

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

NATIONAL FUEL GAS COMPANY, NATIONAL  
FUEL GAS DISTRIBUTION CORPORATION,  
and NATIONAL FUEL GAS SUPPLY  
CORPORATION,

Plaintiffs,

- vs -

SENECA NATION OF INDIANS,

Defendant.

Civil Action No.: \_\_\_\_\_

**VERIFIED  
COMPLAINT**

Plaintiffs National Fuel Gas Company, National Fuel Gas Distribution Corporation, and National Fuel Gas Supply Corporation (collectively, “National Fuel” or “Plaintiffs”), by and through their attorneys Nixon Peabody LLP, for their Complaint herein state as follows:

**PRELIMINARY STATEMENT**

1. National Fuel requests an order compelling Defendants into arbitration and staying tribal court litigation in aid of arbitration. National Fuel does so to secure the benefit of the bargain it struck with Defendant Seneca Nation of Indians (“SNI”)—an express written contractual promise by the tribe that “any dispute arising in the interpretation or performance of this Agreement . . . shall be subject to binding arbitration, which arbitration shall be the exclusive means of resolving such disputes.”

2. This arbitration provision is contained in a 21-page Settlement Agreement, executed on August 1, 1988, that resolved federal and state lawsuits in which the SNI challenged the lawfulness of certain gas lines crossing the tribe's territories in Western New York. A copy of the 1988 Settlement Agreement is attached hereto as Exhibit A.

3. Instead of adhering to its contractual commitment to resolve through arbitration any disputes covered by the Settlement Agreement, the SNI chose to commence two improper lawsuits in its home court—the Seneca Nation of Indians Peacemakers' Court.

4. Not only do those twin tribal court actions contravene the plain terms of the arbitration clause, they violate a separate but related Standstill Agreement between the parties in which the SNI promised, again in writing, to take no action whatsoever against Plaintiffs while the parties worked to resolve certain issues relating to Plaintiffs' performance under the Settlement Agreement.

5. The Standstill Agreement was executed October 21, 2013. A copy of the Standstill Agreement is attached hereto as Exhibit B.

6. The SNI's tribal court complaints, both filed August 18, 2015, are attached as Exhibit C (Peacemakers' Court Case No. 818-15-2) and Exhibit D (Peacemakers' Court Case No. 818-15-3) and hereafter referred to as the "Tribal Court Actions."

7. The Tribal Court Actions seek a broad range of unlawful remedies, including but not limited to a request to nationalize private property owned by

National Fuel, and to impose on National Fuel various tribal regulatory requirements respecting the operation and maintenance of natural gas transmission and distribution lines. In doing so, the Tribal Court Actions violate or threaten to violate the U.S. Constitution, federal statutes, federal common law, and federal regulatory law, as well as the Constitution of the State of New York State and state laws and regulations respecting gas utilities.

8. As set out below, this Court should (1) declare the arbitration clause enforceable; (2) direct the SNI to arbitration, as the parties intended when they entered into the Settlement Agreement and made arbitration their exclusive remedy; and (3) issue an injunction staying the Tribal Court Actions to permit the arbitration to proceed.

### **PARTIES AND JURISDICTION**

#### **National Fuel**

9. Plaintiff National Fuel Gas Company is a New Jersey corporation duly authorized to do business in New York State with offices located at 6363 Main Street, Williamsville, New York 14221.

10. Plaintiff National Fuel Gas Distribution Corporation is a New York corporation with offices located at 6363 Main Street, Williamsville, New York 14221.

11. Plaintiff National Fuel Gas Supply Corporation is a Pennsylvania corporation, duly authorized to do business in New York State, with offices located at 6363 Main Street, Williamsville, New York 14221.

12. National Fuel Gas Supply Corporation provides interstate natural gas transmission and storage for affiliated and nonaffiliated companies through an integrated gas pipeline system that extends over 2,300 miles from southwestern Pennsylvania to the New York-Canadian border at the Niagara River. National Fuel Gas Supply Corporation operates these interstate transmission pipelines under certificates of public convenience and necessity issued by the Federal Regulatory Commission (FERC). The transmission of natural gas in interstate commerce is closely regulated by FERC pursuant to its authority under the Natural Gas Act.

13. National Fuel Distribution Corporation sells or transports natural gas to 737,000 customers through a local distribution system located in western New York and northwestern Pennsylvania. Regulatory jurisdiction over National Fuel's intrastate pipelines in New York falls under the New York State Public Service Commission (PSC).

14. National Fuel or its predecessors-in-interest have operated natural gas pipelines in New York since the 19th Century under federal and state authorizations.

#### **Seneca Nation of Indians**

15. Upon information and belief, SNI is a federally recognized Indian tribe that maintains its principal administration building for the Cattaraugus Territory at 12837 Route 438, Irving New York 14081, and for the Allegany Territory at 90 Ohi:yo' Way, Salamanca, New York 14779.

### **Subject Matter Jurisdiction**

16. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as this action arises under the Constitution, laws, or treaties of the United States, raising the following questions of federal law:

- a. The scope of the adjudicative jurisdiction of the Seneca Nation of Indians.
- b. Issues of federal law respecting the extensive regulatory scheme governing oil and gas leases (both tribal and non-tribal leases).
- c. Whether the Settlement Agreement required approval of the Secretary of the Interior under 25 U.S.C. § 81, and if so, whether the absence of Secretarial approval renders the Settlement Agreement void under 25 U.S.C. § 81, as well as under the Indian Trade and Intercourse Act, 25 U.S.C. § 177, as expressly alleged in the Tribal Court Actions.

### **VENUE**

17. Venue is proper pursuant to 28 U.S.C. § 1391(a)(2), as a substantial part of the events giving rise to this Action occurred in this District

18. Venue is also proper pursuant to 28 U.S.C. § 1391(a)(1), as Defendant resides in this District.

**STATEMENT OF FACTS**

**A. The 1988 Settlement Agreement**

19. The Settlement Agreement (attached as Exhibit A), resolved two lawsuits against National Fuel (or its predecessor) both of which challenged the legality of certain natural gas transmission lines crossing the SNI's Territories.

20. The SNI had filed one action in state court in 1970 and another in federal court in 1982.

21. The SNI alleged in these prior lawsuits that the federal government had not approved two natural gas leases, one executed in 1910, and the other in 1956.

22. A global settlement—the Settlement Agreement—was reached in both lawsuits on August 1, 1988.

23. Pursuant to the Settlement Agreement, the challenged leases were declared to be null and void and the parties' respective leasing obligations going forward were set out in the Settlement Agreement itself.

24. Attached to the Settlement Agreement, as an appendix, is a sample Gas Purchase Agreement governing the future purchase of tribal gas by National Fuel.

25. The sample Gas Purchase Agreement makes both the buyer's and seller's obligations subject to all applicable federal, state and local laws governing such transactions; provides that seller's warranties are governed by Section 2-312 of

the Uniform Commercial Code; and states that “Buyer and Seller agree that this Agreement shall be construed according to the laws of the STATE OF NEW YORK.”

26. The SNI Tribal Council formally approved the Settlement Agreement on April 16, 1988, and the President of the SNI executed the Agreement reaffirming the tribal council’s authorization to do so.

27. Based on the SNI’s representations as to its authority to execute the Settlement Agreement, National Fuel signed the Settlement Agreement as the current leaseholder and owner of certain pipelines and facilities within the Seneca territories.

28. The Settlement Agreement contains a clause requiring the parties to submit to binding arbitration: “[A]ny dispute arising in the interpretation or performance of this Agreement . . . shall be subject to binding arbitration, which arbitration shall be the exclusive means of resolving such disputes.”

29. The Settlement Agreement provides that, unless the parties agree upon the appointment of a single arbitrator, a panel of three arbitrators shall be appointed. Each party shall choose one arbitrator and those two arbitrators will choose the third arbitrator. In the event that the two cannot agree on the third arbitrator within 15 days’ time, the third arbitrator shall be chosen by the Chief Judge of the Western District of New York. If he declines, the “Dean of the School of Law at the State University of New York at Buffalo shall make the selection.”

30. The Settlement Agreement further provides that the arbitration decision “may be vacated only by the United States District Court for the Western District of New York . . . .”

31. The Settlement Agreement expressly waives the SNI’s sovereign immunity with respect to “enforcement or appeal of any arbitration decision pursuant to this section.”

32. The Settlement Agreement includes two collateral provisions in which the SNI agreed not to extract gas from the Medina formation (which was of inferior quality and thus was not suitable for mixing with other natural gas being commercially extracted) and also agreed to forego storing natural gas underground, which would have created significant environmental concerns.

33. The SNI agreed to the twin prohibitions—in the nature of negative easements—for the duration of the Settlement Agreement, exercising its inherent sovereign authority, as well under the authority granted to it by federal treaties and a federal statute passed in 1950, called the Seneca Leasing Act (42 Stat. 442, Act of Aug. 14, 1950) (“Leasing Act”), that expressly exempts the SNI from having to seek Secretarial approval for its leases.

#### **SNI’s Federal Statutory Leasing Authority**

34. The Leasing Act authorizes the SNI to enter into oil and gas leases without approval by the Secretary of the Interior, which otherwise would be required for those leases under 25 U.S.C. § 81.



35. Congress removed the federal oversight requirement because of the SNI's successful history of managing long-term leases with non-Indians without such federal review.

36. Congress broadened the Seneca's tribal authority in 1961 by amending the Leasing Act to allow the tribe to grant rights of way for utility easements (and other purposes) without approval of the Secretary of Interior. (73 Stat. 499 (Sept. 14, 1961)).

37. The SNI's statutory authority to alienate its mineral interests without federal approval necessarily includes the lesser power to execute a negative easement by which the tribe agrees to leave those mineral interests in the ground.

38. The SNI received substantial compensation in the 1988 Settlement Agreement for agreeing to leave undisturbed (in the ground) the inferior natural gas contained in the Medina formation.

39. With respect to the prohibition on underground storage, the SNI Tribal Council passed an ordinance specifically prohibiting that use of its lands due to environmental concerns.

40. In keeping with the SNI's long-standing view of its autonomous leasing authority under the Leasing Act, the SNI never requested Secretarial approval of the Settlement Agreement; never suggested Secretarial such approval was necessary or prudent to obtain; and never asked National Fuel to approach BIA for Secretarial approval.

41. During the intervening 27 years, the SNI has never questioned the validity of the Settlement Agreement—until filing the Tribal Court Actions.

42. During the intervening 27 years, the SNI never challenged any calculation of monies owed under the contract—until filing the Tribal Court Actions.

43. The Settlement Agreement gave the Indians 90 days to challenge the calculation of account balances for gas received from the SNI, and gas delivered to the SNI, referred to as “imbalance” calculations.

44. During the intervening 27 years, the SNI never challenged the imbalance calculations under the Settlement Agreement—until the filing of the Tribal Court Actions.

45. During the intervening 27 years, the SNI never took any steps to either confirm its terms or invalidate any of its provisions—until filing the Tribal Court Actions.

46. Over the past quarter century, SNI accepted National Fuel’s performance under the agreement and received payments from National Fuel totaling approximately \$5.7 million through 27 annual payments made on August 1 of each year, with the last payment of \$198,591 received from National Fuel in July 2015.

**SNI’s Self Proclaimed “Unique Leasing Authority”**

47. The SNI touted its “unique leasing authority” in a 2006 submission to the Department of the Interior, observing that:

Congress carefully considered and recognized the unique history and status of the Nation’s Territories’ and the unique authority

of the Nation to negotiate, approve and manage the leasing process within its Territories. As a result, the Secretary of the Interior lacks the authority under 25 USC 81 or other federal law to approve Nation energy leases . . . .

Letter from SNI President Barry E. Snyder, Jr. to Michael D. Olsen,  
Principal Deputy Assistant Secretary (Acting), Dep't of the Interior,  
Attention: Section 1813 ROW Study Office of Indian Energy and Economic  
Dev. (Jan. 26, 2006), attached hereto as Exhibit E.

48. The SNI has made similar representations to the Bureau of Indian Affairs ("BIA"), stating that its land conveyances are not subject to Section 81 approvals.

49. On information and belief, the SNI Tribal Council has approved and fully honored numerous leases and rights of way agreements with public utilities and others, without federal approvals, over the past three decades or more.

50. On information and belief, the allegations contained in Tribal Court Complaint #818-15-2, at Paragraphs 8, 50, 51, 63-72, 73-82, represents the first and only time since 1961 that the SNI has stated in a judicial proceeding that any grant it made of a lease, easement, right of way or other interest or claim in SNI's real property required Secretarial approval under 25 U.S.C. § 81.

51. On information and belief, the allegations contained in Tribal Court Complaint #818-15-2, at Paragraphs 8, 50, 51, 63-72, 73-82, represents the first and only time since 1961 that the SNI has stated in a judicial proceeding that any grant it made of a lease, easement, right of way or other interest or claim in SNI's real

property was invalid because it had not been approved by the Secretary under 25 U.S.C. § 81.

**2013 Standstill Agreement Respecting Disputes Arising Under Settlement Agreement**

52. Over the years, small disputes have arisen about the parties' performance under the Settlement Agreement.

53. The parties have—until now—worked through the issues without resorting to the formal binding arbitration procedures under the Settlement Agreement.

54. To promote informal dispute resolution and avoid the costs of formal arbitration, the parties in October 2013 entered into a formal Standstill Agreement, directly relating, in part, to the Settlement Agreement. The Standstill Agreement provides in relevant part: “[t]he Parties agree not to take any action of any kind or nature to enforce any claimed rights or remedies during the term of this Agreement . . . . This Agreement applies to all rights, remedies and obligations of each Party hereto . . . .”

55. The Standstill Agreement permits either party to terminate the agreement on 30 days' notice.

**The SNI Commences Litigation in Tribal Court in Violation of Settlement Agreement and Standstill Agreement**

56. Shortly after receiving the annual payment of nearly \$200,000 for 2015, the SNI broke its long-standing acceptance of benefits under the Settlement Agreement, violated two written agreements barring resort to litigation, and

submitted a materially false claim that the SNI lacked the governmental authority to enter into the Settlement Agreement.

57. The Tribal Court Actions arise out of the parties' rights and obligations under the Settlement Agreement, including as the operation and maintenance of the gas pipelines and compensation due under the terms of the Settlement Agreement and related Gas Purchase Agreements.

58. The SNI's contention that the parties needed to obtain Secretarial approval in 1988 to make the Settlement Agreement binding and lawful is frivolous. It comes 27 years after the parties signed the Settlement Agreement and have been performing under it, and where the record shows the SNI exercising its widely-touted autonomous leasing authority without federal review for the past 65 years.

59. SNI's position in tribal court contradicts the tribe's formal position in other litigation and before both the Department of the Interior and the BIA.

60. The SNI's self-contradictory tribal court pleadings demonstrate bad faith.

61. Despite the absence of supporting facts or law for bringing the Tribal Court Actions, the SNI Council Defendants brought those actions in contravention of the SNI's written agreements to refrain from doing so.

62. In its Tribal Court Actions, the SNI threaten to take ownership of National Fuel's private property by nationalizing National Fuel's pipelines and facilities. Such threats cannot be allowed to come to fruition. Self-help remedies that operate outside state and federal constitutions are anathema to settled rules of

law, and, in the hands of the SNI, such self-help efforts have a history of turning violent.

### **CLAIMS FOR RELIEF**

#### **FIRST CLAIM FOR RELIEF**

**(For a Declaration Pursuant to 28 U.S.C. §§ 2201-2202 That the Settlement Agreement and Standstill Agreement are Valid and Enforceable)**

63. Plaintiffs repeat and re-allege the allegations in paragraphs 1-62 above, and incorporate those allegations herein by reference.

64. A judicial declaration of the parties' rights, duties, and obligations is necessary and appropriate at this time under the facts and circumstances alleged above for Plaintiffs and Defendant SNI to ascertain the validity and enforceability of the Settlement Agreement including its provisions for binding arbitration.

65. A judicial declaration of the parties' rights, duties, and obligations is necessary and appropriate at this time under the facts and circumstances alleged above for Plaintiffs and Defendant SNI to ascertain the validity and enforceability of the Standstill Agreement and thereby promote the performance of the parties' contractual promise to arbitrate any disputes arising from the Settlement Agreement.

#### **SECOND CLAIM FOR RELIEF**

**(For a Declaration Pursuant to 28 U.S.C. §§ 2201-2202 That Defendant Breached the Arbitration Clause of the Settlement Agreement)**

66. Plaintiffs repeat and re-allege the allegations in paragraphs 1-65 above, and incorporate those allegations herein by reference.

67. Defendant SNI breached the Standstill Agreement by commencing the Tribal Court Actions and breached the Settlement Agreement by failing to arbitrate the dispute.

68. A judicial declaration of the parties' rights, duties, and obligations is necessary and appropriate at this time under the facts and circumstances alleged above for Plaintiffs and Defendant SNI to ascertain their respective rights, duties, and obligations with respect to whether Defendant SNI breached the arbitration clause of the Settlement Agreement by commencing the Tribal Court Actions in the Seneca Nation of Indians Peacemakers' Court.

69. A judicial declaration of the parties' rights, duties, and obligations is necessary and appropriate at this time under the facts and circumstances alleged above for Plaintiffs and Defendant SNI to ascertain their respective rights, duties, and obligations with respect to whether Defendant SNI breached the Standstill Agreement by commencing the Tribal Court Actions in the Seneca Nation of Indians Peacemakers' Court.

### **THIRD CLAIM FOR RELIEF**

#### **(For an Order Pursuant to 9 U.S.C. § 4 to Compel Arbitration)**

70. Plaintiffs repeat and re-allege the allegations in paragraphs 1-69 above, and incorporate those allegations herein by reference.

71. The Settlement Agreement, which is binding on the parties and governs their relationship, requires that any dispute arising out of it must be arbitrated.

72. The Tribal Court Actions arise out the Settlement Agreement.

73. Defendant SNI filed the Tribal Court Actions in the Seneca Nation of Indians Peacemakers' Court in violation of the parties' agreement to arbitrate any disputes arising out of the Settlement Agreement.

74. Because the Tribal Court Actions were filed improperly and in contravention of the Settlement Agreement in the Seneca Nation of Indians Peacemakers' Court, this Court should compel arbitration in said cases.

#### **FOURTH CLAIM FOR RELIEF**

##### **(Application for Preliminary Injunction)**

75. Plaintiffs repeat and re-allege the allegations in paragraphs 1-74 above, and incorporate those allegations herein by reference.

76. Plaintiffs seek a preliminary injunction preserving the status quo by staying the Tribal Court Actions in the Seneca Nation of Indians Peacemakers' Court, as necessary in aid of this Court's jurisdiction to compel arbitration.

77. Plaintiffs will suffer irreparable harm absent the preliminary injunction / stay. The Tribal Court Actions threaten unconstitutional takings of private property and other unlawful self-help, and the injuries will not be addressable by monetary damages as Defendant is a federally-recognized Indian tribe with quasi-sovereignty that can assert sovereign immunity from suit to such damages in its home court.

78. As set forth above, there is a substantial likelihood that Plaintiffs will prevail on the merits of the narrow question presented, namely whether Defendant



can be compelled to arbitrate disputes arising from the 1988 Settlement Agreement, as the parties expressly agreed.

79. The harms faced by Plaintiffs and set forth above far outweigh any that would be sustained by Defendant if the preliminary injunction were granted. At most, Defendant will be prevented, during the pendency of the arbitration, from taking actions against Plaintiffs that violate federal law.

80. The requested injunction serves the public interest in protecting the status quo while directing the parties to arbitration as the chosen, exclusive dispute resolution method in the Settlement Agreement.

#### **FIFTH CLAIM FOR RELIEF**

##### **(Application for Permanent Injunction)**

81. Plaintiffs repeat and re-allege the allegations in paragraphs 1-80 above, and incorporate those allegations herein by reference.

82. As set forth above, the improper exercise of jurisdiction by the Seneca Nation of Indians in Peacemakers Court, in violation of the Settlement Agreement and Standstill Agreement, has caused, and is continuing to cause, substantial and irreparable injury to Plaintiffs for which there is no adequate remedy at law. Plaintiffs therefore request the Court to permanently enjoin Defendant from unlawfully prosecuting the Tribal Court Actions or taking any other actions to adjudicate disputes arising from the 1988 Settlement Agreement, which expressly requires all such disputes to be arbitrated.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs National Fuel Gas Company, National Fuel Gas Distribution Corporation, and National Fuel Gas Supply Corporation pray for relief against Defendant Seneca Nation of Indians as follows:

1. For a declaration that the Settlement Agreement is valid and enforceable.
2. For a declaration that the Standstill Agreement is valid and enforceable.
3. For a declaration that the Defendant breached the arbitration clause of the Settlement Agreement by failing to commence arbitration.
4. For a declaration that the Defendant breached the Standstill Agreement by commencing an action in the Seneca Nation of Indians Peacemakers' Court.
5. For an order compelling the Defendant to proceed in arbitration.
6. For an injunction staying proceedings in the Seneca Nation of Indians Peacemakers' Court in Tribal Court Actions pending arbitration.

Dated: September 10, 2015

**NIXON PEABODY LLP**

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