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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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JOE MINYEN AND DALYNDA MINYEN,  
HUSBAND AND WIFE,

PLAINTIFFS/APPELLANTS,  
versus

STONE RIVER ENERGY, INC.,

DEFENDANT/APPELLEE,  
and

LORI WROTENBERY, DIRECTOR  
OIL AND GAS CONSERVATION DIVISION  
OKLAHOMA CORPORATION COMMISSION,

INTERVENOR/APPELLEE.

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

APR 15 2008

MICHAEL RICHIE  
CLERK

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Case No. 105,609

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ON APPEAL FROM THE ORDER OF THE MURRAY COUNTY DISTRICT COURT

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APPELLANT'S RESPONSE TO THE APRIL 1, 2008 ORDER TO RESPOND TO OKLAHOMA  
CORPORATION COMMISSION'S MOTION TO DISMISS

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TRAE GRAY (OBA No. 21196)  
THE LAW OFFICES OF TRAE GRAY, PLLC  
28 N. MAIN  
COALGATE, OK 74538  
(580) 927-2314  
(580) 927-2315 (FAX)  
TRAEGRAY@TRAEGRAY.COM  
*Attorney for Appellants*

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Sunday, April 13, 2008

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## I. FACTUAL BACKGROUND AND INTRODUCTION

This is a case involving a private nuisance and a private trespass, where the Oklahoma Corporation Commission (the "OCC") has wrongfully interfered with a private landowner's (the "Minyens") constitutional right to access the Murray County District Court to protect their private property interests. The case involves a longstanding and continuous release of oil field pollutants and disregard for the private property rights of a landowner (the "Minyens") by a private company, Stone River Energy (herein "SRE"). Most recently, on April 3, 2008, SRE's saltwater disposal well discharged an undetermined amount of saltwater onto Plaintiffs' property. (See exhibits 1 and 2, photos taken by DaLynda Minyen on April 3, 2008).

Many times since 2005 the private landowner asked SRE and then the OCC to remedy the situation. Neither was cooperative, and in March 2006, the Minyens filed suit in Murray County District Court. Even though since March 2006 until May 31, 2007 the OCC documented at least seven additional violations by SRE, the OCC failed to take any legal action and contends all pollution is historic. Statements by the OCC and SRE that the pollution is solely historic are inaccurate. Because the OCC had failed to take any legal action, the Minyens hired an expert and an attorney focused on the protection of landowner rights and using the 2006 lawsuit, which remained pending, the Minyens filed a motion for injunctive relief with the Murray County District Court.

When SRE and the OCC learned the Minyens were preparing to move for injunctive relief, OCC filed the administrative action that is the basis of this appeal on August 17, 2007, and sought with the *consent* of SRE to impose a remedy that does not address the vast majority of the Minyens' private nuisance concerns and right to



abatement. Based on the administrative consent action, the OCC intervened in the Minyen's private litigation, and argued both the OCC and SRE positions against the Minyens, ultimately convincing the district court to allow the OCC to impose its remedy.

The OCC asserted to the Murray County District Court that it possesses exclusive jurisdiction for the resolution of the private injunctive relief (abatement) that the Minyens seek. The OCC opened Case No. PD 200700392 on August 17, 2007. That is 506 days after the Minyen's filed their private litigation. The Minyens objected to the purported exclusive jurisdiction at the Murray County District Court, the OCC, and in this Court. This Court dismissed the appeal of the administrative action on the grounds that the Order appealed from the OCC case was not an appealable order. The OCC's intervention in the district court case made them a party to this appeal. It was the intervention and oral arguments of the OCC in the district court that prevented the Minyens from introducing evidence of the pollution. This appeal is brought pursuant to that intervention. **This Court did not, nor has it ever ruled that the OCC has exclusive jurisdiction over abatement of a private nuisance created by oilfield contaminants.** Essentially, that is the issue that must ultimately be addressed and it can only be addressed by this Court in an action where the OCC is a party.

## **II. THE OCC BECAME A PARTY WHEN ITS INTERVENTION AND MISTATEMENT OF THE LAW DENIED THE MINYENS THEIR DUE PROCESS**

On November 11, 2007, the OCC filed a Motion to Intervene and Brief in Support in the district court. In their brief, the OCC asserts its purported exclusive jurisdiction by citing to 52 O.S. § 139 for the proposition that its power to *prevent* pollution is exclusive. Here, the purpose is not prevention, it is abatement. Then, the OCC delves into a long



discussion of its right to order remediation. This is a right that the Minyens would not have disputed if the filing of the remediation action would have been timely. The OCC then provides a long analysis about the public rights and somehow suggests that abatement of a private nuisance would conflict with the public interest. Finally, the OCC further asserts its purported exclusive jurisdiction over clean-up. There, it cites to Union Texas Petroleum Corp v. Jackson, 1995 OK CIV APP 63, 909 P.2d 131. This case dealt with the issue of the OCC proceeding with their remediation while a landowner continued its action for *damages* in the district court. While the Minyens are pursuing an action for damages, that is not the remedy sought in their injunctive motion. The injunction motion is about abatement of a private nuisance. The Minyens contend that no body of Oklahoma law holds that a private remedy for abatement of a private nuisance must be halted by an administrative action for a remediation on behalf of the public. The purported exclusive jurisdiction was the crux of the oral argument of the OCC in the district court. It is this argument and subsequent ruling that made the OCC a party to this appeal.

In the OCC Motion to Dismiss in this Court, the OCC argues it was granted limited intervention. The intervention was anything but limited. The intervention deprived the Minyens of a hearing to present evidence of SRE's pollution. Even if it is determined the intervention was limited, the intervention affects a substantial right of Joe and DaLynda Minyen to access the Murray County District Court.

Although this is not the time to thoroughly brief this Court on the jurisdictional issue, it must be touched on because the OCC argues in its Motion to Dismiss that the Union Texas Petroleum Corp v. Jackson holding somehow trumps the Minyens common



law right to abatement. The district courts of Oklahoma possess jurisdiction to order cleanup. Meinders v. Johnson, 2006 OK CIV APP 35, 134 P.3d 858. The OCC's argument confuses the statutory grant of exclusive jurisdiction to *regulate* oil and gas exploration and production activities in Oklahoma, with the jurisdiction to *afford a remedy* (abatement) to those whose common law rights have been infringed. While the statutory directive is clear that the OCC has exclusive jurisdiction - vis a vis other administrative agencies - to make and enforce environmental regulations related to oilfield operations, the statutes do *not* vest the OCC with exclusive authority to grant a *remedy* for wrongs that originated under common law. Here, the OCC's confusion regarding the status of Oklahoma law compelled the district court to deprive the Minyens of their right to abatement.

There is not one Oklahoma case that holds the OCC has "exclusive" jurisdiction over a pollution case between private parties where abatement and injunctive relief in district court has been sought.<sup>1</sup> Moreover, the OCC's mislaid interpretation would violate the Oklahoma Constitution, Art. 2, Section 6 which guarantees that: "The **courts . . . of the State shall be open to every person**, and speedy and certain **remedy afforded for every wrong and for every injury to person, property . . .**" [Emphasis added.]<sup>2</sup>

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<sup>1</sup> In *Marshall v El Paso*, 874 F.2d 1371 (10<sup>th</sup> Cir. 1989) the court reviewed over 70 reported decisions of Oklahoma courts and federal courts construing Oklahoma law in pollution matters, and did not find a single case where a court had deferred to the OCC. See also, *Tenneco v. Allen* 1973 OK 129, 515 P.2d 1391; *Sheridan v. Wall*, 1940 OK 225, 103 P.2d 507; *Schlegel v. Kinzie*, 1932 OK 243, 12 P.2d 223.

<sup>2</sup> The OCC is an agency of limited jurisdiction, has no power to grant money damages or injunctive relief, and even when the OCC issues an order, the enforcement of the order is reserved to the **courts**. *Burmah O&G v OCC*, 1975 OK 138, 541 P.2d 834; *Merrit v. OCC*, 1968 OK 19, 438 P.2d 495; *TXO v. Rein*, 1975 OK 8, 534 P.2d 1277; *Kingwood Oil v Hall-Jones*, 1964 OK 231, 396 P.2d 510; *GHK v. Tenneco*, 857 F.2d 1388 (10<sup>th</sup> Cir. 1988).



The Corporation Commission has no jurisdiction over the controversy between SRE and the Minyens. Instead, “The Corporation Commission is a tribunal of limited jurisdiction and has only such authority as is expressly or by necessary implication conferred upon it by the Constitution and statutes of this state. Okla. Const., art. IX, §18; Merritt v. Corporation Comm’n, 1968 OK 19, 438 P.2d 495.” Meinders, 2006 OK CIV APP 35. at ¶ 19; Energy Transp. Sys. v. Kansas City Southern Ry., 1981 OK 159, 638 P.2d 459.

Conversely, Oklahoma Courts have jurisdiction to interpret and apply the law, and to mete out legal damages and equitable relief. See Oklahoma Constitution, Art. 7, § 7; Brown v. Lillard, 1991 OK 74, 814 P.2d 1040 (Jurisdiction of a state district judge is virtually unlimited as to all justiciable matters.). To interpret the OCC’s purported exclusive jurisdiction argument as a deprivation of the district court’s “unlimited original jurisdiction of all justiciable matters” raises some substantial constitutional questions, and, absent a clearer expression of the Legislature’s intent to divest the district court of its general jurisdiction, we must adopt a construction of the cited sections which frees them of constitutional infirmity. Meinders, 2006 OK CIV APP 35. at ¶ 31. Respective rights and obligations of parties are to be determined by district court, rather than by Oklahoma Corporation Commission (OCC). Arrowhead Energy Inc. v. Baron Exploration Co., 1996 OK 120, 930 P.2d 181. The Corporation Commission has no jurisdiction over a controversy between two private concerns. Such controversy can be adjusted only in a suit between the parties in a court of competent jurisdiction. Burmah Oil and Gas Co. v. Corporation Commission, 1975 OK 138, 541 P.2d 834.

Even though the OCC argued to the Murray County District Court that it must



yield to the purported exclusive jurisdiction; jurisdiction in the district court was proper and but for the OCC's intervention the Minyens will get their hearing.

The OCC's intervention confused the district court and prevented the district court from fulfilling its legal obligation to the Minyens. The district court was not well appraised of the status of the law in this area. The district court is not required to defer factual issues to an agency under the doctrine of primary jurisdiction if those issues are of the sort that the court routinely considers. Marshall v. El Paso Natural Gas Co., 1989 C.A. 10 (Okl.) 874, 874 F.2d 1373. A district court's actions are proper when it exercises its jurisdiction over a *private* nuisance claim for encroachment of saltwater. Greyhound Leasing & Finan. Corp. v. Joiner City Unit, 10<sup>th</sup> Cir. 1971, 444 F.2d 439. Therefore, the doctrine of primary jurisdiction did not require the Murray County District Court to defer to the OCC.

The OCC asserts that the district court's ruling that the Motion to Intervene was moot somehow constitutes a denial of their motion. The motion was moot because Judge Colbert bought into the purported exclusive jurisdiction argument presented by the OCC and thus ordered that it would be "prudent for the Oklahoma Corporation Commission to apply its expertise and discretion as to oil and gas matters prior to addressing the Plaintiffs' private rights dispute<sup>3</sup>." The ruling recognized the purported exclusive jurisdiction argument, allowed the OCC to intervene in the private rights dispute via their administrative authority, and prohibited the Minyens from introducing evidence of SRE's pollution. By filing the Motion to Intervene and arguing it, the OCC received its

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<sup>3</sup> Language quoted directly from the December 3, 2007 Order of the Honorable Tim Colbert of The Murray County District Court



requested relief and the Minyens were denied theirs. The purpose of the Motion to Intervene was met.

The OCC needs to be a party to this appeal to stop their interference with the Minyens' due process. This Court can order the OCC to stay out of the district court litigation where they do not have any jurisdiction over abatement of a private nuisance. By keeping the OCC in this appeal, the purported exclusive jurisdiction problem can finally be addressed by this Court. Here, the issue is really one of concurrent jurisdiction. One can not dispute that clarification of the law in this area is necessary. Nevertheless, it can only be achieved by keeping the OCC a party to this appeal. Moreover, the Minyens need to keep the OCC in this appeal because if the OCC is not in the appeal, the requested relief of abatement will not apply to the OCC after this Court makes its ruling. The affect could be a second appeal on basically the same issue.

### **III. THE PROCEDURAL ADVANTAGE OF THE OCC CREATES A QUAGMIRE FOR LANDOWNERS DUE A PRIVATE REMEDY UNDER OKLAHOMA LAW**

The OCC has a unique procedural advantage that it bestows on oil and gas operators. Further, this procedural setup creates a dilemma that deprives individual landowners of remedies they are legally entitled to. This structure forces a landowner to litigate in a forum where they can not recoup expenses or get a meaningful remedy. Moreover, the Minyens are deprived of their due process rights when litigating at the OCC. The OCC acts as a lawmaking body, then it simultaneously interprets its own laws, makes its own rulings on these laws, and finally it enforces them. This procedure essentially bars a private individual from the justice they are legally entitled to.



For example, when the Minyens filed a Motion to Stay at the OCC in the pending administrative action, the Motion to Stay was denied by the administrative law judge. Thereafter, the Minyens appealed and requested an en banc hearing to the commissioners. Instead of the Minyens getting a hearing on their appeal, their attorney received an e-mail from the General Counsel's office of the OCC. (See exhibit 3). These types of actions are not consistent with the level of due process an individual is entitled to when they are due a private remedy. At worst, an individual is entitled to have their attorney present an argument as to why the motion should be considered.

The Minyens previously filed an appeal with this Court relating to their denial of a Motion to Dismiss the OCC administrative action. The Minyens' Motion to Dismiss was filed on the grounds that it was a collateral attack of a previously filed matter. That appeal was dismissed because this Court determined the OCC's Order denying their Motion to Dismiss was not an appealable order. **(This Court did not rule that the OCC has exclusive jurisdiction.)** The problem lies in the fact that an appealable order from the OCC will not occur until after the OCC has completely exercised its purported exclusive jurisdiction. By then, it is possible that the legal issues the Minyens desire to bring before this court will not be ripe for appeal. Moreover, by the time any appealable order issues from the OCC additional harm to the Minyens will likely be done. Regardless, the OCC made itself a party to the district court matter when they intervened. They can no longer hide behind the shield of the procedural quagmire created by their administrative powers. The appeal from the district court is proper. This Court should use this opportunity to decide the issue of jurisdiction over abatement of a private nuisance.



#### **IV. ABATEMENT AND REMEDIATION ARE NOT THE SAME**

The district court of the county in which any such nuisance exists or is maintained shall have jurisdiction of any such case and power to adjudge and determine any action brought under the provisions hereof, and where it is adjudged that any such nuisance exists or is maintained and should be abated, such court shall have the power and authority either by and through a commissioner appointed by such court, or otherwise, to cause such nuisance to be abated and to assess all the costs thereof, including the costs of suit, against the property on which such nuisance existed or is maintained, and to declare such costs a judgment against said property and order and direct the sale of said property for the purpose of satisfying said judgment and shall cause the same to be sold and proceeds thereof applied to the payment of the costs of abating any such nuisance. 50 O.S. § 17.

Abatement will require the alleviation of the pollution on the property. Abatement will terminate the present nuisance. Essentially, abatement will require the removal of the contaminants on the Minyen property. Oklahoma District Courts possess the power to order abatement. Alternatively, the OCC possesses the power to order remediation. Remediation is the process of correcting something bad or defective. Essentially, remediation would require SRE to mix good dirt and other materials with contaminated dirt. Then, if the grass begins to grow, the OCC will consider the site remediated. Abatement is a form of legal relief the Minyens are entitled to and it is a higher standard than the standard of remediation that the OCC is seeking. When the abatement is done, remediation will not be necessary. Alternatively, if remediation is



completed, the Minyens will still be entitled to abatement. This procedure could subject SRE and the Minyens to two clean-ups.

## V. CONCLUSION

These matters are indeed complex. But, somewhere in all of this, common sense and justice should govern. Defying logic the OCC and SRE maintain that remediation of the discharges under the direction of SRE are somehow complete, while simultaneously leaving the still present "historic" contamination. Even if that were possible it does not diminish SRE's responsibility and legal obligation to provide a nuisance free environment to the Minyens.

The Minyens are entitled to a meaningful remedy. The OCC's actions have violated the Minyens' constitutional right to access the Murray County District Court to obtain their remedy. Therefore, the Minyens assert the OCC is a proper party to this appeal. The time has come to address the jurisdictional power of the OCC and it can only be done if the OCC is a party to this appeal. To deny the Minyens a ruling on that issue, goes against their rights to have their property free from the contaminants and nuisance maintained by SRE and the OCC.

Respectfully submitted.



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TRAE GRAY, OBA # 21196  
THE LAW OFFICES OF TRAE GRAY, P.L.L.C.  
28 North Main  
Coalgate, Oklahoma 74538  
(580) 927-2314  
(580) 927-2315 facsimile  
ATTORNEY FOR PLAINTIFFS/APPELLANTS

Sunday, April 13, 2008



CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of January, 2008, a true and correct copy of the foregoing was mailed via the United States Mails, first class, postage pre-paid, to:

JIM BUXTON, OBA#19057  
BUXTON CARSON, PLLC  
950 LANDMARK TOWERS EAST  
3535 NW 58<sup>TH</sup> STREET  
OKLAHOMA CITY, OK 73112  
ATTORNEY FOR DEFENDANT/APPELLEE  
STONE RIVER ENERGY, INC.

CONNIE MOORE, OBA#6331  
OKLAHOMA CORPORATION COMMISSION  
440 SOUTH HOUSTON, SUITE 114  
TULSA, OK 74127  
ATTORNEY FOR INTERVENOR/APPELLEE  
LORI WROTENBERRY, DIRECTOR  
OIL AND GAS CONSERVATION DIVISION  
OKLAHOMA CORPORATION COMMISSION

PHIL HURST, OBA#4510  
HURST, MCNEIL & GORDON  
PO Box 597  
SULPHUR, OK 73086  
ATTORNEY FOR DEFENDANT/APPELLEE  
STONE RIVER ENERGY, INC.

MICHELE CRAIG, OBA#10428  
OKLAHOMA CORPORATION COMMISSION  
OFFICE OF GENERAL COUNSEL  
PO Box 52000  
OKLAHOMA CITY, OK 73152-2000  
ATTORNEY FOR INTERVENOR/APPELLEE  
LORI WROTENBERRY, DIRECTOR  
OIL AND GAS CONSERVATION DIVISION  
OKLAHOMA CORPORATION COMMISSION


  
\_\_\_\_\_  
Trae Gray











Exhibit 3  
1 of 2

Connie Moore

**From:** Sally Shipley  
**Sent:** Tuesday, March 25, 2008 9:59 AM  
**To:** 'Trae Gray'; 'Jeremy Fitzpatrick'  
**Cc:** Connie Moore  
**Subject:** PD-200700392

The Appeal for the Motion to Stay was deliberated this morning to the Commissioners. As deliberating counsel I asked all three Commissioners if they would hear en banc the appeal to the ALJ's recommendation to deny the Motion to Stay. The Commissioners in a 3-0 vote denied Mr. Gray's request for an en banc hearing. And the Commissioners in a 3-0 vote denied the Motion to Stay. The case should go forward as scheduled.

A decision sheet will be sent out to you in the next day or two.

Sally Shipley



OKLAHOMA

**Corporation Commission**P.O. BOX 52000  
OKLAHOMA CITY OKLAHOMA 73152-2000Exhibit 3  
2 of 2400 Jim Thorpe Building  
Telephone: (405) 521-2255  
FAX: (405) 521-4150

Office of General Counsel

Ben Jackson, General Counsel

**Oil and Gas  
DELIBERATIONS**

Date of Deliberation: March 25, 2008

Cause No.(s): PD-200700392

Applicant(s): Lori Wrotenbery, Director, Oil & Gas Conservation Division  
Oklahoma Corporation Commission

Respondent(s): Stone River Energy, Inc.

Type of Action: Appeal to the Oral Report of the ALJ

Matter Retained by Commissioners: Yes

Decision of Commissioners: In a 3-0 vote the Commissioners denied Intervener's request for an en banc hearing; and in a 3-0 vote the Commissioners denied Intervener's Motion To Stay.

Deliberating Attorney: Sally A. Shipley

## Notice By Fax to Attorneys:

Name	Fax Number
Connie Sue Moore	918-581-2597
Trae Gray	580-927-2315
Jeremy Fitzpatrick	405-605-2374

Attorney Preparing the Order: Sally A. Shipley

Date Order Is Due: As Soon As Possible

Copies to:  
Court Clerk's Office  
Patricia MacGuigan, ALJ  
Michael Decker, Director OAP  
Brenda Loggins