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

APPELLANT'S OPENING BRIEF

Damien P. DeLaney
Brian M. Noh
AKERMAN LLP
601 West Fifth Street, Suite 300
Los Angeles, California 90071
Tel.: (213) 688-9500
damien.delaney@akerman.com
brian.noh@akerman.com

Attorneys for Defendant-Third-Party-Plaintiff-Appellant
TETRA TECH, INC.
(Additional counsel listed on the following page)

William Taylor
Taylor Law Firm, LLC
4820 East 57th Street
Sioux Falls, South Dakota 57108
Tel.: (605)-782-5304
bill.taylor@taylorlawsd.com

James E. Moore
Woods, Fuller, Shultz & Smith P.C.
300 South Phillips Ave., Suite 300
Sioux Falls, South Dakota 57104
james.moore@woodsfuller.com

Attorneys for Defendant-Third-Party-Plaintiff-Appellant
TETRA TECH, INC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Third-Party-Plaintiff-Appellant Tetra Tech, Inc. hereby certifies that it has no parent corporation and there is no publicly held corporation that owns 10% of more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Introduction

Appellant Tetra Tech and Appellee Mechoopda Cultural Resource Preservation Enterprise, a tribal entity, entered into a contract providing for dispute resolution in "any court with competent jurisdiction."[1] The contract also provides that nothing in it shall be construed as a waiver of sovereign immunity. The question presented is whether the dispute-resolution provision is illusory and without real-world consequences, or whether it constitutes a clear waiver of sovereign immunity under established precedent governing waivers of tribal sovereign immunity.

In 2019, Tetra Tech, Inc. ("Tetra Tech") was awarded a contract with the California Department of Resources Recovery and Recycling ("CalRecycle") to spearhead debris cleanup in the area destroyed by the 2018 Camp Fire. Because the burned area included ancestral tribal lands, CalRecycle required Tetra Tech to contract with tribal entities for monitoring of ground clearing projects that may impact indigenous artifacts, sites, or burial grounds.

Accordingly, Tetra Tech entered into a Professional Services Agreement ("PSA") with the Mechoopda Cultural Resources Preservation

[1] The Mechoopda Tribe does not have a tribal court.

Enterprise ("MCRPE").[2] The underlying dispute arises from a wage-and-hour class action filed by Plaintiff George Engasser, an MCRPE tribal monitor, who sued *Tetra Tech* for alleged wage and hour violations even though MCRPE, and not Tetra Tech, was his employer and controlled his wages, hours, and working conditions. Tetra Tech demanded indemnification under the terms of the PSA, which MCRPE refused, asserting the Mechoopda tribe's sovereign immunity.

MCRPE contends that the dispute-resolution provision is meaningless; it is hiding behind sovereign immunity rather than accepting responsibility for the claims of its own employees based on the contract MCRPE made with Tetra Tech. One of the fundamental exceptions to tribal sovereign immunity is when the tribe consents to be sued, and MCRPE did just that when it entered the PSA.

In the PSA, the parties set forth a detailed, step-by-step procedure for resolving any dispute arising under the agreement (the "DRP"). While the DRP in large part sets forth that the parties must attempt to resolve any disputes by informal discussions, it specifically contemplates that

[2] The MCRPE is a tribal enterprise authorized under the Mechoopda tribal charter.

claims left unresolved by the DRP can be submitted to litigation in "any court of competent jurisdiction." In so doing, both parties understood that claims under the contract could be submitted to court. Indeed, the Tribe's lead negotiator understood that the DRP was intended to be "a different method of trying to resolve things" before resorting to litigation.

The district court erroneously dismissed the third-party complaint. Without persuasive authority, its analysis relies entirely upon a standard provision stating that "[n]othing [in the PSA] shall be construed as a waiver of sovereign immunity." In interpreting the contract, however, the district court was duty bound to give effect to all of its provisions and harmonize any of its conflicting terms. Instead of doing this—essentially interpreting the DRP as a limited consent to suit for disputes under the contract that did not undermine the Tribe's sovereign immunity in any other respects—the district court misapplied established precedent and rendered the DRP as meaningless surplusage, without real-world consequences.

The district court's approach has profound implications for any private party engaging the services of tribal entities like the MCRPE. It frustrates parties like Tetra Tech who, while performing a critical service

to the people of California, have, by necessity, invested *substantial* resources in creating a mutually agreeable arrangement with indigenous groups. And it promotes opportunism of all kinds—here, a tribe can offer a dispute resolution procedure, collect the benefits of the contract, and then assert its sovereign immunity to avoid the very commitments that enticed private parties like Tetra Tech to enter into the agreement in the first place.

Jurisdictional Statement

This case involves issues of tribal sovereignty arising out of a tribal monitoring contract executed between Tetra Tech and MCRPE. Pursuant to that contract, Tetra Tech demanded that MCRPE assume its defense and indemnify it against any related losses in the underlying case. MCRPE denied the request, causing Tetra Tech to incur substantial fees and costs.

This Court has jurisdiction under 28 U.S.C. § 1291 because the appeal arises from the final judgment of the district court granting the MCRPE's Motion to Dismiss the Amended Third-Party Complaint with prejudice. The district court's order, entered on February 9, 2021, completely disposed of all of Tetra Tech's claims against the MCRPE.

The district court had jurisdiction of the underlying matter under 29 U.S.C. §§ 1331 and 1337, and supplemental jurisdiction of Tetra Tech's Amended Third-Party Complaint pursuant to 28 U.S.C. § 1367.

The trial court dismissed all of the claims in the underlying case between Plaintiff George Engasser and Tetra Tech on February 18, 2021, leaving no pending claims, counterclaims, crossclaims, or third-party claims. Tetra Tech timely filed a Notice of Appeal on March 8, 2021.

Issues Presented

Does a tribal entity waive sovereign immunity by agreeing to a dispute-resolution provision that requires contractual disputes to be submitted to any "court with competent jurisdiction," when there is no tribal court that could exercise jurisdiction, and when failure to enforce the provision would leave the contracting parties with no judicial remedy anywhere?

Statement of the Case

I. California Engages Tetra Tech to Coordinate the Clean-Up Effort in the Wake of the Destructive 2018 Camp Fire.

In 2018, the Camp Fire burned 153,000 acres of Butte County in Northern California, killing 85 people and destroying 14,000 homes, making it the deadliest and most destructive wildfire in California

history.[3] The fire left an environmental disaster in its wake; the destruction of homes and businesses left behind a tainted water supply and soil polluted with toxic chemicals.[4] Much of the property burned by the Camp Fire included the ancestral land of several federally recognized indigenous groups. Among these groups is the Mechoopda Indian Tribe of Chico Rancheria, California (the "Tribe").

The California Department of Resources Recovery and Recycling ("CalRecycle"), the government agency responsible for coordinating the response to the disaster, engaged Tetra Tech, a consulting and engineering firm based in Pasadena, to coordinate the abatement and removal of debris left behind by the Camp Fire. (Declaration of Betty Kamara ("Kamara Dec."), ¶ 7, Exhibit ("Ex.") A (Prime Contract, Ex. A, ¶ 1) [2-ER-53-92]). For more than 20 years, Tetra Tech has provided expert support to

---

[3] "The deadliest, most destructive wildfire in California's history has finally been contained," Washington Post (Nov. 26, 2018) (accessible at https://www.washingtonpost.com/nation/2018/11/25/camp-fire-deadliest-wildfire-californias-history-has-been-contained/); "Camp Fire – 2018 California Wildfires," United States Census Bureau (Nov. 2018) (accessible at https://www.census.gov/topics/preparedness/events/wildfires/camp.html.

[4] "The Camp fire clean-up is almost complete. What's next for Paradise?" The Press-Democrat (Oct. 10, 2019) (accessible at https://www.pressdemocrat.com/article/news/the-camp-fire-clean-up-is-almost-complete-whats-next-for-paradise/).

communities seeking to prepare for, respond to, and recover from natural and human-caused disasters. In California, this business has primarily involved wildfire response. Prior to the Camp Fire, Tetra Tech had been engaged to provide similar services in response to numerous other wildfire-related disasters.

To monitor and facilitate the protection of tribal resources and artifacts, CalRecycle directed Tetra Tech to execute a tribal monitoring services agreement. (Professional Services Agreement, at § 1 [2-ER-110]).

Tribal monitoring touches upon core tribal values and interests that are expressly protected by the National Historic Preservation Act (the "Act"). *See* 54 U.S.C.A. § 302706. Under the Act, the Tribe is empowered to address and mitigate the impact of any federal project on its cultural resources. (Deposition of Stephanie L. Reyes ("Reyes Depo."), 76:12-77:11. [2-ER-264-265]). Indeed, when a monitor discovers and identifies a tribal artifact, he or she is statutorily authorized to instruct contractors like Tetra Tech to temporarily cease all work in the area. (Deposition of George Engasser ("Engasser Depo."), 37:21-38:1 [2-ER-133-134]). Each tribe has its own protocols for mitigation that involves prayer, singing, and other rituals unique to the tribe. (Reyes Depo., 80:11-15 [2-ER-105]).

Section X of Exhibit "A" of the Prime Contract (herein, "Section X") addresses tribal monitoring directly. It provides that "**[r]ates established by the tribe(s) will be the basis for the rates paid to the tribal monitors, and is outside of the control of the Contractor**." (Section X (emphasis added).) [2-ER-72-73].

II. The Tribe Forms MCRPE to Engage in Tribal Monitoring to "Facilitate The Protection of Cultural Resources."

The MCRPE is an unincorporated enterprise of the Tribe that is wholly owned by, and created for the benefit of, the Tribe. (MCRPE Ordinance at 2, § 5(b) [3-ER-327]). MCRPE's powers were expressly delegated by the Tribal Council, the Tribe's governing body. (Constitution of the Mechoopda Indian Tribe of Chico Rancheria, California ("MCRPE Constitution") at 2, Art. IV; Ordinance at § 7(c)) (granting the power to "operate the [MCRPE] *as delegated by the Tribal Council on behalf of the Tribe*.") (emphasis added) [3-ER-316 and 328]). Under the Constitution of the Tribe, the Tribal Council is specifically authorized to enforce protection of tribal property and natural resources, encourage and foster the traditions and culture of the Tribe and to enact ordinances "necessary or incidental" to the exercise of its powers. (MCRPE Constitution, Article VIII, § 3(a), (p) [3-ER-318-319]).

Thus, part of MCRPE's purpose is the protection of cultural resources, such as historic Native American burial sites, funerary objects, ceremonial items or artifacts, and all objects with cultural value to the Tribe. (MCRPE Ordinance at 1, § 3, § 4(b) [3-ER-326]).

III. Tetra Tech Contracts With MCRPE for Tribal Cultural Monitoring Services.

On March 12, 2019, Tetra Tech and MCRPE executed the Professional Services Agreement at issue. Under the PSA, MCRPE agreed to provide: "Native American cultural resource monitoring services for the protection and treatment of Native American human remains, funerary objects, ceremonial items or artifacts, sites, features, places, cultural landscapes, sacred features and places, and objects … potentially impacted or found in connection with the Project." (PSA, Ex. A at § I [2-ER-110]). The MCRPE's tribal monitors—including Engasser—were to identify and survey areas in which ground disturbing activities could potentially affect the Tribe's cultural resources; identify, document, and photograph affected artifacts and cultural resources; and oversee the relocation and reburial of such artifacts and cultural resources. (PSA, Ex. A at § IV; *see also id.* at "Exhibit A, Tribal Monitor Scope of Work and Tribal Protocols and Cost to Implement," ¶ 1 [2-ER-110 and 2-ER-116]).

IV. MCRPE's Contract with Tetra Tech Requires it to Indemnify Tetra Tech, and Provides for Enforcement in a "Court with Competent Jurisdiction"

A. MCRPE Required "Sole Control" over the Manner and Means of Performing its Services and its Employees.

At MCRPE's insistence, the PSA kept MCRPE and Tetra Tech separate and independent from one another in every respect. (Reyes Depo., 76:12-77:22) [2-ER-264-265]). Under the PSA, MCRPE had "sole control of the manner and means of performing services under the Agreement" and was to complete the services required "according to its own means and methods of work." (PSA, Exh. A, Tribal Monitor Scope of Work and Tribal Protocols and Cost to Implement [2-ER-116-119]).

Thus, the PSA required MCRPE to:

- Provide workers' compensation coverage to its own officers, employees, and agents;
- Assume any risks related to its own equipment, labor, materials, or services;
- "[C]omply with all applicable laws, orders, citations, rules, regulations, standards, and statutes" in performing the Subcontract;

- Accept sole responsibility for the safety of its employees to perform the work in a safe and lawful manner; and
- Accept sole responsibility for any claim made by its own employees, agents, or subcontractors for wages, employment benefits, or insurance.

(PSA, Terms and Conditions, I.A., II.A., II.B. [2-ER-112]).

MCRPE's independence and exclusive control over all aspects of the project was a critical requirement for the Tribe both because of its concern over its cultural resources, and because of the Tribe's legal responsibility under Section 106 of the Act to address and mitigate any damage to cultural artifacts and resources caused by the clean-up work. (Noh Dec., ¶ 5, Exh. B (ECF No. 36-1) (Transcript of Deposition of Stephanie Reyes, 76:12-77:22) [2-ER-264-265]).

Under the PSA, and as a matter of practice, Tetra Tech had no ability to control, and, in fact, did not control MCRPE's employees. (Kamara Dec., ¶ 8 [2-ER-288-289]). MCRPE had exclusive authority to hire, discipline, pay, or terminate any MCRPE employee in connection with services provided under the PSA. (Kamara Dec., ¶ 8 [2-ER-288-289]). MCRPE's fee for these terms was not to exceed

$33,821,771.36. (PSA, Ex. A, Tribal Monitor Scope of Work, II. [2-ER-118-119]).

B. In Exchange for Full Control and Independence, MCRPE Agreed to Indemnify Tetra Tech for Claims Arising from Misconduct or Negligence, and to Submit all Disputes Related to the PSA to a Court of Competent Jurisdiction.

Not only did the PSA provide for MCRPE to assume the risks arising from its services, labor, and materials—and to indemnify Tetra Tech against losses arising from its conduct—but it also provided a mechanism to resolve disputes. The PSA set forth an extensive procedure that the parties are required to follow to resolve any claims arising from the PSA, as follows:

> Dispute Resolution. Except for actions for nonpayment or breach of confidentiality, all claims, disputes, and other matters in controversy between the Parties arising out of or in any way related to this Agreement shall be submitted as a condition precedent to other remedies provided by law. **Prior to commencing litigation**, the Party seeking relief shall provide the other Party with a written statement setting forth the matters in dispute and request that the Parties meet and confer at a location where the Project is located, unless another location is mutually agreed upon . . . in order to make a good faith attempt to resolve the dispute between the Parties. . . . [T]he Parties agree that statements (including but not limited to any admissions) made during the meet and confer process are confidential and may not be relied upon or introduced as evidence for any purpose, including impeachment, in **any legal, equitable or other proceeding** . . . Any agreement that is reached during the meet and confer process, however, is not confidential and **may be enforced** as a modification of the Agreement without further

> obligation to meet and confer. Notwithstanding the foregoing, any evidence otherwise subject to discovery or otherwise admissible **shall not be protected from discovery or from being admitted into evidence** simply as a result of it having been used in connection with the meet and confer process. **Any court with competent jurisdiction** shall have the authority to enforce this provision and to determine if the meet and confer process has been satisfied.

(PSA, Terms and Conditions, IV. F (emphasis added) [2-ER-114]). When the contract was formed, MCRPE understood the DRP to be a meaningful tool to resolve disputes. Ms. Reyes, MCRPE's Rule 30(b)(6) witness testified in discovery that the DRP was included in the PSA "[t]o have a different method of trying to resolve things instead of having to go to court." (Reyes Depo., 64:16-65:4) [2-ER-262-263]).

Under the PSA, the first step to resolve any disputes arising from the PSA is through a confidential meet and confer process at the site of the project. (PSA, Terms and Conditions, IV. F (emphasis added) [2-ER-114]). This discussion must take place "[p]rior to commencing litigation" and must be kept confidential. (*Id.*) Where disputes remain unresolved, the parties agreed to submit their claims before a "court with competent jurisdiction." (*Id.*)

V. The Underlying Action Emerges from MCRPE's Failure to Pay Overtime Wages to Its Tribal Monitors.

Engasser worked for MCRPE as a tribal monitor on the Camp Fire project at the rate of $50 per hour. (Engasser Depo., 21:9-19 [2-ER-128]). MCRPE charged Tetra Tech an hourly rate for each tribal monitor which ranged from $104.85 per hour to $116.19, depending on the personnel used. (PSA, Ex. A, II. [2-ER-118]). MCRPE paid Engasser straight time wages for all hours worked, and he typically worked a 12-hour day. (*See* Tetra Tech's Amended Third-Party Complaint (ECF No. 31), ¶ 11 [3-ER-352-353]; Engasser Depo., 21:6-19 [2-ER-128]).

Engasser filed this lawsuit as a class and collective action on behalf of himself and all MCRPE tribal monitors. Suing *only* Tetra Tech, Engasser sought to recover unpaid overtime wages under the FLSA and California law, as well as penalties for alleged missed meal periods and rest breaks, alleged improper wage statements, and alleged waiting time penalties under California law. [3-ER-443-460].

VI. MCRPE Breaks Its Promise to Indemnify Tetra Tech.

Prior to filing its Third-Party Complaint, Tetra Tech attempted to meet and confer with MCRPE as required by the DRP in the PSA. (Tetra Tech's Opposition to Motion to Dismiss Amended Third Party Complaint,

at p. 8 [2-ER-217]). Among other things, Tetra Tech demanded that MCRPE assume its defense in this case and fully indemnify it against any related losses. (*Id.*) MCRPE rejected Tetra Tech's request, arguing, in relevant part, that the district court was not a court of "competent jurisdiction" over the matters in controversy. (*Id.*) Instead, MCRPE disingenuously argued that the matter belonged in Tribal court, even though the Tribe has neither established its own court nor participated in an intertribal court system. (*See* MCRPE's Responses to Tetra Tech's Interrogatories Nos. 5 and 6 [2-ER-281-282]; Opposition Brief at p. 15 [2-ER-206-230 at 224]). Tetra Tech filed a Third-Party Complaint asserting claims for, among other things, indemnity, contribution, and restitution [3-ER-429-440]. MCRPE then filed a Motion to Dismiss in which it disclosed statements made by the parties during their confidential meet and confer discussions in breach of Section IV-F of the PSA. [3-ER-376-391, at 383-384]. While the motion was pending, Tetra Tech filed an Amended Third-Party Complaint, the operative Third-Party Complaint. [3-ER-350-373]. Shortly after, MCRPE re-filed a Motion to Dismiss on the same grounds. [3-ER-292-308].

VII. Tetra Tech Appeals the District Court's Order Granting MCRPE'S Motion to Dismiss.

On February 9, 2021, the district court granted MCRPE's Motion to Dismiss (Order Granting Third-Party Defendant's Motion to Dismiss [1-ER-2-12] (the "Order")). The district court held that the MCRPE had expressly retained its sovereign immunity by including a single sentence in the PSA that states: "Nothing herein shall be construed as a waiver of sovereign immunity." [1-ER-8]. Relying on *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affs.*, 255 F.3d 801 (9th Cir. 2001) and *Miller v. Wright*, 705 F.3d 919, 925 (9th Cir. 2013), the district court distinguished the Supreme Court's decision in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 422 (2001), by concluding that *C&L*'s holding was limited to arbitration agreements. [1-ER-9]. Noting that the DRP "does not contemplate arbitration at all, let alone binding arbitration, judicial enforcement of a final arbitration award, or entry of judgment thereon," the district court reasoned that it was not a consent to be sued. (*Id.*)

The district court further found that MCRPE's consent to suit in a "court of competent jurisdiction" was not clear and unequivocal. (*Id.*) According to the court, "these clauses . . . could just as easily suggest

Mechoopda's possible *future* decision to waive its immunity and go to court as they could Mechoopda's consent to court jurisdiction under the PSA." (*Id.*)

Shortly after, the district court dismissed all of Plaintiff's individual claims against Tetra Tech with prejudice. [1-ER-1]. There are no pending claims, counterclaims, crossclaims, or third-party claims.

Tetra Tech timely appealed. [3-ER-461].

Summary of Argument

1. Through a negotiated agreement, MCRPE consented to be sued for claims arising under the PSA that were addressed according to, but not resolved by, the DRP's conditions precedent to litigation. This is because "disputes" under the PSA that are not resolved by the informal processes stated in the provision can be submitted to "any court of competent jurisdiction." No magic words or special formulas are needed for a tribe to waive its sovereign immunity. By consenting to enforcement of the PSA through the DRP—if necessary by litigation—the Tribe unmistakably waived sovereign immunity for disputes covered by that provision.

2. The district court erred by failing to give full effect to all provisions in the DRP, concluding instead that a blanket assertion of sovereign immunity in a separate portion of the contract negated Tetra

Tech's rights under the DRP to a forum in any "court with competent jurisdiction." In so doing, the court impermissibly rewrote the negotiated agreement and denied Tetra Tech any judicial remedy for breach of the agreement. The district court also erred in holding that the DRP was not a waiver because it allowed the parties to submit any dispute related to the PSA to a "court with competent jurisdiction," rather than identifying a particular court.

3. The district court is a court of competent jurisdiction under the DRP, in part because there is no tribal court in which suit could be brought to enforce the indemnity clause and the tender of defense. Thus, the district court erred in failing to enforce the provision of the DRP that allowed both parties to submit any disputes arising from the PSA to a "court with competent jurisdiction."

Standard of Review

Generally, the granting of a motion to dismiss based upon sovereign immunity is reviewable *de novo*. *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 805 (9th Cir. 2001); *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1995). The interpretation and meaning of contract provisions are also questions of law reviewed *de novo*. *Confederated Tribes*

of Siletz Indians of Oregon v. State of Oregon, 143 F.3d 481, 484 (9th Cir. 1998)

The district court's ruling granting the MCRPE's Motion to Dismiss is reviewable under the holding of *Lanning v. Serwold,* 474 F.2d 716, 717, fn. 1 (9th Cir. 1973) because the district court intended its order and judgment to be dispositive of the action.

Argument

I. A Contractual Provision that Disputes May be Litigated in Any "[C]ourt with [C]ompetent [J]urisdiction" is a Clear Waiver of Tribal Sovereign Immunity.

The MCRPE clearly and unequivocally waived its sovereign immunity by agreeing to submit any disputes related to the PSA to a "court with competent jurisdiction." Against the overwhelming weight of Supreme Court and federal court precedent, however, the district court found this language ineffective based on language in the contract that states that, "Nothing herein shall be construed as a waiver of sovereign immunity." In adopting this view, the district court effectively neutralized and rendered the DRP meaningless surplusage in violation of well-settled canons of construction, the plain language of the PSA, and the intent of the parties.

A. The MCRPE Clearly and Unequivocally Waived its Sovereign Immunity Via the DRP.

It is well settled that sovereign entities waive their sovereign immunity by consenting to suit. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 422 (2001); *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996); see also *Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota, Inc.*, 50 F.3d 560, 563 (8th Cir. 1995). A tribe need not use any special language to waive its sovereign immunity. *Rosebud*, 50 F.3d at 563. Nor does a tribe need to identify a specific court or reference a particular set of arbitration rules to waive sovereign immunity. *Sokaogon*, 86 F.3d at 660. Simply put, "[t]o agree to be sued is to waive any immunity one might have from being sued." *Id.* at 659.

In the seminal case of *C & L Enterprises*, a native tribe executed a construction contract for the installation of a foam roof on a tribe-owned commercial building. *C & L Enterprises*, 532 U.S. at 411. The contract included a clause that required arbitration of all contract-related disputes and enforcement of arbitration awards **"in any court having jurisdiction thereof."** *Id.* at 415 (emphasis added). After execution of the contract, but before C & L commenced performance, the tribe solicited

new bids for the installation of the roof. *Id.* at 416. C & L claimed that the tribe dishonored the contract and submitted an arbitration demand. *Id.* In response, the tribe asserted sovereign immunity and declined to participate in arbitration. *Id.* The case went to arbitration, and the arbitrator rendered an award in favor of C & L. *Id.* The contractor filed suit to enforce the award in state court, and the tribe moved to dismiss on the grounds of its sovereign immunity. *Id.* Among other things, the tribe argued that it was immune from suit on its contract with C & L and (much like MCRPE here) claimed that "'no court' on earth or even on the moon" had the jurisdiction contemplated by the arbitration provision. *Id.* at 421.

The Supreme Court disagreed. *Id.* The Court found that the tribe had consented to dispute resolution and to the enforcement of the award in any court having jurisdiction. *Id.* at 419, 423. By way of the dispute resolution clause contained in "a standard form agreement copyrighted by the American Institute of Architects," the tribe in *C & L Enterprises* thus created a right to sue that effectively waived its sovereign immunity. *Id.* at 415, 420-21. That clause memorialized "the Tribe's commitment to adhere to the contract's dispute resolution regime." *Id.* at 422. To

eliminate any doubt about the consequences of the clear language, the Supreme Court emphasized that the contract's dispute-resolution "regime has a real world objective; it is not designed for regulation of a game lacking practical consequences." *Id.*

Here, the dispute resolution provision is even clearer than the one in *C & L Enterprise* because it *expressly* creates a right of action against MCRPE in "any court with competent jurisdiction." [2-ER-114]. By its plain terms, the DRP itself is defined as a condition precedent to initiating litigation on any "claims, disputes, and other matters in controversy between the parties arising out of or in any way related to [the Agreement]." [2-ER-114]. The DRP is triggered "[p]rior to commencing litigation," and requires the aggrieved party to initiate a conference of the parties to resolve the dispute before filing a lawsuit. [2-ER-114]. Both parties agreed that any dispute related to the PSA that was not resolved by conference could then be submitted to "[a]ny court with competent jurisdiction." [2-ER-114].

Nothing else, not even an express reference to "sovereign immunity," was required to be included in the DRP for MCRPE to waive its immunity. *Rosebud*, 50 F.3d at 563 (holding that the Supreme Court has "never

required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity"). Yet the district court erroneously found that the DRP was not a "clear waiver" because it "does not contemplate arbitration at all, let alone binding arbitration, judicial enforcement of a final arbitration award, or entry of judgment thereon." The court stated that none of the provisions present in *C & L* that amounted to clear waiver were present, and, on that basis, found that the DRP was not a clear and unequivocal waiver of sovereign immunity. [1-ER-9].

The district court's narrow reading of *C & L Enterprises* as limited to arbitration contracts is unsupported by the decision itself or any other judicial authority. The Supreme Court in *C & L did not* limit sovereign immunity waivers to arbitration contracts. Rather, the Supreme Court held simply that, to relinquish its immunity, a tribe's waiver must be "clear." *Id.* at 414. Whether a waiver is "clear" depends on the particular facts of the case. *Id.* at 418. In *C & L*, the Tribe "commit[ted] to adhere to the contract's dispute resolution regime" by agreeing to arbitrate all contract-related disputes between the parties. *Id.* at 414. The court found that the arbitration rules referenced in the contract merely clarified that the parties were able to enforce the outcome of the arbitration in

court. *Id.* at 422. Nowhere in its decision did the Supreme Court expressly limit sovereign immunity waivers to arbitration agreements.

Likewise, the district court erred in holding that the DRP was ineffective as a waiver because it failed to identify a *particular* court with "competent jurisdiction." Under Seventh and Eighth Circuit decisions later approved by the U.S. Supreme Court, the Tribe need not identify a specific court to waive sovereign immunity. *Sokaogon Gaming*, 86 F.3d at 660 (holding that an "explicit mention of court actions" is not required to effectuate a valid waiver of sovereign immunity); *Rosebud Sioux*, 50 F.3d at 562 (upholding as valid a waiver of sovereign immunity via an arbitration clause that did not identify any courts or court actions); *accord C & L Enterprises*, 532 U.S. at 422 (citing *Rosebud Sioux* for the proposition that an agreement to arbitrate was a waiver of immunity even though it "did not contain provision for court enforcement").

If not understood as an express consent to be sued, the DRP is meaningless. As the Eighth Circuit held in *Rosebud Sioux*, "disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense." 50 F.3d at 562. Similarly, the Supreme Court held in *C&L Enterprise* that a tribe's agreement "to adhere to certain

dispute resolution procedures" is sufficiently clear for a waiver: "We hold that, by the clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award . . . ." 532 U.S. at 414, 420.[5] *See also Sokaogon Gaming Enterprise Corp.*, 86 F.3d at 660 (upholding waiver of sovereign immunity because "[t]he arbitration clause could not be much clearer . . . if there is a dispute under the contract it must be submitted to arbitration").

Rather than distinguishing the facts and analysis in *C & L Enterprise,* the district court relied on two decisions of this Court that are distinguishable, namely *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). Neither case supports the district court's judgment.

In *Demontiney*, a federal agency, an Indian tribal member, and an Indian Tribe executed various subcontracts for engineering services to remodel the Bonneau Dam located on tribal land in

[5] In fact, this interpretation is consistent with MCRPE's own Rule 30(b)(6) witness, who testified that this provision was included in the agreement "to have a different method of trying to resolve things instead of having to go to court." Noh Dec., ¶ 5, Exh. B (ECF No. 36-1) (Transcript of Deposition of Stephanie Reyes, 64:16-65:4). [2-ER-262-263].

Montana. *Demontiney*, 255 F.3d at 803. The contract included a provision that stated that "[n]othing in this contract shall be construed as . . . [a]ffecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by the Chippewa Cree Tribe." *Id.* at 812. Of note, one of the subcontracts included provisions that granted exclusive jurisdiction over disputes arising under the agreement to the Chippewa Cree Tribal Court. *Id.* at 812. One of the provisions also provided that the decision of the Chippewa Cree Business Committee, the governing body of the Tribe, would be final absent a determination from a "court of competent jurisdiction" of fraud, arbitrariness, capriciousness, or gross error. *Id.*

On appeal, the tribal member argued that the Tribe had signed a contractual waiver of its sovereign immunity and therefore was required to submit all disputes to federal court. *Id.* at 812. The Ninth Circuit disagreed, reasoning that that the provisions at issue only established a waiver of sovereign immunity in tribal court. *Id.* at 812-13. None of the subcontracts showed the tribe's intention to appeal to nontribal jurisdiction, including in district court. *Id.*

The facts of Demontiney bear no resemblance to this dispute. Unlike the litigant in *Demontiney*, the MCRPE has signed an *express* consent to suit provision that requires it to submit any disputes arising from the PSA to a "court with competent jurisdiction." The DRP specifically requires resolving in court any "claims, disputes, and other matters . . . arising out of . . . [the Agreement]." None of the subcontracts in *Demontiney* contained similar language. Further, unlike the tribal member in *Demontiney*, Tetra Tech has no judicial remedy outside of federal court—indeed, MCRPE admitted in discovery that there are no federal, state, or tribal courts that could have adjudicated any claim on the PSA with the MCRPE. (*See* MCRPE's Responses to Tetra Tech's Interrogatories Nos. 5 and 6 [2-ER-281-282]).

Miller v. Wright is also inapposite. In *Miller*, a Native American cigarette retailer and his customers brought action against an Indian Tribe, the tribal chairman, and head of the tribe's tax department alleging that the imposition of cigarette sales taxes by the tribe on non-Native-Americans in Indian country was illegal. *Miller*, 705 F.3d 919, 921-923. Appellants filed suit based on a compact executed between the tribe and the State of Washington regarding the purchase and taxation of

cigarettes. *Id.* at 923. The agreement included a dispute resolution provision to resolve disputes between the State of Washington and the Tribe via mediation. *Id.* at 925. In affirming the lower court, the Ninth Circuit found that "mediation generally is not binding and does not reflect an intent to submit to adjudication by a non-tribal entity." *Id.*

Miller has no relevance to this case because the PSA plainly contemplates that disputes unresolved by the DRP will be resolved in court, not mediation. As the Supreme Court stated in *C & L Enterprise*, all that is necessary for a tribe to relinquish its immunity is a waiver made with the "requisite clarity." *C & L Enterprises*, 532 U.S. at 418. And as stated above, the DRP is clearer than the waivers found in other cases litigated against Indian Tribes because it sets forth the waiver language directly in the DRP, without requiring the MCRPE to reference a set of arbitration or other procedural rules to understand its obligations. In *Miller*, this Court discussed *Demontiney* at length and concluded that the facts in *Miller* were more like *Demontiney* than *C & L Enterprise*. 705 F.3d at 925. That is true, but it confirms that both cases are distinguishable here, the opposite of the district court's conclusion.

The waiver set forth in the DRP is clear. The district court did not hold that the language of the DRP was ambiguous. Nor did the district court's findings cast any doubt on its enforceability. The DRP therefore satisfied the Supreme Court's standard for a clear contractual waiver of sovereign immunity.

B. The District Court Failed to Harmonize the Dispute Resolution Provision with the Sovereign Immunity Clause.

Rather than giving effect to the detailed resolution process set forth in the DRP, the district court's opinion effectively negated Tetra Tech's right to judicial enforcement in the DRP based only on a generalized reservation of sovereign immunity. [1-ER-8]. But the Supreme Court held in *C & L Enterprise* that it was "the clear import of the arbitration clause"-- not a reference to or a discussion of sovereign immunity—that waived immunity. 532 U.S. at 414. The district court cited no case involving a conflict between a clear contractual agreement to submit disputes to a particular forum (whether arbitration or any court of competent jurisdiction) and a simple statement that a tribe intended to retain sovereign immunity. To the extent that the district court recognized the conflict between the reference to sovereign immunity and the DRP, it simply made the reference to sovereign immunity controlling without

explanation or authority. This interpretation is both contrary to the agreement reached by the parties in this case and a marked departure from well-settled principles of contract construction.

"[I]t is axiomatic that courts interpret contracts so as to give effect to all of their provisions." *In re Airadigm Commc'ns, Inc.*, 616 F.3d 642, 657 (7th Cir. 2010). "The usual rule of interpretation of contract is to read provisions so that they harmonize with each other, not contradict each other." *Peterson v. Minidoka City School District No. 331*, 118 F.3d 1351, 1359 (9th Cir. 1997). A construction of a contract that neutralizes one provision should not be adopted if another construction 'which gives effect to all of its provisions is consistent with the general intent.'" *Airadigm*, 616 F.3d at 657 (citing *First Am. Title Ins. Co. v. Dahlmann*, 715 N.W.2d 609, 616-17 (2006)).

Consistent with these principles, this Court has explained that language in a contract cannot be found to be ambiguous in the abstract. *Int'l Bhd. of Teamsters v. NASA Servs., Inc.*, 957 F.3d 1038, 1044 (9th Cir. 2020). Courts will not strain to create an ambiguity where none exists. *Id.* Nor is the language of a contract made ambiguous simply because the parties urge different interpretations. *Id.* Rather, a contract

provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. *Id.* Even if there is an ambiguity, however, a contract term should not be construed to render some of its provisions meaningless, irrelevant, or mere surplusage. *United States v. Hathaway*, 242 F.2d 897, 900 (9th Cir. 1957) ("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."); *Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1149 (9th Cir. 1986). *See also In re Marriage of Williams*, 29 Cal. App. 3d 368, 379 (1972); *In re Tobacco Cases I*, 186 Cal. App. 4th 42, 49 (2010).

The district court's conclusion permitting the reference to sovereign immunity to entirely supersede Tetra Tech's rights under the DRP so utterly departs from these principles that it renders the PSA illusory by disregarding the intent of the parties. Indeed, if the parties intended MCRPE not to have enforceable liabilities under the contract, they would not have included the DRP *or* the indemnification provisions. But they did. The Supreme Court warned against this: a contract's dispute-resolution regime "has a real world objective; it is not designed for

regulation of a game lacking practical consequences." *C & L Enterprise*, 532 U.S. at 422. The district court's analysis gets this wrong.

The DRP sets forth a detailed, pre-litigation meet-and-confer process that the parties negotiated and bargained for before executing the PSA. Both Tetra Tech and MCRPE agreed to submit all claims and disputes related to the PSA to this two-step process as a condition precedent to litigation. The district court's discussion of sovereign immunity should have respected the parties' intention, which was to create an avenue for either party to enforce contractual compliance. *Airadigm*, 616 F.3d at 657; *Hathaway*, 242 F.2d at 900.

The reservation of sovereign immunity in Section IV.D. [2-ER-114] does not exist in a vacuum—it must have meaning and be read in the context of the entire contract. *Int'l Bhd. of Teamsters*, 957 F.3d at 1044; *Airadigm*, 616 F.3d at 657. But instead of reconciling the DRP—which plainly waived the MCRPE's sovereign immunity—with Section IV.D. [2-ER-114], the district court simply struck down the DRP's provision allowing enforcement of the PSA in a "court with competent jurisdiction." The district court order thus contravened well-settled Ninth Circuit case law, which required it to harmonize conflicting provisions. *Peterson*, 118

F.3d at 1359; *Airadigm*, 616 F.3d at 657 (citing *First Am. Title Ins. Co. v. Dahlmann*, 715 N.W.2d 609, 616-17 (2006)). Here, an entirely plausible reading that gives effect to *both* provisions *was* available: the DRP constitutes a limited consent to suit for disputes arising from the contract, but the PSA preserves the Tribe's sovereign immunity in all other respects. Such a reading would have been consistent with the text of the contract and the intent of the parties. Instead of taking this approach, the district court nullified the DRP's judicial enforcement provision.[6] The proper resolution and understanding of the PSA, which nullifies nothing, is plain: the MCRPE enjoys the Tribe's sovereign immunity, but it is waived for disputes under the agreement as provided in the DRP.

C. The District Court is a "[C]ourt with [C]ompetent [J]urisdiction."

The district court 's conclusion that the federal court is not a "court with competent jurisdiction" entirely eviscerates the DRP and leaves Tetra Tech without recourse. As MCRPE admitted in the proceedings below, there are *no judicial or tribal forums whatsoever* where a litigant can

[6] If the provisions cannot be read together, then the more specific provision controls. Antonin Scalia & Bryan Garner, *Reading Law* ¶ 28 at pp. 183-188 (2012) ("If there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalia specialibus non derogant*).)

assert a civil claim against MCRPE or the Tribe. If the district court is not a "court with competent jurisdiction," there are no judicial or tribal courts *anywhere* that can hear this dispute. (*See* MCRPE's Responses to Tetra Tech's Interrogatories Nos. 5 and 6 [2-ER-281-282]).

The DRP hinges on the parties' ability ultimately to litigate issues that are not resolved informally. But without any judicial forum able to assert jurisdiction over MCRPE, the DRP clause is meaningless. Indeed, the history of this case bears that out. MCRPE demanded a services contract that granted it sole control over the manner and means of tribal monitoring in exchange for its agreement to submit any claims and disputes to a "court with competent jurisdiction." When Engasser filed suit below, Tetra Tech sought to meet and confer with MCRPE regarding its claims for indemnification and contribution. But MCRPE responded by simply claiming that it was immune from the claim for indemnification and that the only court that had jurisdiction over it was the tribal court. Opposition Brief at p. 15 [2-ER-224]. Then, when faced with Tetra Tech's third party claims, MCRPE asserted that it could not be sued. Thus, if MCRPE's interpretation wins the day, the DRP cannot be enforced against the MCRPE at all. MCRPE cannot have it both ways.

As a business entity of a federally recognized tribe, MCRPE should be required to submit to the district court or, at the very least, provide a tribal forum to entertain this dispute. MCRPE did neither. When the Indian Reorganization Act of 1934 was enacted, Congress ushered in a new approach to federal-Indian relations that conferred greater tribal authority to develop tribal courts and phase out the previous Courts of Indian Offences, also known as CFR courts. *United States v. Denezpi*, 979 F.3d 777, 782-83 (10th Cir. 2020). None of the procedural safeguards provided by tribal or federal courts are present in this appeal, however, because Tetra Tech has no judicial remedy for MCRPE's breach of contract, nor the ability to enforce any other aspect of the PSA—a contract that MCRPE negotiated, reviewed, and deliberated upon.

The district court's ruling raises significant implications for any private party like Tetra Tech that enters into a contract with an indigenous tribe. Namely, it allows tribal entities like the MCRPE to engage in opportunism of all kinds. Under the district court's opinion, a tribe can agree to indemnify the private entity, offer to participate in a dispute resolution procedure for any related claims, collect the benefits of the contract, and, at the last minute, assert its sovereign immunity to

avoid the very commitments that enticed private parties to enter into the agreement in the first place. Private parties like Tetra Tech are thus left bearing all of the risks, and receiving none of the benefits. Such outright gamesmanship should not be condoned.

Conclusion

The district court's judgment: (1) violates the teaching of *C & L Enterprises* that a tribe need not use magic words to waive its sovereign immunity; (2) contradicts the intent of the parties; (3) ignores the well-established ways in which courts construe agreements to give effect to all of their provisions; and (4) is unnecessarily unfair to Tetra Tech, which in this case negotiated a waiver of immunity with a tribal entity with which it was forced to do business.

Tribal sovereign immunity is broader than the common-law immunity of states, the federal government, and foreign nations. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 765 (1998) (Stevens, J., dissenting). Even when properly applied, in an "economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter." *Id.* at 758. Here, Tetra Tech had no choice but to do business with MCRPE, and it knowingly and purposefully protected its

interests by negotiating a clear waiver of sovereign immunity through a particular dispute resolution procedure. Nothing in federal law requires unfairly nullifying the agreement of the parties providing Tetra Tech with a remedy to claims asserted by third-parties based on MCRPE's, not Tetra Tech's, conduct. Tetra Tech respectfully requests that the district court's judgment be reversed.

DATED: December 20, 2021 Respectfully submitted,

By: */s/ Damien P. DeLaney*
Damien P. DeLaney
Brian M. Noh
AKERMAN LLP

TAYLOR LAW FIRM, LLC
William Taylor

WOODS, FULLER, SHULTZ & SMITH P.C.
James Moore

Attorneys for Defendant-Third-Party-Plaintiff-Appellant
TETRA TECH, INC.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form:
http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 21-55217

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature */s/ Damien P. DeLaney* **Date** December 20, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Certificate of Compliance for Briefs
9th Cir. Case Number: 21-55217

I am the attorney or self-represented party.

This brief contains 7,447 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/ Damien P. DeLaney* **Date** December 20, 2021
*(use "*s/[typed name]*" to sign electronically filed documents)*

CERTIFICATE OF SERVICE

I certify that on December 20, 2021 the foregoing brief was filed electronically using the Court's CM/ECF system, which will cause service to be made on all counsel of record.

/s/ Damien P. DeLaney