

**United States Court of Appeals
For the Eighth Circuit**

Bird Industries, Inc,
A South Dakota Corporation, and
Laura Bird, Individually,

Appellant,

v.

The Tribal Business Council of the
Three Affiliated Tribes of the Fort
Berthold Indian Reservation

Appellee.

ON APPEAL FROM JUDGMENT IN CIVIL CASE OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF NORTH
DAKOTA

Appellants' Brief in Response to Appellee's Brief

IRVIN B. NODLAND, PC
Attorney for Appellants
109 N 4th Street Ste. 300
Bismarck, ND 58501
irv@nodlandlaw.com
701-222-3030
/s/ Irvin B. Nodland

TABLE OF CONTENTS

	PAGE
Table of Contents.....	i
Table of Authorities.....	ii
Statement of Issue.....	1
Argument.....	1
Conclusion.....	4

TABLE OF AUTHORITIES

CASES	PARAGRAPH
<i>Amerind Risk Management Corp. v. Malaterre</i> 633 F.3d 680 (8th Cir. 2011).....	2
<i>C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.</i> 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001).....	2, 8
<i>Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.</i> 50 F.3d 560, 562-63 (8 th Circ. 1995).....	2

STATEMENT OF THE ISSUE

[1] The sole issue before the Court in this appeal is whether sovereign immunity of an Indian Tribe is waived when an arm or sub-agency of the Tribe has included a binding arbitration clause in one of its commercial contracts.

ARGUMENT

[2] The law is clear on whether an Indian Tribe's inclusion of a binding arbitration clause in a commercial contract constitutes a waiver of sovereign immunity. In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.* 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001), the U.S. Supreme Court specifically held that a binding arbitration clause in a contract with an Indian Tribe constitutes a clear intent to waive sovereign immunity. In *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011), the 8th Circuit acknowledged the holding of *C & L*, supra but distinguished its facts. The arbitration clause in *C & L*, supra, was binding. In *Amerind*, supra it was not. With compelling logic, the 8th Circuit said in *Amerind*:

“.....[b]y definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense.....The parties clearly manifested their intent to resolve disputes by arbitration, and the Tribe waived its immunity with respect to any disputes under the contract” Citing *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.* 50 F.3d 560, 562-63 (8th Circ. 1995).

[3] There is no requirement for a Tribal Resolution or a specific statement in a contract that says, “sovereign immunity is waived for purposes of this contract”.

[4] There is no requirement the governing body of a Tribe pass a Resolution waiving sovereign immunity. Logic requires that inclusion of a binding arbitration clause **is** an *express waiver*.

[5] Appellee, Three Affiliated Tribes, admits on page 4, lines 2-4 of its Brief that the contract involved in this case contained a Binding Arbitration Clause. This leaves the Tribe with only an argument that the “arm” or sub-agency of the Tribe that inserted the Binding Arbitration Clause into the contract may be liable to Bird, but the Tribe is not.

[6] We will not cite here the Three Affiliated Tribe’s Constitutional provisions or Resolutions that establish the role of the Tribe in relation to the arms or sub-agencies. We will simply quote from page 3, lines 4-9 of the lower court’s Order Granting Defendant’s Motion to Dismiss. In that Decision, the lower Court stated what it found to be the Tribe’s responsibility:

“The Tribal Business Council is vested with the authority to manage all the economic affairs and enterprises of the Three Affiliated Tribes. *The Tribal Business Council is responsible for all actions taken on behalf of the Three Affiliated Tribes including those taken in the name of its officers, arms, segments, employees, department managers, commissions, corporate entities and sub-entities.*” (emphasis added)

[7] Statements in Appellee’s Brief denying involvement of the Tribe and its responsibility are simply not true. On Page 11 of its Brief, Para III, the Tribe states, “Bird Industries implies that Tribal Business Council must have somehow participated in, or at least acquiesced to the various unsupported and unfounded accusations Bird Industries continues to repeat”. In fact, the Tribal Business Council did heavily participate in the actions that form the basis of this lawsuit. The Tribe’s reliance upon layers of sub-entities to insulate it from liability is exposed as false by the finding of the lower Court when it wrote, “The Tribal Business Council is responsible for all actions taken on behalf of the Three Affiliated Tribes including those taken in the name of its officers, arms, segments, employees, department managers, commissions, corporate entities and sub-entities.” (Page 3, lines 4-9, of the lower court’s Order Granting Defendant’s Motion to Dismiss.)

[8] Further misrepresentation is made on Page 13 of Appellee’s Brief in attempting to distinguish its role from the role played by a Tribe in *C & L*, supra. Appellee asserts the Binding Arbitration Clause here was entered into by “an independent corporation” that “offered the terms of the contract and executed it” whereas, it claims, in *C & L*, supra, it was the Tribe itself that offered and executed the contract containing binding arbitration provisions. The Tribe’s assertion completely ignores the facts and the lower Court’s

finding that the Three Affiliated Tribal Business Council is responsible for all actions taken in the name of its officers, arms, segments, employees, department managers, commissions, *corporate entities* and sub-entities.

[9] Pages 2 and 3 of the lower Court’s Decision details the layers of entities over which the Tribe retains authority “*for all actions*” and has responsibility. In this case, the layers by which the Tribe attempts to distance itself include a geographical division of the Reservation into 6 Segments each of which has a representative on the Tribal Business Council. One of these 6 segments, the Four Bears Segment, created an entity called Four Bears Economic Development Corporation. That corporation then entered into a Joint Venture with Bird Industries. The Joint Venture then created a sub-entity called Lakeview Aggregates. Lakeview Aggregates is where the bulk of the conduct giving rise to this lawsuit took place. We have detailed, in the Complaint and in our opening Brief, the deep involvement and direct offending conduct in this case by the Tribe’s governing body, the Tribal Business Council, and will not repeat it here.

CONCLUSION

[10] The only question before this court in this Appeal is whether inclusion of a Binding Arbitration Clause in a contract entered into *by an arm of the*

tribe over which the Tribe had complete authority, control, and responsibility constituted a waiver of sovereign immunity by the Tribe.

[11] Counsel has suggested if oral argument is considered 10 minutes for each side would be sufficient. We suggest there should be no need for even those 10 minutes.

[12] Respectfully submitted this 12th day of October, 2022.

IRVIN B. NODLAND, PC
Attorney for Appellants
PO Box 640
Bismarck, ND 58502
irv@nodlandlaw.com
701-222-3030
/s/ Irvin B. Nodland

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface (Times New Roman, Size 14) using Microsoft Word for Microsoft 365 Apps for Business (for Windows). As required by Fed. R. App. P. 32(a)(7)(B)(ii), I further certify that Appellant's Brief in Response to Appellee's Brief contains approximately 990 words, which is not more than 6,500 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

Dated: October 12, 2022

IRVIN B. NODLAND, PC
Attorney for Appellants
PO Box 640
Bismarck, ND 58502
irv@nodlandlaw.com
701-222-3030
/s/ Irvin B. Nodland

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that in this case are registered CM/ECT users and that service will be accomplished by the CM/ECF system.

IRVIN B. NODLAND, PC
Attorney for Appellants
PO Box 640
Bismarck, ND 58502
irv@nodlandlaw.com
701-222-3030
/s/ Irvin B. Nodland