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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 GEORGE ENGASSER, an individual,
15 Plaintiffs,
16 vs.
17 TETRA TECH, INC., a Delaware
18 Corporation; and DOES 1 through
19 100, inclusive,
20 Defendants.

CaseNo.2:19-cv-07973-ODW-PLA

Assigned to Hon. Otis D. Wright, II

**SPECIALY APPEARING
MECHOOPDA CULTURAL
RESOURCE PRESERVATION
ENTERPRISE'S REPLY TO
TETRA TECH'S OPPOSITION
TO MECHOOPDA CULTURAL
RESOURCE PRESERVATION
ENTERPRISE'S MOTION TO
DISMISS AMENDED THIRD-
PARTY COMPLAINT**

DATE: August 17, 2020
TIME: 1:30 PM
JUDGE: Hon. Otis D. Wright, II
CTRM: 5D (5th floor)

21 TETRA TECH, INC.,
22 Third-Party Plaintiff,
23 vs.
24 MECHOOPDA CULTURAL
25 RESOURCE PRESERVATION
26 ENTERPRISE, an unincorporated
27 instrumentality of the Mechoopda
28 Indian Tribe of Chico Rancheria,
Third-Party Defendant.

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Table of Authorities

Cases:

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I. INTRODUCTION

3 Tetra Tech, Inc. (“Tetra Tech”), in its Opposition to Mechoopda Cultural
4 Resource Preservation Enterprise’s (“Mechoopda Cultural Enterprise”) Motion to
5 Dismiss (“Opposition”), relies heavily on equitable arguments and claims that a
6 waiver of tribal sovereign immunity should be implied in this case. In doing so,
7 Tetra Tech makes numerous arguments that, if accepted by this Court, would
8 cause significant precedential harm to tribal sovereign immunity throughout the
9 United States. In particular, Tetra Tech only relies upon two federal cases that
10 held a tribe expressly waived its sovereign immunity by agreeing to a binding
11 arbitration provision. *See, e.g., C & L Enterprises, Inc. v. Citizen Band*
12 *Potawatomi Indian Tribe of Oklahoma* 532 U.S. 411 (2001) (“*C & L*”); *Sokaogon*
13 *Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.* 86 F.3d 656 (7th Cir.
14 1996) (“*Sokaogon*”). Tetra Tech now asks this Court to further erode tribal
15 sovereignty by extending the holdings of these cases to the present action because
16 the Professional Services Agreement (“PSA”) includes a general dispute
17 resolution provision with an explicit non-waiver of sovereign immunity provision.

18 Tetra Tech’s arguments, however, fail as a matter of law. Mechoopda
19 Cultural Enterprise has not, by its conduct, waived its sovereign immunity from
20 suit for the purposes of Tetra Tech’s Amended Third-Party Complaint because
21 waivers of sovereign immunity may not be implied but must be unequivocally
22 expressed. Tetra Tech, a billion dollar company with an experienced negotiator
23 and legal counsel, attempts to paint itself as a party that was taken advantage by
24 Mechoopda Cultural Enterprise because it had no choice but to accept the terms
25 and conditions of the PSA. Tetra Tech has worked with other tribes prior to this
26 PSA and has the knowledge of what tribal sovereign immunity is and how it is
27 waived. Tetra Tech’s Opposition selectively cites and emphasizes language of the
28 dispute resolution provision to creatively piece together an argument that

1 Mechoopda Cultural Enterprise expressly waived its sovereign immunity. Further,
2 Tetra Tech conflates the waiver of sovereign immunity argument with the
3 employment issues between Plaintiff George Engasser and Tetra Tech by
4 emphasizing the indemnification provision of the PSA, which has no relevance to
5 the required express waiver of sovereign immunity.

6 For these reasons and the reasons set forth more fully below, Tetra Tech's
7 Amended Third-Party Complaint must be dismissed in its entirety with prejudice.

8 **II. STATEMENT OF FACTS**

9 Tetra Tech's recitation of the "facts" presents a one-sided, incomplete
10 picture that distorts and short shifts the evidence submitted by Mechoopda Cultural
11 Enterprise in its Motion to Dismiss and the deposition testimony of Stephanie
12 Reyes. Mechoopda Cultural Enterprise provides the following additional factual
13 background.

14 **A. Tribal Monitors for the 2018 Camp Fire were Necessary to**
15 **Protect the Mechoopda Indian Tribe's Cultural Resources.**

16 Mechoopda Indian Tribe's ancestral land was burned as a result of the 2018
17 Camp Fire. The 2018 Camp Fire resulted in the destruction of tribal burial sites and
18 resources of cultural or religious significance to the Tribe. This is why Mechoopda
19 Cultural Enterprise entered the PSA with Tetra Tech because it had to monitor and
20 facilitate the protection of the Mechoopda Indian Tribe's resources and artifacts
21 that were being unearthed during the fire cleanup. Tribal monitoring is a
22 reasonable and feasible mitigation measure which allows the fire cleanup and
23 debris removal to proceed while mitigating impacts to significant tribal resources.
24 Pursuant to the PSA, Mechoopda Cultural Enterprise retained control over how the
25 Mechoopda Indian Tribe cared for its own tribal resources and artifacts because the
26 tribal members of the Mechoopda Indian Tribe are descendants of these cultural
27 resources, artifacts and spiritual items. The Tribal Monitors are necessary because
28 the Mechoopda Indian Tribe has its own traditional protocols on how to approach,

1 pick up, and set down the spiritual resources and artifacts. The Mechoopda Indian
 2 Tribe is either going to pray or sing with the tribal resources and artifacts based on
 3 their own protocols and as such it is difficult to capture that process in the PSA, so
 4 the “sole control” language is included to give the Tribal Monitors the authority
 5 and control with any tribal resources and artifacts discovered. The Tribal Monitors
 6 are there to be able to care for and handle the sacred items in tribally appropriate
 7 manner and to prevent them from being further disturbed or scraped and dumped.
 8 Therefore, Tetra Tech could not tell the Mechoopda Cultural Enterprise and
 9 Mechoopda Indian Tribe how to pray, how to sing, when they can or cannot
 10 because that is part of Mechoopda Indian Tribe’s spirituality and traditions. The
 11 purpose of the PSA is to preserve and protect the Mechoopda Indian Tribe’s
 12 cultural resources. Declaration of Sheila Lamb Carroll (“Carroll Decl.”) ¶3, Exh. A
 13 (Transcript of Deposition of Stephanie Reyes (“Reyes Depo.”), 77:3-82:17).

14 **B. Tetra Tech Participated in the Negotiation of the PSA.**

15 Tetra Tech entered into a lucrative agreement with CalRecycle to coordinate
 16 the abatement and removal of debris left behind by the Camp Fire. Tetra Tech
 17 admits that it has been engaged to provide similar services in response to 22
 18 wildfire-related disasters. ECF No. 36 (“Opposition”) at p. 3. As such, this was not
 19 Tetra Tech’s first experience contracting and working with tribes. In fact, the PSA
 20 was essentially a contract template developed through negotiations by Tetra Tech
 21 and other tribes for previous projects. Carroll Decl. ¶3, Exh. A (Reyes Depo.,
 22 38:22-39:20; 43:6-17). During these other negotiations with tribes, Tetra Tech
 23 agreed to strike the waiver of sovereign immunity clause. Carroll Decl. ¶3, Exh. A
 24 (Reyes Depo., 45:20-46:1). Mechoopda Cultural Enterprise did negotiate with
 25 CalRecycle regarding the tribal monitoring rates, labor costs, and overall
 26 compensation for its tribal monitors. However, these specific terms related to the
 27 tribal monitoring rates are irrelevant to whether Mechoopda Cultural Enterprise
 28 expressly waived its sovereign immunity. Tetra Tech and Mechoopda Cultural

1 Enterprise negotiated other terms of the PSA such as Personal Protective
 2 Equipment and payment terms. The PSA took months to negotiate and it was never
 3 a take it or leave it agreement as implied by Tetra Tech. Carroll Decl. ¶3, Exh. A
 4 (Reyes Depo., 63:2-10). Tetra Tech had ample opportunity to negotiate and request
 5 Mechoopda Cultural Enterprise to expressly waive its sovereign immunity, but it
 6 chose not to. Carroll Decl. ¶ , Exh. A (Reyes Depo., 95:3-16).

7 **III. ARGUMENT**

8 **A. Mechoopda Cultural Enterprise Did Not Waive its Sovereign** 9 **Immunity by Executing the PSA.**

10 Tetra Tech erroneously contends that Mechoopda Cultural Enterprise can
 11 be sued in this Court because the PSA contains a Dispute Resolution provision.
 12 Opposition, p. 10-14. The Dispute Resolution provision does not expressly waive
 13 Mechoopda Cultural Enterprise's sovereign immunity. The principal of sovereign
 14 immunity is that Mechoopda Cultural Enterprise has the ability to sue but still
 15 retains its sovereignty. Tribal sovereign immunity is crucial to tribal government
 16 existence and to the survival of Native constituents of the tribe. Carroll Decl. , ¶ ,
 17 Exh. A (Reyes Depo., 47:14-25). Thus, a waiver of tribal sovereign immunity
 18 must be express and clear and in accordance with a tribe's governing constitution
 19 and charters. *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.* (“*Memphis*
 20 *Biofuels*”) 585 F. 3d 917, 922 (6th Cir. 2009). As detailed in Mechoopda Cultural
 21 Enterprise's Motion to Dismiss, the Mechoopda Cultural Enterprise and the
 22 Mechoopda Indian Tribe did not waive its sovereign immunity pursuant to both
 23 federal law and the Mechoopda Cultural Enterprise's Ordinance and the Tribal
 24 Constitution. ECF No. 34-1 (“Motion to Dismiss”), p. 12-14.

25 “The Supreme Court has held that agreeing to an arbitration clause may
 26 establish a clear waiver of sovereign immunity.” *Miller v. Wright* 705 F.3d 919,
 27 924 (2013). Mechoopda Cultural Enterprise is keenly aware of how courts
 28 construe arbitration clauses as a waiver of sovereign immunity, thus an arbitration

1 on by Tetra Tech are distinguishable from this case. The contracts in the *C & L*
2 and *Sokaogon* cases included binding arbitration clauses. The courts in these cases
3 held that these binding arbitration clauses operated as express waivers of tribal
4 sovereign immunity because the tribes expressly agreed to: (1) an agreement to
5 submit disputes to a body for adjudication; and (2) an agreement as to what
6 particular body will hear such disputes.” *Id.* at 924-926.

7 No such binding arbitration clause or agreement to arbitrate exists in the
8 PSA. The Dispute Resolution provision is readily distinguishable from the
9 arbitration provisions that operated as express waivers of tribal immunity in *C & L*
10 and *Sokaogon*. At no point has Mechoopda Cultural Enterprise agreed to
11 arbitration, judicial enforcement of an arbitration award, or any other provision
12 authorizing this court to resolve this dispute between it and Tetra Tech. In fact,
13 Tetra Tech has had to pull apart the Dispute Resolution provision to cobble
14 together its argument that there is an expressed waiver by emphasizing random
15 terms.

16 Notably, the PSA speaks only to **where** a suit may be brought to enforce the
17 Dispute Resolution provision and whether the meet and confer process has been
18 satisfied – “any court with competent jurisdiction” – but it does not expressly or
19 impliedly address **whether** a suit may be brought or the particular body that may
20 hear the dispute. In contrast to the arbitration provisions in the *C & L* and
21 *Sokaogon* cases, the Dispute Resolution provision and PSA are silent as to
22 identifying any jurisdiction or a choice of law. Further, unlike in *C & L* and
23 *Sokaogon*, Mechoopda Cultural Enterprise did not expressly agree to submit any
24 dispute for adjudication.

25 The emphasized “prior to commencing litigation” language at most implies
26 Mechoopda Cultural Enterprise’s right to sue Tetra Tech for failure to comply
27 with the terms of handling the Mechoopda Indian Tribe’s cultural resources and
28 artifacts. Mechoopda Cultural Enterprise is cloaked with immunity from suit, but

1 artifacts. Mechoopda Cultural Enterprise is cloaked with immunity from suit, but
2 retains its right to sue, unlike the ordinary citizens that Tetra Tech typically enters
3 contracts with. Tribal sovereign immunity is not a new concept to Tetra Tech, and
4 it is well versed in contracting with tribes and is fully aware of the significance
5 and consequences of tribal sovereign immunity. Carroll Decl. ¶3, Exh. A (Reyes
6 Depo., 38:22-39:4; 43:6-17; 45:20-46:1; 47:10-25; 64:16-65:7).

7 Further, the *C & L* and *Sokaogon* cases were not confronted with
8 agreements with a specific provision expressly asserting sovereign immunity like
9 the PSA here. ECF No. 34-4 (“Declaration of Robyn Forristel”), ¶7, Exh. C at
10 Terms and Conditions, Section IV(D). Each and every draft of the PSA exchanged
11 between Tetra Tech and Mechoopda Cultural Enterprise included the provision
12 “[n]othing herein shall be construed as a waiver of sovereign immunity. *Id.*;
13 Carroll Decl. ¶3, Exh. A (Reyes Depo., 38:22-39:4; 45:20-46:1). The PSA
14 refused to waive Mechoopda Cultural Enterprise’s sovereign immunity and
15 proceeded to allow Mechoopda Cultural Enterprise the ability to consent to
16 litigation to a particular suit arising under the PSA even as Mechoopda Cultural
17 Enterprises chooses to stand on its claim of sovereign immunity pursuant to the
18 Dispute Resolution provision. *See Ute Indian Tribe of the Uintah & Ouray*
19 *Reservation v. Utah* 790 F.3d 1000 (2015).

20 Even with Tetra Tech’s rearrangement of the language in its attempt to
21 rework the Dispute Resolution provision, it still fails to establish an express and
22 unequivocal waiver of Mechoopda Cultural Enterprise’s sovereign immunity. This
23 is for good reason as a waiver has not and will not be provided by Mechoopda
24 Cultural Enterprise.

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1 **B. Mechoopda Cultural Enterprise Cannot Waive its Sovereign**
 2 **Immunity Without Following its Ordinance and the Tribal**
 3 **Constitution.**

4 Tetra Tech relies on the case *Smith v. Hopland Band of Pomo Indians*
 5 (*“Smith”*) for its contention that Mechoopda Cultural Enterprise can waive its
 6 sovereign immunity without the requisite approvals pursuant to the Tribal
 7 Constitution and Ordinance. Opposition, p. 16-18. However, the facts of this case
 8 are distinguishable from the *Smith* case as discussed in the *Smith* court’s analysis.
 9 The *Smith* court distinguished the facts from the *Sanderlin v. Seminole Tribe of*
 10 *Florida* case. *Smith v. Hopland Band of Pomo Indians* 95 Cal. App. 4th 1, 11-12
 11 (2002). First, the contract in the *Sanderlin* case did not contain an explicit waiver
 12 of sovereign immunity. *Id.* at 11. Second, the *Sanderlin* court never considered the
 13 question of whether the tribal law or federal law should be applied because the
 14 agreement did not involve an explicit waiver of tribal immunity. *Id.* Third, the
 15 tribal ordinance in *Sanderlin* provided that a waiver of tribal immunity had to be
 16 made by resolution of the tribal council and there was no evidence that the tribal
 17 council passed a resolution. In contrast, in the *Smith* case, “a person with actual
 18 authority to execute a contract on behalf of the Tribe did so, and then the contract,
 19 which included terms which explicitly waived the Tribe’s sovereign immunity,
 20 was approved by resolution of the tribal council.” *Id.* at 11-12.

21 Here, like in *Sanderlin* and unlike in *Smith*, the PSA did not include a term
 22 which explicitly waived Mechoopda Cultural Enterprise’s sovereign immunity. In
 23 contrast, the PSA explicitly retained Mechoopda Cultural Enterprise’s sovereign
 24 immunity. Declaration of Robyn Forristel, ¶7, Exh. C at Terms and Conditions,
 25 Section IV(D) (“Nothing herein shall be construed as a waiver of sovereign
 26 immunity.”). This is why the Mechoopda Cultural Enterprise’s Board of
 27 Directors, pursuant to the Ordinance, did not review or approve of a waiver of
 28 sovereign immunity because it did not exist in the PSA and was not at issue.

1 Further, the Tribal Council, pursuant to the Ordinance and Tribal Constitution, did
2 not review or approve of a waiver of sovereign immunity either. Robyn Forristel
3 did have the authority to execute the PSA, but she did not have the authority from
4 the Mechoopda Cultural Enterprise or the Mechoopda Indian Tribal Council to
5 waive Mechoopda Cultural Enterprise's sovereign immunity. Ms. Forristel's
6 execution of the PSA was not a waiver of tribal sovereign immunity.

7 Assuming *arguendo* that this Court finds Ms. Forristel did waive the
8 Mechoopda Cultural Enterprise's sovereign immunity, this would be considered
9 an unauthorized act of a tribal official which is insufficient to waive tribal
10 sovereign immunity. *Memphis Biofuels, supra*, 585 F.3d at 922. The Tribal
11 Constitution and Ordinance control how the Mechoopda Cultural Enterprise
12 waives its sovereign immunity and without the required resolutions and terms in
13 the PSA, any waiver of tribal sovereign immunity is insufficient. *Id.*

14 **C. Mechoopda Cultural Enterprise Has Participated in**
15 **Jurisdictional Discovery.**

16 Mechoopda Cultural Enterprise does not dispute that Tetra Tech has a right
17 to **limited** discovery related solely to matters affecting the court's subject matter
18 jurisdiction. When sovereign immunity issues are presented, putting subject
19 matter jurisdiction into question, "discovery and fact-finding should be limited to
20 the essentials necessary to determining the preliminary question of jurisdiction."
21 *Gould, Inc. v. Pechiney Ugine Kuhlmann*, F.2d 443, 441 (1988). Mechoopda
22 Cultural Enterprise has provided ample evidence related to the court's subject
23 matter jurisdiction and that there is no express waiver of its sovereign immunity.
24 Mechoopda Cultural Enterprise submitted a clear and unequivocal declaration
25 from Ms. Forristel. Additionally, in an effort to cooperate, Mechoopda Cultural
26 Enterprise agreed to a stipulation to allow Tetra Tech to conduct limited
27 discovery, including Interrogatories, Request for Production of Documents, and a
28 Rule 30(b)(6) witness deposition. ECF No. 36-1 ("Noh Decl."), ¶¶4-7, Exhs. A-C.

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Therefore, Tetra Tech has failed to establish the need for additional jurisdictional discovery as Mechoopda Cultural Enterprise has provided the “essentials necessary” to determine whether this Court has jurisdiction.

IV. CONCLUSION

Mechoopda Cultural Enterprise did not waive its sovereign immunity by executing the PSA. The Tribal Council, pursuant to the Tribal Constitution, and the Mechoopda Cultural Enterprise’s Board of Directors, pursuant to the Ordinance, never reviewed or approved a waiver of sovereign immunity in favor of Tetra Tech. On these grounds, Mechoopda Cultural Enterprise respectfully requests this Amended Third-Party Complaint be dismissed for lack of subject matter jurisdiction and personal jurisdiction under the well-established doctrine of tribal sovereign immunity.

Dated: August 3, 2020

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