IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

1) LISA GRIGGS, and 2) APRIL MARLER, on behalf of themselves and all others similarly situated, Plaintiffs, v. 1) CHESAPEAKE OPERATING, L.L.C., 2) NEW DOMINION, L.L.C., 3) DEVON ENERGY PRODUCTION COMPANY, L.P., AND 4) SANDRIDGE EXPLORATION AND PRODUCTION, L.L.C., Defendants.	)	Case No. CIV-16-138-D

DEFENDANT DEVON ENERGY PRODUCTION COMPANY, L.P.'S NOTICE OF REMOVAL

Defendant Devon Energy Production Company, L.P. ("Devon"), pursuant to 28 U.S.C. §§ 1331, 1332, 1441, and 1446, the Class Action Fairness Act ("CAFA"), and Local Rule 81.2, hereby notifies this Court that it is removing the above-captioned action, currently pending in the District Court of Logan County, Oklahoma to the United States District Court for the Western District of Oklahoma. In support of this Notice of Removal, Devon states as follows:

SUMMARY FOR REMOVAL

1. On January 12, 2016, Plaintiffs filed in the District Court of Logan County, Oklahoma a Class Action Petition for damages, punitive damages, attorneys' fees and costs, and other additional relief styled *Lisa Griggs and April Marler, on behalf of*

themselves and all others similarly situated v. Chesapeake Operating, L.L.C., New Dominion, L.L.C., Devon Production Company, L.P., and Sandridge Exploration and Production, L.L.C., Case No. 2016-6 (the "State Court Action"). The docket sheet and all papers served in the State Court Action are attached hereto as Exhibits 1 - 10.

2. Devon was served with the Class Action Petition on January 14, 2016. This Notice of Removal is being filed with this Court within 30 days of service of Plaintiffs' Petition, as required by 28 U.S.C. § 1446(b).

3. As required by 28 U.S.C. § 1441(a), Devon is removing this case to the U.S. District Court for the Western District of Oklahoma, which is the district and division embracing the place where the State Court Action was filed.

4. In accordance with 28 U.S.C. 1446(d), Devon has given contemporaneous written notice of this Notice of Removal to all adverse parties and the clerk of the District Court of Logan County, Oklahoma. (Notice of Filing of Notice of Removal, attached as Exhibit 11.)

5. As set forth below, this Court has subject matter jurisdiction over this case pursuant to the class action provisions of the Class Action Fairness Act, 28 U.S.C. §§ 1332(d)(1)-(10), 1453. Removal is proper because the suit is a class action in which any member of a class of plaintiffs is a citizen of a state different from any defendant; because the proposed class is comprised of at least 100 class members; and because the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs. *See* 28 U.S.C. § 1332(d)(2)(A); *Blockbuster, Inc. v. Galeno,* 472 F.3d 53, 56 (2d Cir. 2006).

6. Additionally, removal is proper because Plaintiffs' claims raise a federal question, and are thus removable to this Court pursuant to 28 U.S.C. §§ 1331 and 1441(a). Specifically, Plaintiffs' claims arise in part from activities Devon performed on and in relation to Indian land that was permitted and regulated by the federal government. Accordingly, Plaintiffs' claims raise substantial questions of federal law, and this Court has original jurisdiction over this matter under 28 U.S.C. § 1331.

7. All other Defendants have consented to this Notice of Removal.

NATURE OF THE CASE

8. Plaintiffs' Petition seeks damages, punitive damages, attorneys' fees and costs, and other additional relief under theories of private nuisance, strict liability for alleged ultra-hazardous activities, negligence, and trespass. The basis for Plaintiffs' claims is their allegation that the Defendants have disposed of saltwater produced during oil and gas operations in such a manner as to increase the risk of earthquakes experienced by their real properties in Logan and Oklahoma counties. (Compl. ¶¶ 1, 63, 68.)

9. Specifically, Plaintiffs allege that Defendants operate saltwater disposal wells throughout the entire state of Oklahoma. (*Id.* at ¶ 55.) Plaintiffs allege that this activity correlates with increased seismic events in certain parts of Oklahoma, and that "Defendants have contributed and are contributing to the past and present handling, storage, and disposal of production wastes, which is causing earthquakes in Oklahoma that have damaged Plaintiffs and the members of the putative class." (*Id.* at ¶ 60.)

10. Most of the disposal wells at issue exist on privately-held land in Oklahoma. However, Defendant Devon operates multiple oil and gas wells and their

attendant disposal wells in Osage County, Oklahoma on tribal lands of the Osage Nation.[1] For each of these wells, Devon has entered into an Oil & Gas Mining Lease with the Osage Nation. These leases exist because the Osage Nation owns the entire mineral estate in Osage County, and this estate is held in trust by the federal government.

11. Plaintiffs seek (1) an order certifying the class as requested in their Petition and appointing Plaintiffs' counsel lead counsel for the class, (2) "compensatory damages according to proof," (3) punitive damages, (4) attorneys' fees, expenses, and costs, (5) pre-judgment and post-judgment interest, and (6) "[a]ll other relief to which Plaintiffs and the Class are entitled or that the Court deems just and proper." (*Id.* at Prayer for Relief.)

REMOVAL IS PROPER UNDER THE CLASS ACTION FAIRNESS ACT

I. This Suit Is A Class Action Whose Parties Are Minimally Diverse.

12. This action was filed by a two named Plaintiffs who allege to be citizens of Oklahoma, Lisa Griggs and April Marler. Plaintiffs bring their claims pursuant to 12 O.S. § 2023, on behalf of themselves and a class defined by Plaintiffs as including "[a]ll residents of Oklahoma owning real property from 2011 through the time the Class is certified, Class notice has been delivered to the Class, and Class members have had the opportunity to opt out." (Compl. ¶ 73.) Though Devon denies that this lawsuit is properly maintained as a class action under Federal Rule 23, and reserves the right to

[1] Pursuant to *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014), Devon has not attached substantive evidence in support of this Notice. However, Devon reserves the right to present such evidence should Plaintiffs move to remand this case to state court, or if the Court so desires.

challenge class certification, Plaintiffs have alleged a class action as that term is defined by 28 U.S.C. § 1332(d)(1).

13. Plaintiffs' proposed class consists of hundreds of thousands of "Oklahoma residents" who owned real property within that state since 2011. Plaintiffs allege that the class is "sufficiently numerous and scattered across Oklahoma making joinder of all members of the Class in a single action impracticable …." (Compl. ¶ 79.) Based on the allegations in the Petition, the proposed class comprises a minimum of 100 members as required by 28 U.S.C. § 1332(d)(5)(B).

14. In class actions covered by CAFA, the requisite diversity of citizenship is satisfied as long as there is "minimal diversity," that is, so long as "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A); *see Blockbuster*, 472 F.3d at 58-59.

15. Plaintiffs' class definition is extraordinarily broad, and includes all "residents" of Oklahoma who owned real property since 2011. Given its breadth, Plaintiffs' class definition includes individuals who resided in and owned property in Oklahoma at some point between 2011 and the present, but who have since moved out of the state and became citizens of states other than Oklahoma. The proposed class also includes all "residents" of Oklahoma who are citizens of other states.

16. Devon is a citizen of Oklahoma.

17. Though the named Plaintiffs, Devon, and the other Defendants appear to be citizens of Oklahoma, Plaintiffs' proposed class includes citizens of states other than

Oklahoma. Thus, the "minimal diversity" between the proposed class and Defendants exist, and CAFA provides this Court with jurisdiction over Plaintiffs' claims.

II. This Suit Is A Class Action With The Aggregate Amount In Controversy Greater Than $5,000,000.

18. Under CAFA, a minimally diverse class action is removable if the amount in controversy is greater than $5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). The claims of the individual class members "shall be aggregated" to determine whether that jurisdictional minimum has been met. 28 U.S.C. § 1332(d)(6).

19. In this case, the jurisdictional minimum is met based on the sheer breadth of the Plaintiffs' claims and proposed class. Specifically, Plaintiffs seek damages related to thousands of alleged earthquakes on behalf of every person who owned real property in Oklahoma since 2011. This class consists of tens, if not hundreds, of thousands of property owners. If the named Plaintiffs are representative of Plaintiffs' proposed class, each proposed class member would seek damages for "extensive damage to [his or her] home, including shifts to the piers of [his or her] home's foundation, cracks to the concrete block forming the foundation, separation of the chimney from the home, separation of the cabinets from the walls, cracks and separations to exterior brick veneer and mortar joints, cracks to drywall, wracking of doors, damages to door casings, and separations in door and window trim." (Compl. ¶ 64; *see also id.* at ¶ 69.) The cost to repair these alleged damages for each class member would likely total thousands of dollars. When aggregated amongst all proposed class members, the total damages would exceed CAFA's $5,000,000.00 minimum.

PLAINTIFFS' CLAIMS RAISE FEDERAL QUESTIONS, AND REMOVAL IS PROPER PURSUANT TO 28 U.S.C. § 1441(a)

I. Federal Question Jurisdiction.

20. A district court may exercise original federal jurisdiction over any civil action "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Under Section 1331, federal jurisdiction is present when a plaintiff's well-pleaded complaint demonstrates that (a) "federal law creates [one or more] cause[s] of action" alleged by a plaintiff or (b) a "plaintiff's right to relief [under one or more causes of action] necessarily depends on resolution of a substantial question of federal law." *Singh v. Duane Morris LLP*, 538 F.3d 334, 337-38 (5th Cir. 2008). "A single claim over which federal-question jurisdiction exists is sufficient to allow removal." *Broder v. Cablevision Systems Corp.*, 418 F.3d 187, 194 (2d Cir. 2005).

21. Under the "artful pleading doctrine," a plaintiff cannot thwart federal court jurisdiction by simply pleading state law claims when federal questions are essential elements of his claims. *See Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1203 (10th Cir. 2012); *see also Frank v. Bear Stearns & Co.*, 128 F.3d 919, 922 (5th Cir. 1997) ("A federal court may find that a plaintiff's claims arise under federal law even though the plaintiff has not characterized them as federal claims."); *Hawkins v. Nat'l Ass'n of Sec. Dealers Inc.*, 149 F.3d 330, 332 (5th Cir. 1998) (finding federal question jurisdiction where "[plaintiff's] claims . . . , though carefully articulated in terms of state law [were] actions at law seeking to enforce liabilities or duties created by federal securities laws"). To invoke federal question jurisdiction, a

defendant must show that at least one of two recognized exceptions to the well-pleaded complaint rule is applicable: either that (1) plaintiff's state law claims are completely preempted or (2) there is a substantial, disputed federal law issue necessarily embedded in plaintiff's state law claims. *Devon Energy Prod. Co., L.P.*, 693 F.3d at 1203-04.

22. Thus, this Court has federal-question jurisdiction over a case involving only state-law claims when one or more of the claims necessarily raises a federal question that is "actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); *Devon Energy Prod. Co., L.P.*, 693 F.3d at 1208. Where a plaintiff's ability to prevail on the case-in-chief rests on the resolution of federal law, it raises a "substantial" federal question. *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1235 (10th Cir. 2006).

II. Plaintiffs' Petition.

23. Plaintiffs allege that there has been "a dramatic increase in the number and intensity of earthquakes in Oklahoma during the last five years. (*Id.* at ¶ 13.) Plaintiffs allege that these earthquakes have caused property damage as well as harm to people. (*Id.* at ¶ 52.) Plaintiffs specifically allege that "Defendants operate wastewater injection wells in and around Plaintiffs' homes and within the Class Area (as defined below)." (Pet. at ¶ 54.) According to Plaintiffs, "[t]hese injections wells have caused the earthquakes occurring in the Class Area, and proximately caused damages to Plaintiffs and the putative Class." (*Id.*) As a result, Plaintiffs seek to represent a class defined as:

"All residents of Oklahoma owning real property from 2011 through the time the Class is certified, Class notice has been delivered to the Class, and Class members have had the opportunity to opt out." (*Id.* at ¶ 73.) Thus, the Class Area, as defined by Plaintiffs, is the entire state of Oklahoma.

24. Nowhere do Plaintiffs specify or limit which particular wastewater injection wells of the Defendants are at issue. Based on the plain language of the Petition, Plaintiffs include every wastewater injection well operated by Defendants in the State of Oklahoma. (Pet. at ¶¶ 54, 73.)

III. Devon Operates Disposal Wells Pursuant To Leases Administered By The Federal Bureau of Indian Affairs.

25. Devon operates multiple oil and gas wells and disposal injection wells in Osage County pursuant to Indian leases administered by the Bureau of Indian affairs and permitted by the Environmental Protection Action. For each of these wells, Devon has entered into an Oil & Gas Mining Lease with the Osage Nation. These leases exist because the Osage Nation owns the entire mineral estate in Osage County, and this estate is held in trust by the federal government. Each mineral lease was negotiated by the Osage National Council and approved by the Secretary of the Interior.

IV. A Comprehensive Federal Regulatory Scheme Governs Every Aspect of Oil and Gas Operations in Osage County.

26. In 1906, Congress passed the Osage Allotment Act "in part for the purpose of dividing the land in the Osage Reservation among the members of the Osage Tribe." *Quarles v. United States ex rel. Bureau of Indian Affairs*, 372 F.3d 1169, 1172 (10th Cir. 2004). This Act and its implementing regulations "were developed pursuant to the

United States government's plenary and exclusive jurisdiction over tribal and allotted lands held in trust or restricted status." *Id*. In addition, "the Act established a subsurface mineral estate trust, held by the United States, on behalf of the Osage Tribe." *Id*. "The Secretary of the Interior is directed to manage oil and gas extraction leases, with the royalties earned from the leases reserved to the Osage Tribe." *Id*. Accordingly, the "Secretary of the Interior through the Bureau of Indian Affairs (BIA) controls the leasing process and approves assignments of leases covering allotments." *Id*. Moreover, "[t]he BIA's necessary approval of assignments indicates that the leases and transfers thereof are subject to the United States government's ongoing trust obligation." *Id*.

27. This management of the leases is manifested in detailed regulations implemented by the Department of the Interior at 25 C.F.R. § 226.1, *et seq*. As of now, there are seventy-one (71) separate regulations that govern every aspect of oil and gas operations in Osage, including wastewater disposal, leasing procedure, rental, production, royalties, operations, cessation of operations, requirements of lessees, penalties, and appeals and notices.

28. One of these regulations specifically regulates wastewater injection wells. It states that "[a]ll produced water must be disposed of by injection into the subsurface, in approved pits, or by other methods which have been approved by the Superintendent." 25 C.F.R. § 226.45.

29. Another of these regulations also specifically relates to the maintenance of a nuisance. It states that "[t]he lessee must conduct its operations in a workmanlike manner, commit no waste and allow none to be committed upon the land, nor permit any

avoidable nuisance to be maintained on the premises under its control." 25 C.F.R. § 226.37.

30. Moreover, the leases for the oil and gas wells at issue specifically reference this comprehensive regulatory scheme. For instance, one of Devon's leases specifically notes that it is "under and pursuant to the [federal] [Osage Allotment Act] . . . ." In addition, the lease states that "[i]t is specifically understood that this lease is subject to the current regulations of the Secretary [of the Interior] contained in CFR 226, "Leasing of Osage Reservation Lands for Oil and Gas Mining," and any amendments to the regulations hereinafter promulgated are made a part of this lease and lessee hereby agrees to abide and conform thereto."[2]

31. Thus, at least some of the wells that Plaintiffs claim have damaged them and the putative class exist on tribal lands and are subject to a comprehensive federal regulatory scheme.

V. There is Substantial Law Holding That A Claim That Relates To An Oil And Gas Lease On Tribal Lands Necessarily Raises a Federal Question.

32. It is well-settled that "[t]he traditional notions of Indian sovereignty provide a crucial backdrop against which any assertion of state authority must be assessed." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). "A long line of Supreme Court decisions illustrates the importance of the federal and tribal interests in Indian cases and the authority of Congress to protect those interests." *Gaming Corp. of*

[2] These wells are also specifically regulated by the Environmental Protection Agency. Thus, the wells on tribal lands are governed by not one but two comprehensive federal regulatory schemes. *See* Section VII.

America v. Dorsey & Whitney, 88 F.3d 536, 547 (8th Cir. 1996). It has long been held that Congress has "plenary and exclusive power . . . to deal with Indian tribes.'" *Id.* (quoting *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 376 n.2 (1976)). Though "[p]rinciples of Indian sovereignty and jurisdiction have developed and changed over time . . . the Supreme Court [has] reaffirmed that Indian commerce is 'under the exclusive control of the Federal Government.'" *Id.* at 548 (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)). "Native Americans are entitled to the benefit of the doubt if legislation is ambiguous." *Id.* (quoting *Bryan*, 426 U.S. at 392) ("[S]tatutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expression being resolved in favor of the Indians.")).

33. It is equally well-settled that claims that relate to oil and gas leases on tribal lands raise a federal question. *See Tenneco Oil Co. v. Sac. & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574 (10th Cir. 1984). In *Tenneco*, the court found that a federal question existed because the lease at issue noted that it "shall be subject to the regulations of the Secretary of Interior now or hereafter in force . . . ." *Id.* The same provision exists in the leases of the oil and gas wells at issue here that exist on tribal lands. The Tenth Circuit affirmed the holding in *Tenneco* in *Superior Oil Co. v. U.S*, 798 F.2d 1324 (10th Cir. 1984), reiterating that federal question jurisdiction was present based on the federal regulation of oil and gas leases on tribal lands. More recently, the Fifth Circuit in *Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian*, 261 F.3d 567 (5th Cir. 2001), relied on *Tenneco* and *Superior* in holding that "[t]he federal regulations and statutes governing tribal oil and gas leases are adequate to invoke federal question

jurisdiction over the instant dispute." *Id*. at 574. In fact, that Court held that "this extensive regulatory scheme demonstrates that tribal oil and gas leases represent a very specialized subset of contract, and therefore, compels the conclusion that they belie characterization as routine contracts." *Id*. at 575.

34. Numerous other courts that have decided issues regarding related federal statutes governing tribal lands have reached the same conclusion. For instance, the California Supreme Court, sitting *en banc*, held that several such federal statutes "embody the principle that the exclusive federal-Indian trust relationship is best maintained by channeling all disputes about such land into federal court." *Boisclair v. Superior Court*, 801 P.2d 305, 311 (Cal. 1990). That court held that if the dispute at issue concerns an "interest" related to the tribal lands, then exclusive federal jurisdiction is proper. *Id*. In *Rainbow Resources, Inc. v. Calf Looking*, 521 F.Supp. 682 (D. Mont. 1981), a federal district court in Montana found that it had federal question jurisdiction pursuant to authority implicit in a related federal statute that governs tribal lands that provides that all "operations under any oil, gas or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior." *Id*; *see also Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974) (where tribe's right to possession of land was claimed to arise under federal law in the first instance, construction of federal law was necessary and thus claim concerning land rights presented federal question); *Unalachtigo Band of the Nanti-coke-Lenni Lenape Nation, v. New Jersey*, 867 A.2d 1222, 1229 (N.J. Super. 2005) (holding that various federal

statutes gave "a clear understanding that Congress expressly intended to preserve exclusive jurisdiction over claims to Indian land, which is subject to a restriction against alienation."); *Black Hills Institute of Geological Research v. U.S.*, 812 F.Supp. 1015 (D. S.D. 1993) ("Indian lands are governed solely by federal law and, where legal title to such land is held in trust by the United States, any attempted conveyance or alienation must conform to the requirements of federal law."), *reversed in part on other grounds by* 12 F.3d 737 (8th Cir.); *U.S. v. Mottaz*, 476 U.S. 834, 845 (1986) (holding that § 345 grants federal jurisdiction over suits involving the interests and rights of the Indian in his allotment after he has acquired it); *Begay v. Albers*, 721 F.2d 1274, 1278 (10th Cir. 1983)(similar); *Everglades Ecolodge at Big Cypress, LLC v. Seminole Tribe of Florida*, 836 F.Supp.2d 1296 (S.D. Fla. 2011).

35. Federal courts in Oklahoma have reached similar conclusions. One such court almost forty years ago declared that "the surface interests in tribal lands have stood burdened not only with the ordinary servitude for activities necessary in the exploitation of the underlying minerals but also with the federal regulatory power over all of the reserved trust estate in the Osage minerals." *Appleton v. Kennedy*, 268 F.Supp. 22, 24 (N.D. Okla. 1967). Due to this federal regulatory power over tribal lands and activities, federal district courts in Oklahoma have often found that a federal question exists when tribal lands are at issue in a lawsuit. For instance, in *Quarles v. United States ex rel. Bureau of Indian Affairs*, No. OO-CV-0913-CVE-PJC, 2006 WL 2054074, at *3 (N.D. Okla. July 24, 2006), the court found that a claim for damages to land arising under the Osage Allotment Act and BIA regulation is a claim "expressly based on federal law." *Id.*

Another court held that a trespass action on tribal land was a federal question under a related federal statute governing tribal lands. See *Nahno-Lopez v. Houser*, 627 F.Supp.2d 1269, 1279 (W.D. Okla. 2009) (holding that a trespass action on tribal land "falls within the statutory language of § 345"). In 2010, a federal district court found that "[t]he issue of whether the State of Oklahoma can validly execute authority over Indian lands presents a substantial question of federal constitutional, statutory, and decisional law . . . ." *Muhammad v. Comanche Nation Casino*, 742 F.Supp.2d 1268, 1275 (W.D. Okla. 2010). Other Oklahoma federal district courts have also found that federal jurisdiction exists when tribal lands are at issue. *See, e.g.*, *Harris v. Muscogee (Creek) Nation*, 2012 WL 2279340 (N.D. Okla. 2012) (concluding removal on federal question grounds by Tribe was proper where a question of where a federal Gaming Compact and a federal statute operate to waive the Tribe's immunity from suit); *Richardson v. Malone*, 762 F.Supp. 1463, 1469 (N.D. Okla. 1991) ("Where personal property, as here is physically located in Indian country, beyond the reach of the state, and where, as here, the remedy sought by Plaintiff is foreclosure upon an alleged security interest in the property, exercise of federal jurisdiction . . . is appropriate.").

VI. The Claims At Issue Here Necessarily Implicate The Tribal Lands And The Oil and Gas Leases Between Devon And The Tribe.

36. Plaintiffs' causes of action are nuisance, ultra-hazardous activities, negligence, and trespass. (Pet. at ¶¶ 91, 95, 98, 103.). These claims necessarily implicate the oil and gas leases between Defendants and the Tribe for at least[3] four reasons.

37. ***First***, because there is a comprehensive federal regulatory scheme in place that regulates the oil and gas leases for at least some of the operations that allegedly have harmed Plaintiffs' properties, there is a question as to whether the State of Oklahoma can validly execute authority over these wells on tribal lands. As explained above, the federal government has promulgated extensive regulations that govern every aspect of the operations of these wells, including wastewater injection wells. Indeed, one such regulation explicitly states that "[a]ll produced water must be disposed of by injection into the subsurface . . . or by other methods which have been approved by the Superintendent." 25 C.F.R. § 226.45. Thus, the very operations that Plaintiffs complain of here were actually performed at the direction, and with the approval, of the federal government, at least on tribal lands. *See Muhammad*, 742 F.Supp. 2d 1268 (finding a necessary prerequisite for the plaintiffs' claims to show that they could actually hold defendant liable under the laws of the State of Oklahoma in light of the federal statutes governing tribal lands). The same is true here, given the comprehensive federal regulatory scheme that not only governs oil and gas leases generally on tribal lands, but that specifically govern the exact actions that Plaintiffs complain of in their Petition.

[3] There are numerous federal statutes and regulations that govern the tribal lands at issue here, and there are many ways in which these numerous statutes and regulations necessarily come into play in adjudicating this lawsuit. Only a few are discussed herein, but Defendant can provide more detail as to other such ways if the Court so desires.

38. ***Second***, the legal relationships between not only the Plaintiffs and Defendants but also between the Defendants, Tribe and the federal government turn on an evaluation of federal statutes and regulations. Both the U.S. Supreme Court in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.,* 545 U.S. 308 (2005), and the Tenth Circuit in *Gilmore v. Weatherford*, 694 F.3d 1160, 1174 (10th Cir. 2012) have dealt with this exact question. In *Grable*, "the legal relationship between two private parties would be determined by whether a federal agency had complied with its duty to the plaintiff." *Id.* As a result of that dispositive question based on federal law, the Court found that a federal question had been met. In *Gilmore*, "the legal relationship between the parties turns on whether defendants satisfied their (alleged) duties to a federal agency." *Id*. at 1160. Here, the same is true. An essential element of all of Plaintiffs' claims is to prove that the Defendants owned or operated the oil and gas wells at issue and to determine their property interests in the wells, if any. A related question is who owned the wastewater that was allegedly used in the injection wells by defendants. Plaintiffs allege that this wastewater consists of some spent fluid but is primarily "formation brines." (Petition at ¶ 26.) Under state law, this brine is governed by the OCC. But under federal law, this brine arguably belongs to the Tribe and federal government. *See generally* Federal Geothermal Steam Act of 1970, 30 U.S.C. § 1019 *et seq*. In addition, if Defendants' actions were specifically approved by the federal government, then that necessarily changes the legal relationship between the parties. *See Gaming World Int'l Ltd v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 848 (8th Cir. 2003) (recognizing federal jurisdiction over whether a contract received valid

federal approval under the Indian Gaming Regulatory Act). Regardless, this will require an in-depth analysis of the federal Osage Allotment Act and its regulations. This, pursuant to *Grable* and *Gilmore*, means that there is a federal question that governs the relationship of the parties. This is especially true given the recent decision in *Hayes v. Chaparral Energy LLC*, No. 14-CV-495-GKF-PJC, 2016 WL 54212 (N.D. Okla. Jan. 5, 2016), where a federal district court invalidated an oil and gas lease with the Osage Nation because the federal government had failed to comply with NEPA when it issued two drilling permits in 2014. In essence, at least with regard to the Plaintiffs' claims that relate to tribal lands, the standard of care is derived from federal laws and regulations. One federal district court just recently held that where a comprehensive federal regulatory scheme governed and the Plaintiffs necessarily had to look to federal law to establish the standard of law for claims including nuisance and negligence, federal question jurisdiction existed. *See, e.g.*, *Board of Commissioners v. Tennessee Gas Pipeline Co.*, 29 F.Supp.3d 808, 854-856 (E.D. La. 2014).

39. ***Third***, there are numerous putative class members that reside in Osage County, given that the putative class definition includes all residents who own property in the State of Oklahoma. No distinction is made between kinds of property interests, so this would include owners of mineral estates as well as surface estates in Osage County. However, the owner of the mineral estates in Osage County is the Tribe, and leases incorporating federal law govern the relationship between the Defendants and the Tribe. More importantly, the federal regulations at issue also govern the relationship between the surface owners in Osage County and Defendants. These regulations are very detailed

and mandate arbitration in certain circumstances. *See* 25 C.F.R. § 226.1, *et seq.* Before any such surface owners can assert any claims against Defendants, an interpretation of these federal regulations is required. This is yet another reason why federal question jurisdiction is appropriate here.

39. ***Fourth,*** Plaintiffs' nuisance claim necessarily implicates the property interests of the Tribe and the federal government. Abatement is a remedy for private nuisance actions in Oklahoma. *See* 50 O.S. § 13. ("The remedies against a private nuisance [include] . . . [a]batement." In their Petition, Plaintiffs do not explicitly mention abatement, but do ask for all "other relief" to which they are entitled under the law. (Pet. at Prayer for Relief.) This "other relief includes abatement. Under Oklahoma law, property owners can be liable for private nuisances, even if it is the actions of a lessee that causes the nuisance. 50 O.S. § 505 ("Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, . . . is liable therefor in the same manner as the one who first created it."); *see also* Restatement Second of Torts Section 837 (states that a landowner can be subject to liability for a nuisance caused by an activity carried on upon the land during a lease under certain circumstances). Moreover, there is a long line of cases that hold that where a nuisance action is being sought against one party such as a lessee, it is necessary to join the owner of the property as a necessary party because all persons whose right, title or interest might be affected by the relief sought should be part of the action. *See, e.g., United States v. Gaffney*, 10 F.2d 694 (2d Cir. 1926); *Clark v. Deutsche Bank Nat'l Trust Co.*, 2013 WL 3821568, at *6 (S.D. Miss. July 23, 2013); *Stanley v. Amalithone Realty, Inc.*, 921

N.Y.S.2d 491 (Sup. 2011); *J.K. Dean, Inc. v. KSD, Inc.*, 709 N.W.2d 22 (S.D. 2005); *Aldridge v. Aldridge*, 527 So.2d 96, 98 (Miss. 1988); *State ex rel. Ely v. Bandall*, 220 Mo. App. 1222 (1927). Some courts have dismissed claims such as trespass where a plaintiff fails to join all mineral interest holders. *See, e.g., Ladner v. Quality Exploration Co.*, 505 So.2d 288, 291-92 (Miss. 1987). In addition, courts have long held that a nuisance action necessarily implicates a property ownership interest, akin to a cloud of title. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (declared that nuisance places restrictions upon land ownership); *Mohilef v. Janovici*., 51 Cal.App.4th 267, 285 (1996) ("[i]n light of the [plaintiffs'] ownership interests in the ranch and the fact that [one plaintiff] partially owns the [birds] through his commercial ventures, the City's nuisance abatement proceeding sufficiently implicates a protected property interest."). This is especially true in Oklahoma where "[t]he right of possession of the leased premises under an oil and gas mining lease is concurrent in the lessor and lessee." *Tenneco Oil Co. v. Allen*, 515 P.2d 1391, 1396 (Okla. 1973). Thus, Plaintiffs' nuisance claim necessarily implicates the property interests of the Tribe and the federal government, both of which are arguably indispensable parties for the claim arising from the operations on tribal lands. There necessarily must be an interpretation of the federal laws and regulations that apply before these property interests of the Tribe and federal government can be fully adjudicated. In addition, abatement of the alleged nuisance in the context of this case would mean an injunction by the Court against further disposal of water in the SWD wells authorized by the EPA and the Department of the Interior and

would conflict with the federal regulatory scheme. This would necessarily raise federal questions.

VII. Various Other Federal Statutes and Regulations Also Must Necessarily Be Adjudicated Here, Providing An Additional Basis for Federal Question Jurisdiction

40. The federal Environmental Protection Agency provides extensive regulation over the oil and gas operations on the tribal lands. For instance, the Clean Water Act and the Safe Drinking Water Act specifically apply to Defendant's oil and gas operations on tribal lands. In fact, Defendant must receive authorization from the EPA in order to convert a well to an injection well, and these authorizations specifically mention compliance with Safe Drinking Water Act. Also, the EPA runs an Osage Brine Program that monitors brine discharge activities on tribal lands. In addition to the federal questions stemming from Plaintiffs' claims related to Devon's operations pursuant to Indian leases and federal regulations governing such activities, Plaintiffs' claims raise a federal question because they seek to challenge the federal regulatory scheme governing wastewater disposal operations on non-tribal lands in Oklahoma. Specifically, the EPA has delegated the authority to regulate disposal wells under the Safe Water Drinking Act to the Oklahoma Corporation Commission. *See* 40 C.F.R. § 147.1851; *see also HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1232 (10th Cir. 2000) ("The SDWA is an environmental statute establishing overall minimum drinking water protection standards for the nation, and providing, in many instances, for delegation of specific regulation and enforcement to states and Indian tribes."). As noted above, Oklahoma law permits Plaintiffs to seek

"abatement" of the alleged nuisance. Abatement in this case directly conflicts with the federal regulatory scheme for disposal wells, which demonstrates that Plaintiffs' nuisance claim necessarily implicates federal law.[4]

VIII. All of the Elements for Federal Question Jurisdiction to Apply Have Been Met Here.

41. All of the elements of federal question jurisdiction exist in this case. As established above, there are several federal questions at issue in this suit. These federal questions are clearly disputed since Plaintiffs failed to even raise these federal questions on the face of the Petition. In addition, these federal questions are substantial. The Tenth Circuit has held that '"[a] case should be dismissed for want of a substantial federal question only when the federal issue is (1) wholly insubstantial or obviously frivolous, (2) foreclosed by prior cases which have settled the issue one way or another, or (3) so patently without merit as to require no meaningful consideration." *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227 (10th Cir. 2006). This is certainly not the case here – these federal questions are important as demonstrated by the extensive regulations that the federal government has implemented to govern the oil and gas leases on the tribal land in Osage County. Finally, "given the absence of threatening structural consequences and the importance for availability for a federal forum, there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of this

[4] Moreover, a federal complaint was recently filed against some of the same defendants in this case by the same Plaintiffs' counsel in this case under the Resource Conservation and Recovery Act (RCRA). *See Sierra Club v. Chesapeake Operating LLC et al*, Case No. 5:16-cv-00134 (W.D. Okla.). This demonstrates that the comprehensive federal regulatory scheme necessarily governs many of the issues in this case.

state-law . . . .claim." *Nicodemus*, 440 F.3d at 1237. Thus, federal question jurisdiction exists here.[5]

WHEREFORE, Defendant Devon requests that the above-captioned action, now pending in the District Court for Logan County, Oklahoma be removed to the United States District Court for the Western District of Oklahoma, and that said U.S. District Court assume jurisdiction over this action and enter such other and further orders as may be necessary to accomplish the requested removal and promote the ends of justice.

Respectfully submitted,

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[5] "Once federal question jurisdiction exists, it is within the trial court's discretion to exercise supplemental jurisdiction over those state law claims that derive from a common nucleus of facts." *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1220 (10th Cir. 2000).

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2016, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants. I also certify that a true and correct copy of the above and foregoing was mailed via U.S. Mail, postage prepaid, to:

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