

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

APACHE TRIBE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	
)	Case No. CIV-11-1078-D
TGS ANADARKO, LLC, and WELLS)	
FARGO BANK, NATIONAL)	
ASSOCIATION,)	
)	
Defendants.)	

PLAINTIFF’S REPLY IN SUPPORT OF MOTION TO REMAND

The Apache Tribe of Oklahoma replies in support of its Motion to Remand (Doc. No. 12) as follows:

In their Joint Memorandum in Opposition (Doc. No. 16), Defendants make no serious effort to acknowledge the holding of *Okla. Tax Comm’n v. Graham*, 489 U.S. 838, 841 (1989), in which the U.S. Supreme Court held that, even though tribal sovereign immunity is a creature of federal law, the assertion of tribal sovereign immunity in a case or controversy does not by itself create federal question jurisdiction. Defendants then make no effort to distinguish the line of cases cited by Plaintiff requiring a declaratory judgment action to be analyzed on the basis of the underlying claims. Having failed in those tasks, Defendants suggest that Plaintiff’s request for a state-court injunction provides this Court with federal question jurisdiction. Defendants are wrong.

The cases cited by Defendants in support of federal jurisdiction are exactly that, requests for relief based upon clearly defined questions of federal law. First, the federal

district court in *Wells Fargo Bank, N.A. v. Sokaogon Chippewa Community*, 787 F.Supp.2d 867 (E.D.Wis. 2011), found that a federal question existed because Wells Fargo sought a judicial determination that its bond indenture was not a management contract as contemplated (and prohibited if unapproved) by the Indian Gaming Regulatory Act (“IGRA”). In *Sokaogon*, the only attacks on the waiver of sovereign immunity were (a) the existence of an unapproved management contract, and (b) an allegation the contract was void for violation of 25 U.S.C. § 81. The defendant tribe directly tied the waiver of sovereign immunity with federal statutes requiring federal approval of certain contracts, thereby creating an independent basis for federal question jurisdiction. *Id.* at 878.

Defendants further rely upon *ANR Pipeline Co. v. Corporation Com'n of State of Okl.*, 860 F.2d 1571 (10th Cir. 1988), to suggest that a plea for an injunction supports the existence of federal question jurisdiction. However, in *ANR Pipeline*, federal law in the form of the Natural Gas Act and the Natural Gas Policy Act of 1978 were alleged to completely preempt the challenged Oklahoma natural gas scheme. *Id.* at 1573 (*citing* 15 U.S.C. §§ 717-717w; 15 U.S.C. §§ 3301-3432). The requested injunction was necessary to give effect to federal law in a field of preemption. The Tenth Circuit held, “[o]ur decision affirming the district court's jurisdiction is also supported by many decisions of the Supreme Court which have found federal question jurisdiction where the plaintiff claims pre-emption, and seeks to enjoin enforcement of the state law.” *Id.* at 1577. Here, the Tribe seeks a declaratory judgment that its waiver of sovereign immunity was not executed in accordance with tribal law as set forth in the Apache Constitution. There is

no federal regulatory scheme which exists to determine the validity of tribal waivers of immunity.

Finally, Defendants rely upon *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1237 (10th Cir. 2003), in which the railroad argued that federal question jurisdiction existed because: (1) the federal government subsidized construction of the transcontinental railway, (2) the federal government has a limited right of reverter in railroad rights of way, and (3) federal common law applies to federal land-grant statutes. However, the Tenth Circuit found that the claims and causes of action all arose separately under Wyoming tort law. Thus, the Court held: “Because the requested injunctions would protect *state-created rights*, and since the federal land-grant statutes at issue lack any evidence of congressional intent to provide a federal forum, we have no jurisdiction under 28 U.S.C. § 1331 to consider these claims.” *Id.* at 1240 (emphasis in original). Similarly, Defendants’ claims in the underlying arbitration, and the Tribe’s state court claims, are based upon rights created by Oklahoma’s contract and statutory law. As a result, this Court lacks federal question jurisdiction.

Should this Court not remand the lawsuit, a peculiar exception will be created in relation to the holding of *Okla. Tax Comm’n v. Graham*. Tribes which cannot remove as a defendant when they assert sovereign immunity to a contract action or tort claim would be able to file lawsuits in the first instance as a plaintiff based upon federal question. Similarly situated plaintiffs, being federally recognized Indian tribes, would likely prefer that *Graham’s* holding be reversed. The end-result would be that every lawsuit in which an Indian tribe could assert sovereign immunity would become removable based upon

federal question. As a practical matter this would involve almost all lawsuits in which Indian tribes are a defendant, as each lawsuit must contain some alleged waiver of the tribe's immunity to suit in the first instance. But, under *Graham* and its progeny, that is not the law at this time, and as a result, this Court lacks subject matter jurisdiction over the claims presented by the Apache Tribe.

CONCLUSION

The Apache Tribe respectfully requests that the Court grant the Motion to Remand, and any other relief to which it is entitled.

Respectfully submitted,

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& ANDERSON, L.L.P.

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