

Dustin C. Hamilton, ABA #1405024
LeGros Buchanan & Paul
4025 Delridge Way SW, Suite 500
Seattle, Washington 98106
Phone: 206-623-4990
Facsimile: 206-467-4828

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

ALASKA LOGISTICS, LLC,

Plaintiff,

v.

NEWTOK VILLAGE COUNCIL and
GOLDSTREAM ENGINEERING, INC.

Defendants.

Case No.: 3:18-cv-00108-SLG

**PLAINTIFF’S OPPOSITION TO
NEWTOK VILLAGE COUNCIL’S
MOTION TO DISMISS AND MOTION
TO STRIKE**

I. RELIEF REQUESTED

Plaintiff Alaska Logistics, LLC (“Alaska Logistics” or “Plaintiff”) requests an order denying the Motion to Dismiss (ECF No. 18) and Motion to Strike (ECF No. 27) filed by Defendant Newtok Village Council (“Newtok” or “NVC”). Newtok waived its tribal sovereign immunity by asserting five counterclaims against Alaska Logistics arising out of the same transaction and occurrences as Alaska Logistics’ initial claims. By asserting these counterclaims, Newtok consented to suit in the District of Alaska; Newtok cannot ask the Court to adjudicate its counterclaims while simultaneously contending the Court lacks jurisdiction over Alaska Logistics’ initial claims and counterclaims to counterclaims. Alternatively, Alaska Logistics requests an order of

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1 continuance so Alaska Logistics can obtain limited jurisdictional discovery to oppose
2 Newtok's Motion to Dismiss.

3 As for Newtok's Motion to Strike, the Federal Rules of Civil Procedure
4 encompass "counterclaims to counterclaims," and multiple courts have held that
5 counterclaims to counterclaims are acceptable filings under the Federal Rules of Civil
6 Procedure. Accordingly, Plaintiff's Motion to Dismiss and Motion to Strike must be
7 DENIED.

8 **II. STATEMENT OF FACTS**

9 **A. Newtok Issues IFB for Transportation of Construction Supplies &** 10 **Equipment.**

11 Alaska Logistics is a limited liability company which provides, among other
12 services, marine transportation services to remote areas of Alaska.

13 On March 17, 2017, Newtok issued an "Invitation to Bid" ("IFB"), prepared by
14 contractor Goldstream Engineering, Inc. ("Goldstream"), for barge transportation
15 services for the "Mertarvik Road Construction Project." Complaint ¶ 7.¹ The IFB
16 consisted of two parts: (1) transportation of "diverse road construction materials and
17 equipment, including but not limited to corrugated metal pipe (culvert), vehicles, fuel
18 tanks, and various heavy equipment"; and (2) transportation of 25,000 gallons of ultra
19 low sulfur diesel. Complaint ¶ 8; IFB, Section I. The freight was to be shipped from
20 Anchorage to Mertarvik with an estimated delivery date of June 1, 2017. Complaint
21 ¶ 8, ¶ 10.

22
23 ¹ A true and correct copy of the IFB is attached as Exhibit A to the Complaint (ECF
No. 1-1).

1 The IFB instructed bidders to submit separate bid forms for transportation of
2 “[c]onstruction supplies & equipment” and fuel delivery, and stated that bidders “may
3 choose to bid on one or both of NVC’s transportation needs.” Complaint ¶ 11; IFB,
4 Section III(2). The IFB stated that the “Bidder will provide a proposed purchase
5 agreement between NVC and the Bidder with project specific terms and conditions as
6 part of the bid.” Complaint ¶ 13; IFB, Section VI(1).

7 Newtok’s IFB included a “Planning Manifest” which set forth estimated
8 shipping weights and dimensions, as well as descriptions of 27 pieces of equipment for
9 the transportation of construction supplies & equipment. Complaint ¶ 14. Newtok later
10 issued two addenda which revised various provisions of the IFB, including the Planning
11 Manifest. Complaint ¶ 15.

12 As amended, the Planning Manifest provided an estimated shipping weight of
13 772,281 lbs. for the construction supplies & equipment. Complaint ¶ 17. In addition, as
14 Newtok admits, the vast majority of the cargo set forth in the Planning Manifest, as
15 amended, consisted of “rolling stock” or construction vehicles and freight which could
16 easily be rolled on and off barges with minimal stevedoring. Complaint ¶ 17; Newtok’s
17 Answer ¶ 18 (ECF No. 6).

18 **B. Alaska Logistics Successfully Bids on Portion of Mertarvik Road**
19 **Construction Project.**

20 On March 31, 2017, Alaska Logistics submitted bids for the construction
21 supplies & equipment transportation and fuel delivery. Complaint ¶ 20. Along with the
22 bids, Alaska Logistics submitted an “Alaska Logistics, LLC Transportation Agreement”
23

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1 (“Transportation Agreement”)² as required by Section VI(1) of the IFB instructing
2 bidders to provide a “proposed purchase agreement between NVC and the Bidder with
3 project specific terms and conditions”). Complaint ¶ 21.

4 Article 4.3 of the Transportation Agreement contains a forum selection clause
5 providing that “Any action brought by either party to enforce any term or provision of
6 this contract shall be commenced in the United States District Court for the Western
7 District of Washington at Seattle, as appropriate.” Complaint ¶ 23.

8 Alaska Logistics was the lowest bidder for the transportation of the construction
9 supplies & equipment and received the contract for that portion of the IFB. Complaint
10 ¶ 24. Alaska Logistics did not receive the award for the transportation of the 25,000
11 gallons of fuel. However, Alaska Logistics later agreed to deliver 10,000 gallons of
12 fuel to Mertarvik outside of the IFB. Complaint ¶ 27.

13 **C. Newtok and Goldstream Provide Freight for Transportation That**
14 **Far Exceeds Scope and Volume of the Parties’ Contract.**

15 After receiving the award for the transportation of the construction supplies &
16 equipment, Newtok and Goldstream’s conduct differed in several material respects from
17 the representations set forth in the IFB. Most significantly, the actual freight provided
18 to Alaska Logistics for delivery to Mertarvik differed in nature and volume than the
19 freight described in the IFB. Complaint ¶ 30. For example, the actual cargo that was
20 provided to Alaska Logistics for transportation to Mertarvik was not limited to
21 construction supplies & equipment. The cargo included three 60 ft. modular housing
22 units (“mods”) and refrigerated food items which were not set forth in the IFB or

23 ² A true and correct copy of the Transportation Agreement is attached as Exhibit C to
the Complaint (ECF No. 1-3).

1 Addenda. Complaint ¶ 31. In addition, the actual freight was not limited to “rolling
2 stock,” resulting in far more stevedoring and requiring significantly more cargo space to
3 transport than the dimensions set forth in the Planning Manifest. Complaint ¶ 32.

4 **D. Newtok Agrees to Change Order But Fails to Pay.**

5 On May 15, 2017, shortly after receiving the cargo, Alaska Logistics contacted
6 Mark Sherman, president of Goldstream, to advise him that there would be additional
7 charges associated with shipping Newtok and Goldstream’s actual freight. Complaint
8 ¶ 36. On May 18, 2017, after its barges were underway, Alaska Logistics sent a formal
9 change order (“Change Order #1”) in the amount of \$231,391 to reflect the actual
10 transportation services Alaska Logistics provided. Complaint ¶ 37.³

11 On May 28, 2017, Mr. Sherman sent a letter to Alaska Logistics acknowledging
12 that Alaska Logistics shipped freight out of additional ports of departure that were not
13 included in the original IFB, transported frozen food that was not part of the original
14 IFB, and incurred additional costs loading in Anchorage. Complaint ¶ 38.

15 On June 1, 2017, Paul Charles, president of Newtok Village Council, sent a
16 letter to Alaska Logistics accepting Change Order #1 in full. Mr. Charles wrote, “The
17 Newtok Village Council is in agreement to pay the extra charges which totals
18 \$213,391.00 [sic] per your May 18, 2018 request.” Complaint ¶ 39.⁴ Despite accepting
19 Change Order #1, Newtok and Goldstream ultimately failed to pay any additional
20

21 _____
22 ³ A true and correct copy of Change Order #1 is attached as Exhibit D to the Complaint
(ECF No. 1-4).

23 ⁴ A true and correct copy of Mr. Charles’ June 1, 2017 letter is attached as Exhibit E to
the Complaint (ECF No. 1-5).

1 compensation for the barge transportation services provided by Alaska Logistics.
2 Complaint ¶ 46.

3 **E. Procedural Background.**

4 On April 25, 2018, Alaska Logistics initiated this action and asserted claims
5 against Defendants for breach of contract, breach of good faith and fair dealing,
6 *quantum meruit*, misrepresentation, and violation of Alaska’s Unfair Trade Practices
7 Act. Complaint ¶¶ 47-72.

8 On June 7, 2018, Newtok filed an answer and asserted counterclaims against
9 Alaska Logistics in lieu of responding to the Complaint by filing a Rule 12(b) motion.
10 (ECF No. 6). Newtok asserted five counterclaims against Alaska Logistics arising out
11 of the IFB and Alaska Logistics transportation of construction equipment & supplies
12 and 10,000 gallons of fuel. Those counterclaims included (1) fraud, misrepresentation,
13 and unfair/deceptive practices, (2) breach of contract-fuel, (3) breach of contract-
14 diverted/hostage freight, (4) breach of contract-damage to crusher, and (5) breach of
15 contract-change of POD to Seward. Newtok’s Answer ¶¶ 89-119.

16 In the counterclaims, Newtok alleged that Alaska Logistics “intentionally
17 underbid the IFB” and then engaged in a “classic ‘bait and switch’, by invoicing
18 [Newtok] for additional compensation without documentation[.]” Newtok’s Answer
19 ¶ 89, ¶ 93. Newtok also claimed that “Alaska Logistics held the entire freight shipment
20 hostage in an attempt to coerce [Newtok] into paying the changed rates.” Newtok’s
21 Answer ¶ 96. Newtok also alleged that Alaska Logistics failed to deliver the full 10,000
22 gallons of fuel, improperly diverted the shipment of “crusher screens” and held them as
23 hostage freight, damaged a “rock crusher” during transport, and forced Newtok to incur

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1 additional charges by changing one of the points of departure from Anchorage to
2 Seward. Newtok's Answer ¶¶ 102-119.

3 On June 27, 2018, Alaska Logistics filed its answer to Newtok's counterclaims.
4 (ECF No. 15).

5 On July 7, 2018, Newtok filed a Motion to Dismiss Alaska Logistics' claims on
6 the basis that the claims were barred under the doctrine of tribal sovereign immunity.
7 (ECF Nos. 18, 19). Notably, Newtok did not seek to dismiss its own counterclaims
8 against Alaska Logistics, intending to invoke the Court's jurisdiction to adjudicate its
9 counterclaims.

10 On July 13, 2018, Alaska Logistics filed an Amended Answer to Newtok's
11 Counterclaims and asserted counterclaims to Newtok's counterclaims. (ECF No. 25).

12 On July 23, 2018, Newtok filed a Motion to Strike Alaska Logistics'
13 counterclaims to counterclaims. (ECF No. 27).

14 **III. POINTS AND AUTHORITIES**

15 **A. Legal Standard.**

16 Generally, "when a federal court . . . lacks subject-matter jurisdiction, the court
17 must dismiss the complaint,' *sua sponte* if necessary." *Pistor v. Garcia*, 791 F.3d 1104,
18 1111 (9th Cir. 2015) (citation omitted). By contrast, sovereign immunity is merely
19 "quasi-jurisdictional" in nature, meaning "[i]t may be forfeited where the [sovereign]
20 fails to assert it and therefore may be viewed as an affirmative defense." *Id.* (citation
21 omitted). "In other words, sovereign immunity is not 'jurisdictional in the sense that it
22 must be raised and decided by this Court on its own motion,'" but rather "in the sense
23 that it 'may be asserted at any time.'" *Id.* (citation omitted). Although sovereign

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1 immunity is only quasi-jurisdictional in nature, courts have recognized that
2 Rule 12(b)(1) “is still a proper vehicle for invoking sovereign immunity from suit.” *Id.*

3 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*
4 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the
5 challenger asserts that the allegations contained in a complaint are insufficient on their
6 face to invoke federal jurisdiction.” *Id.* The allegations in the complaint are taken as
7 true and all reasonable inferences are drawn in the non-moving party’s favor. *Wolfe v.*
8 *Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). “By contrast, in a factual attack, the
9 challenger disputes the truth of the allegations that, by themselves, would otherwise
10 invoke federal jurisdiction.” *Meyer*, 373 F.3d at 1039. “Once the moving party has
11 converted the motion to dismiss into a factual motion by presenting affidavits or other
12 evidence properly brought before the court, the party opposing the motion must furnish
13 affidavits or other evidence necessary to satisfy its burden of establishing subject matter
14 jurisdiction.” *Id.* (internal quotation marks and citation omitted).

15 **B. Newtok Waived Sovereign Immunity By Its Actions in the**
16 **Litigation.**

17 “Although the Supreme Court has expressed limited enthusiasm for tribal
18 sovereign immunity, the doctrine is firmly ensconced in our law until Congress chooses
19 to modify it.” *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006)
20 (citing *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) (“There
21 are reasons to doubt the wisdom of perpetuating the doctrine. . . . [I]mmunity can harm
22 those who are unaware that they are dealing with a tribe, who do not know of tribal
23 immunity, or who have no choice in the matter, as in the case of tort victim.”)).

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1 “The immunity, however, is not absolute.” *United States v. State of Oregon*,
2 657 F.2d 1009, 1013 (9th Cir. 1981). Tribal sovereign immunity can be abrogated by
3 authorization of Congress or waiver by the tribe. *Miller v. Wright*, 705 F.3d 919, 923
4 (9th Cir. 2013). A tribe may be found to have “waived sovereign immunity if it **does**
5 **not invoke its immunity in a timely fashion** and **takes actions indicating consent to**
6 **the litigation.**” *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (emphasis
7 added). Thus, a sovereign may waive its immunity by its conduct in litigation.
8 *Quinault Indian Nation v. Pearson for Estate of Comenout*, 868 F.3d 1093, 1097 (9th
9 Cir. 2017) (“[A] tribe’s participation in a lawsuit can ‘effect a waiver for limited
10 purposes.’”); *McClendon v. United States*, 885 F.2d 627, 631 n.2 (9th Cir. 1989)
11 (“Indian tribes may, in certain circumstances, consent to suit by participation in
12 litigation.”). Some courts have referred to this as the “waiver-by-litigation doctrine.”
13 *Tohono O’odham Nation v. Ducey*, 174 F. Supp. 3d 1194, 1204 (D. Ariz. 2016).

14 For instance, a tribe clearly waives sovereign immunity by filing suit in state or
15 federal court. “Initiation of a lawsuit is an action that ‘necessarily establishes consent to
16 the court’s adjudication of the merits of that particular controversy’ . . . including the
17 risk of being bound by an adverse determination.” *In re White*, 139 F.3d 1268, 1271
18 (9th Cir. 1998); *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1017
19 (9th Cir. 2016) (“By filing a lawsuit, a tribe may of course ‘consent[] to the court’s
20 jurisdiction to determine the claims brought’ and thereby agree to be bound by the
21 court’s decision on those claims.”).

22 A tribe can also waive its sovereign immunity by intervening in an action.
23 In *United States v. State of Oregon*, 657 F.2d 1009 (9th Cir.1981), the Ninth Circuit

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1 held that the Yakima Tribe waived its sovereign immunity when it intervened in an
2 action addressing salmon fishing rights on the Columbia River. As the Ninth Circuit
3 explained:

4 Here, the Tribe intervened to establish and protect its treaty fishing
5 rights; a basic assumption of that action was that there would be
6 fish to protect. Had the original decree found the species to be in
7 jeopardy, and enjoined all parties from future fishing in order to
8 conserve the species, the Yakimas could not have then claimed
9 immunity from such an action. Otherwise, tribal immunity might
10 be transformed into a rule that tribes may never lose a lawsuit.

11 *Oregon*, 657 F.2d at 1014. The Ninth Circuit further explained: “By intervening,
12 the Tribe assumed the risk that its position would not be accepted, and that
13 the Tribe itself would be bound by an order it deemed adverse.” *Id.* at 1015.

14 Under these principles, federal courts have held that, by initiating a lawsuit in
15 state or federal court, a tribe also waives its sovereign immunity with regard to
16 counterclaims asserted by a defendant. To be clear, the “bare act of filing suit does not
17 operate as a complete, automatic waiver that subjects a tribe to any counterclaims filed
18 by the defendant.” *Quinault*, 868 F.3d at 1097. “The scope of the waiver depends on
19 the particular circumstances, including the tribe’s actions and statements as well as the
20 nature and bounds of the dispute that the tribe put before the court.” *Id.* The exception
21 to sovereign immunity applies provided “the counterclaim did not ‘venture outside the
22 subject of the original cause of action.’” *United States v. Tsosie*, 92 F.3d 1037, 1043
(10th Cir. 1996).

23 For example, in *Tohono O’odham Nation v. Ducey*, the Tohono O’odham
Nation (“Nation”) filed suit in federal district court claiming that federal law preempts
any state-law authority the Arizona Department of Gaming (“ADG”) might have to

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1 withhold certain certifications for the construction of a casino in the Phoenix
2 metropolitan area. *Tohono O’odham*, 174 F. Supp. 3d at 1196. The ADG Director
3 asserted counterclaims against the Nation for promissory estoppel, fraudulent
4 inducement, and material misrepresentation. *Id.* The Director sought a variety of relief,
5 including declaratory and injunctive relief prohibiting the Nation from conducting
6 gaming activities on the property and rescission of the Gaming Compact between the
7 State of Arizona and the Nation. *Id.*

8 The Nation moved to dismiss the Director’s counterclaims on the basis of tribal
9 sovereign immunity. Citing *United States v. State of Oregon*, 657 F.2d 1009 (9th Cir.
10 1981), the district court noted that a tribe may waive its sovereign immunity under the
11 waiver-by-litigation doctrine. To determine the scope of the waiver for that particular
12 case, the district court examined the Nation’s complaint to evaluate “the issues
13 necessary to decide the action.” *Id.* at 1205. The district court held that the Nation’s
14 complaint put several questions “squarely at issue” such as the Nation’s right to engage
15 in gaming activities on the property and the terms and scope of the Gaming Compact.
16 *Id.* at 1205-06.

17 After determining the scope of the Nation’s waiver, the district court then
18 decided “which of the Director’s counterclaims falls within the scope of that waiver.”
19 *Id.* at 1206. The district court found that many of the Director’s counterclaims mirrored
20 the Nation’s claims and “thus implicates only issues necessary” to decide the Nation’s
21 claims. *Id.* at 1206-07. The Nation therefore waived its sovereign immunity with
22 regard to the majority of the Directors’ counterclaims. *Id.* at 1207. The district court
23 dismissed only a few of the Director’s demands, because they “venture outside the

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1 subject of the original cause of action,” insomuch as the Nation did not seek comparable
2 relief in its complaint. *Id.* (citing *Tsosie*, 92 F.3d at 1043).

3 Other courts have likewise held that a tribe waived its sovereign immunity after
4 engaging in the same analysis as the *Tohono O’odham* court. *See, e.g., Battle Mountain*
5 *Band v. United States Bureau of Land Mgmt.*, 3:16-CV-0268-LRH-WGC, 2018 WL
6 1532153, at *4 (D. Nev. Mar. 28, 2018) (tribe waived its sovereign immunity as to
7 intervenor’s cross-claims where tribe’s claims involved the “exact issue” raised by the
8 intervenor’s cross-claims); *Cayuga Indian Nation of New York v. Seneca Cty., New*
9 *York*, 260 F. Supp. 3d 290, 299 (W.D.N.Y. 2017) (holding that “mirror-image
10 counterclaims are *not* precluded by sovereign immunity”).

11 Here, Newtok waived its sovereign immunity by asserting counterclaims against
12 Alaska Logistics. After Alaska Logistics filed its complaint, Newtok filed an answer
13 and asserted counterclaims against Alaska Logistics *before* Newtok ever sought to
14 dismiss Alaska Logistics’ claims. Newtok’s Motion to Dismiss and Motion to Strike
15 only seek to dismiss Alaska Logistics’ claims and counterclaims to counterclaims.
16 Newtok did not wait to assert counterclaims against Alaska Logistics until the Court
17 ruled on the sovereign immunity issue. Newtok did not assert counterclaims because it
18 was merely “pleading in the alternative” in the event its Motion to Dismiss was denied.
19 Rather, Newtok affirmatively invoked the Court’s jurisdiction to adjudicate its
20 counterclaims. Accordingly, for the purposes of the waiver-by-litigation doctrine,
21 Newtok’s counterclaims are the equivalent to a tribe filing suit in the first instance or a
22 tribe intervening in an existing action. Indeed, Alaska Logistics has filed counterclaims
23 to Newtok’s counterclaims demonstrating that this case is no different than the more

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1 typical waiver-by-litigation case in which a defendant asserts counterclaims to a tribe's
2 claims.

3 Review of the pleadings demonstrates that Newtok's counterclaims are the
4 mirror image of Alaska Logistics' claims and counterclaims to counterclaims. The
5 claims, counterclaims, and counterclaims to counterclaims all relate to the IFB, Alaska
6 Logistics' transportation of construction supplies & equipment and fuel delivery, and
7 Newtok and Goldstream's compensation for Alaska Logistics' barge transportation
8 services. Newtok has asserted counterclaims for fraud, misrepresentation, unfair and
9 deceptive practices, and breach of contract. Alaska Logistics as asserted claims and
10 counterclaims to counterclaims for the exact same causes of action. Both parties seek
11 money damages. Alaska Logistics seeks additional compensation pursuant to a change
12 order. Complaint ¶¶ 36-39. Newtok characterizes Change Order #1 as a "classic 'bait
13 and switch'" which forms the basis of its fraud, misrepresentation, unfair and deceptive
14 practices counterclaims. Newtok's Answer ¶ 93. Alaska Logistics alleges that Newtok
15 materially misrepresented the scope of the IFB. Complaint ¶ 48. Newtok alleges that
16 Alaska Logistics "intentionally submitted an unusually low bid in order to secure the
17 bid over other responsible bidders." Newtok's Answer ¶ 91.

18 Thus, Newtok and Alaska Logistics' claims are merely two sides of the same
19 coin—all of the claims relate to the same subject matter. To adjudicate Newtok's
20 counterclaims and Alaska Logistics claims and counterclaims to counterclaims, the
21 Court will clearly need to determine the scope, terms, performance, and payment
22 relating to the IFB, as well as the parties' subsequent negotiations relating to Alaska
23 Logistics' compensation. Alaska Logistics' claims and counterclaims to counterclaims

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1 are the mirror image of Newtok’s counterclaims. Newtok consented to the Court’s
2 jurisdiction by its conduct in the litigation. Accordingly, Newtok waived its sovereign
3 immunity as to Alaska Logistics’ claims and counterclaims to counterclaims under the
4 waiver-by-litigation doctrine.

5 **C. Newtok Waived Sovereign Immunity by Agreeing to Forum**
6 **Selection Clause in the Transportation Agreement.**

7 In addition, Newtok waived its sovereign immunity pursuant to the forum
8 selection clause in the Transportation Agreement. Section VI(1) of the IFB instructed
9 bidders to provide a “proposed purchase agreement between NVC and the Bidder with
10 project specific terms and conditions”). Complaint ¶ 21. Pursuant to this requirement,
11 Alaska Logistics submitted the Transportation Agreement with its bid which contained
12 a forum selection clause providing that “Any action brought by either party to enforce
13 any term or provision of this contract shall be commenced in the United States District
14 Court for the Western District of Washington at Seattle, as appropriate.” Complaint ¶
15 23.

16 A tribe can waive its sovereign immunity “by agreeing to contract terms
17 inconsistent with sovereign immunity.” *Nenana Fuel Co., Inc. v. Native Vill. of*
18 *Venetie*, 834 P.2d 1229, 1232 (Alaska 1992); *see also Native Vill. of Eyak v. GC*
19 *Contractors*, 658 P.2d 756, 760 (Alaska 1983). For example, in *Nenana Fuel v. Native*
20 *Village of Venetie*, the Alaska Supreme Court held that a tribe waived sovereign
21 immunity by entering into a note and security agreement that contained a “remedies”
22 provision which allowed the lender to “bring an action upon the Note” and “invoke any
23 other remedy provided by law or this agreement.” *Nenana Fuel*, 834 P.2d at 1234. The

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1 Alaska Supreme Court held that this remedies provision constituted an express waiver
2 of sovereign immunity by “referring actions based upon the contract to Alaska courts
3 for application of Alaska law.” *Id.* at 1233. Likewise, in *Hydaburg Co-op Ass’n of*
4 *Hydaburg v. Hydaburg Fisheries*, the Alaska Supreme Court held that a tribe waived
5 sovereign immunity by entering into an agreement containing an arbitration clause,
6 because an arbitration clause “would be meaningless if it did not constitute a waiver of
7 the tribe’s immunity from suit to compel arbitration or to enforce an arbitration award.”
8 826 P.2d 751, 755 (Alaska 1992).

9 Here, per Newtok’s instructions, Alaska Logistics submitted the Transportation
10 Agreement with its bid and was awarded the contract. Newtok never objected to the
11 Transportation Agreement or the forum selection clause contained therein. Alaska
12 Logistics then performed the contract in accordance with the terms of the IFB and
13 Transportation Agreement. By consenting to the Transportation Agreement, Newtok
14 waived its sovereign immunity by “agreeing to contract terms inconsistent with
15 sovereign immunity.” The forum selection clause is fundamentally inconsistent with
16 Newtok’s assertion that it is immune from suit in state or federal court for disputes
17 relating to the IFB and Alaska Logistics’ barge transportation services. Accordingly,
18 Newtok’s consent to the Transportation Agreement operates as a waiver of its sovereign
19 immunity.

20 **D. In the Alternative, Alaska Logistics Should Be Entitled to Take**
21 **Jurisdictional Discovery on Sovereign Immunity Issue.**

22 In the event the Court finds that Newtok did not waive its sovereign immunity,
23 Alaska Logistics requests that the Court defer ruling on this issue so Alaska Logistics

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1 can pursue limited jurisdictional discovery on whether Alaska Logistics contractually
2 waived its sovereign immunity in another agreement relating to the Mertarvik
3 Construction Project.

4 As Newtok admits, it has made both a facial and factual challenge to the Court's
5 jurisdiction. Motion to Dismiss at 5. When jurisdiction is "factually attacked in a
6 Rule 12(b)(1) motion, the court may hear evidence before ruling on the issue." *HRPT*
7 *Properties Tr. v. Lingle*, 676 F. Supp. 2d 1036, 1041 (D. Haw. 2009) (citing *St. Clair v.*
8 *City of Chico*, 880 F.2d 199, 200–202 (9th Cir. 1989)). "The court may permit
9 discovery before allowing the plaintiff to demonstrate the requisite jurisdictional facts."
10 *Id.*; see also *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 108 (3d Cir. 2015)
11 ("District courts have the authority to allow discovery in order to determine whether
12 subject-matter jurisdiction exists."); *Myhre v. Seventh-Day Adventist Church Reform*
13 *Movement Am. Union Int'l Missionary Soc.*, 298 F.R.D. 633, 641 (S.D. Cal. 2014)
14 ("Generally, where 'pertinent facts bearing on the question of jurisdiction are in
15 dispute, discovery should be allowed.'"); *Wyatt v. Syrian Arab Republic*, 225 F.R.D. 1,
16 3 (D.D.C. 2004) (court "must give the plaintiff 'ample opportunity to secure and present
17 evidence relevant to the existence of jurisdiction'" where foreign sovereign claims it is
18 immune from suit).

19 Alaska Logistics' barge transportation services is only a small part of the
20 Mertarvik Construction Project. Newtok's relocation effort has spanned for over a
21 decade and has involved dozens of state and federal agencies as well as numerous
22 private contractors. Affidavit of Dustin C. Hamilton ("Hamilton Aff.") ¶¶ 2-3, Exs. A-
23 B. As a part of the Mertarvik Construction Project, Newtok has routinely waived its

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1 sovereign immunity, by contract, to qualify for government grants or enter into
2 agreements with various contractors. For example, Newtok and Goldstream's
3 "Professional Planning, Engineering Construction Management Services Agreement,"
4 which was signed by NVC President Paul Charles, provides that the "Council hereby
5 waives the Council's right to assert the defense of sovereign immunity with respect to
6 any suit brought by Goldstream with respect to the enforcement of this Agreement in
7 accordance with its terms" Hamilton Aff. ¶ 4, Ex. C. Likewise, Newtok and
8 DOWL Engineering's "Contract to Construct Mertarvik Evacuation Center," which was
9 also signed by NVC President Paul Charles, includes a limited waiver of sovereign
10 immunity. Hamilton Aff. ¶ 5, Ex. D.

11 Alaska Logistics has only been able to acquire a small number of these records
12 from Alaska state agencies via Alaska's Public Records Act. Alaska Logistics has a
13 reasonable basis to believe that Newtok has waived its sovereign immunity in other
14 contracts or grant applications with government agencies and private contractors, and
15 that some of those waivers may extend to Alaska Logistics claims and counterclaims to
16 counterclaims. To this end, the U.S. Bureau of Indian Affairs has indicated that it
17 possesses over 13,650 pages of documents relating to the Mertarvik relocation project
18 from the years 2010-2017, which was cost-prohibitive to obtain. Hamilton Aff. ¶ 6, Ex.
19 E. All of these documents are within Newtok's possession, custody, or control.
20 Newtok can more easily identify the documents relating to sovereign immunity than a
21 state or federal agency, and Newtok's witnesses can testify about issues pertaining to
22 the tribe's waiver of sovereign immunity. Furthermore, Newtok's contracts with
23 private contractors may not be in the possession of a government agency. Accordingly,

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1 to the extent the Court finds that Newtok has not already waived its sovereign
2 immunity, Alaska Logistics requests that the Court defer its ruling on Newtok's Rule
3 12(b)(1) motion so Alaska Logistics can conduct limited jurisdictional discovery on
4 whether Newtok waived its sovereign immunity (to the extent the Court finds that
5 Newtok has not already waived it).

6 **E. Counterclaims to Counterclaims Are Recognized Pleadings Under**
7 **the Federal Rules of Civil Procedure.**

8 Finally, Newtok's Motion to Strike lacks merit and should be denied.
9 Rule 15(a)(1) provides that a party "may amend its pleading once as a matter of course
10 within . . . 21 days after serving it[.]" Alaska Logistics filed its Amended Answer and
11 Counterclaims to Counterclaims (ECF No. 25) on July 13, 2018—fourteen days after it
12 filed its original Answer to Newtok's Counterclaims (ECF No. 15). Accordingly,
13 Alaska Logistics was entitled to file the Amended Answer as a "matter of course" and
14 did not require Newtok's consent or leave of court to file the amended pleading.

15 As for Newtok's contention that a counterclaim to a counterclaim is not
16 "allowed under the Rules," Motion to Strike at 1-2, the weight of authority supports the
17 opposite conclusion. "Most courts that have addressed this issue have concluded that a
18 counterclaim may be asserted in a reply to a counterclaim." *Soilworks, LLC v. Midwest*
19 *Indus. Supply, Inc.*, CV-06-2141-PHX-DGC, 2007 WL 1521585, at *1-2 (D. Ariz.
20 May 22, 2007) (citing *Power Tools & Supply, Inc. v. Cooper Power Tools, Inc.*, No. 05-
21 CV-73615-DT, 2007 WL 1218701, at *1-3 (E.D. Mich. Apr. 20, 2007); *United*
22 *Magazine Co. v. Murdoch Magazines Distrib., Inc.*, No. 00 Civ. 3367(AGS), 2003 WL
23 223462, at *3 (S.D.N.Y. Feb. 3, 2003); *Electroglas, Inc. v. Dynatex Corp.*, 473 F. Supp.

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1 1167, 1171 (N.D. Cal. 1979); *S.E. Indus. Tire Co. v. Duraprene Corp.*, 70 F.R.D. 585,
2 586 (E.D. Pa. 1976); *Evans v. S.S. Kresge Co.*, 54 F.R.D. 536, 539 (W.D. Pa. 1972);
3 *Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc.*, 50 F.R.D. 415, 418 (D. Del.
4 1970); *Warren v. Indian Refining Co.*, 30 F.Supp. 281, 282 (N.D. Ind. 1939)); *see also*
5 *Lincoln Sav. Bank v. Open Sols., Inc.*, 956 F. Supp. 2d 1032, 1038–39 (N.D. Iowa 2013)
6 (“[S]everal courts have recognized a counterclaim to a counterclaim as a valid
7 pleading.”); *Baker v. Borg Warner Morse Tec, Inc.*, CIV.A. 3:11-505, 2012 WL
8 195011, at *1-2 (S.D.W. Va. Jan. 23, 2012) (“There are several courts which have
9 considered the issue and most ‘have concluded that a counterclaim may be asserted in a
10 reply to a counterclaim.’”).

11 The district court’s decision in *Power Tools & Supply* is instructive. There, the
12 district court reasoned as follows:

13 “Pleading” is defined by Rule 7(a), which permits several types of
14 pleadings. Included amongst the permissible pleadings is “a reply
15 to a counterclaim denominated as such.” Fed.R.Civ.P. 7(a). In
16 other words, by the plain language of the rules, a counterclaim may
be raised in a pleading, and a reply to a counterclaim is a
permissible pleading; hence, a counterclaim may be asserted in a
reply to a counterclaim.

17 2007 WL 1218701 at *2 (citing *S.E. Indus. Tire Co.*, 70 F.R.D. at 586).

18 Lastly, Newtok fails to provide a basis upon which it would be entitled to fees or
19 costs for preparing its Motion to Strike. “It is well established under
20 the American Rule that a party may not generally recover attorney’s fees absent
21 statutory authorization or a contract providing for an award.” *Dir., Office of Workers’*
22 *Comp. Programs, U. S. Dep’t of Labor v. Robertson*, 625 F.2d 873, 876 (9th Cir. 1980).
23 Newtok cites no rule, statute or other authority entitling it to recover fees or costs.

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Newtok is not entitled to fees or costs simply because it (wrongly) deems a pleading or argument to be “frivolous.” Motion to Strike at 2-3.

IV. CONCLUSION

For all the above reasons, Defendant Newtok Village Council’s Motion to Dismiss and Motion to Strike should be DENIED.

Dated this 27th day of July, 2018.

LE GROS, BUCHANAN & PAUL

By: s/Dustin C. Hamilton
Dustin C. Hamilton, ABA #1405024

Attorney for Plaintiff

I hereby certify that on the 27th day of July, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the Court, and serve it on all associated counsel.

s/Stephanie Gurney
Legal Assistant
LeGros Buchanan & Paul
4025 Delridge Way SW, Suite 500
Seattle, Washington 98106
Telephone: 206-623-4990
Facsimile: 206-467-4828
Email: sgurney@legros.com