No. 21-55217
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ENGASSER, an individual,
Plaintiff,

v.

TETRA TECH, INC., a Delaware corporation,
Defendant-Third-Party-Plaintiff-Appellant,

v.

MECHOOPDA CULTURAL RESOURCE PRESERVATION ENTERPRISE,
Third-Party-Defendant-Appellee.

On Appeal from the United States District Court
For the Central District of California
No. 2:19-cv-07973-ODW-PLA
Hon. Otis D. Wright, II

APPELLEE'S ANSWERING BRIEF

SHEILA LAMB CARROLL, SBN 142764 (scarroll@thecarrollfirm.com)
SAMANTHA I. PRANATADJAJA, SBN 305383 (samantha@thecarrollfirm.com)
CARROLL & ASSOCIATES, P.C.
3600 American River Drive, Suite 205, Sacramento, CA 95864
Telephone: (916) 488-5388; Facsimile: (916) 488-5387

Attorneys for Third-Party-Defendant-Appellee
MECHOOPDA CULTURAL RESOURCE PRESERVATION ENTERPRISE

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Third-Party-Defendant-Appellee Mechoopda Cultural Resource Preservation Enterprise certifies that it does not have a parent corporation and no publicly-held corporation owns stock in Mechoopda Cultural Resource Preservation Enterprise.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations and Rules

Other

INTRODUCTION

It is well settled that a waiver of tribal sovereign immunity cannot be implied but must be unequivocally expressed. Appellee Mechoopda Cultural Resource Preservation Enterprise ("Mechoopda Cultural Enterprise") did not waive its sovereign immunity by agreeing to a general dispute resolution provision in the Professional Services Agreement ("PSA") with Appellant Tetra Tech, Inc. ("Tetra Tech"). Instead, Mechoopda Cultural Enterprise expressly retained its sovereign immunity in the PSA, stating "[n]othing herein shall be construed as a waiver of sovereign immunity." Mechoopda Cultural Enterprise is a wholly owned, unincorporated entity of the Mechoopda Indian Tribe of Chico Rancheria, California, a federally recognized Indian tribe ("Mechoopda Indian Tribe"). The purpose of the Mechoopda Cultural Enterprise is to facilitate the protection of tribal cultural resources. Tetra Tech is a billion-dollar company that has been publicly traded since 1991 and is a global provider of consulting and engineering services.

Tetra Tech contends that the question here is "whether the dispute resolution process is illusory and without real world consequences or whether it constitutes a clear waiver of sovereign immunity. . .", but that is not really the question Tetra Tech argues. (Appellant's Opening Brief ("BR"), 1.) The PSA at issue clearly states that Mechoopda Cultural Enterprise's sovereign immunity is not waived.

The only illusory element of this case is the fact that Tetra Tech is attempting a linguistic sleight of hand to avoid the clear and direct language of the PSA it negotiated and entered into, consensually, and with full knowledge. The United States District Court for the Central District of California ("District Court") saw through this meritless argument, and properly dismissed Tetra Tech's Amended Third Party Complaint on the basis of Mechoopda Cultural Enterprise's unwaived inherent sovereign immunity. The District Court reached the correct decision based on controlling law and the admissible evidence, including declarations of the parties and jurisdictional discovery.

Tetra Tech's Opening Brief relies heavily on equitable arguments, alleged contract ambiguity, and claims that a waiver of tribal sovereign immunity should be implied. In particular, Tetra Tech only relies upon three federal cases that held a tribe expressly waived its sovereign immunity by agreeing to a binding arbitration provision. *See, e.g., C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* 532 U.S. 411 (2001) ("*C & L*"); *Rosebud Sioux Tribe v. Val-U Const. Co of South Dakota, Inc.* 50 F.3d 560 (8th Cir. 1995) ("*Rosebud"*); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.* 86 F.3d 656 (7th Cir. 1996) ("*Sokaogon*"). As discussed below, these cases are not analogous to this case, as the PSA does not contain a binding arbitration clause and expressly retains Mechoopda Cultural Enterprise's sovereign immunity. Tetra Tech now

seeks this Court to further erode tribal sovereignty by extending the holdings of these cases to the present action because the PSA includes a general dispute resolution provision with explicit non-waiver of sovereign immunity provisions.

As correctly concluded by the District Court, Tetra Tech's arguments fail as a matter of law because Mechoopda Cultural Enterprise did not waive its sovereign immunity since waivers of sovereign immunity may not be implied but must be unequivocally expressed. Tetra Tech, a billion-dollar company with an experienced negotiator and legal counsel, attempts to paint itself as a party that was taken advantage of by Mechoopda Cultural Enterprise because it had no choice but to accept the terms of the PSA. Tetra Tech has worked with other tribes prior to this PSA and has the knowledge of what tribal sovereign immunity is and how it is waived. Tetra Tech entered into the PSA clearly knowing and understanding what it was signing.

Tetra Tech's Opening Brief selectively cites and emphasizes language of the Dispute Resolution provision to creatively twist together an argument that Mechoopda Cultural Enterprise expressly waived its sovereign immunity. The fact that Tetra Tech has to creatively highlight the Dispute Resolution provision defeats Tetra Tech's argument for an express waiver. Further, Tetra Tech conflates the waiver of sovereign immunity argument with the employment issues between

Plaintiff George Engasser[1] ("Engasser") and Tetra Tech by emphasizing the indemnification provision of the PSA, which has no relevance to the required express waiver of sovereign immunity.

Tetra Tech's evident displeasure with the doctrine of tribal sovereign immunity does not and cannot change fundamental principles. Mechoopda Cultural Enterprise is immune from this action and there has been no waiver of its sovereign immunity by agreeing to the Dispute Resolution provision in the PSA. Mechoopda Cultural Enterprise respectfully requests that this Court affirm the District Court's Order.

JURISDICTIONAL STATEMENT

This is an appeal from the final order of the United States District Court for the Central District of California dated February 9, 2021 granting Mechoopda Cultural Enterprise's Motion to Dismiss on the basis of lack of subject matter jurisdiction because Mechoopda Cultural Enterprise did not waive its sovereign immunity, and dismissing Tetra Tech's Amended Third Party Complaint. (February 9, 2021 Order Granting Third-Party Defendant's Motion to Dismiss ("Order") [1-ER-4-14]). The basis for jurisdiction of Tetra Tech's Amended Third Party Complaint in the District Court was supplemental jurisdiction pursuant to 28

[1] Engasser is not a member of the Mechoopda Indian Tribe of Chico Rancheria, California.

U.S.C. §1367. This Court has jurisdiction from the final order issued by the District Court under 28 U.S.C. §1291.

ISSUE PRESENTED

Whether the District Court correctly determined that Mechoopda Cultural Enterprise did not expressly and unequivocally waive its sovereign immunity by agreeing to a general dispute resolution provision in the PSA, where Mechoopda Cultural Enterprise expressly retained its sovereign immunity by stating "[n]othing herein shall be construed as a waiver of sovereign immunity."

STATEMENT OF THE CASE

A. The Mechoopda Indian Tribe of Chico Rancheria.

The Mechoopda Indian Tribe is a federally recognized Indian tribe with Indian lands in Butte County. 84 Fed. Reg. 1200. The Tribe is governed by the Constitution of the Mechoopda Indian Tribe of Chico Rancheria, California, as adopted on February 1, 1998 ("Tribal Constitution"). (Declaration of Robyn Forristel ("Forristel Decl.") at ¶3, Exh. A [3-ER-317-330]).

The governing body of the Tribe is the Tribal Council of the Mechoopda Indian Tribe ("Tribal Council"). (*Id.* at ¶3, Exh. A at Article IV [3-ER-322]). The Tribal Council consists of seven (7) members elected at-large by adult members of the Tribe. (*Id*). The Tribal Constitution provides the Tribal Council with the authority to "promulgate and adopt ordinances, rules and regulations"; "charter

tribal enterprises, corporations and associates; and "to waive the sovereign immunity of the Tribe to unconsented lawsuit." (*Id.* Exh. A at Article VIII, Section 3(a), (l), (t) [3-ER-324-325]). Only the Tribal Council has the authority to waive its sovereign immunity and contingent that the waiver is "clearly stated in writing and approved by a Tribal Council Resolution pursuant to a duly called meeting." (*Id.* Exh. A at Article VIII, Section 3(t) [3-ER-325]).

Pursuant to its constitutional authority, the Tribal Council resolved to adopt as tribal law, the Mechoopda Indian Tribe's Cultural Resource Preservation Enterprise Ordinance on January 19, 2019 ("Tribal Ordinance"). (Forristel Decl. ¶¶4-5 [3-ER-318-319]).

B. Mechoopda Cultural Resource Preservation Enterprise.

On January 19, 2019, in order to facilitate the protection of cultural resources, the Tribal Council established the Mechoopda Cultural Resource Preservation Enterprise. (Forristel Decl. ¶5, Exh. B. [3-ER-318-319, 331-338]). The Mechoopda Cultural Enterprise is a wholly owned, unincorporated entity of the Mechoopda Indian Tribe, operating as an arm of the Mechoopda Indian Tribe and sharing the Mechoopda Indian Tribe's sovereignty and sovereign immunity from unconsented suit. (*Id.* at Exh. B at Section 4(e) [3-ER-332]). The governing board of the Mechoopda Cultural Enterprise is a three (3) person Board of Directors, including a President and two Directors who are each appointed by the

Tribal Council and at least two (2) must be Tribal Members. (*Id*. at Exh. B at Section 6(a) [3-ER-333]).

The purpose of Mechoopda Cultural Enterprise is to: (1) facilitate the protection of cultural resources; (2) further the economic operation and program of the Tribe; (3) oversee and manage the assets of Mechoopda Cultural Enterprise; (4) be a party or assignee to contracts that further the purpose of Mechoopda Cultural Enterprise; and (5) ensure Mechoopda Cultural Enterprise compliance with its legal obligations. (*Id*. at Exh. B at Section 3 [3-ER-332]).

C. The Professional Services Agreement with Tetra Tech.

On or about February 1, 2019, Tetra Tech entered into a lucrative agreement with the California Department of Resources Recycling and Recovery ("CalRecyle") to coordinate the abatement and removal of debris left behind by the Camp Fire ("Prime Contract). (Tetra Tech's Amended Third-Party Complaint") ¶6 [3-ER-356-358]). Mechoopda Cultural Enterprise was not a party to the Prime Contract. The terms of the Prime Contract were not incorporated into the PSA. Mechoopda Cultural Enterprise was not bound by the terms of the Prime Contract. (Forristel Decl. ¶7, Exh. C [3-ER-319, 339-351].) Tetra Tech admits that it has been engaged to provide similar services in response to twenty-two (22) wildfire-related disasters. (Tetra Tech's Opposition to Motion to Dismiss at 3:15-19 [2-ER-216]). As such, this was not Tetra Tech's first experience contracting and working

with Native American tribes. In fact, the PSA was essentially a contract template developed through negotiations by Tetra Tech and other tribes for previous projects. (Deposition of Stephanie L. Reyes ("Reyes Depo."), 38:22-39:20; 43:6-17 [2-ER-190-192]). During these other negotiations with tribes, Tetra Tech agreed to strike the waiver of sovereign immunity clause. (Reyes Depo., 45:20-46:1[2-ER-193-194]).

Mechoopda Cultural Enterprise negotiated with CalRecycle regarding the tribal monitoring rates, labor costs, and overall compensation for its tribal monitors. The PSA is clear that Mechoopda Cultural Enterprise would adhere to all Tribal laws regarding all labor matters, which it has done, and regularly does as a responsible Tribal employer. At the time of negotiations, Tetra Tech could have bargained for Mechoopda Cultural Enterprise's adherence to California labor laws but they did not for apparent business reasons. Tetra Tech and Mechoopda Cultural Enterprise negotiated other terms of the PSA such as Personal Protective Equipment and payment terms. However, these specific terms related to the tribal monitoring rates are irrelevant to whether Mechoopda Cultural Enterprise expressly waived its sovereign immunity. The PSA took months to negotiate and it was never a take it or leave it agreement as implied by Tetra Tech. (Reyes Depo., 63:2-10 [2-ER-196]). Tetra Tech had ample opportunity to negotiate and request Mechoopda Cultural Enterprise to expressly waive its sovereign immunity, but

made the business decision not to. (Reyes Depo., 95:3-16 [2-ER-205]). On or about March 12, 2019, Mechoopda Cultural Enterprise entered into the PSA with Tetra Tech to provide Tribal Monitoring services. (Forristel Decl. ¶7, Exh. C [3-ER-319, 339-351]). Tetra Tech is a sophisticated, international, and billion-dollar company that negotiated and agreed to the terms of the PSA. (Sheila Lamb Carroll Declaration ("Carroll Decl.") ¶3, Exh. D [3-ER-353-355]).

The PSA acknowledges that Mechoopda Cultural Enterprise is an unincorporated instrumentality of the Mechoopda Indian Tribe, a sovereign government and federally recognized Indian tribe. (Forristel Decl. ¶7, Exh. C, Preamble [3-ER-340].) Mechoopda Cultural Enterprise retained its sovereign immunity in the PSA, noting that: "D. Nothing herein shall be construed as a waiver of sovereign immunity." (*Id.* at Exh. C at Terms and Conditions, Section IV(D) [3-ER-344]). Further, Mechoopda Cultural Enterprise retained its sovereign immunity in the Tribal Monitor Scope of Work, Exhibit A to the PSA, stating that "nothing herein shall be construed as a waiver of . . . the Tribe's . . . sovereign rights as a federally recognized Indian Tribe." (*Id.* at Exh. C at Exhibit A Tribal Monitor Scope of Work [3-ER-346]).

D. Tribal Monitors for the 2018 Camp Fire were Necessary to Protect the Mechoopda Indian Tribe's Cultural Resources.

Mechoopda Indian Tribe's ancestral land was burned as a result of the 2018 Camp Fire. The 2018 Camp Fire resulted in the destruction of tribal burial sites and

resources of cultural or religious significance to the Tribe. This is why Mechoopda Cultural Enterprise entered the PSA with Tetra Tech because it had to monitor and facilitate the protection of the Mechoopda Indian Tribe's cultural resources and artifacts that were being unearthed during the fire cleanup. Tribal monitoring is a reasonable and feasible mitigation measure which allows the fire cleanup and debris removal to proceed while mitigating impacts to significant tribal resources. Pursuant to the PSA, Mechoopda Cultural Enterprise retained control over how the Mechoopda Indian Tribe cared for its own tribal resources and artifacts because the tribal members of the Mechoopda Indian Tribe are descendants of these cultural resources, artifacts and spiritual items.

The Tribal Monitors are necessary because the Mechoopda Indian Tribe has its own traditional protocols on how to approach, pick up, and set down the spiritual resources and artifacts. The Mechoopda Indian Tribe is either going to pray or sing with the tribal resources and artifacts based on their own protocols and as such it is difficult to capture that process in the PSA, so the "sole control" language is included to give the Tribal Monitors the authority and control with any tribal resources and artifacts discovered. The Tribal Monitors are there to be able to care for and handle the sacred items in tribally appropriate manner and to prevent them from being further disturbed or scraped and dumped. Therefore, Tetra Tech could not tell the Mechoopda Cultural Enterprise and Mechoopda

Indian Tribe how to pray, how to sing, when they can or cannot because that is part of Mechoopda Indian Tribe's spirituality and traditions. The purpose of the PSA is to preserve and protect the Mechoopda Indian Tribe's cultural resources. (Reyes Depo., 77:3-82:17 [2-ER-199-204]).

E. Meet and Confer with Tetra Tech Regarding Indemnity.

On November 8, 2019, Tetra Tech, through its counsel, and Mechoopda Cultural Enterprise, through its counsel, met and conferred pursuant to the PSA regarding Tetra Tech's request for indemnification for Engasser's September 13, 2019 Complaint against Tetra Tech. Mechoopda Cultural Enterprise clarified its participation in the meet and confer meeting did not waive its sovereign immunity. (Declaration of Christina Kazhe ("Kazhe Decl.") ¶3 [3-ER-315-316]). Mechoopda Cultural Enterprise retained its sovereign immunity and explained that the indemnification provision was narrowly drafted and that it was operating under the Tribal laws that applied to it. After the conclusion of the meeting, Mechoopda Cultural Enterprise never heard from Tetra Tech until Tetra Tech served the February 19, 2020 Third-Party Complaint seeking indemnity.

F. Procedural History.

On September 13, 2019, Engasser filed his Complaint, as a class action, against Tetra Tech seeking unpaid overtime wages under the FLSA and California law and penalties for alleged missed meal periods and rest breaks, improper wage

statements, and alleged waiting time penalties. (Engasser's Complaint [3-ER-449-465]). On February 19, 2020, Tetra Tech filed its Third-Party Complaint seeking indemnity, contribution, and restitution against Mechoopda Cultural Enterprise. (Tetra Tech's Third-Party Complaint [3-ER-435-446]). On April 27, 2020, Mechoopda Cultural Enterprise filed its Motion to Dismiss Tetra Tech's Third-Party Complaint on the grounds that the District Court lacked subject matter jurisdiction because it did not waive its sovereign immunity. (Mechoopda Cultural Enterprise' Motion to Dismiss [3-ER-380-434]). While the initial Motion to Dismiss was pending, Tetra Tech filed its Amended Third-Party Complaint on May 18, 2020. (Tetra Tech's Amended Third-Party Complaint [3-ER-356-379]). On June 1, 2020, Mechoopda Cultural Enterprise filed its Motion to Dismiss Tetra Tech's Amended Third-Party Complaint on the same grounds as its initial Motion to Dismiss. (Mechoopda Cultural Enterprise' Motion to Dismiss [3-ER-296-355]).

On February 9, 2021, the District Court granted Mechoopda Cultural Enterprise's Motion to Dismiss and dismissed Tetra-Tech's Amended Third-Party Complaint. (Order [1-ER-4-14]). The District Court properly concluded that Mechoopda Cultural Enterprise did not expressly and unequivocally waive its sovereign immunity by agreeing to the general Dispute Resolution provision in the PSA as Mechoopda Cultural Enterprise expressly retained its sovereign immunity in the PSA. (*Id.*). The District Court carefully analyzed the *C & L* case relied on by

Tetra Tech and concluded the facts in this case are more analogous to *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affs.* 255 F.3d 801, 811 (9th Cir. 2001) and *Miller v. Wright* 705 F.3d 919, 925 (9th Cir. 2013). (*Id.* at 5:24-9:7 [1-ER-8-12]). The District Court held the Dispute Resolution provision in the PSA did not contain similar terms as the arbitration provision from *C & L* to amount to a clear waiver. (*Id.* at 8:5-13 [1-ER-11]). The District Court also concluded that it "may not resolve any ambiguity" as contended by Tetra Tech because a waiver of sovereign immunity must be clear and unequivocal. (*Id.* at 8:1-4 [1-ER-11]). The District Court found Mechoopda Cultural Enterprise is immune from Tetra Tech's suit and the District Court lacked jurisdiction. (*Id.* at 9:4-7 [1-ER-12]).

On February 18, 2021, the District Court dismissed all of Engasser's claims against Tetra Tech with prejudice. (Order re Dismissal [1-ER-3]). On March 8, 2021, Tetra Tech timely filed its notice of appeal of the District Court's Order granting Mechoopda Cultural Enterprise's Motion to Dismiss. (Notice of Appeal [1-ER-467]).

SUMMARY OF ARGUMENT

1. Mechoopda Cultural Enterprise did not waive its sovereign immunity by executing the PSA with Tetra Tech because it agreed to a general dispute resolution provision. It is well settled law that a waiver of tribal sovereign immunity must be express, clear, and unequivocal. The Dispute Resolution

provision does not expressly waive Mechoopda Cultural Enterprise's sovereign immunity. In fact, the PSA expressly retains Mechoopda Cultural Enterprise's full right of sovereign immunity in two separate provisions. Tetra Tech must creatively highlight and abstractly piece together the language in the general Dispute Resolution provision in an attempt to argue an express waiver. Nowhere in the PSA, the indemnification provision, or Dispute Resolution provision does Mechoopda Cultural Enterprise explicitly waive its sovereign immunity by consenting to submit any dispute to a particular forum or be bound by its judgment.

2. The District Court properly reviewed and analyzed all the provisions in the PSA, including the Dispute Resolution provision. Tetra Tech contends that the District Court should have respected the parties' intentions with the PSA, which was to create an avenue for either party to enforce contractual compliance. However, Tetra Tech requests this Court to rewrite the provisions in the Dispute Resolution provision to create an express waiver by Mechoopda Cultural Enterprise. The provisions in the PSA expressly retaining Mechoopda Cultural Enterprise's sovereign immunity and the Dispute Resolution provision do not contradict each other as neither constitute an express waiver of Mechoopda Cultural Enterprise's sovereign immunity.

3. Tetra Tech's equity argument is unpersuasive. Tetra Tech argues that the District Court negated Tetra Tech's right to a judicial remedy in the United

States District Court because the Mechoopda Indian Tribe has not established a tribal court. In making this argument, Tetra Tech completely ignores the fact that Mechoopda Indian Tribe is a sovereign nation. Mechoopda Cultural Enterprise has the right to establish a tribal court, but there is not a requirement that it must. There can be no "waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *E.g., Kiowa,* 523 U.S. at 758. This Court cannot waive Mechoopda Cultural Enterprise's sovereign immunity because it has not established a tribal court. A waiver of tribal sovereign immunity represents a substantial surrender of sovereign power and can only be expressly waived by Mechoopda Cultural Enterprise and the Mechoopda Indian Tribe.

STANDARD OF REVIEW

A district court's granting of a motion to dismiss based on sovereign immunity is reviewed *de novo*, as are questions of tribal sovereign immunity and contract interpretation. *Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999); *Jachetta v. United States,* 653 F.3d 898, 903 (9th Cir. 2011); *Doe I v. Wal-Mart Stores, Inc*., 572 F.3d 677, 681 (9th Cir. 2009).

ARGUMENT

I. The District Court Properly Dismissed Tetra Tech's Amended Third-Party Complaint for Lack of Subject Matter Jurisdiction, Based on Mechoopda Cultural Enterprise's Sovereign Immunity.

Tetra Tech does not dispute that Mechoopda Cultural Enterprise is entitled to tribal sovereign immunity as an arm of the Mechoopda Indian Tribe. Therefore, Mechoopda Cultural Enterprise is immune from suit absent a clear and unequivocal waiver. Tetra Tech contends that Mechoopda Cultural Enterprise waived its sovereign immunity by agreeing to the general Dispute Resolution provision in the PSA because it includes the terms "[a]ny court with competent jurisdiction". (BR, 19-29). As the District Court explained, the "Dispute Resolution provision falls far short of the clear waiver in *C & L*." (Order at 8:13 [1-ER-11]). The District Court found no basis for an express waiver of Mechoopda Cultural Enterprise's sovereign immunity, and concluded that the "lack of clear waiver in the PSA and Mechoopda's express retention of sovereign immunity", necessitated dismissal for lack of subject matter jurisdiction. (*Id*. at 9:4-7 [1-ER-12]).

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

Indian tribes and their governing bodies may not be sued absent waiver of immunity by the tribe or abrogation of tribal immunity by Congress, and any such waiver or abrogation must be express and unequivocal. *Kiowa Tribe of Oklahoma*

v. Mfg. Techs, Inc., 523 U.S. 751, 758-759 (1998) ("*Kiowa*"). It is well settled that a waiver of tribal sovereign immunity cannot be implied but must be unequivocally expressed. *See Kiowa, supra,* 523 U.S. 751; *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59 (1978) ("*Santa Clara Pueblo*"). The requirement that the waiver be "unequivocally expressed" is not a "requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe* 149 F.3d 1260, 1267 (10th Cir. 1998). "In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id.*

Moreover, the Ninth Circuit has held that "[t]here is a strong presumption against waiver of tribal sovereign immunity[.]" *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811. (9th Cir. 2001) ("*Demontiney*"). It is "the plaintiff" – not the defendant who "bears the burden of showing a waiver of tribal sovereign immunity." *Hall v. Mooretown Rancheria,* 2013 U.S. Dist. Lexis 81446, *citing Ingrassia,* 676 F.Supp.2d at 956-57 (E.D. Cal. 2009).

Tetra Tech erroneously contends that Mechoopda Cultural Enterprise can be sued in the District Court because the PSA contains a Dispute Resolution

provision with the terms "[a]ny court with competent jurisdiction". (BR, 19-29). The Dispute Resolution provision does not expressly waive Mechoopda Cultural Enterprise's sovereign immunity. The principal of sovereign immunity is that Mechoopda Cultural Enterprise has the ability to sue but still retains its sovereignty. Tribal sovereign immunity is crucial to tribal government existence and the general welfare of the tribe. (Reyes Depo., 47:14-25 [2-ER-195]). Thus, a waiver of tribal sovereign immunity must be express and clear and in accordance with a tribe's governing constitution and charters. *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.* ("*Memphis Biofuels*") 585 F. 3d 917, 922 (6th Cir. 2009).

Mechoopda Cultural Enterprise and the Mechoopda Indian Tribe did not waive its sovereign immunity pursuant to both federal and tribal law, including the Mechoopda Cultural Enterprise's Tribal Ordinance and the Tribal Constitution. Mechoopda Cultural Enterprise's sovereign immunity is so important to its mission that it can only waive its sovereign immunity "upon the express written approval" of Mechoopda Cultural Enterprise and the Tribal Council:

> Section 16. Sovereign Immunity.
>
> (b) The Enterprise may waive its sovereign immunity when necessary, in the best business judgment of the Board, to serve a substantial advantage or benefit for the Enterprise or the Tribe. Any waiver shall become *effective only upon the express written approval of the Enterprise and the Tribal Council*. Any waiver of sovereign immunity shall be specific and limited as to (i) duration, (ii) the

> beneficiary, (iii) the scope of the waiver, (iv) the nature and description of the property or funds, if any, of the Enterprise, available to satisfy any order or judgment, (v) the particular court or courts having jurisdiction over the Enterprise, and (vi) the law that shall be applicable thereto. Any express waiver of sovereign immunity by resolution or contract of the Enterprise shall not be deemed a waiver of the sovereign immunity of the Tribe, its directors, officers, employees or agents or any other instrumentality of the Tribe, and no such waiver by the Enterprise shall create any liability on the part of the Tribe or any other instrumentality of the Tribe for the debts and obligations of the Enterprise, or shall be construed as a consent to the encumbrance or attachment of any property of the Tribe or any other instrumentality of the Tribe based on any action, adjudication or other determination of liability of any nature incurred by the Enterprise. The acts and omissions of the Enterprise, its directors, officers, employees or agents shall not create any liability, obligation or indebtedness either of the Tribe or payable out of assets, revenues or income of the Tribe.

(Forristel Decl. Exh. B at Section 16 (Emphasis added) [3-ER-337-338]). The Mechoopda Indian Tribe can only waive its sovereign immunity by a "Tribal Council Resolution" and "general waivers of immunity are not favored":

> (t) To waive the sovereign immunity of the Tribe to unconsented lawsuit, provided that no such waiver of the immunity shall be effective unless the intent to so waive immunity, and the extent of which it shall be waived, *is clearly stated in writing and approved by a Tribal Council Resolution pursuant to a duly called meeting and provided further that general waivers of immunity are not favored*, and the Council shall make every effort to place restrictions on any waiver of immunity that are reasonable under the circumstances.

(Forristel Decl. Exh. A at Article VIII, Section 3(t) (Emphasis added) [3-ER-325]).

The PSA does not include any of these terms nor meet any of the requirements for a valid waiver of sovereign immunity by Mechoopda Cultural Enterprise. The PSA itself specified that Mechoopda Cultural Enterprise retained its full right to sovereign immunity, noting that: "D. *Nothing herein shall be construed as a waiver of sovereign immunity.*" (Forristel Decl. Exh. C at Terms and Conditions, Section IV(D) (Emphasis added) [3-ER-344]). Additionally, Mechoopda Cultural Enterprise retained its sovereign immunity in the Tribal Monitor Scope of Work, Exhibit A to the PSA, stating that "nothing herein shall be construed as a waiver of . . . the Tribe's . . . sovereign rights as a federally recognized Indian Tribe." (*Id.* at Exh. C at Exhibit A Tribal Monitor Scope of Work [3-ER-346]). At no time did the Tribal Council, pursuant to the Tribal Constitution, and the Mechoopda Cultural Enterprise's Board of Directors, pursuant to the Tribal Ordinance, review or approve a waiver of sovereign immunity in favor of Tetra Tech in writing or otherwise. (Forristel Decl. ¶¶8-9 [3-ER-319]).

The PSA does contain a narrowly drafted indemnification provision in which "[e]ach Party assumes the risk in furnishing the equipment, labor, materials and services provided hereunder" and "will indemnify, hold harmless and defend the other Party" due to "intentional misconduct and sole negligent acts or omissions…" (Forristel Decl., Exh. C at Terms and Conditions, Section II (B) [3-

ER-342]). But nowhere in this indemnification provision, does Mechoopda Cultural Enterprise explicitly waive its sovereign immunity.

B. The Dispute Resolution Provision Is Not an Express Waiver of Mechoopda's Sovereign Immunity.

Tetra Tech cannot identify a specific provision in the PSA that expressly waives Mechoopda Cultural Enterprise's sovereign immunity. Instead, Tetra Tech selectively emphasizes the Dispute Resolution provision in the PSA in an attempt to analogize the Dispute Resolution provision to the arbitration provisions in *C & L, Sokaogon, and Rosebud.* (BR, 12-13). The District Court noted that "[n]one of the language Tetra Tech artfully highlights alters" the conclusion that the Dispute Resolution provision "falls far short of the clear waiver in *C & L*." (Order, 8:13-15 [1-ER-11]). "The Supreme Court has held that agreeing to an arbitration clause may establish a clear waiver of sovereign immunity." *Miller v. Wright* 705 F.3d 919, 924 (2013). Mechoopda Cultural Enterprise is keenly aware of how courts construe arbitration clauses as a waiver of sovereign immunity, thus an arbitration provision is not included in the PSA.

The three cases, *C & L, Sokaogon*, and *Rosebud* relied on by Tetra Tech are distinguishable from this case. The contracts in *C & L, Sokaogon,* and *Rosebud* cases included binding arbitration clauses. The courts in these cases held that these binding arbitration clauses operated as express waivers of tribal sovereign immunity because the tribes expressly agreed to: (1) an agreement to submit

disputes to a body for adjudication; and (2) an agreement as to what particular body will hear such disputes. *Miller v. Wright*, 705 F.3d at 924-926. While no magic words are required for a tribe to waive its sovereign immunity, the waiver must still be express and unequivocal. *Rosebud*, 50 F.3d at 563. Certainly, the PSA does not waive Mechoopda Cultural Enterprise's sovereign immunity, a statement that was in fact made twice and agreed to in writing by Tetra Tech, is quite clear.

In *C & L*, the court focused on two key provisions of the contract. First the arbitration clause, where the tribe expressly agreed to submit disputes to final and binding arbitration, to be conducted in accordance with the American Arbitration Association's procedures. The tribe also explicitly consented to judicial enforcement of any resulting arbitration award "and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." *C & L*, 532 U.S. at 415. Second the choice of law clause, where the tribe agreed to Oklahoma law as the governing law, which provided that "an agreement. . .providing for arbitration in this state confers jurisdiction on the court to enforce the agreement. . . and to enter judgment on an award thereunder." *Id.*

In *Sokaogon*, the tribe agreed that all disputes and claims arising out of the contract were "subject to and decided by arbitration in accordance with the rules… of the American Arbitration Association." *Sokaogon*, 86 F.3d at 659. Additionally, the tribe agreed that the arbitration clause "shall be specifically enforceable in

accordance with applicable law in any court having jurisdiction" and "judgment may be entered upon in accordance with applicable law in any court having jurisdiction thereof." *Id.* The *Sokaogon* court found this language was not ambiguous and the tribe expressly agreed to "submit disputes to arbitration", "be bound by the arbitration award" and "have its submission and the award enforced in a court of law." *Id.*

The court in *Rosebud* held the tribe expressly waived its sovereign immunity because the "parties clearly manifested their intent to resolve disputes by arbitration." *Rosebud*, 50 F.3d at 563. The tribe in *Rosebud* agreed that "[a]ll questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." *Id*. at 562.

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

terms. As discussed in *Rosebud*, the language in the clause was "spare but explicit that disputes under the contract 'shall be decided by arbitration.'" *Rosebud,* F.3d at 562.

Notably, the PSA at best suggests only **where** a suit may be brought and whether the meet and confer process has been satisfied – "any court with competent jurisdiction" – but it does not expressly or impliedly address **whether** a suit may be brought or the particular body that may hear the dispute. In contrast to the arbitration provisions in the *C & L* and *Sokaogon* cases, the Dispute Resolution provision and PSA are silent as to identifying any jurisdiction or a choice of law. Further, unlike in *C & L*, *Sokaogon,* and *Rosebud*, Mechoopda Cultural Enterprise did not expressly agree to submit any dispute for adjudication nor to the jurisdiction of a particular court.

The emphasized "prior to commencing litigation", especially read in context of the clearly stated retention of sovereign immunity provisions makes clear that only Mechoopda Cultural Enterprise has a right to sue Tetra Tech for failure to comply with the terms of handling the Mechoopda Indian Tribe's cultural resources and artifacts. Mechoopda Cultural Enterprise is cloaked with immunity from suit, but retains it right to sue as a sovereign nation. Tribal sovereign immunity is not a new concept to Tetra Tech, and it is well versed in contracting with tribes and is fully aware of the significance and consequences of tribal

sovereign immunity. (Reyes Depo., 38:22-39:4; 43:6-17; 45:20-46:1; 47:10-25; 64:16-65:7 [2-ER-190-195, 197-198]). Quite simply Tetra Tech and Mechoopda Cultural Enterprise agreed to the PSA, which Mechoopda Cultural Enterprise did not give up its inherent right: it did not waive its sovereign immunity.

Further, the *C & L*, *Sokaogon*, and *Rosebud* cases were not confronted with agreements with a specific provision expressly asserting sovereign immunity like the PSA here. (Forristel Decl., Exh. C at Terms and Conditions, Section IV(D) [3-ER-344]; Exhibit A Tribal Monitor Scope of Work [3-ER-346]). Each and every draft of the PSA exchanged between Tetra Tech and Mechoopda Cultural Enterprise included the provision "[n]othing herein shall be construed as a waiver of sovereign immunity." (Forristel Decl., Exh. C at Terms and Conditions, Section IV(D) [3-ER-344]; Reyes Depo., 38:22-39:4; 45:20-46:1 [2-ER-190-191, 193-194]). The PSA refused to waive Mechoopda Cultural Enterprise's sovereign immunity and allows Mechoopda Cultural Enterprise the ability to consent to litigation to a particular suit arising under the PSA even as Mechoopda Cultural Enterprises chooses to stand on its claim of sovereign immunity pursuant to the Dispute Resolution provision. *See Ute Indian Tribe of the Unitah & Ouray Reservation v. Utah*, 790 F.3d 1000 (2015).

Even with Tetra Tech's rearrangement of the language in its attempt to rework the Dispute Resolution provision, it still fails to establish an express and

unequivocal waiver of Mechoopda Cultural Enterprise's sovereign immunity. This is for good reason as a waiver was not provided by Mechoopda Cultural Enterprise.

C. The PSA is More Akin to the *Miller* and *Demontiney* Cases.

Tetra Tech attempts to distinguish this case from the *Miller* and *Demontiney* cases. (BR, 25-29). The courts in *Miller* and *Demontiney* distinguished the *C & L* case holding that the contractual provisions did not waive immunity because the dispute resolution procedures were not binding, the tribes did not unequivocally submit to a court's jurisdiction, or the tribes expressly retained their sovereign immunity. *Miller v. Wright*, 705 F.3d at 925; *Demontiney*, 255 F.3d at 812-813.

The *Demontiney* court held that the tribe did not waive its sovereign immunity where the contract addressed such mundane issues as indemnity and insurance, and, significantly, expressly retained tribal sovereign immunity. *Demontiney*, 255 F.3d at 812-813. The *Demontiney* court further distinguished the *C & L* case, explaining that the dispute resolution clause did not incorporate procedures that provided jurisdiction in non-tribal courts or included a choice of law contemplating any law other than that of the tribe. *Id*. The *Demontiney* court further concluded that the tribe did not clearly waive its immunity because the "only express discussion of sovereign immunity" in the contract expressly provided that the tribe "did not intend to waive its sovereign immunity." *Id.*

The *Miller* court relied on *Demontiney*'s holding and further distinguished the *C & L* case. In *Miller*, the compact between the Puyallup Tribe and State of Washington included a mediation provision. The *Miller* court acknowledged that '[t]he Supreme Court has held that agreeing to an arbitration clause may establish a clear waiver of sovereign immunity." *Miller*, 705 F.3d at 924. It then went into a lengthy discussion and comparison of the *C & L* and *Demontiney* cases. The *Miller* court held that the "mediation provision to resolve disputes between the State of Washington and the Tribe does not evidence a clear and explicit waiver of immunity." *Id.* at 925. The *Miller* court explained that mediation is generally not binding and "does not reflect an intent to submit to adjudication by a *non-tribal entity*." *Id.* (Emphasis added.) Further, the *Miller* court concluded the compact did not include any language that the Puyallup Tribe was "subjecting itself to the jurisdiction of the state." *Id*. at 926.

The PSA is more akin to the *Miller* and *Demontiney* cases than the *C & L* case, heavily relied on by Tetra Tech. Here, the PSA includes the provision "[n]othing herein shall be construed as a waiver of sovereign immunity." (Forristel Decl., Exh. C at Terms and Conditions, Section IV(D) [3-ER-344]). Additionally, Mechoopda Cultural Enterprise retained its sovereign immunity in the Tribal Monitor Scope of Work, Exhibit A to the PSA, stating that "nothing herein shall be construed as a waiver of . . . the Tribe's . . . sovereign rights as a federally

recognized Indian Tribe." (*Id.* at Exh. C at Exhibit A Tribal Monitor Scope of Work [3-ER-346]). As in *Demontiney*, these two express provisions are the only express discussions of sovereign immunity in the PSA. *Demontiney*, 255 F.3d at 812-813. Similar to the mediation provision in *Miller*, the Dispute Resolution provision "does not reflect an intent to submit to adjudication by a *non-tribal entity*." *Miller*, 705 F.3d at 924 (Emphasis added). Mechoopda Cultural Enterprise and Tetra Tech agreed to "meet and confer . . . to try to arrive at a mutually agreeable resolution of the dispute." (Forristel Decl., Exh. C at Terms and Conditions, Section IV(F) [3-ER-344]). The Dispute Resolution provision outlined the procedures to effectuate that goal and to maintain the confidentiality of any settlement discussions. This Dispute Resolution provision does not include any language that the parties have agreed to a particular forum to dispute claims, be bound by an entry of judgment, and does not contemplate arbitration at all, let alone binding arbitration. At most this Dispute Resolution provision is Mechoopda Cultural Enterprise and Tetra Tech's attempt to agree to an informal non-binding dispute resolution like the mediation provision in *Miller*.

II. The District Court Did Harmonize the Dispute Resolution Provision with the Sovereign Immunity Clause.

The District Court analyzed the various clauses in the PSA, including the Tribal Monitor Scope of Work, Exhibit A to the PSA, and determined these clauses in the PSA did not constitute an effective waiver of Mechoopda Cultural

Enterprise's sovereign immunity. (Order [1-ER-4-14]). Notwithstanding the requirement that any waiver of tribal sovereign immunity must be both express and made by Mechoopda Cultural Enterprise and the Mechoopda Indian Tribe, Tetra Tech submits a confusing argument that the Dispute Resolution provision and express retention of Mechoopda Cultural Enterprise's sovereign immunity create an ambiguity in the PSA, resulting in an express waiver of Mechoopda Cultural Enterprise's sovereign immunity. (BR, 29-33). As the District Court noted, "Tetra Tech's attempts to dismiss Mechoopda's express and unequivocal retention of immunity as 'boilerplate' in need of the Court's reconciliation to avoid, wavier are unpersuasive." (Order, 7:24-8:1 [1-ER-10-11]). Tetra Tech's ambiguity argument between Mechoopda Cultural Enterprise's express retention of its sovereign immunity and the Dispute Resolution provision is nonsensical. These provisions harmonize with each other and do not contradict each other as neither constitute an express waiver of Mechoopda Cultural Enterprise's sovereign immunity.

Tetra Tech is requesting this Court to review whether or not sophisticated contracting parties in this case really meant that there is no waiver of sovereign immunity when they executed the PSA that explicitly stated, in two separate provisions, that Mechoopda Cultural Enterprise did not waive its sovereign immunity. "A fundamental rule of construction is that a court must give effect to every word or term employed by the parties and reject none as meaningless or

surplusage in arriving at the intention of the contracting parties." *United States v. Hathaway*, 242 F.2d 897, 900 (9th Cir. 1957). This Court should hold the parties of the PSA to their words. *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 553 (9th Cir. 2016). The PSA includes the provision "[n]othing herein shall be construed as a waiver of sovereign immunity." (Forristel Decl., Exh. C at Terms and Conditions, Section IV(D) [3-ER-344]). Additionally, Mechoopda Cultural Enterprise retained its sovereign immunity in the Tribal Monitor Scope of Work, Exhibit A to the PSA, stating that "nothing herein shall be construed as a waiver of . . . the Tribe's . . . sovereign rights as a federally recognized Indian Tribe." (*Id.* at Exh. C at Exhibit A Tribal Monitor Scope of Work [3-ER-346]). These two provisions could not have been clearer in the PSA or the Scope of Work that Mechoopda Cultural Enterprise did not waive its sovereign immunity. The PSA does contain a narrowly drafted indemnification provision in which "[e]ach Party assumes the risk in furnishing the equipment, labor, materials and services provided hereunder" and "will indemnify, hold harmless and defend the other Party" due to "intentional misconduct and sole negligent acts or omissions…" (*Id.* at Exh. C at Terms and Conditions, Section II (B) [3-ER-342]). The Dispute Resolution provision includes language such as "[p]rior to commencing litigation" and "[a]ny court of competent jurisdiction shall have the authority to enforce this

provision and to determine if the meet and confer process has been satisfied." (*Id.* at Exh. C at Terms and Conditions, Section IV (F) [3-ER-344]).

Similar to the *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F. 2d 1374 (8th Cir. 1995) ("*American Indian Agric.*") case, Tetra Tech's creative interpretation of the Dispute Resolution provision simply asks too much to derive an express waiver of Mechoopda Cultural Enterprise's sovereign immunity. *American Indian Agric.* 780 F. 2d 1374, 1380-1381. The *American Indian Agric*. court found there was no express waiver from the language in a promissory note that included various remedies in the event of the default, allowed for attorney's fees incurred in collection efforts, and stated that the law of the District of Columbia applied. The *American Agric.* court held that the tribe "did not explicitly consent to submit any dispute over repayment on the note to a particular forum, or to be bound by its judgment." *Id.* Here, like the promissory note in *American Agric.*, nowhere in the PSA, the indemnification provision, or Dispute Resolution provision does Mechoopda Cultural Enterprise explicitly waive its sovereign immunity by consenting to submit any dispute to a particular forum or be bound by its judgment.

Unlike Tetra Tech's interpretation, Mechoopda Cultural Enterprise's interpretation does not render any portion of the Dispute Resolution provision meaningless. As demonstrated, the Dispute Resolution provision simply provides

the parties a mechanism to meet and confer and "try to arrive at a mutually agreeable resolution of the dispute." (Forristel Decl., Exh. C at Terms and Conditions, Section IV (F) [3-ER-344]). The Dispute Resolution provision provides the timing and procedures to effectuate that goal. Tetra Tech does not identify any provision in the PSA that the "parties clearly manifested their intent to resolve disputes by" a particular forum and Mechoopda Cultural Enterprise "waived its immunity with respect to any disputes under the" PSA. *Rosebud*, 50 F.3d at 563.

III. Tetra Tech Cannot Rely on Equity to Overcome Mechoopda Cultural Enterprise's Sovereign Immunity.

Tetra Tech's argument that principles of equity can evade Mechoopda Cultural Enterprise's sovereign immunity is at odds with the overwhelming weight of federal case law which consistently finds that there can be no "waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *E.g.*, *Kiowa*, 523 U.S. at 758; *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). This is because sovereign immunity is such an essential aspect of sovereignty. *See Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort* 629 F.2d at 1182 ("sovereign immunity is an inherent part of the concept of sovereignty and what it means to be a sovereign"); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (nothing that the United

States' sovereign immunity and tribal sovereign immunity are alike in that regard). In the tribal context, sovereign immunity is recognized to be essential to implementing federal policies of self-determination, economic development and cultural autonomy. *Am. Indian Agric.*, 780 F.2d at 1378. "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." *Pan Am. Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 419 (9th Cir. 1989).

Therefore, Tetra Tech's gamesmanship argument has no bearing or merit as it does not apply to overcome tribal sovereign immunity. (BR, 34-36). The express waiver standard of sovereign immunity does not impair a tribe's ability to conduct business as "[t]ribes and persons dealing with them long have known how to waive sovereign immunity when they so wish." *American Indian Agric.*, 780 F.2d at 1378-1379. Tetra Tech is a billion-dollar publicly traded company that regularly contracts with other Native tribes and fully understands how a tribe expressly waives its sovereign immunity. (Reyes Depo., 38:22-39:20; 43:6-17; 45:20-46:1 [2-ER-190-194]). Tetra Tech knew the risk of contracting with Mechoopda Cultural Enterprise without receiving an express waiver of its sovereign immunity. Now, in hindsight, after Tetra Tech has reaped the benefits of the lucrative Prime Contract, they are trying to rewrite a valid agreement, the PSA, with new terms that Mechoopda Cultural Enterprise quite simply would not have agreed to.

Tetra Tech now makes the huge leap of attempting to create an exception to the sovereign immunity doctrine that grants a federal court jurisdiction over Mechoopda Cultural Enterprise if tribal remedies are nonexistent. (BR, 34-36). Mechoopda Indian Tribe has the right to establish a tribal court, but is not required to establish a tribal court as Tetra Tech mistakenly asserts. As discussed in *Demontiney*, even if Tetra Tech's tribal remedies are uncertain or inadequate, "precedent recognizes the inadequacy of tribal remedies as a basis of federal jurisdiction is not applicable" to this case. *Demontiney*, 255 F.3d at 814-815. The existence of a tribal court is irrelevant to whether the language in the PSA gives rise to an express waiver of sovereign immunity. Tetra Tech needs to live with the plain language of the PSA that it negotiated and freely entered.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Dated: February 18, 2022

CARROLL & ASSOCIATES, PC

By: */s/ Sheila Lamb Carroll*
SHEILA LAMB CARROLL
SAMANTHA I. PRANATADJAJA
Attorneys for Third-Party-Defendant-Appellee
MECHOOPDA CULTURAL RESOURCE PRESERVATION ENTERPRISE

STATEMENT OF RELATED CASES

Appellee knows of no cases pending in this Court that would be deemed related under Circuit Rule 28-2.6.

Dated: February 18, 2022

CARROLL & ASSOCIATES, PC

By: */s/ Sheila Lamb Carroll*
SHEILA LAMB CARROLL
SAMANTHA I. PRANATADJAJA
Attorneys for Third-Party-Defendant-Appellee
MECHOOPDA CULTURAL RESOURCE PRESERVATION ENTERPRISE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number: 21-55217

I am the attorney or self-represented party.

This brief contains 7,785 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ Sheila Lamb Carroll* **Date** February 18, 2022
*(use "*s/[typed name]*" to sign electronically filed documents)*

CERTIFICATE OF SERVICE

I certify that on February 18, 2022 the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will cause service to be made on all counsel of record.

/s/ Sheila Lamb Carroll