IN THE DISTRICT COURT OF MURRAY COUNTY
STATE OF OKLAHOMA

JOE MINYEN, et al.,	)	
Plaintiffs,	)	
vs.	)	Case No. CJ-06-67
	)	
STONE RIVER ENERGY, INC.,	)	
	)	
Defendant.	)	

FILED
NOV 08 2007
JO FREEMAN, Court Clerk
By ____________ Deputy

PLAINTIFFS' AMENDED MOTION FOR PERMANENT INJUNCTIVE RELIEF, REQUEST FOR HEARING, AND BRIEF IN SUPPORT

COME NOW the Plaintiffs, by and through their attorney of record, Trae Gray and hereby move this Court pursuant to 12 O.S. § 1381, *et seq*. and 50 O.S. §§ 8 & 13, to order the Defendant, Stone River Energy, Inc., to remove its oil field waste from their property and to cease the continuing trespass and nuisance that the Defendant is causing. In support of this motion the Plaintiffs would show the Court the following:

INTRODUCTION

The Defendant operates two oil wells and a saltwater disposal well that are a part of what the company calls the "Miller Production Facility." One of these wells is located on the Plaintiffs' property, and the other well is immediately adjacent. The two wells are connected together by flow lines, and all the saltwater from both wells are supposed to be disposed of in a disposal well on the Plaintiffs' property.[1]

Together, these three wells and the Defendant's operation of them, has caused a great deal of saltwater and oil pollution of the surface and shallow subsurface on the

---

[1] Plaintiffs purchased the property in October 2005. The property is comprised of 20 acres, a pond, and a residence the Plaintiffs built near to the time they purchased the property.

Plaintiffs' property. And, the Defendant operates two open pits, which together with the surface locations contain salt water, oil, ethylbenzene, toluene, xylene, gasoline range organics and diesel range organics and runoff. See Exhibit D. The pits and operation of the wells with their release of uncontrolled sources of hazardous substance containing oil and saltwater pose a serious hazard to the Plaintiffs, other persons, their pets, livestock, and other animals. Further, the Defendant's operation of these pits and their release of salt water causes erosion which creates gullies and unsightly areas of land that will not grow grass.

The Plaintiffs' desire to have the Defendant's pollutants removed is not a matter of convenience. The Defendant's pollutants cause a significant threat to the Plaintiffs' health and well being. According to the United States Department of Health and Human Services, "the International Agency for Research on Cancer (IARC) has determined that long-term exposure to ethylbenzene may cause cancer in humans." See Exhibit A.

Xylene was also present on the Plaintiffs' property. It occurs naturally in Petroleum. **See** Exhibit B at 1. The United States Department of Health and Human Services states, in relation to the health effects of xylene:

> Short term exposure of people to high levels of xylene can cause irritation of the skin, eyes, nose, and throat; difficulty in breathing; impaired function of the lungs; delayed response to a visual stimulus; impaired memory; stomach discomfort; and possible changes in the liver and kidneys. Both short- and long-term exposure to high concentrations of xylene can also cause a number of effects on the nervous system, such as headaches, lack of muscle coordination, dizziness, confusion, and changes in one's sense of balance. **Some people exposed to very high levels of xylene for a short period of time have died.**

See Exhibit B at 4 (emphasis added).

Toluene, which was also found to be in the Defendant's wastes on the Plaintiffs' property, has the following health effects:

> Toluene may affect the nervous system. Low to moderate levels can cause tiredness, confusion, weakness, drunken-type actions, memory loss, nausea, loss of appetite, and hearing and color vision loss. These symptoms usually disappear when exposure is stopped.
>
> Inhaling high levels of toluene in a short time can make you feel light-headed, dizzy, or sleepy. It can also cause unconsciousness, and even death.
>
> High levels of toluene may affect your kidneys.

See Exhibit C at 1-2.

While Benzene was not found at the site, it is usually part of crude oils, and is usually found in combination with ethylbenzene, xylene, and tolune. In fact, the presence of benzene in brine produced from dry holes is used by the oil and gas industry as an indicator of the proximity of petroleum deposits (See Exhibit D-1). Classically, the combination of these four hazardous substances (benzene, toluene, ethylbenzne and xylenes) is called "BTEX." Benzene "volatilizes" – escapes to the air – more quickly than the other components of BTEX. To the extent the Defendants released benzene on the Plaintiffs' property, and same is very likely from the data now known, the National Cancer Institute proved that "white blood cell counts were lowered in workers exposed to less than 1 [part per million] ppm of the chemical benzene." See Exhibit C-1. While the Plaintiffs are not yet aware of any harmful result to them or their animals from this pollution, it is a very real threat of harm and it is very serious.

The Plaintiffs have offered informally to resolve this matter with Defendants. Prior to and during this litigation, the Plaintiffs asked the Defendant to clean up the spills they could see, but the Defendant has refused to meet the Plaintiff's requests. As a result, the Plaintiffs made a number of citizen complaints to various state and federal agencies.

These agencies inspected the facility on at least eleven different occasions since the fall of 2005 and the majority of these inspections show that violations existed.

These agencies requested the Defendant to take various remedial action, including in 2005 "to repair all facility leaks," to "dig up and remove oil from past working pit by disposal well." This summer, two years later, the same agency was still asking the Defendant to "tighten all connections at wellhead to prevent leaks (well currently leaking)," to "close trench south of tank battery and restore vegetative growth," to "fix leaking circulating pump located at tank battery," to "close reserve pit east of Bullard #2, level to grade and restore vegetative growth, to "restore vegetative growth to bare area north of reserve pit," and to "remove all oil field trash and debris located in and around this site."

Beyond their refusal to stop their trespass as the Plaintiffs requested, the Defendant has failed to comply with the various recommendations made by the agencies. Under Oklahoma law, the Plaintiffs are entitled to an injunction, requiring the Defendant to remove the pollutants and to cease the trespass and unreasonable interference they are causing to the Plaintiffs' property. See, e.g., Angier v. Mathews Exploration Corp., 1995 OK CIV APP 109, 905 P.2d 826, 830.

Perhaps most egregiously, the Defendant denies having released these pollutants onto the Plaintiffs property. The Defendant has stated to Plaintiffs and others that the pollution is simply not their fault or responsibility, arguing that the pollution is all "historic." Even if this were the case, the Defendant's argument is legally insufficient, because every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefore in the

same manner as the one who first created it. See, Union Texas Petroleum Corp. v. Jackson., Okla. App. 1995, 909 P.2d 131. Further, in the same matter the Oklahoma Corporation Commission found, in Order No. 372735: *liability for pollution would be assessed for two reasons: first, because pollution of the treatable water zones within the Application Area resulted from violations of Commission rules which prohibit pollution and require operators to maintain pollution-free facilities; and second, liability may be imposed upon the purchaser of contaminated property where a) the buyer takes over oil and gas operations and b) a violation of a Commission rule is occurring after the sale. Thus, liability is predicated in both instances on the existence of a rule violation.*

Here, there is clear and unambiguous evidence that shows the Defendant's own operations are causing the pollution. See Exhibits E, F, G, H, I, J, K, L, M, N, and Exhibit D the test results from July 18, 2007. Recent testing shows that there are significant quantities of Defendant's pollutants spread on and under more than 2 acres of the Plaintiffs' property.

Permanent injunctive relief will assist in alleviating the harm to Plaintiffs' property, and the risk to their health. Plaintiffs specifically request that Stone River Energy, Inc. be required to remove the pollutants they have spread on Plaintiffs' property in accordance with widely accepted practices, and with oversight and supervision from a reputable environmental professional. The Plaintiffs maintain that permanent injunctive relief can be granted while preserving the rights of not only the Plaintiffs but as well as the Defendant. This can be achieved by prohibiting a continued nuisance, continued hazardous environmental activities, continual unjust enrichment, and a continual trespass beyond what is reasonable and necessary for the extraction of the mineral estate. While

the Plaintiffs are requesting that the court order the clean up of the contaminated areas of the site, the Plaintiffs are not requesting that the Defendant cease its operations, provided that the Defendant remediates the contaminated areas promptly and in accordance with widely accepted industry practices.

FACTUAL BACKGROUND

The following comprises a chronological recitation of the facts relevant to this dispute that Plaintiffs will prove, among others, at trial on this motion for permanent injunction:

1. On 7/18/07 Dr. J. Berton Fisher and his staff conducted a site assessment and performed sampling at the Plaintiffs' property. The results of this sampling show that there are significant quantities of oil, benzene, and salt water on Plaintiffs' property, and that Defendants' pollution is continuing to trespass and interferes with Plaintiffs' use of their property. See Exhibit D.

2. On 5/31/07 Charles Lord, the program manager with underground injection control program for the Oklahoma Corporation Commission directed a letter to the Defendant in connection with an inspection he conducted at the facility on 5/17/07. Mr. Lord's letter requested the Defendant to "bring your lease into compliance" by taking the following actions by or before 7/8/07:

   a. Remove a house trailer Defendants were living in at the facility;
   b. Put pressure gauge on tubing at wellhead;
   c. Tighten all connections at wellhead to prevent leaks (well currently leaking);
   d. Close trench south of tank battery and restore vegetative growth;
   e. Fix leaking circulating pump located at tank battery;
   f. Close reserve pit east of Bullard #2, level to grade and restore vegetative growth;
   g. Restore vegetative growth to bare area north of reserve pit; and
   h. Remove all oil field trash and debris located in and around this site.

   See Exhibit E.

3. On 3/14/07 the OCC sent Defendants a "Notice of Report of Investigation" which made the following findings and recommendations:

a. Findings: Saltwater seeping at south side of tank battery. Water field tested at 8100 parts per million (ppm) total dissolved solids (tds). The water in the two unclosed pits have elevated TDS readings.

b. Recommendations: The Fisher and Miller Leases are to be shut down. Operator to locate source of seep as well as fix all drips at valves and connections at tank battery and well sites. Operator to comply with rule 165: 10-7-5 & 165: 10-3-29.

See Exhibit F.

4. Also on 3/14/07 the OCC sent Defendants a "Notice of Report of Investigation" which made the following findings and recommendations:

a. Findings: Need Proper markings on tanks per rule 165: 10-3-17 (F). Need to remove from location old shed and trash and debris in shed.

b. Recommendations: Pick up all yellow tank insulation that is on location. Remove old cable and belts protruding from berm of tank battery. Remove joint of tubing adjacent to disposal well. Remove sucker rods, thread protectors and cement pad to comply with Rule 165: 10-3-17 (C). Lock hatches at tanks or place "Do Not Open Danger" sign at tank hatches per state statute. Proper sign needed at disposal well per rule 165: 10-3-17 (D).

See Exhibit G.

5. On 3/11/07 the OCC "red tagged" and shut down the defendants facility because of ongoing pollution and ongoing releases of saltwater.

See Exhibit H.

6. On 12/26/06 the OCC sent the Defendant a "Notice Of Report Of Investigation," making the following findings and recommendations:

a. Findings: 12-23-06 Heater treater malfunctioned causing spray of oil to discharge through vent line. Oil spray covered area 120' X 40' in pasture.

b. Recommendations: Operator will cut oily grass from pasture and bag. Once this is done area will be evaluated for remediation.

See Exhibit I.

7. On 9/11/06 the OCC sent the Defendant a "Notice Of Report Of Investigation," making the following findings and recommendations:

a. Findings: Oil on wellhead and gravel coming from load barrel for chemical treatment, packing leaking on injection pump and drain pan full, trans pump packing leaking and drain pan full. Separator leaking at bottom (not in use) oil on top of tank from transferring fluid back from the disposal well.

b. Recommendations: Operator needs to clean wellhead and ground cover each time chemical treatment performed. Injection Pump needs to be replaced and maintained to stop water accumulation to drain pan. Operator should install sump pump in pan to rid of accumulated water. Transfer pump needs to be repacked and maintained with sump pump added in drain pan. Separator needs to be cleaned out and repaired or replaced. Oil on top of tank too small of amount to require attention at this time.

See Exhibit J.

8. On 5/16/06 the OCC sent the Defendant a "Notice Of Report Of Investigation," making the following findings and recommendations:

a. Findings: Saltwater seeping from bank down gradient from disposal well. Oil coming to surface from underground source. 90' X 30' Area from previous spill needs more remediation and revegetation.

b. Recommendations: OCC will meet with operator to find solutions for pollution.

See Exhibit K.

On 3/29/06 the Plaintiffs filed their Petition[2]

9. On 3/21/06 the State of Oklahoma Construction Industries Board sent the Defendant a letter with a "Notice of Violation and Order to Correct"

See Exhibit O.

10. On 10/7/05 the OCC sent the Defendant a "Notice Of Report Of Investigation," making the following findings and recommendations:

---

[2] At the date of the filing of the petition, the matter had never been referred to the OCC legal department as recommended in the 10/7/05 Notice of Report of Investigation. Further, on 5/31/07 when Charles Lord directed a letter to the Defendants, 19 months after the filing of the petition, the lease still had not been brought into compliance.

a. Findings: Operator has removed unused equipment from the pasture and posted signs. No visual effort has been made to close/cover pit or install 30 mil liner and permit, dig up and remove oil from old working pit or begin remediation work on area south of tank battery.

b. Recommendations: File Formal Complaint. Incident will be referred to OCC legal department on 11-7-05 if lease not brought into compliance.

See Exhibit L.

11. On 9/13/05 the OCC sent the Defendant a "Notice Of Report Of Investigation," making the following findings and recommendations:

a. Findings: On 9-6-05 OCC conducted a site inspection. Leak allowed an undetermined amount of oil to escape into tank dykes then seeping out into pasture area. Oil seeped through dykes across fence line on the Minyen Property covering a 20' X 6' area.

b. Recommendations: Operator is instructed to cleanup and remediate leak area.

See Exhibit M.

12. On 9/8/05 the OCC sent the Defendant a "Notice Of Report Of Investigation, making the following recommendations:

On 8-30-05 the OCC conducted an onsite inspection. Operator needs to repair all facility leaks, fill in low area by salt water tank or construct pit with proper liner and permit. Defendant should dig up and remove oil from past working pit by disposal well; oil currently leaching to the surface. Defendant should remediate dead area south of tank battery back to grass. Defendant should remove unused equipment from pasture and should post proper lease signs.

See Exhibit N.

13. On 9/4/05 an oil spill occurred. The polluted soil was never removed, but was only covered up with fill dirt. OCC Complaint #185060G030826 states that polluted soil should be completely removed.

<u>On 8/21/05 the Minyen's contract for the purchase of the property</u>

ARGUMENT

Plaintiffs maintain that for over two years the Defendant has improperly engaged in oilfield operations and has failed to remediate their own contamination and any prior

contamination. The contamination threatens the health, safety, welfare, quiet enjoyment, and exclusive possession of the Plaintiffs' properties. Such acts amount to a continuing nuisance and trespass under Oklahoma law and remediation should be ordered to preserve the Plaintiffs' property rights. In order to prevail on this motion, Plaintiffs will show at trial or hearing that:

(i) Plaintiffs are likely to be successful on the merits of their trespass and nuisance claims;

(ii) Under Oklahoma law, and in application to the facts of this case, the Plaintiffs have suffered and are suffering irreparable injury. In dealing with a continuing nuisance or continuing trespass Oklahoma law provides that money alone cannot compensate the Plaintiffs' future losses that would occur absent an order requiring the Defendant to remove their pollutants that cause a continuing trespass.

(iii) An analysis of the balance of the harm shows that the harm is greater to Plaintiffs because an injunction would only require the Defendant to do what the law otherwise requires, and because an injunction would only restore the Plaintiffs to the use of their property to which they are already entitled. Moreover, a reasonable injunction ordering the clean up will not prevent the Defendants from operating their facilities.

(iv) Public policy concerns favor Plaintiffs' request for protection of their exclusive right of possession of their properties free from contamination.

I. Final Injunctive Relief Should Be Issued

A. Continuing Trespasses Will Be Enjoined

Where a trespasser persists in trespassing upon another's land and threatens to continue the wrongful invasion of the premises, equity will enjoin such continuing

trespass. Angier v. Mathews Exploration Corp., 1995 OK CIV APP 109, 905 P.2d 826, 830 citing Fairlawn Cemetery Association v. First Presbyterian Church, U.S.A. of Oklahoma City, 1972 OK 66, 496 P.2d 1185, 1187 (Okla.1972); Harrison v. Perry, 1969 OK 99, 456 P.2d 512 (Okla.1969). This is so even though the trespasser is able to respond financially in damages "for in such cases the party in possession has no adequate remedy at law". Harrison, at 516. Moreover, continuing trespasses and nuisances are enjoined because it is the Plaintiffs' "exclusive possession" of their land which is invaded. Angier at 830. Stated another way, where a trespasser persists in trespassing upon real estate in the possession of another, and threatens to continue his wrongful invasion of the premises, equity will restrain such trespass, although the trespasser may be solvent and financially able to respond in damages, for in such cases the party in possession has no adequate remedy at law. In Angier the Court held that a permanent injunction should have been granted even though damages could compensate the plaintiffs because the trespass was threatened as a continuing trespass to the exclusive possession by plaintiff of her property.

Although Angier admitted in that case that damages were sufficient to compensate her for that portion of the road which was wrongfully located, she insisted that money damages could not compensate her for the continuing trespass, Mathews' unauthorized use of the road. The Court of Civil Appeals agreed. Angier at 830. The Court stated that "It is [Angier's] interest in the exclusive possession of her land which has been invaded by Mathews' use of the wrongfully-placed portion of the road. The trial court erred in denying Angier's request for a permanent injunction against Mathews...." Angier at 830.

Saltwater contamination is considered a nuisance under Oklahoma Law. **Saltwater contamination from oil and gas operations occurring from violations of Commission rules are referred to as nuisances.** Texaco, Inc. v. Berry Petroleum Corporation, 869 F. Supp. 1523 (W.D. Okla. 1994). The Oklahoma Supreme Court has specifically acknowledged a Plaintiff's right to sue for an injunction to abate an environmental pollution nuisance or trespass, or to obtain damages and to seek disgorgement of wrongfully retained profits or savings that are the unjust enrichment of the tortfeasor. See N.C. Corff Partnership, Ltd. v. OXY USA, Inc., 1996 OK CIV APP 92, 929 P.2d 288; see also MM Resources, Inc. v. A.L. Huston, 1985 OK 102 ¶ 12, 710 P.2d 763. Further, the proper forum for a landowner to recover damages for nuisance caused by encroaching saltwater is in district court. Greyhound leasing & Financial Corp. v. Joyner City Unit, 444 F.2d 439 (10th Cir. 1971); Harper-Turner Oil Co. v. Bridge, 331 P.2d 947 (Okla. 1957).

With regard to Plaintiffs' nuisance claims, Plaintiffs are entitled to abatement. See Sheridan Oil Co. v. Wall, 1940 OK 225,103 P.2d 507, 510; Tenneco Oil Co. v. Allen, 1973 OK 129, 515 P.2d 1391, 1392. Either a mandatory injunction can issue, requiring the defendant to abate the nuisance, or plaintiff can be awarded the costs of abatement. Sheridan, 103 P.2d at 510; see also, Miller v. Cudahy Co., 858 F.2d 1449, 1456-7 (10th Cir. 1988). This rule is predicated upon the defendant's ability and duty to abate the existing conditions that cause the nuisance. Id.

Oklahoma statutes also provide that nuisances are abatable. 50 O.S. § 8 (Remedies against a public nuisance, (1) indictment, (2) a civil action (3) abatement); 50 O.S. §13 (Remedies against a private nuisance are: (1) a civil action; or, (2) abatement).

Generally, courts of equity have power to give relief against either public or private nuisances by compelling abatement or restraining the continuance of an existing nuisance or enjoining the commission or establishment of a contemplated nuisance. Simons v. Fahnestock, 1938 OK 264, 78 P.2d 388 (an injunction may be granted to abate a nuisance). An injunction may be granted to enjoin and suppress the keeping and maintaining of a common nuisance. McNulty v. State, 1923 OK 509, 217 P. 467.

II. Plaintiffs Have Met the Requirements for an Injunction

There are four criteria that courts are to consider to determine whether or not to grant the injunctive relief requested in this matter. "(A) the applicant's likelihood of success on the merits, (B) irreparable harm to the party seeking relief if injunctive relief is denied, (C) relative effect on the other interested parties, and (D) public policy concerns arising out of the issuance of injunctive relief." Tulsa Order of Police Lodge v. City of Tulsa, 2001 OK CIV APP 153, 39 P.3d 152, 158 quoting Thayne Hedges Regional Speech & Hearing Ctr, Inc. v. Baughman, 1998 OK CIV APP 122, 996 P.2d 939, 941.

A. Plaintiffs' Likelihood of Success on the Merits

Here, the Defendant has a Spill Prevention, Control, and Countermeasure Plan (SPCC) that has not been followed. The SPCC plan is attached as Exhibit P. On page 2 of the plan in the Introduction, the plan states that its purpose is to prevent discharges from occurring, and to prepare Stone River Energy to respond in a safe, effective, and timely manner to mitigate the impacts of a discharge from the Miller Production Facility. On page 3, the Chief Operating Officer signed the plan and is designated as the person

accountable for the implementation of the plan. The plan requires the OCC to be notified by the **Operator** when there is a discharge of oil, condensate, saltwater, or drilling mud.

Here, the evidence will show that Stone River Energy failed to follow their own plan. The field reports of the OCC, testimony of the Plaintiffs, and expert testimony will show that the Defendant has continually discarded pollutants onto the Minyen's property over the past two years. Further, the evidence will show that the Plaintiffs were the parties that notified the OCC because the Chief Operating Officer and other agents of the Defendant consistently denied any discharges and did not follow their own SPCC plan.

Throughout the litigation, the Defendant has consistently taken the position that there is no proof that the Defendant's operations have caused any harm. The attached exhibits from the OCC reports will show that is not the case. This evidence will show a trespass and under Angier the Defendants are required to remove the pollutants, cease the trespass, and prevent the interference they are causing to Plaintiffs' property. Even if the allegations that the pollution was historic were true, Union Texas Petroleum Corp. v. Jackson requires every successive owner of property who neglects to abate a continuing nuisance to be liable in the same manner as the one who first created it. Therefore, Oklahoma Law requires an operator to abate any present nuisances prior to operating a facility. Here, the evidence will not only show the operator has failed to abate the nuisance, the evidence will further show the operator has continued to pollute.

Based on the site assessment conducted by Dr. Fisher on July 18, 2007, the Defendant has not conducted the actions c-h as listed in Exhibit D. These were to be done by July 8, 2007 prior to Dr. Fisher's site visit. The Oklahoma Corporation Commission has made numerous requests for this site to be operated properly as is

evidenced by Exhibits E, F, G, H, I, J, K, L, M, and N. Further, these exhibits will show that the OCC found liability and recommended cleanup, which the defendant has either not done or has done inadequately. Dr. Fisher will further testify about the test results (See Exhibit D). These tests were also taken on Dr. Fisher's July 18th site assessment. These tests will show the presence of current and historic contamination on the site. This contamination includes, but is not limited to, the discharge of saltwater, the discharge of oil, and the discharge of benzene. Dr. Fisher will testify about the Defendant's failure to follow its own SPCC plan, failure to comply with the laws of the State of Oklahoma, and the damage that has occurred to the Plaintiffs' property from the Defendant's operations.

The Minyens live on the property. They continue to witness the Defendant's discharges. The Minyens have made numerous contacts with the Defendant concerning its polluting. The Defendant has taken the position that the requests to stop polluting constitute harassment. The Minyens will also testify about their contacts with the OCC. The evidence will show that the Minyens have made numerous efforts to get the Defendant to stop polluting and to clean up the site prior to asking this court for injunctive relief. The Defendant has continually denied any wrongdoing.

When you couple the attached exhibits, the Minyens' testimony, and the testimony of Dr. Fisher, it will be apparent that the Plaintiffs will prevail on their claims for trespass, nuisance, negligence, environmental destruction to their property, and the loss of quiet enjoyment, discomfort, annoyance, fear and anxiety that the Defendant has caused.

B. Injury is Irreparable if it is Difficult to Measure

Oklahoma law provides that "[i]njury is irreparable when it is incapable of being fully compensated by money damages, **or where the measure of damages is so speculative that arriving at an amount of damages would be difficult or impossible**." Tulsa Order of Police Lodge v. Tulsa, 2001 OK CIV APP 153, 39 P.3d 152, 158 quoting House of Sight and Sound, Inc. v. Faulkner, 1995 OK CIV APP 112, 912 P.2d 357, 361; *See also*, *Angier*, 905 P.2d at 830 citing Manuel v. Oklahoma City University, 1992 OK CIV APP 73, 833 P.2d 288 (money damages cannot compensate for a continuing trespass). The law is clear, irreparable does not mean without measure. Irreparable simply means that a damage calculation is difficult to measure. Moreover, in dealing with a continuing nuisance or continuing trespass Oklahoma law provides that money cannot compensate to protect the probable loss of the right of "exclusive possession." Moreover, even where damages are compensable continuing trespasses should be enjoined. Here, Plaintiffs maintain that the damage calculation for the contamination and their annoyance, loss of quiet enjoyment and discomfort is both difficult to measure and irreparable.

1. Irreparable Harm Exists in this Case for the Plaintiffs' Discomfort, Annoyance and for the significant risks they would be exposed to if the injunction is not granted.

Plaintiffs are entitled to recover for their annoyance and inconvenience related to the defendants torts. Personal annoyance and discomfort to a property owner caused by the maintenance of a nuisance or trespass is a separate and distinct element of damages and is a personal injury. Thompson v. Andover Oil Company, 1984 OK CIV APP 51, 691 P.2d 77; Nichols v. Mid-Continent Pipe Line Co., 1996 OK 118, 933 P.2d 272. In *Nichols*, the Oklahoma Supreme Court held, We adopt today the national common-law

norms found in the Restatement (Second) of Torts § 821D as harmonious with this State's extant jurisprudence. Both clearly allow a private nuisance claimant to recover for personal harm, inconvenience and annoyance incidental to another's interference with the possessory interest in land. Nichols, 1996 OK 118, ¶ 11 (emphasis added); *see also,* Ward Petroleum Corp. v. Stewart, 2003 OK 11, ¶ 5, 64 P.3d 1113, 1117 (dissenting opinion); Town of Briggs. v. Slape, 1952 OK 396, 250 P.2d 214, 216-17(plaintiffs were entitled to reasonable compensation for the inconvenience and annoyance suffered by the odors); Marshall v El Paso, 874 F.2d 1373 (10th Cir. 1989)(recovery for inconvenience, annoyance and discomfort in addition to property damages and punitive damages).

In Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001), the Tenth Circuit cited Thompson applying Oklahoma law and holding that $1,200,000 for annoyance, inconvenience, and aggravation was permissible since it constituted "a separate and distinct element of damage." There is no arithmetical rule by which such damages may be measured. Nor can damages for physical pain and suffering, or mental anguish, or for libel and slander be definitely and arithmetically measured. Oklahoma City v. Eylar, 1936 OK 614, 61 P.2d 649, 650-53. In Eylar the court stated, It is established by the verdict of the jury that either by the negligent operation of the sewer system, or by improperly treating the sewage, there was created foul and noxious odors which caused discomfort, annoyance, and inconvenience to plaintiff and his family; and that the right of plaintiff and his family to enjoy his premises was thereby greatly diminished. Id. The Eylar court further explained,

> The evidence shows that during the time plaintiff occupied her farm as a homestead she suffered annoyances and inconveniences as a result of the wrongful operation of the defendant's farm. It is, of course, true that she did not offer any evidence of any pecuniary loss which she suffered during such time; but

> how could she? Is she therefore to be without compensation for her injuries? Is a person injured in an accident to be deprived of compensation for the pain and suffering endured because he cannot offer evidence of what the pain and suffering were worth from a pecuniary standpoint? The law is too humane to adopt such a rule, and has therefore established the principle that one injured may recover for pain and suffering without evidence of it pecuniary value, and it has also established the rule that for injuries to one's homestead, caused by a nuisance, the owner of such homestead may recover for such injuries without evidence of pecuniary value.

Id. at 652.

These situations are very similar to the manner in which the Defendant Stone River Energy, Inc. has polluted and neglected to abate a continuing nuisance. The Plaintiffs have lost the quite enjoyment they are entitled to have by owning the property. The Plaintiffs are continually encumbered by the necessity of contacting the Defendant, the OCC, and their own attorney's and experts to assist with defending their rights. The Minyen's have incurred a significant amount of expense to defend their rights. An injunction will do nothing more than guarantee their efforts have not been in vain and provide the remedies that our laws provide for persons in the situation they have found themselves in.

2. Probability is Certain for Continuing Acts of Nuisance and Trespass

The Defendant has continued their operations for several years and plans to continue these operations in the near future. If irreparable meant without measure then no court would be permitted to issue restraining orders for threats of harm to another person. For example, should someone be threatened with bodily harm (i.e. I am going to break your arm); then this Court would obviously have no question with regard to issuing a restraining order against the bad actor. Yet, there is not an attorney in Oklahoma that would argue that a broken arm is not capable of compensatory loss easily calculated by

the medical profession. But yet the threat of a bad actor would probably force this Court or any court to issue a restraining order prohibiting such conduct.

The same analysis is true here the Plaintiffs' damage calculation is not only difficult to measure but will necessarily entail substantial and costly expert testimony, involve a tremendous amount of judicial resources, has required an significant expense in legal fees, and will continue to require significant expense and time. The remediation could possibly require years. The final determination of the lasting effects of the pollution are yet to be full realized. Nevertheless, unless the Court grants the requested relief, the continued trespass and nuisance will be present.

C. The Harm to Plaintiffs If This Injunction Is Not Granted Outweighs The Harm To Defendants If It Is Granted

There is a balancing of harm that must be analyzed anytime injunctive relief is granted. Here, the Plaintiffs are simply asking the Defendant to abate a continuing nuisance and trespass. If the injunction is granted, the injunction will require the Defendant to remediate the site, remove it's pollutants, and restore the site to it natural state prior to the Defendant's operations. The requested injunction does not require anything more than the law already requires. The Plaintiffs are not asking the Defendant to cease its operations, provided the Defendant does not continue to pollute. Therefore, the harm to the Defendant is minimal. Actually, the Defendant will not be harmed because the Defendant will only be required to do what it is already supposed to be doing. And, by that being done, the Plaintiffs' harm will be reduced.

In Heilman v. France Stone Co., 151 N.E. 798 (Ohio App. 1925), blasting operations in the defendant's quarry caused stones and other debris to be thrown on nearby property and also caused damage to such property by concussion. The Heilman

court held such activity to be a continual trespass as to entitle the plaintiffs to injunctive relief. However, such injunction was not to the extent of requiring the quarrying operation to be discontinued, but to the extent of enjoining the defendant from causing injury to the plaintiffs' property through concussion or through hurling stones and debris thereon. Id.

Plaintiffs here maintain that this Court should temporarily enjoin Defendants from the continued maintenance of trespasses and nuisances on their land. Plaintiffs believe that such injunction could provide a provision where the Defendants are permitted to continue operations such that pollution does not occur. As one Oklahoma court of appeals court so eloquently stated, "it is difficult to see how they are hurt by this injunction, as all it does is order them to obey the law." Western Heights School Dist. V. Avalon, Retirement Ctr, LLC., 2001 OK CIV APP 140, 37 P.3d 962. Accordingly, the damage and harm to the Plaintiffs should a temporary injunction not issue could be devastating to their persons and property and exacerbate the already known damages. Such harm far exceeds any harm to the Defendant.

D. The Public Policy Concerns Clearly Weigh In Favor of Plaintiffs

Plaintiffs maintain that a grave injustice will occur during this litigation should the Defendant not be restrained from continual trespass and further damaging Plaintiffs' property. Moreover, it is the public policy of Oklahoma to protect the exclusive possession and quiet enjoyment of one's own homestead free from the continued threats of trespass and nuisance. As the foregoing illustrates, the Defendant simply will not take meaningful corrective actions in a cooperative manner. The Defendant's activity has had

an undisputed history of damaging Plaintiffs' property and invading their personal rights and directly impacting their quality of life.

Additionally, the Miller Production Facility lies in an area full of precious natural resources, both to the great state of Oklahoma and to the Chickasaw Nation. On page 9 of the SPCC plan it states, "The facility is located within the Washita River watershed, approximately one mile to the west of Guy Sandy Creek that feeds into the Lake of the Arbuckle's…" Further, the facility sits above the watershed that feeds the Arbuckle Simpson Aquifer, which is responsible for feeding over 100 springs that are known to discharge water for the state's citizens. Surely it would be in the best interest of the residents of the State of Oklahoma and the Chickasaw Nation to ensure that benzene and other pollutants were removed from the Miller Production Facility to further protect these precious natural resources.

III. DR. FISHER HAS DEVISED A REMEDIATION PLAN THAT SHOULD BE ORDERED TO BE IMPLEMENTED BY DEFENDANTS.

The Minyen's have retained an expert to assist with the evaluation of the pollution to their property. This expert, Dr. Berton Fisher, is a professional geologist, geoscientist, and geochemist with over 30 years experience in the oil and gas industry. Dr. Fisher has previously served as Chairman of a board of industry specialists who advise the executive board of the Integrated Petroleum Environmental Consortium (IPEC) on environmental research needs in the domestic petroleum industry. He assisted Exxon in a matter related to saltwater contamination of soil and groundwater at a production facility in Oklahoma. Dr. Fisher has worked for numerous operators over the years. He has the ability to

provide an objective assessment of the Miller Production Facility and assist with a plan that will ensure the abatement of a continuing trespass and nuisance at the facility.

CONCLUSION

For the foregoing reasons Plaintiffs respectfully request that this Court grant a permanent injunction in this matter, compelling the Defendant to clean up the operations as Dr. Fisher has recommended. Plaintiffs respectfully demonstrated that this Court may issue an injunction that can protect both the Plaintiffs and the Defendant with proper safeguards. As such, Plaintiffs request that this Court issue a permanent injunction against the Defendant ordering the Defendant to restore and remediate the Plaintiffs' property and that such order provide for reasonable parameters and guidelines that specify the manner in which the project will be conducted.

All of which is respectfully submitted.

TRAE GRAY, OBA # 21196
THE LAW OFFICES OF TRAE GRAY, P.L.L.C.
Attorney at Law
28 North Main
Coalgate, Oklahoma 74538
(580) 927-2314
(580) 927-2315 facsimile

CERTIFICATE OF MAILING

This is to certify that on Thursday, November 08, 2007, a true and correct photocopy of the within and foregoing **PLAINTIFFS' AMENDED MOTION FOR PERMANENT INJUNCTIVE RELIEF, REQUEST FOR HEARING, AND BRIEF IN SUPPORT** was mailed via U.S. First Class Mail with sufficient postage fully prepaid thereon, to Defendant's counsel of record as indicated below:

Jim Buxton
950 Landmark Towers East
3535 Northwest 58th Street
Oklahoma City, OK 73112

Phil Hurst, Esq.
PO Box 597
Sulphur, OK 73086

Trae Gray