 Court? I didn't understand your answer to Justice Breyer.

7 QUESTION: You don't think it even mean Tribal
8 Court, do you?

9 MR. MINNIS: Well, I -- what I tried to --

10 QUESTION: You think it means any court that you
11 can get me in without this agreement, which doesn't
12 include any Tribal Court.

13 MR. MINNIS: That's correct.

14 QUESTION: Is it a court on the moon? I mean,
15 what is -- there are only to my knowledge Tribal Courts,
16 federal courts, state courts, what else is there?

17 MR. MINNIS: There are any courts that have
18 jurisdiction. It begs the questions which court has --

19 QUESTION: But, you say no court has
20 jurisdiction because this isn't a waiver of tribal
21 immunity.

22 MR. MINNIS: That's correct.

23 QUESTION: I thought your position was no court
24 had jurisdiction.

25 MR. MINNIS: That's correct.

1 QUESTION: You're on the moon.
2 MR. MINNIS: That's correct.
3 QUESTION: So, the tribe in effect has asked the
4 contractor to use a term which in fact is totally
5 meaningless, utterly misleading, and apparently an act of
6 intentional bad faith. Isn't that the consequence of your
7 position?
8 MR. MINNIS: No, Your Honor. The -- every --
9 QUESTION: It means any court having
10 jurisdiction. A-ha, there isn't one of those. Too bad.
11 We didn't mention that. That seems to be the argument.
12 MR. MINNIS: That is the argument, Your Honor.
13 But, it's the argument any party that contracts with any
14 government, except perhaps an Indian government --
15 QUESTION: May I interrupt you with this
16 question? We had a case a couple weeks ago and it rose
17 out of California contracting and problems with that.
18 Suppose California had this clause as a standard part of
19 all its government contracts, all its procurement
20 contracts. Would it be enforceable or not?
21 MR. MINNIS: If California had as part of their
22 --
23 QUESTION: Precisely the same language we have
24 before us and they agreed to arbitration, the American
25 Arbitration Association, and all the rest. Would that be

1 an unenforceable or an enforceable agreement in your view?

2 MR. MINNIS: In my view, it would be

3 unenforceable.

4 QUESTION: It would? Even if they did, in all

5 their contracts, they said this precise thing?

6 MR. MINNIS: Well, it --

7 QUESTION: This is standard boiler -- we're

8 using your term, it's boiler plate. They use it in all

9 their contracts.

10 MR. MINNIS: Right. It's boiler plate created

11 contracts created by them, not boiler plated in a contract

12 copyrighted by the --

13 QUESTION: If it is created by the --

14 MR. MINNIS: -- by the American Arbitration

15 Association.

16 QUESTION: Well, they're the ones who tender the

17 contract just like your client did. Is it enforceable

18 against the state or not in your view?

19 MR. MINNIS: In my view, it would not be. And

20 my view is that an arbitration clause is not a waiver

21 under any -- of any sovereign immunity except, as counsel

22 is arguing here, if the party that is involved happens to

23 be an Indian tribe.

24 QUESTION: That is not, I have not seen. I have

25 never seen -- you say any government other than an Indian

1 tribe government could make this argument. I have only
2 been here a limited time, but I have never seen a state
3 government make this argument. I thought that state
4 governments would argue the words in any court in our
5 contract mean in any state court.
6 And of course, the state courts are open. They
7 have waived immunity in those courts. It's a perfectly
8 plausible alternative forum. I've never -- and so, if
9 there is some case where it is different between the
10 Tribal Government and the state government, I'd like to
11 know what that is because my impression is it's the same.

12 MR. MINNIS: Well, maybe I'm deviating from the
13 focus of your question. But, we've cited Prepay --
14 Florida Prepay where they discussed that the state does
15 not consent to suit unless -- in their own courts unless
16 they specifically say it even though they have that
17 language.

18 And so, I don't understand how they could --

19 QUESTION: Yes, yes. I'll look at that. I was
20 just saying that. (Laughter.)

21 MR. MINNIS: Well, I'm sorry.

22 QUESTION: Mr. Minnis, the picture here is that
23 a tribe selects out a certain form contract to present to
24 the other side. And as I understood the way this thing
25 unfolded, it wasn't simply the enforcement in court. The

1 tribe stayed out of the arbitration forum too, didn't it?

2 MR. MINNIS: That's correct, Your Honor.

3 QUESTION: So, it gave the other side a piece of
4 paper that says arbitration and the whole thing was a
5 deception.

6 QUESTION: It was illusory?

7 MR. MINNIS: Well, it is a deception in terms of
8 a party who is not -- if you say that the parties aren't
9 charged to know the law, which in Oklahoma they are. And
10 the law is that you have to have a waiver by the Tribal
11 Government or the state government. It's not deceptive.

12 QUESTION: There is also a rule, isn't there, in
13 most common-law jurisdictions that parties deal in good
14 faith with one another and don't pretend something, which
15 is just illusory as you interpret this contract to be?

16 MR. MINNIS: Well, I don't interpret this
17 contract as illusory.

18 QUESTION: Well, I just thought I --

19 MR. MINNNIS: I interpret this --

20 QUESTION: Just deceptive you said. Is that your
21 answer to Judge - -

22 MR. MINNIS: Well --

23 QUESTION: Wasn't that your answer?

24 MR. MINNIS: I interpret --

25 QUESTION: Just a minute.

1 MR. MINNIS: Oh, I'm sorry.

2 QUESTION: I'm asking you what your answer to
3 Justice Ginsburg was, whether you didn't agree whether it
4 was a deceptive contract?

5 MR. MINNIS: I don't believe it's a deceptive
6 contract as a matter of law because everyone is chargeable
7 with knowledge of the law, which are that Indian tribes
8 have sovereign immunity and unless they waive it. And
9 they don't have a clear and unequivocal waiver here and
10 therefore --

11 QUESTION: So, the tribe brings this contract to
12 the contractor. It says they agree to arbitration in any
13 court having jurisdiction, but it really doesn't grant
14 anything that way.

15 MR. MINNIS: Absent from something from the
16 tribe, that's correct, Your Honor. And I'd like to quote
17 -- the same thing is true of any municipality in terms of
18 the authority. Here is Nottingham v. City of Yukon, 766
19 Pacific 2nd 973, at 975, 976. In this case, a city
20 manager had compromised the claim. He said that's
21 deceptive because the city manager didn't have authority.

22 Here's what Oklahoma said, "The Yukon city
23 manager acted in excess of his statutory authority by
24 attempting to settling compromise or wrongful demotion
25 claim". And then the court said Whoever contracts with a

1 municipality does so with notice under limitation on its
2 or its agents powers. Everyone is presumed to know the
3 law and whoever contracts with such a municipality or
4 furnishes supplies does so with reference to the law. If
5 such persons go beyond the limitations imposed, they do so
6 at their own --

7 QUESTION: Well, of course, that just restates
8 the proposition of what the law is and brings us right
9 back to where we started. Let me ask you this. For this
10 party, this contractor, are there any claims procedures by
11 which he can request payment? Suppose he built the
12 building and the tribe just didn't pay?

13 MR. MINNIS: If he built the building and the
14 tribe didn't pay, then, no, there would be -- It's just
15 like --

16 QUESTION: There are no -- would he go to the
17 Tribal Council and ask for a special private bill to get
18 paid? I mean, is that the way it works?

19 MR. MINNIS: They could, but that of course is
20 not the situation here. Nothing happened here. But,
21 you're talking --

22 QUESTION: I'm asking what alternative remedies
23 there are if you contract with this tribe and you've got
24 this language in it and the tribe says it means that you
25 can't sue.

1 MR. MINNIS: There is no alternative remedy.
2 When you deal with a sovereign, you get the sovereign to
3 waive the immunity and you get the sovereign to do it as
4 is provided for in its own laws or you don't have the
5 waiver.
6 QUESTION: But, you do --
7 QUESTION: Don't other states have the
8 possibility of pursuing private bills, of pursuing --
9 MR. MINNIS: Oh yes.
10 QUESTION: -- pursuing --
11 MR. MINNIS: Yes.
12 QUESTION: --pursuing administrative claims
13 adjudication?
14 MR. MINNIS: Yes.
15 QUESTION: And I'm asking if any of those
16 procedures have ever been -- exist with the tribe or have
17 ever been pursued by other contracting parties?
18 MR. MINNIS: I don't know any other contracting
19 party that I can think of right now who's ever had a
20 problem getting paid for doing work that they performed
21 for the tribe. I don't know that it's a situation that's
22 ever arisen.
23 QUESTION: Justice Scalia, Did you have a
24 question?
25 QUESTION: I was um, you know, it doesn't

1 matter.

2 QUESTION: Pardon?

3 QUESTION: Thank you, Mr. Minnis.

4 MR. MINNIS: Thank you.

5 QUESTION: Mr. Garre, we'll hear from you.

6 ORAL ARGUMENT OF MR. GARRE

7 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

8 SUPPORTING THE RESPONDENT

9 MR. GARRE: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 In Kiowa Tribe, this Court recognized that
12 Indian tribes enjoy sovereign immunity from suit in state
13 courts with respect to both the governmental and
14 commercial activities. In deciding whether a tribe has
15 waived that immunity, this Court applies the same
16 stringent standard that is applied -- that it applies in
17 determining whether a state, or the United States, has
18 waived its immunity from suit.

19 QUESTION: What is the authority for that, Mr.
20 Garre? Was that said in the Kiowa case?

21 MR. GARRE: Well, certainly this court in the
22 Santa Clara Pueblo case --

23 QUESTION: That was just dicta, wasn't it?

24 MR. GARRE: The Court said that the test was
25 unequivocal expression. And the Court has in the

1 Potawatomi case said the test was a clear waiver which
2 certainly we view as being the same as an unequivocal
3 waiver. And the court even in the Kiowa case cited Santa
4 Clara Pueblo with approval.

5 QUESTION: But, you think clear waiver
6 necessarily means the same standards that are required for
7 a waiver by a state under the Eleventh Amendment?

8 MR. GARRE: Well, we certainly don't mean that
9 unequivocal means one thing for a state and one thing for
10 a tribe. The court has expressed the standard as
11 unequivocal expression and the Merrion v. Jicarilla Apache
12 Tribe, the court addressed the question of whether because
13 Indian tribes had different attributes of their
14 sovereignty than the states, or the United States, a
15 different waiver standard ought to apply.

16 QUESTION: But, what's unequivocal? It may mean
17 something different when you're talking about a state
18 court and when you're talking about a Tribal Court. For
19 instance, if I read this clause about, you know, you can
20 bring suit in any court having jurisdiction thereof, if
21 the tribe were taking the more limited position, which I
22 gather the United States is, that this was at least an
23 agreement to suit in the Tribal Court. Okay.

24 If I had this agreement with a state, I would
25 think that it might be limited to just the state court.

1 But, if I entered into this agreement with a tribe with
2 respect to real estate off of the tribal reservation, the
3 notion of a Tribal Court just wouldn't enter into my mind
4 when it spoke about in accordance with applicable law in
5 any court having jurisdiction thereof.

6 MR. GARRE: Well --

7 QUESTION: I mean, what's unequivocal depends on
8 what you have in your -- maybe I'm not enough of a
9 westerner. I don't know. But, a Tribal Court wouldn't
10 occur to me.

11 MR. GARRE: Well, that sort of interpretation I
12 think goes beyond the four corners of the document that
13 the Court would be construing. And this Court in finding
14 unequivocal waivers has always limited its analysis to the
15 language of the statute of contract.

16 Here, that would be applying an understanding or
17 a belief about the availability of jurisdiction in Tribal
18 Court, about whether Tribal Courts exist. And that, we
19 don't know from the record in the case. And that I'm not
20 sure it'd be reasonable in the case --

21 QUESTION: No. I'm assuming they exist. I'm
22 assuming they exist. But, I'm still saying the reasonable
23 import of that language, the unequivocal import of that
24 language with regard to a state might well be that you can
25 only bring suit in the state court. I am not sure that it

1 would be the same when you're dealing with a tribe simply
2 because who thinks of any court having jurisdiction
3 thereof as a Tribal Court.

4 MR. GARRE: But, the Court of course has said
5 that in the context of the state in the Kennecott Copper
6 case and in the College Savings case. And we think that
7 that makes sense as a rule of construction, that a
8 sovereign as a presumption would only intend to consent to
9 suit if it were going to consent to suit in its own courts
10 and not another sovereign's courts.

11 QUESTION: Yes, but doesn't that presumption
12 operate in circumstances in which the state is making
13 agreements in the state context. The state is making
14 agreements for work to be done in the state. And if here
15 the agreement were for work to be done on the reservation,
16 you would have a stronger argument.

17 But, here the agreement is for work to be done
18 outside the reservation on non-Indian lands. And doesn't
19 that bring us back to what Justice Scalia said? That if
20 you've got a contract within its four corners makes it
21 clear that you're contracting about work to be done
22 outside the reservation.

23 MR. GARRE: Well, of course --

24 QUESTION: It doesn't have the implication that
25 it's a waiver only as to Tribal Courts.

1 MR. GARRE: No, we don't believe that it does.
2 Because the Court has held squarely and most recently in
3 Kiowa Tribe that the on the reservation - off the
4 reservation distinction doesn't work for purposes of
5 tribal sovereign immunity. This contract was entered into
6 with the tribe.

7 QUESTION: You know, but it's the -- but the
8 question is what does unequivocal mean here? What is
9 clear here? And it seems to me that what is clear here
10 will perhaps vary depending on whether the subject matter
11 of the contract is subject matter on reservation or off
12 reservation.

13 MR. GARRE: But, we don't think that the Court
14 has drawn that distinction or should draw that distinction
15 in this case.

16 QUESTION: Why isn't it a sensible distinction
17 to draw? In other words, we're trying to find meaning
18 here.

19 MR. GARRE: The contractor -- the contract was
20 entered into with the tribe. The fact that the particular
21 property underlying this contract was not on the
22 reservation doesn't add or subtract any ambiguity from the
23 language that's in there, which is again any court having
24 jurisdiction language.

25 It doesn't answer the ambiguity that this Court

1 identified in Kennecott Copper --

2 QUESTION: But, it also might be helpful, at
3 least to me I would think, if any tribe is supposed to be
4 Tribal Court. I would like to know. Do Tribal Courts
5 normally handle arbitration matters or don't they?

6 You represent the Interior Department. I would
7 imagine that they must have discussed this with you. So,
8 are there normally arbitration matters in Tribal Courts or
9 are there not?

10 MR. GARRE: The record in this case doesn't
11 reflect that.

12 QUESTION: I know. But, that isn't a matter of
13 the record. It's a matter of what the Interior Department
14 and the government would represent.

15 MR. GARRE: I'm not prepared to make a
16 representation on that. It is clear, however, that this
17 court and Congress has recognized that Tribal Courts are
18 perfectly competent and capable of adjudicating important
19 personal and property rights.

20 QUESTION: But, this contract does refer to
21 application of the rules of the American Arbitration
22 Association and it makes some reference to the state act.
23 Both of those in turn refer to at least state court and in
24 the American Arbitration Association to state or federal
25 court.

1 Now, why isn't that part and parcel of the
2 contract then? We know what it referred to.

3 MR. GARRE: Of course, it would require the
4 Court to go beyond the contract to interpret it, which is
5 -

6 QUESTION: I don't think so.

7 QUESTION: No. It refers to it within the
8 contract itself. It asked the parties. The parties
9 agreed that's what's going to be binding.

10 MR. GARRE: The contract provides that
11 arbitration shall be in accordance with the rules. If
12 that's all that were here, then the separate arbitration
13 enforcement provision would not be necessary.

14 And moreover, whatever ambiguity that is
15 resolved by the fact that the rules provide for
16 jurisdiction in a federal or state court, the fact that
17 the contract omits that language simply reintroduces the
18 ambiguity back into it.

19 QUESTION: Just on this whole issue, you're
20 arguing that this might be in Tribal Court. But, the
21 tribe represented to us 12 minutes ago that it was not
22 waiving its immunity in a Tribal Court. So, this is just
23 a red herring that you're entered into it seems to me.

24 MR. GARRE: We don't think so. We believe that
25 the party's intent should be determined from the language

1 in the contract as in any other contract case. And in
2 reviewing this language, we believe that the language does
3 not unequivocally express the tribe's --

4 QUESTION: Yes. But, didn't the agreement
5 incorporate the rules of the American Arbitration
6 Association which refer to federal or state court and
7 don't mention Indian Tribal Court?

8 MR. GARRE: As I said, the agreement says
9 arbitration shall be in accordance with that. There would
10 be no need for the separate enforcement provision of the
11 clause if the reference -- if the parties thought that the
12 reference to the rules alone resolved that.
13 And the fact that the contract doesn't contain
14 the federal or state court limitation that's in the rules
15 simply introduces ambiguity as to whether the parties
16 intentionally omitted that.

17 Now, with respect to the choice of law
18 provision, we don't think that the separate choice of law
19 provision itself can unequivocally express the tribe's
20 consent to suit in state court.

21 And moreover, the Oklahoma Uniform Arbitration
22 Act by its terms is inapplicable to the contract in this
23 case because that act only applies to agreements which
24 provide for arbitration in this state. And the agreement
25 in this case did not provide for arbitration in Oklahoma.

1 So, that act doesn't apply.

2 QUESTION: Well, why couldn't you say it
3 provided for arbitration in Oklahoma by virtue of the fact
4 that it could be brought in any court of competent
5 jurisdiction?

6 MR. GARRE: I think that gets back to the
7 question of what courts would have competent jurisdiction.
8 But, it is -- given the plain meaning to the language,
9 providing for jurisdiction in this state we think that the
10 conflict - that the law requires that the arbitration
11 contract provide for arbitration in Oklahoma. That's not
12 uncommon in this context.

13 QUESTION: First I thought that in winning this
14 case, the tribes would lose the war because they'd have an
15 awfully hard time getting people to contract with them.
16 In general, what contractors will go into this kind of
17 thing with your fine spun arguments being used against
18 them?

19 MR. GARRE: Some tribes --

20 QUESTION: So, what is your answer to that?

21 MR. GARRE: Some tribes, like some states, and
22 the United States after 80 years of its existence, have
23 decided to waive immunity from suit in breach of contract
24 actions. The Navajo Nation has done that in its laws.
25 Each tribe will have to make that determination in whether

1 or not to waive its immunity from suit in any given case.

2 In Kiowa Tribe, this Court recognized that
3 Congress was in the best position to weigh the competing
4 policy concerns and reliance interests in this area. The
5 Court has consistently recognized the unequivocal
6 expression standard. We don't think that unequivocal
7 should mean one thing in the case of the states, which
8 even here today has acknowledged this type of language
9 would not waive their immunity from suit in federal court
10 and should mean another thing for the tribes.

11 QUESTION: Thank you, Mr. Garre. Mr. Mashburn,
12 you have three minutes remaining.

13 REBUTTAL ARGUMENT OF JOHN DAVID MASHBURN
14 ON BEHALF OF THE PETITIONER

15 MR. MASHBURN: Mr. Chief Justice, and may it
16 please the court:

17 Unless there are further questions, we would
18 waive our rebuttal.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Mashburn. The case is submitted.

21 (Whereupon, at 11:58 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25