IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WORLD FUEL SERVICES, INC,	)	
	)	
Plaintiff,	)	
	)	
V.	)	**Civil Action No. 1:18-cv-00836-JB-SCY**
	)	
NAMBE PUEBLO DEVELOPMENT CORPORATION,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

I.

World Fuels argues that the question whether a valid arbitration agreement here exists must be determined by an arbitrator, not by a court, because NPDC's challenge is to the validity of the parties' alleged contract as a whole, and not only to the arbitration clause in that instrument. Resp., pp. 1, 4-5, relying upon *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006) and *Rent-a-Center West, Inc. v. Jackson,* 561 U.S. 63 (2010). That argument would be correct if this were not a case involving a challenge to the very formation of the contract, as opposed to a challenge to the contract's validity or enforceability where it was otherwise clear that the party resisting arbitration knowingly executed the contract containing an arbitration clause, but that party nonetheless claims the contract is otherwise unenforceable, e.g. based on a fraud in the inducement theory or some other kind of state law violation impacting the contract's enforceability.

But as will be shown below, where (as here) the party resisting arbitration claims that it never entered into the contract relied upon by the party seeking to compel arbitration, whether

that contract ever came into existence is a matter for a court, not for an arbitrator, to rule upon. Here, NPDC contends that it never agreed to the contract signed by Carlos Vigil, and that Mr. Vigil had no authority to bind NPDC to that contract without express board approval as required by the NPDC Charter. Randy Vigil Aff'd, ¶ 10 (Doc. 14-1). Thus, NPDC's challenge goes to the very formation of the contract, not to any other claim of invalidity or unenforceability.

This fundamental distinction is expressly acknowledged by the U.S. Supreme Court in the very cases World Fuels relies upon. In *Buckeye*, the resisting parties admitted they had signed the contracts containing arbitration clauses, but argued the contracts were nonetheless not valid and enforceable because they were void under Florida law. *Buckeye*, *supra* at 444-446. In *Rent-a-Center West*, the party resisting arbitration also admitted execution of the contract containing the arbitration clause, but argued the contract "was unconscionable under Nevada law." *Rent-a-Center*, *supra* at 65 (a substantive unconscionability argument).

The court in both cases[1] ruled that in those circumstances, where due execution of the contract was not disputed and where there was no separate challenge to the validity of the arbitration clause itself (as distinct from the challenge to the validity of the whole contract containing that clause), the contract's validity or enforceability had to be decided by the arbitrators, not by the courts.

However, in both cases, the Court expressly excluded from this rule situations in which the party resisting arbitration claims it never entered into the contract containing the arbitration clause. In those cases, as here, the court ruled that questions regarding contract formation are to

[1] Also, in both *Buckeye* and *Rent-a-Center* the arbitration clauses involved expressly conferred upon the arbitrator the power to decide "gateway" issues such as whether there actually existed a binding contract containing an arbitration clause. As shown in footnote 3 *infra*, the arbitration clause here relied upon by World Fuels (even if it were otherwise binding on NPDC) does not confer any such power upon an arbitrator.

be decided by a court, not an arbitrator. *Rent-a-Center, West, Inc., supra* at 70, n.2 ("The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded,' and, as in *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), we address only the former. *Id.*, at 444, n.1, 126 S.Ct. 1204"); *Buckeye, supra* at 444, n.1:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and oblige was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (C.A.11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (C.A.3 2000); *Sphere Drake Ins. Ltd. V. All American Ins. Co.*, 256 F.3d 587 (C.A.7 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco,* 330 F.3d 1266 (C.A.10 2003). (Emphasis added).

Similarly, in *Comanche Indian Tribe v. 49, LLC,* 391 F.3d 1129, 1131, n.3 (2004) the court approved the district court's decision to itself determine, rather than leaving it to an arbitrator, whether the Comanche Indian Tribe had actually become bound to various contracts signed by the tribal chairman containing an arbitration clause; left intact the District Court ruling that all but one of the disputed contracts had been lawfully executed by the tribal chairman with the requisite authority to bind the tribe. As to the latter contract, the district court ruled that it never came into existence since the chairman had no authority to bind the tribe to that contract without express tribal council authorization as required by the Tribe's constitution. *Comanche, supra* at 1131, n.3. ("The Tribe argued the contracts were invalid for three reasons: … (3) the contracts violated Article XII, § 1 of the Tribe's Constitution because the Tribe's Chairman had allegedly entered into the contracts without the express authorization from the Comanche Tribal

Council.").[2] NPDC has made the identical kind of claim here. NPDC claims it never agreed to enter the contract relied upon by World Fuels because the NPDC charter required board approval of all contracts and no such board approval was ever given.

And, it is well settled that no party can be compelled to engage in arbitration unless they have agreed to do so. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 479 (1989) (parties cannot be required to arbitrate disputes unless they have contractually bound themselves to do so); *accord, Ragab v. Howard,* 841 F.3d 1134, 1137 (10th Cir. 2016); and, the party seeking to compel arbitration has the burden to prove that an agreement to arbitrate was formed. *Jacks v. CMH, Inc.,* 865 F.3d 1301, 1304 (10th Cir. 2017). Thus, World Fuels is simply wrong in asserting that this question of contact formation must be decided by an arbitrator, not by a court. There is a fundamental difference between entering into a contract which contains an arbitration clause and then challenging the enforceability of that contract's provisions *versus* claiming there was never any contract to begin with. NPDC says it never agreed to this contract or to the arbitration clause it contained.

II.

This brings us to the core issue presented by NPDC's motion to dismiss—NPDC's contention that because of Plaintiff's duty to exhaust tribal remedies, the proper court to rule on the contract formation question (and all related arbitration and contract questions *see,* NPDC's

[2] Neither the court nor the parties raised the issue of exhaustion of tribal remedies in the *Comanche* case. That is an anomaly, but sometimes occurs when the tribe involved has no functioning tribal court. *Krempel v. Prairie Island Indian Community,* 126 F.3d 621 (8th Cir. 1997) (exhaustion of Tribal remedies not required where there is no functioning tribal court); *accord, Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas,* 261 F.3d 567 (5th Cir. 2001); *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.,* 715 F.3d1196 (9th Cir. 2013). That is the most likely explanation for why exhaustion of tribal remedies was not required in the *Comanche* case. *Compare, Navajo Nation v. Intermountain Steel Bldgs., Inc.,* 42 F.Supp.2d 1222, 1227 (D.N.M. 1999) where the Court *sua sponte* raised and enforced the duty to exhaust tribal remedies over the objection of the tribal party.

Memorandum in Support of Motion to Dismiss (Doc. 15), pp. 11-13, most of which require interpretation of NPDC's Charter) is the Nambe Tribal Court, not this Court. *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987); *see, U.S. v. Tsosie,* 92 F.3d 1037 (10th Cir. 1996) (where interpretation of tribal or federal Indian law issues respecting affected reservation in diversity case is required to resolve a dispute; that is another factor supporting the duty to exhaust tribal remedies). *Kerr-McGee Corp. v. Furley,* 115 F.3d 1498, 1507 (10th Cir. 1997) (tribal exhaustion doctrine applies where lawsuit implicates tribal interests).

As will be shown below, none of World Fuels' arguments for evading its duty to exhaust tribal remedies withstand scrutiny.

A.

World Fuels contends that wording in the arbitration clause in the disputed contract instrument which allows enforcement of "any binding arbitration decision … by any court having jurisdiction," and references to a limited sovereign immunity waiver associated with that arbitration clause, implicitly waived World Fuels' duty to exhaust its tribal remedies. (Resp., p.20).

Initially, World Fuels cannot rely on words in a contract instrument to which NPDC is not a party to avoid exhaustion of tribal remedies relating to claims derivative of its fuel sales to NPDC on Nambe Indian reservation lands. *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation,* 868 F.3d 1199, 1202-1203 (10th Cir. 2017) (contract clause waiving duty to exhaust tribal remedies did not excuse exhaustion of tribal remedies where tribal court had not yet ruled on tribe's claim that contract containing the waiver clause was not binding on the tribe).

World Fuels next misapplies the ruling in *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma,* 121 S.Ct. 1539 (2001) (holding that tribal execution of a

contract containing an arbitration clause and agreement to enforcement of arbitration decisions in an agreed forum for an off-reservation contract dispute is an effective waiver of sovereign immunity—a rule that only applies where there is no other clause addressing sovereign immunity), attempting to apply the *C&L* rule to the quite separate question whether execution of a contract containing an immunity waiver clause waives the parties' duties to exhaust tribal remedies before seeking federal court relief. In that regard, it is well-settled in this Circuit that the duty to exhaust tribal remedies applies even if the party seeking to compel arbitration claims the tribal party has waived its immunity. Those are two entirely separate issues. *MacArthur v. San Juan County*, 309 F.3d 1216, 1227 (10th Cir. 2002) (district court erred in ruling on tribe's sovereign immunity defense; court should have required plaintiff to exhaust its tribal remedies and allow the tribal court to rule on the sovereign immunity issue).

More importantly, in this Circuit, a party's duty to exhaust tribal remedies cannot be waived in a contract, even where explicit exhaustion waiver language is involved. This duty does not spring from the parties' negotiations or contractual terms, but from federal policy. *Amerind Risk Management Corporation v. Blackfeet Housing*, 2016 WL 9415477 (D.NM 2016):

> "The tribal exhaustion rule requires that absent exceptional circumstances, federal courts typically should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted. *Thlopthlocco Tribal Town*, 762 F.3d at 1237. In this Circuit, application of the tribal exhaustion rule may not be waived. *See Navajo Nation v. Intermountain Steel Bldgs., Inc.* 42 F.Supp.2d 1222, 1227 (D.N.M. 1999) ("'the requirement of exhaustion of tribal remedies' is not 'a mere defense to be raised or waived by the parties.'" (quoting *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991)).

In *Intermountain Steel, supra* at 1227, the district court required exhaustion of tribal remedies even though both the tribe and the contractor wanted their dispute to be adjudicated in

the federal court rather than in the tribe's courts, because "the parties cannot waive the tribal exhaustion rule." Thus, World Fuels' "waiver" argument fails.

B.

World Fuels then argues that it has no duty to exhaust its tribal remedies because there presently exists no parallel tribal court proceeding. In this Circuit, the duty to exhaust tribal remedies exists and must be enforced even if no parallel tribal court proceedings are ongoing. *See*, authorities at NPDC's Memorandum in Support of Motion to Dismiss (Doc. 15), p. 14, and *U.S. v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996) ("Moreover, the exhaustion rule does not require an action to be pending in tribal court."). World Fuels' reliance on cases from other Circuits suggesting or applying a different rule are unavailing. (Resp., pp. 17-19).

The Supreme Court itself identified the need to avoid competing tribal and federal court proceedings as one justification for the exhaustion rule. *Iowa Mutual*, *supra* at 17 ("In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."). That risk exists no matter whether the tribal or federal case is filed first; and, if the absence of a tribal court case excused exhaustion, parallel tribal court proceedings would be routinely filed in every case following a federal court filing, thus giving rise to the very inter-court conflict the exhaustion doctrine is intended to avoid. *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991) (application of the tribal exhaustion rule does not hinge upon the existence of a pending suit in tribal court: "[t]he fact that [plaintiff] apparently has not yet presented his case to a tribal court *does not diminish the comity considerations* present in the case."). Thus, World Fuels' "no parallel tribal court case" argument fails.

C.

World Fuels claims that requiring it to exhaust tribal remedies would undermine the intent for arbitration to be a speedy remedy. (Resp., p. 1). Even ignoring the obvious that there can be no right to arbitration without first having an agreement to arbitrate, there are two fundamental problems with World Fuels' argument. First, World Fuels erroneously assumes (without evidence) that resolving its contract and arbitration dispute in the Nambe Courts will take longer than resolving those disputes in this Court. Further, any delay World Fuels suffers from initially filing in the wrong court is a self-inflicted wound.

World Fuels' suggestion (Resp., p. 1) that three (3) sets of proceedings will be required to resolve this dispute if exhaustion is enforced also assumes that further federal proceedings on the merits will be required after the Nambe Court proceedings are concluded. That is not the case. The only post-tribal court proceedings permitted after exhaustion of tribal remedies would be a challenge to the tribal court's jurisdiction. *Res judicata* principles (assuming no material due process or other ICRA violations occur in the tribal court) will ordinarily bar federal court re-litigation of the tribal court's merits rulings. *Iowa Mutual, supra* at 19 ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad-faith claim and resolved in the Tribal Courts.").

Further, in analogous circumstances, even persons detained by tribal governments who seek to invoke the speedy statutory *habeas corpus* remedy to obtain their release under 25 U.S.C. § 1303 must first exhaust their tribal remedies before seeking federal court relief via that express statutory remedy. Securing a speedy arbitration remedy is certainly of no greater import than seeking a speedy release from unlawful tribal custody. In both instances, exhaustion of tribal

remedies is required. *Valenzuela v. Silversmith,* 699 F.3d 1199 (10th Cir. 2012) (petitioner seeking habeas corpus relief based on detention by order of a tribal court was denied due to petitioner's failure to exhaust tribal remedies); *Stewart v. Mescalero Apache Tribal Court,* 2016 WL 546840 (Jan. 30, 2016) (unpublished) (dismissing tribal prisoner's federal *habeas corpus* suit for failure to exhaust tribal remedies). *See,* authorities cited at Doc. 15, pp. 6-10.

Finally, World Fuels' reliance (Resp., pp. 13-14) upon *Preston v. Ferrer,* 522 U.S. 346 (2008) to evade exhaustion of its tribal remedies is misplaced. In *Preston,* the court merely held that *where there is no dispute about the formation of a binding arbitration agreement* (and the agreement provides that all "gateway issues" are to be resolved by an arbitrator),[3] *Buckeye* requires that state law based challenges and exhaustion requirements are trumped by the rule that claims of contract validity must be decided by the arbitrator. In our case, the core issue is

[3] Further, even if the contract and arbitration clause relied upon by World Fuels had been agreed upon by the parties, it contains no language conferring on the arbitrator the power to decide "gateway issues." Hence, the rule of *Buckeye* and *Rent-a-Center* invoked by World Fuels is not applicable here. *Bio-Tec Environmental, LLC v. Adams,* 792 F.Supp.2d 1208, 1218 (D.N.M. 2011) (where parties did not expressly give arbitrator power to decide "gateway issues," such issues are to be resolved by a court). *Compare,* the bare bones arbitration clause (Doc. 9-1, ¶ 18(a) ("If any dispute arises between the parties over or in connection with this Agreement and the parties, after good faith efforts, are unable to resolve the dispute between themselves, either party may serve notice in writing to the other of such dispute and demand that it be resolved through binding arbitration, …") relied on by World Fuels with the clauses before the Court in *Buckeye, supra* at 442 in which the arbitration clause stated *inter alia* "any claim, dispute, or controversy … arising from or relating to this Agreement … or the validity, enforceability or scope of this Arbitration Provision or the entire Agreement … shall be resolved, upon the election of you or us or said third-parties, by binding arbitration …"; *And see, Rent-a-Center, supra* where the court noted that:

> … the Agreement included two relevant arbitration provisions: It provided for arbitration of all disputes arising out of Jackson's employment, including discrimination claims, and it gave the "Arbitrator … exclusive authority to resolve any dispute relating to the [Agreement's] enforceability … including … any claim that all or any part of this Agreement is void or voidable." (Emphasis added).

whether a contract containing an arbitration clause was ever formed. Thus, *Preston's* exhaustion ruling is plainly inapplicable.

D.

World Fuels next argues (Resp., pp. 7-15) that it cannot be compelled to present its motion to compel arbitration to the Nambe Courts because the Federal Arbitration Act ("FAA") mandates that suits to compel arbitration can only be heard in a U.S. District Court. (Resp., 1). This would be news to the many state courts that routinely rule on motions to compel arbitration in contract or tort cases that come before them. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S.1, 25, n.32 (1983). This would also be news to all the federal courts that have required non-Indian parties to first present their arbitration demands in tribal courts where the dispute giving rise to the arbitration demand arose from on-reservation transactions, as here. *See,* authorities cited at pp. 15-16, *infra.*

Further, Section 4 of the FAA does not provide that petitions to compel arbitration must be filed in U.S. District Courts, nor does any provision in the FAA provide that the federal courts are the exclusive forum for adjudicating petitions to compel arbitration. Section 4 merely provides that the party seeking to compel arbitration "may" choose to seek that relief in a U.S. District Court—and provides the further restriction that a party can seek that relief only in circumstances where the federal court would otherwise have jurisdiction to adjudicate the underlying dispute between the parties.

Obviously, if a particular kind of dispute can only be heard in a designated federal forum, there would be no duty to exhaust tribal remedies. [4] But, the FAA is nothing like exclusive

[4] The Court in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, at 856, n.21, identified three exceptions to the tribal exhaustion requirement, one of which was where the exercise of tribal court jurisdiction would be "patently violative of express

federal forum statutes,[5] and World Fuels' argument that the ruling in *El Paso Natural Gas Company vs. Neztsosie*, 526 U.S. 473, 119 S.Ct. 1430 (1999) frees it from the duty to exhaust tribal remedies is simply wrong.

The Court in *Neztsosie* distinguished for exhaustion purposes between cases which involve ordinary questions of federal law (as to which exhaustion of tribal remedies is not excused unless it is clear the tribe otherwise lacks jurisdiction over the action under *Montana* or where one of the other *National Farmers* exceptions to exhaustion is invoked), versus cases filed in tribal courts involving claims which fall within the exclusive jurisdiction of the federal courts based upon a completely preemptive statute,[6] or a statute which otherwise evidences the kind of "*unmistakable" Congressional preference* that the dispute should be resolved in a federal forum

---

jurisdictional prohibitions." In *Strate v. A-1 Contractors, Inc.*, 520 U.S. at 448-453, the Court ruled that exhaustion of tribal remedies is excused if the tribe has no jurisdiction over the underlying claim under *Montana v. United States*, 450 U.S. 544 (1981). *Strate*, *supra*, at 453-460. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), later applied the *Strate* exception to invalidate the tribe's attempt to tax the non-member for its conduct on its own fee lands, an action foreclosed by *Montana's* Main Rule, and the inapplicability of either *Montana* exception. The court again emphasized that the tax could have been upheld had it been levied upon the non-Indian company for its conduct on tribally-owned reservation lands, *Id.* at 651-654, or pursuant to a "consensual relationship" evidenced by "commercial dealing, contracts, leases or other arrangements". *Id.* at 655-656.

[5] *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (tribal exhaustion not required as to suits filed under 42 U.S.C. § 6972(a) which "places exclusive jurisdiction in federal courts' over such suits); *Lower Brule Construction v. Sheesley's Plumbing*, 84 B.R. 638 (D.S.D. 1988) (exhaustion of tribal remedies is not required as to core proceedings in bankruptcy, since those claims fall within exclusive jurisdiction of bankruptcy court).

[6] In this regard, *see*, Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U.L. Rev. 1177, 1241 (2001) (in *Neztsosie* "Justice Souter was careful to point out, however, that only in cases involving complete preemption such as those brought under the [PAA], can defendants correctly assert that they need not exhaust their tribal remedies"). *See*, statutes referenced at fn. 3, *supra.*

as was found in the Price Anderson Act ("PAA"), 42 U.S.C. §§ 2014(hh) and 2201 *et seq.*; *Neztsosie, supra,* at 484, n.6 and 485, n.7:

> 6. This structure [of the PAA], in which a public liability action becomes a federal action, but one decided under substantive state law rules of decision that do not conflict with the Price-Anderson Act, *see* 42 U.S.C. § 2014(hh), resembles what we have spoken of as "'complete pre-emption' doctrine," *see Caterpillar Inc. v.* Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), under which "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,'". (Citations omitted).
>
> * * * *
>
> 7. This is not to say that the existence of a federal preemption defense in the more usual sense would affect the logic of tribal exhaustion. Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different. *See, Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (tribal courts available to vindicate federal rights). The situation here is the rare one in which statutory provisions for conversion of state claims to federal ones and removal to federal courts express congressional preference for a federal forum.

The Court in *Neztsosie* ruled that the PAA evidences an unmistakable Congressional preference that a federal forum decide public liability actions derivative of "nuclear incidents" in several ways. Initially, 42 U.S.C. §§ 2014(hh) and 2210(n)(2) federalize all such tort claims and authorize the promulgation of special rules by which the federal courts are to handle those claims (§ 2210(n)(3)(C)(v)), giving rise to a complete preemption of the field as to all such claims. *Neztsosie, supra,* at 484-485 and 484, n.6; *see, Acuna v. Brown & Root, Inc.*, 200 F.3d 335 (5th Cir. 2000) (the PAA creates "an exclusive federal cause of action for torts arising out of nuclear incidents").

Moreover, § 2210(n)(2) contains a unique removal provision which *inter alia* gives the Atomic Energy Commission (now known as the Nuclear Regulatory Commission) and the Secretary of Energy (or either of them), and any defendant, the right to remove or transfer any such "public liability" action pending in any state court, or in any other U.S. district court, "to

the U.S. District Court having venue" over such actions as otherwise provided at § 2210(n)(2). By this extraordinary provision, allowing either the Commission or the Secretary to force removal of the action (though not parties to the suit), Congress took this choice-of-forum decision from the parties and made unmistakably clear its preference that these cases be decided in the federal forum designated in the PAA.

Unlike the PAA, the FAA does not confer exclusive or even concurrent jurisdiction upon the federal courts (*Moses H. Cone, supra* at 25, n.32), allows the parties to contractually circumvent many of its provisions, *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478-479 (1989), and does not require (or reflect any Congressional preference) that a party's federal arbitration claims ever be presented to a federal forum. Instead, this choice-of-forum decision is wholly left to the parties under the FAA. Section 4 of the FAA merely creates an optional federal arbitration enforcement remedy available only if some other basis for federal jurisdiction exists. Indeed, the FAA is an "anomaly" and "enforcement of the [FAA] is left in large part to the state courts. ..." *Moses H. Cone, supra*, at 25, n.32.

Moreover, the FAA neither expects nor requires uniformity in the answer to the question whether a valid arbitration agreement exists, instead leaving this to be determined by the non-federal contract law of the jurisdiction in which the dispute arose, including that jurisdiction's law regarding questions of "contract formation." 9 U.S.C. § 2 (". . .an agreement in writing to submit to arbitration. . .shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); *Doctor's Associates v. Casarotto*, 517 U.S. 681, 687 (1996) (". . .generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (the question

whether a valid agreement to arbitrate exists is governed by the non-federal law governing "the formation of contracts"); *Volt, supra* at 479 (arbitration under the FAA "is a matter of consent, not coercion"); *see, EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) (FAA requires arbitration only when parties are bound to arbitrate by written agreement valid under applicable contract law).

The FAA does reflect a strong federal policy favoring arbitration and has given rise to federal law standards for deciding what issues are arbitrable *once a valid arbitration provision agreed to by the parties is found to exist*. *Rent-a-Center; Buckeye; Moses H. Cone*, *supra*, at 24-25. However, those standards do not come into play until an arbitration provision agreed to by the parties is found to exist. *See, EEOC v. Waffle House, Inc., supra*, at 761-762*; Volt, supra; Ragab v. Howard, supra*.

World Fuels is basically arguing that since Congress authorized World Fuels to use "any United States District Court" to resolve its arbitration claims where diversity or federal question jurisdiction exists, the federal courts must set aside the tribal exhaustion requirement and decide those claims. World Fuels' argument overlooks a critical aspect of the tribal exhaustion doctrine—the (non-jurisdictional) duty to exhaust tribal remedies only exists in a federal court where there otherwise exists a federal court duty to exercise its jurisdiction to decide the claim presented. *Nat'l Farmers Union; Iowa Mutual; Colorado River Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976) (recognizing "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" by Congress through enactment of jurisdictional statutes)[7].

[7] Of course, this broad brush statement is not literally true. Parties in these circumstances are often deprived of a federal forum in such cases where one of this Courts' other "abstention" doctrines are invoked to leave a case in state court. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496

But *Neztsosie* makes clear that federal statutes which merely confer this kind of option upon a party to choose whether to present a certain claim to a federal or to a non-federal forum do not preempt the duty to exhaust tribal remedies, *Neztsosie*, *supra*, at 485, n.7. World Fuels' FAA preemption argument was rejected in *Bank One, N.A. v. Shumake*, 281 F.3d 507, 515 (5th Cir. 2002), where the Court enforced the duty to exhaust tribal remedies in a suit seeking to compel arbitration under the FAA:

> The policy which animates the tribal exhaustion doctrine, however, "subordinates the federal court's obligation to exercise its jurisdiction to the greater policy of promoting tribal self-government." *Colorado River* abstention is thus the exception to the rule, whereas tribal exhaustion is the rule rather than the exception. The latter is the appropriate doctrine to apply here.

Section 4 of the FAA does not impose any greater duty upon the district courts to decide disputes as to the formation, validity or enforceability of alleged arbitration agreements, than their duty to decide similar issues arising under other not-completely-preemptive federal statutes or when similar contract issues are confronted in diversity cases; and, yet, it is in precisely such circumstances that the tribal exhaustion doctrine requires that the federal action be stayed or dismissed where necessary to avoid interference with a tribal court's jurisdiction.

The bottom line here is that World Fuels' arguments against exhaustion based on the FAA do not excuse exhaustion of tribal remedies in this case. *See*, authorities cited at Doc. 15, pp. 9-10 and the following additional authorities, all of which required the party seeking to compel arbitration to seek that relief in the tribal courts there involved. *Ninigret Development Co. v. Narrangansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30-35 (1st Cir. 2000) (arbitration clause did not excuse exhaustion of tribal remedies); *Bruce H. Lien Co. v. Three*

(1941); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *see, Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

Affiliated Tribes, 93 F.3d 1412, 1415, 1421-1422 (8th Cir. 1996) (affirming District Court's order requiring exhaustion of tribal remedies despite arbitration clause and contract language agreeing that arbitration process "is deemed sufficient to exhaust the parties' tribal remedies"); *Calumet Gaming Corporation v. The Kickapoo Tribe of Kansas*, 987 F.Supp. 1321, 1328 (D. Kan. 1997) (FAA does not limit tribal court civil jurisdiction to enforce arbitration clause); *see, Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 (11th Cir. 1993) (noting that when federal court action was stayed for exhaustion of tribal remedies after district court denial of motion to compel arbitration, the tribal court found a binding arbitration agreement and ordered parties to arbitrate); *cf. Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848 (8th Cir. 2001), *cert. denied*, 535 U.S. 1053 (2002), an arbitration dispute which came to the Eighth Circuit only after exhaustion of tribal remedies was ordered by the district court. *See*, Civil Docket, No. 96-Cv-202, entry of 4/02/02 ("this action is stayed pending plf's exhaustion of tribal court remedies").

III.

World Fuels complains that NPDC improperly relied upon materials outside the Complaint in framing its Motion to Dismiss. (Resp., pp. 5-6). However, in order to plead a Motion to Dismiss grounded in a failure to exhaust tribal remedies, certain factual predicates have to be established, e.g., that the movant is a tribal entity, that the dispute arose from on-reservation commercial dealings of the non-Indian party with the tribal party (here, on-reservation fuel sales), that there exists a functioning tribal court, and (where applicable) showing that resolution of the dispute turns in part on interpretation of tribal governing documents or charters. Under N.M. Loc. Rule 7.3(b), any factual allegations made in support of a motion must be supported by an affidavit or other admissible evidence.

Although the factual predicate respecting most of these issues can largely be deduced from the complaint and exhibits thereto as filed by World Fuels (Doc. 1), the affidavit of Randy Vigil was filed and referenced in NPDC's Motion to Dismiss to ensure that NPDC had satisfied this requirement. This is a typical way such issues are addressed in this district in such motions. *See*, for example, the affidavits and documents filed in *Fine Consulting, et al. v. George Rivera*, 915 F.Supp.2d 1212 (D.N.M. 2013) and *Amerind Risk Management Corporation v. Blackfeet Housing, supra*, in support of the tribal defendants' motion to dismiss for failure to exhaust tribal remedies. World Fuels has not controverted any of the factual allegations supported by the Vigil Affidavit or the other exhibits attached to NPDC's Motion to Dismiss.

Finally, for the reasons set out in NPDC's Motion to Dismiss and in this Reply, in view of World Fuels' duty to exhaust its tribal remedies, the rule that would normally require this Court when handling a Section 4 petition (Resp., p. 6) to "proceed summarily to the trial" of contract formation issues in the face of factual disputes bearing on that issue, or to otherwise rule on that issue without a trial if no disputed facts are involved, is not applicable.

CONCLUSION

World Fuels' attempt to evade its duty to exhaust its tribal remedies should be rejected. NPDC's Motion asking the Court to dismiss due to World Fuels' failure to comply with that duty should be granted.

Respectfully submitted,

VanAMBERG, ROGERS, YEPA, ABEITA
& GOMEZ, LLP

By: /s/C. Bryant Rogers
C. BRYANT ROGERS
RONALD J. VanAMBERG
Post Office Box 1447
Santa Fe, NM 87504-1447

Phone: (505) 988-8979
Fax: (505) 983-7508
E-mail: cbrogers@nmlawgroup.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was field electronically pursuant to CM/ECF procedures, which cause the parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing

s/C. Bryant Rogers