

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

CITY OF ELK CITY and ELK CITY PUBLIC)
WORKS AUTHORITY,)

Plaintiffs,)

v.)

BECKHAM COUNTY RURAL WATER)
DISTRICT NO. 3,)

Defendant.)

Case No. CV-06-35-F

MOTION TO REMAND AND BRIEF IN SUPPORT

Respectfully submitted,

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Defendant.)

MOTION TO REMAND AND BRIEF IN SUPPORT

The Plaintiffs, the City of Elk City and Elk City Public Works Authority (hereinafter “the Plaintiffs”), respectfully move the Court for an order remanding this action to the District Court of Beckham County, State of Oklahoma.

In support of their Motion to Remand, the Plaintiffs respectfully submit their Brief in Support of their Motion to Remand.

INTRODUCTION

The removed action and this Motion to Remand raise interesting and unique issues of state constitutional law regarding the authority of a state agency to enter into a contract with the federal government that serves as support for an exercise of a right granted under the federal Spending Clause power. The Plaintiffs are challenging the Defendant’s authority to enter into such a contract. If the contract is declared void, then the Plaintiffs would be entitled to relief under the Oklahoma remedy in the nature of quo warranto. This remedy would give the State of Oklahoma the authority to rectify the District’s illegal conduct. One effect might be the elimination of the District’s federal monopoly power, which in and of itself causes the District’s exercise of authority to be illegal under state law.

The Plaintiffs have found no similar case involving a state agency's illegal exercise of the authority to enter into such a federal contract. The Plaintiffs' state-court Petition and this Motion to Remand, therefore, raise issues that fall within uncharted territory.

Beckham County Rural Water District No. 3 ("the District") has attempted the removal of a state-law action for declaratory judgment, injunction, action in the nature of quo warranto, and receivership. The District bases its attempted removal on the application of a federal statute, 7 U.S.C. § 1926(b) and on 28 U.S.C. § 1442, arguing that the USDA is a necessary and indispensable party. Section 1926(b) provides anticompetitive protection to certain rural water districts who owe money to the U.S. Department of Agriculture. Section 1442 provides removal for certain actions none of which pertain to or resemble the present removed action.

In their state-law action, the Plaintiffs have requested an order from the District Court of Beckham County declaring Title 82, Section 1324.10 of the Oklahoma Statutes unconstitutional under the Oklahoma Constitution to the extent that it provides the District with the authority to enter into loan agreements with the USDA that carry with them exclusive rights to serve a particular territory, its service area – an area broader than its existing customers. The question of whether Section 1324.10 is constitutional under state law will determine whether the District acted with proper authority in entering into its loan agreements with the USDA. Nonetheless, the District's authority to bind the State of Oklahoma to an agreement with the federal government is a state-law issue that should be addressed by the state courts.

The District's attempted removal is contrary to federal law governing federal-question removal jurisdiction because the Plaintiffs' claims for relief are based on and necessitate application of state law action rather than federal law. The District's attempts to frame these proceedings as a federal issue are nothing more than the expression of a federal *defense* (federal

preemption) to this action. But in asserting its federal defense, the District has overlooked the critical points that (1) the District cannot establish *complete preemption* of these state-law questions, (2) the USDA is not a necessary party to the action, and (3) 28 U.S.C. § 1442 is inapplicable to the case at hand. As a result, these proceedings should be remanded to the District Court of Beckham County, based on an absence of federal-question removal jurisdiction, and lack of authority to remove under 28 U.S.C. § 1442.

STATEMENT OF FACTS

1. On December 13, 2005, the Plaintiffs filed their Petition against Beckham County Rural Water District No.3, Beckham County, Oklahoma, with the District Court of Beckham County, State of Oklahoma. The District has attached a copy of the December 13, 2005 Petition to its January 13, 2006 Notice of Removal.

2. The December 13, 2005 Petition initiated an action in the Nature of Quo Warranto, along with several other actions, before the District Court of Beckham County. In the Petition, Plaintiffs assert the right to the requested relief arising out of the unconstitutionality of Title 82, Section 1324.10 of the Oklahoma Statutes, which is in contravention of both the Oklahoma Constitution and Oklahoma case law to the extent that it provides the District with the authority to enter into loan agreements with the USDA that carry with them exclusive rights to serve a particular territory, its service area – an area broader than its existing customers.

3. On January 13, 2006, the District filed its Notice of Removal in the U.S. District Court for the Western District of Oklahoma, claiming its right to remove under Title 28 U.S.C. §1441 et.seq., regarding federal question jurisdiction, and 28 U.S.C. § 1442, based upon the District's argument that the USDA a necessary and indispensable party.

4. At the time the District filed its Notice of Removal, the Plaintiffs had not yet served the District with Summons and Petition in the state-court action. In order to ensure

compliance with applicable state and federal procedural requirements, the Plaintiffs have since caused a summons to be issued. Applicable case law allows the Plaintiffs to cause the issuance of a summons while still reserving their right to file this Motion to Remand.

ARGUMENT AND AUTHORITIES

A. Removal is barred because the requirements of federal-question removal jurisdiction are not satisfied.

The District identifies federal-question jurisdiction as its basis for removal of the underlying state Action in the Nature of Quo Warranto. [Notice of Removal, at p. 1.] The statutory source of federal-question removal jurisdiction is found in 28 U.S.C. § 1441(a), (b). Section 1441(a) provides that “[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). Section 1441(b) provides that “[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.” 28 U.S.C. § 1441(b).

The burden of establishing federal jurisdiction is on the party seeking removal. *Heckelmann v. Piping Companies, Inc.*, 904 F. Supp. 1257, 1260 (N.D. Okla. 1995) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)). Because removal jurisdiction raises significant federalism concerns, the Court must strictly construe removal jurisdiction. *Id.* (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)).

The well-pleaded complaint rule governs whether a case is removable from state court to federal court under 28 U.S.C. § 1441(a). *Holmes Group, Inc. v. Vornado Air Circulation Sys.*,

Inc., 535 U.S. 826, 830 n.2 (2002). “As is true of original federal question subject matter jurisdiction, a legion of cases hold that a case arises ‘under the Constitution, treaties or laws of the United States’ for purposes of removal jurisdiction if the adjudication of the plaintiff’s claim for relief depends on the application of any of the enumerated sources of federal law.” 14B Charles A. Wright et al., *Federal Practice and Procedure* § 3722, at 379 (3d ed. 1998) (footnotes omitted). Importantly, federal-question removal jurisdiction “cannot depend upon the answer.” *Holmes Group, Inc.*, 535 U.S. at 831 (quoting *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913)). The application of the well-pleaded complaint rule must be “unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.” *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983) (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). Similarly, a counterclaim cannot form the basis for federal-question removal jurisdiction. *Holmes Group, Inc.*, 535 U.S. at 831.

“Thus, a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, or that a federal defense the defendant may raise is not sufficient to defeat the claim. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff’s original cause of action, arises under the Constitution. For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the plaintiff’s complaint establishes that the case ‘arises under’ federal law. A right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action.” *Franchise Tax Board*, 463 U.S. at 10 (internal quotations omitted) (citations omitted).

As demonstrated in more detail below, the District has failed to satisfy the requirements of federal-question removal jurisdiction. The claims for relief asserted by the District in their Notice of Removal filed on January 13, 2006 do not “arise under” federal law.

B. The action in the nature of quo warranto and other actions in the December 13, 2006 Petition do not “arise under” federal law.

The District seeks to enforce monopoly protection found in 7 U.S.C. § 1926(b). Section 1926(b) protection is available to rural water districts that have borrowed money from the federal government under certain federal loan programs. As demonstrated in more detail below, this monopoly protection serves as the principal reason why the District’s federal loans are illegal under Oklahoma law. Nonetheless, the District is incorrect arguing that the Plaintiffs are seeking “a declaration that the 7 U.S.C. § 1926(b) funding contains a condition precedent requiring compliance with state law.” [Notice of Removal, at p. 1.] In the removed action, the Plaintiffs do not seek a declaration regarding whether Section 1926(b) requires compliance with state law. Such a declaration is not necessary because the issue is already squarely decided by federal regulations. Title 7, C.F.R. § 1780.15, which is found among the regulations that govern 7 U.S.C. § 1926(b), requires compliance with state law in the District’s action in borrowing money from the federal government. Specifically, Section 1780.15 states, in part:

Applicants will be *required to comply with Federal, State, and local laws* and any regulatory commission rules and regulations *pertaining to:* (a) Organization of the applicant and its authority to own, construct, operate, and maintain the proposed facilities; (b) *Borrowing money, giving security therefore, and raising revenues for the repayment thereof;* (c) Land use zoning; and (d) Health and sanitation standards and design and installation standards unless an exception is granted by RUS.

Id. (emphasis added). Thus, rather than seeking a declaration that federal law requires compliance with state law, the Plaintiffs seek relief in the nature of quo warranto, and other

equitable relief, remedying the District's actions in borrowing from the federal government when the District lacked the state-law authority to do so.

In an effort to identify an essential federal element, the District claims that the Plaintiffs' claims are "in reality an effort to remove the protection provided to Beckham-3 by 7 U.S.C. §1926(b), which precludes another water provider from selling water in competition with Beckham-3 and from selling water with Beckham-3's service area." [Notice of Removal, at p. 1.] With this argument, the District merely identifies one of the clear effects of an order requiring the District to abide by Oklahoma state case law and the Oklahoma Constitution. With this argument, the District effectively concedes that, if Title 82, Section 1324.10 of the Oklahoma Statutes is declared to be unconstitutional, such a declaration will remove the District's Section 1926(b) protection. However, the District cannot establish federal-question removal jurisdiction merely by identifying that the result of the removal action might have an impact on federal rights or federal funding. *See, e.g., Evans v. Sentry Property Management Corp.*, 852 F. Supp. 71, 72-73 (D. Mass. 1994) ("It would be a dangerous precedent to hold that federal funding alone can transform that which is strictly a state cause of action into a federal case, for the consequence would be that federal courts would then become inundated by the minutiae of state litigation.").

With their quo warranto action, the Plaintiffs do not seek a declaration that 7 U.S.C. § 1926(b) contains a condition precedent as compliance with State Law, but rather seek a remedy which arises because of a violation of Oklahoma state and Constitutional law. "A suit arises under the law that creates the action." *Oklahoma v. G.T. Blankenship*, 447 F.2d 687, 690 (10th Cir. 1971). Because the efficacy of 7 U.S.C. §1926(b) itself is not in question in this quo warranto action, the removed action properly arises under state law.

Additionally, causes of action arising out of a violation of state constitutional rights do not provide a right to removal because such a claim is based in state law. *See e.g. Pilcher v. J. Swalec*, 540 F. Supp. 1373 (N.D. Ill. 1982). This case depends on the construction of state law, and may not be said to arise under federal law since the correct outcome of the case does not depend on the construction of either the federal constitution or federal law. *G.T. Blankenship*, 447 F.2d at 690 (“A case may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.” (internal quotations omitted)). This is clearly not the case in this situation because the federal law will to continue to remain in full force and effect regardless of the outcome of this case.

C. Defendant’s claim of “artful pleading” ignores the fact that the Plaintiffs’ claims arise out of a state contract that violates state law.

Title 7, U.S.C. § 1926(b) and the rules promulgated thereunder were enacted pursuant to Article I, § 8, cl. 1 of the United States Constitution (the “Spending Clause”). It is well settled that legislation enacted pursuant to the Spending Clause operates in the nature of a contract. *See Pennhurst v. Halderman*, 451 U.S. 1, 17 (1981). The federal funds are conditioned upon the receiving state’s voluntary and knowing acceptance of the terms of a “contract.” *Id.* The required terms of the contracts entered into between the District and the USDA are set forth in Title 7, Section 1780 of the Code of Federal Regulations and in the loan documents themselves. The loans are conditioned upon the authority and ability of the District to borrow money and grant a security interest in a sufficient amount to protect the USDA’s loan. 7 C.F.R. § 1780.15(b). The District had no right to enter into a contract with the USDA for federal monies under Section 1324.10 and its predecessor statutes because these statutes are unconstitutional under Oklahoma state constitutional law, to the extent that they purport to authorize rural water districts to enter into federal contracts that invoke monopoly power.

In entering into the above-mentioned loans with the USDA, the District relied upon Title 82, section 1324.10 of the Oklahoma Statutes, as providing its authority to enter into such contractual obligations. Okla. Stat. tit. 82 § 1324.10 provides:

A. Every district incorporated hereunder shall have perpetual existence, subject to dissolution as provided by the Rural Water, Sewer, Gas and Solid Waste Management Districts Act, and shall have power to:

...

(4.) Borrow money and otherwise contract indebtedness for the purposes set forth in this act, and, without limitation of the generality of the foregoing, to borrow money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require; and to issue its notes or obligations therefore [*sic*], and to secure the payment thereof by mortgage, pledge or deed of trust on all or any property, assets, franchises, rights, privileges, licenses, rights-of-way, easements, revenues, or income of the said district;

...

(9.) Make any and all contracts necessary or convenient for the exercise of the powers of the district;

Section 1324.10 and its predecessor statutes are unconstitutional under Oklahoma state constitutional law, to the extent that they purport to authorize rural water districts to enter into federal contracts that invoke monopoly power. Article V, section 51, of the Oklahoma Constitution provides: “The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.”

In 1972, the Oklahoma Supreme Court rejected the theory that an Oklahoma water district can hold exclusive franchise rights to distribute water. The Oklahoma Supreme Court held that a rural water district cannot enter into a contract that has the effect of cloaking the rural water district with prohibited exclusive rights. The Supreme Court held that rural water districts are prohibited from “creat[ing] for [themselves] an exclusive franchise by entering into [a] loan

contract with the [Rural Utilities Service].” *Comanche County Rural Water District No. 1 v. City of Lawton*, 1972 OK 117, 501 P.2d 490. The Court reasoned that this would “ascribe to our Legislature an intention to violate Art. 5, § 51 of the Oklahoma Constitution.” *Comanche County Rural Water Dist. No. 1 v. City of Lawton*, 501 P.2d 490, 493 (Okla. 1972).

In 1979, the *Comanche County* decision was addressed by the U.S. District Court for the Northern District of Oklahoma, but in a manner that does not resolve the critical question raised by the state-law Petition filed by the Plaintiffs in state court. See *Rural Water District # 3 v. Owasso Utils. Auth.*, 530 F. Supp. 818 (N.D. Okla. 1979). The *Owasso* decision distinguished *Comanche County* on the basis that “[t]he *Comanche County* case did not involve an ‘encroachment’ by the municipality into areas within the confines of the Water District territory by either annexation or otherwise.” *Owasso*, 530 F. Supp. at 822. The *Owasso* court determined that, while the *Comanche County* court struck down an Oklahoma Attorney General opinion dealing with Section 1926(b), “[t]he Court did not deal with the constitutionality of § 1926(b), nor did the Court consider the question of the supremacy of the Federal Act.” *Id.* The *Owasso* decision is inapplicable to the issues raised by this Motion to Remand because the *Owasso* court did not address the impact of *Comanche County* or the Oklahoma Constitution on the rural water district’s authority to borrow federal funds, or the impact of the district’s lack of authority on the conditions imposed by the federal government pursuant to the Spending Clause.

In 1988, the U.S. Court of Appeals for the Tenth Circuit addressed the impact of the Oklahoma Constitution on rural water districts’ authority to enter into loans that carried with them Section 1926(b) protection. *Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989). Unfortunately, the Tenth Circuit was silent on the *Comanche County* decision and its impact on the state-law issues

regarding rural water districts' authority to enter into such contracts. Indeed, the *Glenpool* decision contradicts *Comanche County* on issues of Oklahoma state law regarding the types of contracts that are prohibited under Okla. Const. art. 5, § 5. On page 1216 of the *Glenpool* decision, the Tenth Circuit quoted from Section 1324.10(4) and concluded that "Oklahoma thus authorized [the rural water district] to borrow from the federal government and to enter into any required agreements in connection with those loans." *Glenpool*, 861 F.2d at 1216. The Tenth Circuit concluded that Section 1324.10(4) did not contravene the Oklahoma constitution because it "authorized the acceptance of a condition rather than having granted an exclusive right. The district's right to exclude *Glenpool's* water service here was granted to the rural water district by the *federal* legislature through section 1926(b), and not by the Oklahoma state legislature." *Glenpool*, 861 F.2d at 1216. Because the *Glenpool* court reached a conclusion regarding state law that contradicts a decision of the Oklahoma Supreme Court, there is reason to question whether the *Glenpool* court correctly resolved the issue of whether Oklahoma law authorizes rural water districts to enter into USDA loans.

The *Glenpool* decision contains a number of specific findings regarding issues of state law. The Tenth Circuit has already retraced its steps on one such finding regarding Oklahoma state law. Specifically, the *Glenpool* decision contained a statement regarding the rural water district's obligation to provide service to those within its state-law geographic boundaries. But in 1999, the Tenth Circuit retraced its steps and held that "*Glenpool* did not expressly hold that Oklahoma water districts have a legal duty to provide service; it merely referred to a specific water district's 'responsibilities to applicants within its territory' in affirming a factual finding by the district court." *Sequoyah County Rural Water District No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1202 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037, 529 U.S. 1049 (2000).

The *Owasso* and *Glenpool* decisions, therefore, do not answer the question of whether, in light of *Comanche County*, Oklahoma rural water districts hold the state-law authority to enter into loans that bring Section 1926(b) protection. This question was answered, however, by the Oklahoma Supreme Court. In 2002, the Oklahoma Supreme Court reaffirmed the *Comanche County* rule, despite the intervening federal-court decisions in *Owasso* and *Glenpool*. The Oklahoma Supreme Court was faced with an argument to expand the anticompetitive protection offered by a state statute, Okla. Stat. tit. 82, § 1085.36. The rural water district argued that Section 1085.36 should be given the same broad protection associated with Section 1926(b). The Oklahoma Supreme Court rejected the argument. “The Water District’s proposed territorial approach to application of section 1085.36 would not, however, be consistent with the public policy of encouraging and promoting the development of water and sewer facilities. Okla Stat. tit. 82, § 1085.31 (2001). It would limit County Commissioners’ ability to release and separate areas from a water district even when it was in the best interests of the landowners and the water district to do so. Additionally, a territorial approach would impose provisions of a water district’s loan agreement with the Water Resources Board on non-customer landowners who are not parties to the contract. Finally, such an approach would result in the granting of an exclusive right to provide water and sewer services within the geographical boundaries of a water district in contravention of Article V, section 51, of the Oklahoma Constitution and this Court’s holding in *Comanche County Rural Water District No. 1 v. City of Lawton*, 501 P.2d 490 (Okla. 1972).” *Rural Water & Sewer Dist. No. 4 v. Coppage*, 2002 OK 44, ¶ 13, 47 P.3d 872, 874-75.

The *Coppage* decision clarified that, in the context of a rural water district that borrows money from the federal government, “the [state] constitutional prohibition could not be evaded by entering into a contract with the Farmers Home Administration.” *Id.* In *Coppage*, the

Oklahoma Supreme Court limited the protection offered by a state statute that is similar to Section 1926(b), providing that the state statute could only protect water sales to *existing* customers of the rural water district. Otherwise, the state statute would violate the Oklahoma Constitution. The federal protection associated with Section 1926(b) is far broader than the protection authorized by *Coppage*, and, as a result, is violative of the Oklahoma Constitution. According to Tenth Circuit decisions, the federal protection applies to the rural water district's territory – its “service area” as defined by the “made service available” test. The “service area” is not limited to actual existing customers of the rural water district. As a result, the Oklahoma statute that purportedly authorizes a rural water district to borrow federal money and thereby invoke federal Section 1926(b) protection is unconstitutional under the Oklahoma Constitution, the *Comanche County* decision, and the *Coppage* decision.

D. The USDA is not a necessary party and therefore cannot be indispensable.

The District claims that the USDA is necessary and indispensable party to the current action. [Notice of Removal, at p. 2] Federal Rule of Civil Procedure Rule 19 governs compulsory party joinder. *See, generally, Angst v. Royal Maccabes Life Ins. Co.*, 77 F.3d 701 (3rd Cir. 1996). The determination of whether an absentee is necessary is governed by a two-step analysis under Federal Rules of Civil Procedure, Rule 19(a).

Rule 19(a) requires the joinder of a party who is subject to service of process and within the court's subject matter jurisdiction when: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede that person's ability to protect that interest or (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a)(1) and (2). Because the USDA is not a necessary party under 19(a), there is no need to determine whether they are indispensable under 19(b). In other words, “[b]ecause the threshold requirements of Rule 19(a) have not been satisfied” there is no need to make an inquiry under Rule 19(b) as to indispensability. *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 8 (1991).

The first requirement under Rule 19(a) is for the court to “consider whether complete relief can be accorded *among those who are already parties.*” *Angst*, 77 F.3d at 705 (emphasis added). Essential to an understanding of this prong of the test is the rule that “[c]ompleteness is determined on the basis of those persons *who are already parties* and not as between a party and the absent person whose joinder is sought.” *Id.* (citation omitted) (emphasis added). As such, this prong of the test applies to the Plaintiffs and Defendant in this action, and not the USDA. Complete relief is available to Elk City under the state action in the nature of quo warranto. Additionally, complete relief is afforded to the District because the District’s obligations to the USDA will not change. The District has always and will continue to have one obligation – that is to repay the USDA loan. The District should not be allowed to escape this obligation even though the loans that it entered are void under Oklahoma law. The remedy of quo warranto will assist the State of Oklahoma in resolving the District’s unlawful actions, by replacing the governance of the District and taking appropriate action to repay and thus eliminate the unlawful loans.

The second part of Rule 19(a) analysis deals with meaningful relief afforded to both the absentee and the parties to the suit. This prong of the test involves a 2-part analysis with the first part of the analysis identifying whether failure to join as a “practical matter [may] impair or impede [the absentee’s] ability to protect that interest.” Fed. R. Civ. P. 19(a)(2)(i). According to *Sierra Club v. Watt*, “because the court must address the question of whether as a ‘practical

matter' these interests will be effective,... some further refinement of what interests exist is required." 608 F.Supp. 305, 321 (E.D. Ca. 1985).

The USDA's interest in this action is the District's obligation to repay the loans issued pursuant to 7 U.S.C. § 1926. A declaration that these contracts are void will not affect the USDA's right to repayment of the funds loaned to the District. If anything, the relief of quo warranto will speed the repayment of any obligations owed to the USDA, by enabling the State of Oklahoma to rectify the illegal actions by the District. Here, the USDA was assured by the District and the District's attorneys that the District held the authority that it claimed to have. The inaccuracy of these representations and the value conveyed by the USDA to the District will result in ample legal theories through which the USDA can recover complete relief against the District and those enabling its illegal conduct.

The USDA and the federal government should have no interest in insisting upon a violation of the State's rights. The USDA's interest in this suit is nothing more than its ability to be repaid under the § 1926(b) contracts. A determination that these contracts are void should not result in the USDA's inability to recoup the funds illegally obtained by the District. As such, a final determination in the state court proceeding without the entry of the USDA will not be at all inconsistent with equity and good conscience.

The last step in a Rule 19(a) analysis is to determine if the absence of the USDA will "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Fed. R. Civ. P. 19(a)(2). This inquiry focuses on whether the parties to the suit, namely the District and the Elk City Plaintiffs, will be held to multiple, inconsistent, or double obligations. "Subdivision (a)(2)(ii) is primarily aimed at protecting parties before the court." *Sindia Expedition, Inc. v.*

Wrecked & Abandoned Vessel, 895 F.2d 116, 121 (3rd Cir. 1990) (citing Moore’s Federal Practice ¶ 1901-[2.2], at 111 (2d Ed. 1989)). Additionally, the risk posed to the current parties must be “substantial” and not simply a possible risk. *Sindia*, 895 F.2d at 122. Important to note is the fact that the “substantial risk of harm” element applies to the party’s *obligations*, which are anticipated to be the result of the action. Here, the District’s obligations remain the same. The District is obligated to repay the USDA for these loans regardless of whether they are upheld as constitutional and proper by the state court. The theory of recovery available to the USDA might change, if it is found that the District has entered into an illegal loan. But the District’s obligations are not double, multiple, or inconsistent, but rather merely remain the same. As such, the USDA is not a necessary party to the present state action.

“It is a misapplication of Rule 19(a) to add parties who are neither necessary nor indispensable, who are not essential for just adjudication and who have a separate cause of action entirely.” *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982) (citing *Lachemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 601 (D. Del. 1971)). The court in *Bakia* is clear in stating that “Rule 19(b) considerations come into play only after analysis of the factors in Rule 19(a).” 687 F.2d at 301. Because Defendants cannot meet the threshold requirements under 19(a), Defendant’s petition for removal should not be granted on the grounds that the USDA is a necessary and indispensable party.

E. This action is not subject to removal under 28 U.S.C. § 1442.

Defendants have removed this action based on 28 U.S.C. § 1442. [Notice of Removal, at p. 2.] Removal of this action under 28 U.S.C. § 1442 is not proper. 28 U.S.C. § 1442 states, in pertinent part:

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the

United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

28 U.S.C. § 1442 (1948). Clearly subsections (a) (2-4) do not apply in this instance since (1) a state action in the nature of quo warranto does not affect the “validity of any law of the United States.” 28 U.S.C. § 1442(a)(2). The USDA is not an “officer of the courts of the United States.” *Id.* § 1442(a)(3). The USDA is not an “officer of either House of Congress.” *Id.* § 1442(a)(4).

Moreover, subsection (b) does not apply since the USDA is not “a civil officer of the United States ... a nonresident of [Oklahoma], wherein jurisdiction [was] obtained by the State court by personal service of process.” *Id.* § 1442(b). The USDA has not even been named as a party to this suit, and certainly has not been served.

This analysis leaves the possibility that 28 U.S.C. § 1442(a)(1), might subject this action to federal removal. However, this would be erroneous since the USDA is not being sued “for any act under color of title, or on account of any right, title, or authority claimed under any Act

of Congress for the apprehension or punishment of criminals or the collection of the revenue.” *Id.* § 1442(a)(1) (emphasis added). The USDA is not being sued, nor is the validity of the federal statute whereby defendant originally gained their loans, being questioned or subject to interpretation. The USDA is not a necessary party to this suit, nor is the action subject to removal jurisdiction based on 28 U.S.C. § 1442.

F. Remand of this case is appropriate in light of the abstention doctrine.

This case should be remanded to the District Court for Beckham County based on the doctrine of abstention. The federal courts have held that one “possible source for discretionary remand is the abstention doctrine.” *IMFC Professional Services of Fl., Inc. v. Schweiker*, 676 F.2d 152 (5th Cir. 1980). Additionally, “[t]he Tenth Circuit has reversed a district court for not abstaining and remanding a removal case.” *Todd v. Richmond*, 844 F.Supp. 1422, 1426 (D. Kan. 1994) (citing *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 700, 706 (10th Cir. 1988)).

Because abstention is proper grounds for removal and this case presents a situation wherein exercise of the abstention doctrine is appropriate, the District Court should remand the case back to The District Court for Beckham County. The *Pullman* abstention doctrine is most appropriate in this situation, when there is an issue of state law which is unclear, and deference to the state court adjudication of that matter would circumvent the necessity of federal interpretation. See e.g. *Railroad Commission of Texas. et al. v. Pullman Co.*, 312 U.S. 496 (1941). “Few public interests have a higher claim upon the discretion of a federal [court] that the avoidance of needless friction with state policies.” *Id.* This case squarely implicates the authority of the Oklahoma courts and the Oklahoma Constitution. A decision by a state court interpreting the state law at issue in this case will eliminate the need for a federal interpretation of the matter. “The possibility that the case could be disposed of on non-federal grounds,” supports a decision to remand the case back to state court. *Naylor v. Case & McGrath, Inc.*, 585

F.2d 557, 564 (2nd Cir. 1978). This case necessitates disposition on state law grounds because it involves the interpretation of an Oklahoma state statute under the Oklahoma state Constitution.

Abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary ‘which might avoid in whole or in part the necessity for federal constitutional adjudication, *or at least materially change the nature of the problem.*

Id.

Here, the Plaintiffs suggest that the interpretation of Oklahoma state law is quite clear in holding that the District’s USDA loans are illegal under the Oklahoma constitution. But the District disputes this issue. Rather than adjudicating the correct interpretation of a state law, under the state constitution, the federal court should remand this case so that the state courts may resolve these state-law questions. If the state courts resolve these issues in favor of the District, then the District’s Section 1926(b) claims would be allowed to proceed in federal court. Indeed, the District has already filed an action in federal court, seeking to enforce its Section 1926(b) claims. Thus, a ruling by the proper judiciary with the appropriate authority, will *materially change the nature of the problem.*

In addition,

[a]bstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.

Colorado River Water Conservation District et al. v. U.S., 424 U.S. 800, 814 (1976). The public’s interest in stopping the violation of state law, and having Oklahoma state laws be interpreted by the state, is of utmost importance, and transcends any interest of the federal courts. “[N]o matter how seasoned the judgment of the district court may be, it[s] [decision] can not escape being a forecast rather than a determination.” Therefore, this case should be remanded back to the state court for adjudication. *Pullman*, 312 U.S. at 499.

Furthermore,

[a]bstention in favor of state court adjudication is sound judicial administration where, as here, it can increase the assurance that all those affected by the statute in question, including the parties to this action, will be given the benefit of an authoritative and uniform rule of law applied alike to all businesses and grievants.

Naylor, v. Case & McGrath, Inc., 585 F.2d 557, 565 (2nd Cir. 1978). The District, the Plaintiffs, and all of those public agencies in Oklahoma who have similar concerns, should be allowed to receive the benefit of an authoritative and uniform rule of law applied alike to all concerned. Allowing the state to decide the constitutionality of Okla. Stat. tit. 82 § 1324.10, will afford all in the state the benefit of a uniform rule of law, and a clear and equal application in all counties throughout the state. “It is well for federal courts to remember that in such a case as the present one a federal court can only try to ascertain state law.” *Naylor*, 585 F.2d at 565. It is the state which must determine whether Okla. Stat. tit. 82 § 1324.10 is constitutional. “[A]bstention can be exercised through remand, assuring an adjudication of the state law issues in the pending action without risk of delay. That is the indicated course where, as here, the state law is uncertain and its resolution a matter of concern to the state.” *Naylor*, 585 F.2d at 565.

G. If the Court finds that removal was proper and that abstention does not require remand, the Plaintiffs respectfully urge the Court to certify the question regarding the constitutionality of Okla. Stat. tit. 82 § 1324.10 to the Oklahoma Supreme Court.

Certification to the state supreme court by a court of the United States is appropriate under Okla. Stat. tit. 20 § 1602, which grants the Oklahoma Supreme Court the power to “answer a question of law certified to it by a court of the United States.” Okla. Stat. tit. 20 § 1602. Additionally, this is the correct procedure for reference of state law questions by the federal courts when abstention may not be warranted. “Certification is a means of getting authoritative answers to state law questions in situations in which Pullman-type abstention calls for them.” Wright, Miller, & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 4248, p.158 (2nd

ed. 1988). The U.S. Supreme Court, in *Bellotti v. Baird*, stated that “[i]n the absence of an authoritative construction [of the state statute], it is impossible to define precisely the constitutional question presented.” 428 U.S. 132, 147 (1976). The *Bellotti* Court held that “the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of” the state statute. *Id.* at 151. If there is a state statute allowing for the answering of certified questions, as there is in Oklahoma, “[t]hat path is open to this Court and to any court of appeals of the United States.” *Lehman Brothers v. Schein, Investors Diversified Services, Inc.*, 416 U.S. 386, 390 (1974). As such, the United States District Court for the Western District of Oklahoma, if it decides to not abstain from this issue, should certify the constitutionality of Okla. Stat. tit. 82 § 1324.10 to the Oklahoma Supreme Court for a decision which would substantially aid this court in its determination of the issues.

The Plaintiffs have filed, contemporaneously herewith, a separate motion to certify the state law questions. The separate motion to certify is submitted as an alternative motion, to be addressed if this Motion to Remand is overruled.

CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that this action be remanded to the District Court of Beckham County, State of Oklahoma for adjudication.

Respectfully submitted,

/s/ James C. Milton

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2006, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Steven M. Harris, Esq.
Michael D. Davis, Esq.
John N. Goodman

/s/ James C. Milton _____

James C. Milton