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On behalf of himself and a Class of similarly situated citizens, Plaintiff alleges that these earthquakes were caused by Defendants' pollution, and more specifically, their fracking wastewater disposal operations nearby. Petition ¶¶ 1, 2, 5, 6, 30-33. Plaintiff and the Class plead causes of action for absolute liability, negligence, private nuisance, and trespass. Petition ¶¶ 53-68. They seek damages to their real and personal property, market value losses to their real property, emotional distress, and punitive damages. Petition ¶¶ 3, 56, 57, 60, 64, 68 and 69.

Members of the Class must meet the following requirements:

- a) Citizens of Oklahoma;
- b) owning a home or business in Pawnee County, Creek County or Noble County (the "Class Area");
- c) during the dates of seismic activity within the Class Area between September 3, 2016 to the present (the "Class Period");
- d) excluded from the Class are all Class member properties on exclusive federal and/or tribal land; and,
- e) excluded from the Class are Defendants and their officers and directors, and the judge presiding over this action and his/her immediate family members.

Petition ¶ 36 (hereinafter, the "Class Definition").

On December 21, 2016, Defendant Cummings Oil Company ("Cummings Oil") removed this case to this Court, and Defendant Eagle Road Oil LLC consented to the removal. ECF Nos. 3 and 10. As demonstrated below, this action should be remanded to Pawnee County District Court.

LAW AND ARGUMENT

A. Introduction

The Class Definition specifically excludes all federal and tribal lands, which certainly would comprise of instances where the Bureau of Indian Affairs (“BIA”) exercises oversight. This federal oversight includes land held in trust by the United States for a tribe or a tribal member, or land not held in trust, but otherwise subject to federal restrictions relating to alienation, encumbrance, etc. *See* Declaration of Andrew Knife Chief, Executive Director of the Pawnee Nation, attached as Exhibit A, ¶ 7.

Defendants’ notice of removal seems to suggest, without any legal authority or proof, that there are lands held by Indian owners within the Class Area that are subject to restrictions against alienation, and thus, fall outside the Class Definition’s specific exclusion of tribal lands. Notice of Removal (ECF No. 3) (“Notice”) ¶ 10b. Frankly, and as the Pawnee Nation’s Executive Director explains, those lands are obviously subject to BIA oversight and considered tribal lands. Ex. A ¶¶ 6, 7. However, because these lands are specifically excluded by the Class Definition, this Court lacks subject matter jurisdiction. Consequently, remand to Pawnee County District Court is proper, and indeed, required.

B. Clarifications

Two items need to be cleared up. First, the Notice of Removal says this case is an attempt to create a subclass from the *Griggs* case filed previously in the Logan County District Court, and removed to the Western District Court of Oklahoma (assigned to Judge Stephen Friot). Notice ¶ 2. It is not.

In fact, the massive quake that struck near Pawnee on Labor Day weekend last year hit some nine months *after* the *Griggs* action was filed. Moreover, the *Griggs* action is no longer pending. Thus, what Cummings Oil avers in its Notice of Removal is not accurate, or even possible.

It appears that Cummings Oil wants the Court to infer from the Notice that Judge Friot addressed this federal question jurisdictional issue previously in *Griggs*, and found jurisdiction. If so, the inference is also inaccurate and misleading. Instead, Judge Friot found jurisdiction based on diversity of citizenship grounds and never addressed the issue of federal question jurisdiction. *See* Judge Friot’s Jurisdictional Opinion, attached as Exhibit B. Moreover, the class definition set forth in the *Griggs* action had no exclusion of federal and tribal lands, whereas the Class Definition set forth in the Petition in this action does. *Compare* Class Action Petition in the *Griggs* action, annexed hereto as Exhibit C, ¶ 73 *with* the Petition in this action, ¶ 36.

Second, the Notice of Removal also suggests that Cummings Oil was permitted to remove on federal question grounds without any underlying factual proof, and simply on “information and belief.” Notice ¶ 10h. But Cummings Oil cites a case that actually holds that this is only true with respect to issues of citizenship, not federal question. *Id.* n.2 (citing *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014)).

As shown below, all pertinent authority places the burden of proof on the removing defendant to demonstrate that the district court has federal question jurisdiction – even beyond a presumption against removal jurisdiction.

C. Applicable Legal Standards

Subsection (c) of 28 U.S.C. § 1447 provides, in pertinent part, “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). “[T]here is a presumption against removal jurisdiction.” *Id.*

Moreover, in the context of federal question jurisdiction, a removing defendant has the burden to establish that federal jurisdiction exists. *See Karnes v. Boeing Co.*, 335 F.3d 1189, 1193 (10th Cir.2003); *see also McPhail v. Deere & Co.*, 529 F.3d 947, 954 (10th Cir. 2008). Of course, Cummings Oil fails to offer any facts in support of federal question jurisdiction. Instead, its attorneys assert allegations based merely on “information and belief.” Notice ¶ 10h. Cummings Oil has failed to sustain its burden.

Tenth Circuit precedent provides that “[s]ince federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction.” *Karnes*, 335 F.3d at 1194 (quoting *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir.1999)). Cummings Oil did not meet this legal standard.

Further, for federal-question removability, the existence of jurisdiction is governed by the “well-pleaded complaint rule,” under which “a complaint must on its face present a federal claim.” *Oklahoma Tax Comm’n v. Graham*, 489 U.S. 838, 840 (1989). Under the well-pleaded complaint rule, “the plaintiff is considered the ‘master of the claim,’” and “may choose to have his claims heard in state court by avoiding claims based on federal law.” *Karnes*, 335 F.3d at 1192–93. Indeed, if federal law does not directly create the cause of action, then a substantial, disputed question of federal law must be an essential element of the plaintiffs' well pleaded

complaint in order to remove the case to federal court under 28 U.S.C. § 1331. *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 886 (10th Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

D. Cummings Has Failed to Meet Its Burden to Establish Federal Question Jurisdiction.

Plaintiff brought this action on behalf of himself and those similarly situated, and as required by class certification legal requisites. Mr. Adams meets each element of the Class Definition. *See* Declaration of James Adams, attached as Exhibit D. He owns his home in fee simple absolute, and does not own any land (his home or otherwise) subject to any federal and/or BIA restrictions. *Id.* ¶¶ 3 – 5. He seeks only to represent those similarly situated to him, and not any tribe or member of a tribe owning land in trust or with federal restrictions. *Id.* ¶6. Thus, the exclusion of federal and/or tribal lands set forth in the Class Definition here was appropriate because Mr. Adams would not be typical of those on such federally restricted lands, adequate to represent those interest, and further, he would lack standing to pursue the claims.

Tenth Circuit precedent provides that

[i]n order to protect the class's interest adequately and fairly, “a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” Thus, the class representatives' interest must be “coextensive” with the interest of the class; but this does not mean that the class representatives' “positions have to be identical” with the positions of the absent class members. Rather ... the representatives and the class members must share common objectives and legal or factual positions. ...

Tennile v. Western Union, 785 F.3d 422, 430 (2015) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-626 (1997), and 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1769, at 434–35 (3d ed. 2005)). Based upon this authority, the Petition’s exclusion of federal and tribal lands was proper and falls within the well-pleaded rule. *Graham*, 489 U.S. 838, 840 (1989); *Karnes*, 335 F.3d at 1192–93.

Remand is proper here because, despite the Notice of Removal seemingly asserting that Indian lands are at issue, which are subject to federal restrictions and BIA oversight, nevertheless the Notice fails to explain (both factually and legally) why those Indian lands are not within the federal and tribal land exclusion of the Class Definition.

Submitted with this brief is the Declaration of the Pawnee Nation’s Executive Director, and he explains that lands owned by tribes or tribal members that are subject to federal restrictions and BIA oversight are tribal lands. *See* Ex. A ¶¶ 6, 7. Indeed, it’s nonsensical to think otherwise – that an Indian owns land subject to federal BIA restrictions, but that it isn’t tribal land.

“It is well-established that statutes conferring jurisdiction upon the federal courts, and particularly removal statutes, are to be narrowly construed in light of [federal courts’] constitutional role as limited tribunals.” *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094–95 (10th Cir. 2005). The Notice of Removal fails to even overcome this presumption, and obviously fails to meet its burden in proving federal question jurisdiction as required under the law. *Karnes*, 335 F.3d at 1193 (10th Cir. 2003), and *McPhail*, 529 F.3d at 954 (10th Cir. 2008).

CONCLUSION

Because Cummings Oil has not overcome the presumption against removal jurisdiction or met its legal burden to establish federal question jurisdiction this Court should remand the action to the Pawnee County District Court.

WHEREFORE, Plaintiff prays for an order remanding this action to Pawnee County District Court, and for all other just and appropriate relief.

DATED: January 20, 2017

Respectfully Submitted,

/s/ Scott Poynter

Scott Poynter,
Poynter Law Group
400 W. Capitol Ave., Suite 2910
Little Rock, AR 72201
Tel: (501)251-1587
Email: scott@poynterlawgroup.com

Robin L. Greenwald
Curt D. Marshall
Weitz & Luxenberg, PC
700 Broadway
New York, NY 10003
Tel: (212) 558-5500
Fax: (212) 344-5461
Email: rgreenwald@weitzlux.com
Email: cmarshall@weitzlux.com

Keith Allen Ward
Keith A. Ward PLLC
1874 S. Boulder Ave
Tulsa, OK 74119
Tel: (918) 764-9011
Fax: (918) 764-9384
Email: keith@keithwardlaw.com

Billy Joe Ellington
Attorney at Law
PO Box 491
Pawnee, OK 74058
Ph: (918) 762-2589
Email: bjelaw33@gmail.com

CERTIFICATE OF SERVICE

On this 20th day of January, 2017, I electronically filed the foregoing via the Court's CM/ECF system. The CM/ECF system will automatically serve all counsel of record.

/s/ Scott Poynter