IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ULTRACLEAN FUEL (TRANSMIX), LLC,

Plaintiff,

v. **No. 1:25-cv-00410-JFR-KK**

LDC ENERGY, LLC,

Defendant.

DEFENDANT LDC ENERGY'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Defendant LDC Energy, LLC ("LDC-E") has moved to dismiss the Complaint herein on the ground that Plaintiff Ultraclean Fuel (Transmix), LLC ("Ultraclean") has failed to exhaust its tribal remedies. (Doc. 8) In its response to the motion (Doc. 13), Ultraclean's sole argument is that the parties elected, in the Laguna Fuel Processing Agreement ("Laguna FPA") to submit disputes to the "non-exclusive jurisdiction of the courts of the United States and New Mexico," Laguna FPA at 5, ¶ 3(b), and thus waived any claim that this case should be heard in Laguna Pueblo Court. As LDC-E will show, the language of the Laguna FPA is not controlling here, and the tribal court exhaustion requirement cannot be waived.

INTRODUCTION

This action arises out of an effort by Laguna Development Corporation ("LDC"), a federally chartered corporation wholly owned by the Pueblo of Laguna, that is the parent corporation of LDC-E, to get into the business of processing transmix, a mixture of gasoline and diesel fuel that is created when the two substances are serially pumped through the same pipeline, into marketable diesel. In 2011 LDC entered into an agreement (the "Supply

Agreement," Exhibit B to Ultraclean's Complaint) with Ultraclean Fuel Pty. [Proprietary] Limited ("UFPL"), an Australian company that claimed to have developed a new technology for processing transmix into low-sulfur diesel, by which UFPL would construct a device to demonstrate this technology on a tract of Laguna Pueblo land that the Pueblo had assigned to LDC for this purpose. The device (the "Laguna Ultrex Unit," or the "Unit") was eventually constructed, but it is unclear when it began operations, although it was processing some transmix by mid-2018, under the control of employees of the Australian company. In mid-2017, LDC assigned its rights and obligations under the Supply Agreement to LDC-E, and LDC-E and LDC entered into a group of agreements, including the Laguna FPA, with the Ultraclean companies. It is correct, as Ultraclean argues, that in the Laguna FPA the parties purport to submit any disputes to the "*non-exclusive* jurisdiction of the courts of the United States and New Mexico," Laguna FPA at 5, ¶ 3(b) (emphasis added). In the same section of the agreement, the parties agreed that "[t]his Agreement is governed by and construed in accordance with *tribal laws*, the laws of the United States and the laws of New Mexico, *in that order*." *Id*. at ¶ 3(a) (emphasis added).

The operation of the Unit was erratic, and several spills of hydrocarbons and other materials occurred during the period of its operation, and eventually the relationship between LDC-E and the Ultraclean companies was terminated, in 2020. In 2022, LDC and LDC-E, joined by the Pueblo, filed suit against Ultraclean in Laguna Pueblo Court, alleging damages for trespass, public nuisance, breach of contract and on other grounds. *Pueblo of Laguna, et al., v. Ultraclean Fuel (Transmix), LLC*, No. CV 22-00017 (Laguna Pueblo Court). Ultraclean moved to dismiss the complaint, arguing, as it does here, that the forum selection clause in the Laguna FPA precluded jurisdiction in the Laguna Court. The motion was fully briefed and argued, but

as of this date the court has not ruled on the motion. Subsequently, in August, 2024, the Pueblo, alone, filed suit against three of the Ultraclean companies, including Ultraclean Fuel (Transmix), LLC, seeking damages for subsurface trespass. *Pueblo of Laguna v. Ultraclean Fuel, Limited, et al.*, No. CV 24-00041 (Laguna Pueblo Court). Ultraclean again moved to dismiss, on the same ground as in the first case, but the court denied the motion, on the ground that the Pueblo was not party to any of the Ultraclean contracts, and thus is not bound by any purported forum selection clause. The Pueblo then moved for a preliminary injunction, requiring Ultraclean to remove the Unit, because there is substantial contamination directly beneath the Unit that cannot be remediated until the Unit is removed, and that motion was granted. Ultraclean is presently under an order to remove the Unit by September 8, 2025.

ARGUMENT

I. The Laguna FPA Forum Selection Clause Does Not Preclude Application of the Tribal Exhaustion Rule.

Ultraclean's argument that the doctrine of exhaustion of tribal remedies does not apply here is solely based on the language of Section 3(b) of the Laguna FPA, quoted above. Importantly, Ultraclean does not contend that, apart from the forum selection clause of the Laguna FPA, it would not be subject to Laguna Court jurisdiction.[1] Even if one agreed that the Laguna FPA was in effect (which LDC-E does not, as will be explained), and that the tribal remedy exhaustion rule could be waived (a proposition that, again, LDC-E strongly rejects), however, its language does not expressly preclude application of the rule here. First, importantly, Section 3(a) of the Laguna FPA expressly states that the leading authority for

[1]Ultraclean does state, at p. 5 of its Response (Doc. 13), that "it is apparent that Tribal Court does not have jurisdiction," but in context it is clear that that statement refers to its argument that tribal exhaustion is inapplicable. In the following sentence, it quotes an exception to the exhaustion rule, claiming that that exception applies here.

governing and interpreting the agreement is "tribal law." With all due respect, LDC-E submits that it is highly unlikely that this Court or a state court would have the ability to apply and interpret Laguna law in deciding this case. The implication that tribal court involvement would be needed is strong. Section 3(b) of the agreement, moreover, states that the parties agree to submit to the "non-exclusive" jurisdiction of state or federal courts, an unusual phrasing that plainly cannot be interpreted to mean that such jurisdiction is *exclusive* of tribal court jurisdiction. Finally, Ultraclean cites paragraph 3(c) of the Laguna FPA, where each party purports to "waive any right it may now or in the future have to object to any action relating to this Agreement being brought in those [state or federal] courts," including arguments that the forum is inconvenient or that those courts have no jurisdiction. That language is somewhat peculiar, since if either of those courts did not in fact have jurisdiction, the case could not be heard there, regardless whether LDC-E objected. And LDC-E is not claiming that the forum is inconvenient, nor is it actually "objecting" to this action being brought in this Court; it is pointing out, rather, that before this Court acts it must give the Laguna Pueblo Court an opportunity to determine if *it* has jurisdiction to hear the case, and if it finds that it does, to proceed to hear it. And there is no mention in paragraph (c) of a waiver of the requirement to first exhaust tribal remedies. LDC-E submits that Section 3 of the Laguna FPA, thus, does not clearly displace the exhaustion mandate, even were that allowed.

There is, moreover, a serious question whether the Laguna FPA language is actually in effect. Section 1.2(b) of the Laguna FPA states that its Effective Date is the date on which the Laguna Ultrex Unit is "commissioned" (meaning that it was operating according to standards set forth in the Coordination Agreement, Exhibit C to the Complaint). It is true that in its Complaint, at ¶¶ 23 and 24, Ultraclean alleges that the Unit was commissioned by November 30,

2018, but LDC-E disputes that claim, and that issue is crucial in determining whether the Laguna FPA, including its forum selection clause, on which Ultraclean relies so heavily, ever came into effect. The Laguna Pueblo Court should have the first opportunity to determine that issue, since if it were determined that the Laguna FPA is not in effect, this action would clearly be subject to that court's jurisdiction regardless of the proper interpretation of the forum selection clause.

2. Even Were the Laguna FPA Forum Selection Clause in Effect, it Does Not Trump the Tribal Exhaustion Requirement.

Ultraclean relies on a Utah federal district court decision, *QEP Field Services Co. v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 740 F.Supp. 2d 1274 (D. Utah 2010), for the proposition that when a tribe expressly waives its sovereign immunity and any requirement of exhaustion of tribal remedies, a federal court may proceed to hear a case against the tribe that arises on tribal land. This decision, according to Westlaw, has been cited by other courts only once in the 15 years since it was issued, and then only on the issue of the grounds for a preliminary injunction, not for its ruling that exhaustion was not required, and LDC-E submits that its ruling on that issue is not in accordance with the weight of authority. LDC-E submits that a far more thorough and careful analysis of that issue is contained in a much more recent decision from this Court, issued by Judge James O. Browning, *World Fuel Services, Inc., v. Nambe Pueblo Development Corp.*, 362 F.Supp. 3d 1021 (D.N.M. 2019).[2] A detailed examination of Judge Browning's ruling is warranted.

[2]Ultraclean cites this case in its Response at 3, but for the point that a motion to dismiss for failure to exhaust tribal remedies is considered under the principles applicable to a motion under F.R.Civ.P.12(b)(6), not 12(b)(1), as LDC-E argued in its motion. Under the circumstances, LDC-E will concede that as the tribal exhaustion rule is a rule of comity, it would be more appropriate to consider it under 12(b)(6).

World Fuel Services provided gasoline to Nambe Pueblo Development Corp. ("NPDC") that it sold at its travel center on Nambé tribal lands north of Santa Fe. A dispute arose as to whether NPDC had paid required taxes on the fuel it was purchasing. The contract between the parties specified that disputes would be referred to binding arbitration, and World Fuel served an arbitration demand on NPDC.[3] NPDC failed to respond to the demand, and World Fuel filed suit in this Court to compel arbitration. NPDC moved to dismiss or stay the suit, arguing that World Fuel had failed to exhaust tribal remedies. In a lengthy opinion, Judge Browning extensively analyzed the law governing the tribal exhaustion rule, and ultimately granted the motion.

The Court began its examination of the law on tribal exhaustion by noting that the Supreme Court cases requiring exhaustion reflect "the federal government's longstanding policy of promoting tribal self-government." 362 F.Supp. 3d at 1058 (citing *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987)). It observed that "the Tenth Circuit has routinely required tribal exhaustion," as do the First, Second, Fifth, Eighth and Ninth Circuits. *Id*. at 1061 (citing numerous cases). It quoted from an opinion by Judge James Parker of this Court, in *Navajo Nation v. Intermountain Steel Buildings, Inc.*, 42 F.Supp. 2d 1222, 1226 (D.N.M. 1999), a case in which the plaintiff, the Navajo Nation, had elected to sue in federal court over a dispute that arose from a construction contract for a building on Navajo Nation land. Judge Parker raised the exhaustion issue *sua sponte*, writing that "[w]hen the dispute at issue is a reservation affair, . . . comity concerns 'almost always dictate that the parties exhaust their tribal remedies before resorting to the federal

[3]Like LDC-E here, NPDC claimed that the contract was invalid, as having not received the approval of its board, and it submitted an affidavit in support of that claim, but the Court, having determined that the motion to dismiss would be treated as a 12(b)(6) motion, 362 F.Supp. 3d at 1057, *see supra* n. 2, accepted the allegation in the complaint that the contract was in effect as true for purposes of the motion.

forum.'" (Quoting *Texaco v. Zah*, 5 F.3d 1374,1378 (10th Cir. 1993). And it cited *United States v. Tsosie*, 92 F. 3d 1037 (10th Cir. 1996), a Tenth Circuit decision in which the court forced the United States, which was seeking to oust a Navajo Indian from an allotment, to first exhaust its remedies in tribal court.

This Court did not consider any of the exceptions to the exhaustion rule, as set forth in *National Farmers Union*, 471 U.S. at 856 n.21; and see LDC-E's Motion to Dismiss (Doc. 8) at 5 n.1, to be applicable, 362 F.Supp. 3d at 1096,[4] and it noted that the Tenth Circuit "'has taken a strict view of the tribal exhaustion rule,' *Kerr-McGee Corp. v. Farley*, 115 F. 3d at 1507, 'the exceptions are applied narrowly,' *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d at 1239." 362 F.Supp. 3d at 1096. As long as tribal court jurisdiction over the matter is "colorable," the Court explained, the exhaustion rule must be applied. *Id.*

Like Ultraclean's insistence in this case that the language of the Laguna FPA overrides any requirement of exhaustion, World Fuel argued that the Federal Arbitration Act's strong preference for a federal forum to enforce arbitration clauses should do the same. In response, Judge Browning cited two decisions that had rejected identical arguments, *Basil Cook Enterprises, Inc., v. St. Regis Mohawk Tribe*, 117 F. 3d 61 (2nd Cir. 1997), and *Bank One, N.A. v. Lewis*, 144 F.Supp. 2d 640 (S.D. Miss. 2001), *affirmed sub nom. Bank One v. Shumake*, 281 F.3d 507 (5th Cir. 2002). The Court quoted this passage from the district court decision in *Bank One*:

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[4]The Court quoted a passage from *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006), that added a few more exceptions to the list from *National Farmers Union*, one of which Ultraclean cites in its Response, at 5, that "the exhaustion requirement would serve no purpose other than delay." Considering that there are presently two other cases pending in the Laguna Pueblo Court arising out of this project, *see supra* at 2-3, that claim cannot be credited. The Laguna Court is clearly well informed about this project, and is capable of handling the issues raised in this suit.

> It is manifest to the court that, directly or not, the relief sought by Bank One in this case would undeniably undermine the Tribal Court's authority to determine its jurisdiction. That is because, while the relief demanded by Bank One is an order compelling arbitration, a concomitant goal, or a necessary byproduct of this suit, is to foreclose the Tribal Court from further consideration of defendant's claims for relief. That is then, in the court's opinion, properly viewed as a challenge to the Tribal Court's jurisdiction, which implicates considerations of tribal exhaustion.

144 F.Supp. 2d at 645. The very same considerations apply here.

LDC-E urges that the comprehensive analysis set forth in *World Fuel Services* correctly states the law on exhaustion of tribal remedies, and that the case on which Ultraclean relies, *QEP Field Services*, is an outlier, whose ruling on this issue has not been followed, and should not be. A party bringing suit against a tribe or tribal entity regarding matters arising within tribal land must first exhaust tribal remedies before a federal court may hear the matter, and a contractual directive to arbitration, or to a particular forum (especially a disputed one) does not override that requirement. Moreover, as the Supreme Court held in *Iowa Mutual*, "[u]nless a federal court determines that the Tribal Court lacked jurisdiction, . . . proper deference to the tribal court system precludes relitigation of [Plaintiff's claims] resolved in the Tribal Courts." 480 U.S. at 19.

CONCLUSION

For all of the foregoing reasons, and for those set forth in LDC-E's motion, LDC-E urges this Court to dismiss or stay this action, while Ultraclean takes its claim to the Laguna Pueblo Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of July, 2025, I caused the foregoing document to be filed electronically with CM/ECF which caused all counsel of record to be served as reflected on the notice of service.

/s/ *Richard W. Hughes*
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