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CORPORATION COMMISSION
OF OKLAHOMA

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICANT: MEWBOURNE OIL COMPANY	)	
	)	
RELIEF SOUGHT: POOLING	)	CAUSE CD NO.
	)	200604826
LEGAL DESCRIPTION: SECTION 1, T20N, R24W	)	
ELLIS COUNTY, OKLAHOMA	)	

MEWBOURNE OIL COMPANY'S MOTION TO DISMISS THE MOTION TO REOPEN TO DETERMINE SANCTIONS AND RESTITUTION ARISING FROM APPLICANT'S ADJUDICATED MISCONDUCT FILED ON BEHALF OF OPTIMA OIL & GAS COMPANY, L.L.C., AND BRIEF IN SUPPORT

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INTRODUCTION

This matter comes to the Oklahoma Corporation Commission ("The Commission") with an extraordinary procedural history and seeks extraordinary relief that the Commission cannot and should not grant. In view of the procedural history and the relief sought, the Commission should dismiss the case and deny the motion to reopen.

The leases that formed the underlying controversy are no longer in existence, having expired years ago. The parties to this proceeding own no oil and gas interests in the land covered by the pooling order from which all of the issues arose.

BACKGROUND

A. Optima received the original pooling application and the notice of hearing and failed to protest.

Mewbourne Oil Company ("Mewbourne") is in the business of drilling oil and gas wells. In the time leading up to April 2006, Mewbourne acquired oil and gas leases covering 15% of Section 1, Township 20 North, Range 24 West, Ellis County, Oklahoma ("Section 1"). During that time, Optima Oil & Gas Company, L.LC. ("Optima"), also owned oil and gas leases in Section 1. With a desire to develop Section 1, Mewbourne began the steps to file an application with the Commission to pool Optima's working interest within that Section.

At all times previous, Optima had represented (and Mewbourne had understood) that Optima was an Oklahoma-based entity with its office in Oklahoma City. Indeed, Optima and Mewbourne were participating in a nearby well and had a business relationship with that understanding. An examination of record title in Section 1 revealed that all of the

oil and gas leases under Optima's name were taken in the name of Optima Oil & Gas Company, as lessee, whose address is 120 N. Robinson, Suite 2112, Oklahoma City, Oklahoma 73102. None of the oil and gas leases referred to a Colorado entity. Further, the Oklahoma Secretary of State records listed Optima Oil & Gas Company, LLC, as an Oklahoma entity at the address above.

On June 1, 2006, Mewbourne filed with the Commission its pooling application for Section 1. The same day, Mewbourne caused to be served a certified mailing of the pooling application and notice of hearing. Mewbourne also published public notice in both Oklahoma and Ellis Counties, all as required under Commission rules. Mewbourne sent the pooling application to Optima's Oklahoma City office, which in the exercise of due diligence, Mewbourne understood Optima to have maintained as its principal place of business. Optima's operations manager, William Jack, admitted in Commission proceedings that Mewbourne sent the notice to Optima's correct address.

On June 2, 2006, an Optima employee, Mr. Jack's secretary, received the notice of Mewbourne's pooling application. The Optima employee signed the certified-mail return receipt, which went back to Mewbourne, and demonstrated Optima's receipt of the pooling application. Thereafter, Mewbourne heard nothing from Optima on the issue.

On June 27, 2006, the day of hearing stated in the notice, an Administrative Law Judge heard and recommended the pooling application. Optima did not appear at the docket call or the hearing.

B. Optima appears before the Commission.

After the pooling application was recommended, but before the pooling order was issued, Optima appeared and argued to the Commission a motion to stay in an effort to stay the issuance of the pooling order. In those arguments, Optima contended that Mr. Jack's secretary had mislaid Mewbourne's pooling notice; and, therefore, Optima should be excused for not appearing to protest the pooling application. The Commission denied Optima's motion; and, on August 10, 2006, the Commission issued Pooling Order No. 528230, which pooled the working interest of Optima and designated Mewbourne as operator.

Optima filed a motion to vacate Order No. 528230 and to reopen the record for purposes of a protested hearing. The Commission denied Optima's request to reopen and to vacate the order on September 8, 2006.

C. Optima elects not to participate in unit development under Order No. 528230, but appeals that order to the Oklahoma Supreme Court.

Under the pooling order, Mewbourne had 180 days to commence operations for the drilling of an initial well. The pooling order allowed Optima the following alternatives:

(a) to retain its working interest by electing to participate in the initial well; or

(b) to relinquish its working interest and accept cash bonus and an excess or overriding royalty interest; or

(c) or to relinquish its working interest and take no cash bonus but a larger excess or overriding royalty interest.

On August 25, 2006, Optima elected to relinquish its working interest to Mewbourne in exchange for no cash bonus but the larger excess or overriding royalty interest.

Before the pooling order became final, Optima filed with the Oklahoma Supreme Court an appeal of the Commission's order. During the pendency of Optima's appeal, the time to commence operations for the drilling of the initial unit well continued to run. Mewbourne obtained top leases from two (2) landowners in Section 1 in order to maintain its right to drill on the lands Optima had relinquished to Mewbourne. Mewbourne then sought and, over Optima's objection, obtained an order from the Commission extending by one year the time within which the initial unit well shall be commenced.

D. No well is drilled in Section 1 within the extended time provided for in the pooling order. As a result all leases expire.

During the pendency of the appeal, drilling in the land around Section 1 led Mewbourne to the conclusion that the geological prospect was no longer viable. Neither Optima nor Mewbourne drilled a well in Section 1. Ultimately, the leases of both Mewbourne and Optima in Section 1 expired under their own terms. Optima made no effort to lease Section 1 thereafter.

In April of 2008, the Oklahoma Court of Civil Appeals, in review of the Commission's orders, vacated the pooling orders relating to Section 1. That Court ordered "the matter remanded to the Corporation Commission for a full hearing on the merits of Mewbourne's Pooling Applications and any further proceedings consistent with this Opinion." Optima failed to pursue any proceedings consistent with the Court's opinion upon remand. Given Mewbourne's opinion concerning the prospect, it also chose to pursue no further action with the Commission. As a result, no action was taken at the Commission with regard to the Court of Civil Appeals opinion. Instead, Optima sued Mewbourne in federal court for money damages.

E. Optima sues Mewbourne for damages under a theory of intrinsic fraud, but the Federal Courts dismiss the case.

Optima first sued Mewbourne in federal court in June of 2008, just two months after the Court of Civil Appeals opinion had remanded the pooling application back to the Commission. Mewbourne moved to dismiss that litigation noting multiple deficiencies with Optima's complaint. While Mewbourne's Motion to Dismiss was pending, Optima filed a Notice of Dismissal in August of 2008. That original lawsuit was ended by virtue of Optima's own action.

In February of 2009, Optima sued Mewbourne in federal court for the second time. In the second suit, Optima claimed that Mewbourne had tricked the Commission into issuing a flawed pooling order and fooled it again into extending that pooling order. According to Optima, the pooling orders deprived Optima of the ability to develop or further market its properties. Mewbourne denied that it had misled the Commission, or anyone else, when it sought to pool Section 1. Further, Mewbourne contended that no court could grant relief to Optima for a fraud allegedly practiced on the Commission. As a precedent legal issue, Mewbourne pointed out that the federal court could not grant relief of any kind for purported fraud on the Commission. Ultimately, Optima's sole assertion, disputed by Mewbourne, was the purported fraud by Mewbourne on the Commission.

The Honorable Robin Cauthron, U.S. District Court for the Western District of Oklahoma, found that Optima's claims rested on Optima's allegation (whether accurate or not) that Mewbourne misled the Commission. Following Oklahoma Supreme Court precedent, that federal district court concluded that relief, if any, for fraud on a tribunal must come from such tribunal. As a result, the federal district court dismissed Optima's

litigation in August of 2011. Optima appealed that ruling to the Tenth Circuit Court of Appeals. In October of 2012, the Court of Appeals affirmed the district court's ruling. In November of 2012, the Tenth Circuit Court of Appeals denied Optima's petition for rehearing. Ultimately, the decisions of the federal courts were based upon a finding that they lacked jurisdiction to hear the claims made by Optima.

Optima reappeared more than five years and nine months (on January 17, 2014) after the Oklahoma Court of Civil Appeals remanded the case to the Commission and filed a motion seeking an award of money damages from the Commission. Optima disguises that request under the pretense of an action for sanctions and restitution from Mewbourne. That Motion was protested on behalf of Mewbourne. The Motion has been continued on numerous occasions. In late 2016, Counsel for Optima requested that the Motion be argued. Mewbourne now seeks to dismiss the Motion to Reopen pending herein.

ARGUMENT AND AUTHORITIES

There is no basis for a claim that the Commission was misled by Mewbourne. The Commission held open hearings, in which Optima participated and presented its arguments. The Commission ruled on the evidence before it, including the claims made in the Federal Court litigation as a basis for fraud, and, issued the pooling orders despite such argument. The Oklahoma Court of Civil Appeals reversed the Commission's issuance of the pooling order and remanded the matter back to the Commission for the purpose of allowing Optima to protest the merits of the pooling application. Optima chose to take no action in response to that remand.

If required, Mewbourne will prove that it did nothing wrong in the original

Commission proceeding which led to entry of the pooling orders. However, Mewbourne respectfully requests that Optima's Motion to Reopen be dismissed.

PROPOSITION A: OPTIMA LACKS STANDING TO SEEK THE REQUESTED RELIEF

In order to invoke jurisdiction of the Commission, a petitioner must show either an interest in the affected lands or unit or the right to drill for oil or gas. *See May Petroleum, Inc. v. Corporation Com'n of State of Oklahoma*, 1982 OK 51, 663 P.2d 716. Any party can raise standing at any level in the process. *See Samson Resources Co. v. Oklahoma Corp. Com'n*, 1993 OK CIV APP 67, 859 P.2d 1118. As a result, nothing bars either Mewbourne or the Commission from challenging Optima's standing now.

While a dispute over the actual owner of the oil and gas leasehold interests in Section 1 may have existed when the matter was before the Commission in 2006, no dispute exists now. The movant, Optima Oil & Gas, LLC (a Colorado entity) has no present oil and gas interest in Section 1 and does not have the right to drill for oil and gas in that land. Any such perceived interest terminated when the oil and gas leases covering Section 1 expired under their own terms. (*See* Affidavit of Tony Phillips attached hereto as Exhibit "1"). The same is true regarding the Optima entity under the same name that was registered in Oklahoma. (*See* Affidavit of Tony Phillips attached hereto as Exhibit "1"").

No Optima entity owns an oil and gas interest in Section 1. Optima originally relinquished its working interest in Section 1 to Mewbourne in exchange for the larger excess or overriding royalty interest provided for in the pooling order. More importantly, all of the oil and gas leases in Section 1 owned by Optima, whether through the Oklahoma entity identified in the leases, or the Colorado entity, have terminated by their own terms.

Based on these facts, Optima has no present right, title, or interest in any oil and gas lease covering Section 1. Accordingly, Optima lacks standing to request that the Commission reopen the pooling proceeding.

PROPOSITION B: THE COMMISSION LACKS JURISDICTION TO GRANT THE RELIEF OPTIMA REQUESTS

The Commission stands as a tribunal of limited jurisdiction. *See Arrowhead Energy, Inc. v. Baron Exploration Co.,* 1996 OK 120, 930 P.2d 181, 183; *Burmah Oil & Gas Co. v. Corporation Commission,* 1975 OK 138, 541 P.2d 834. In the Oklahoma Constitution, the people of Oklahoma delegated the administration of the regulation of oil and gas matters to the Commission. *See* Okla. Const., art. IX, §§15-18. And, by virtue of that delegation, the Commission serves as both an administrative board and a judicial tribunal. *Id.* But the Commission's power "is only such as expressly or by necessary implication granted by statute." *Marathon Oil Co. v. Corporation Comm'n,* 1994 OK 28, 910 P.2d 966, 969. The Commission, therefore, cannot grant relief when it lacks statutory jurisdiction.

Under the weight of authority recognizing and detailing the limitations to the Commission's jurisdiction, Optima seeks to reopen this pooling action to pursue money damages from Mewbourne. However, long-established jurisdictional limitations upon the Commission's power forbid such relief because the terms of Oklahoma's conservation laws do not confer the power to try money damage suits. The relevant authorities permit no contrary conclusion.

In *Kingwood Oil Company v. Hall-Jones Oil Corp.*, one leaseholder sued another "in an ordinary action for damages sounding in tort." 1964 OK 231, 396 P.2d 510, 512. Considering the Commission's jurisdiction, the Oklahoma Supreme Court held that the

statutes conferring jurisdiction on the Commission did not provide for the ability to adjudicate claims for money damages: "We find nothing in the quoted language from 52 O.S. 1961 § 87.1(d), or in any other portion of said section, granting to the Corporation Commission jurisdiction to hear and render judgment in an action sounding in tort." *Kingwood Oil*, 396 P.2d at 512. After discussing the scope of the Commission's jurisdiction "to avoid the drilling of unnecessary wells" and "to protect correlative rights," the Supreme Court held that the conservation statute, which confers jurisdiction on the Commission, "does not confer jurisdiction upon the Corporation Commission to try damage suits." *Id.* (emphasis added); *See also Texas Oil and Gas Corporation v. Rein*, 1974 OK 8, 534 P.2d 1277, 1279 (rejecting a mineral owner's contention that the Commission should allow a jury trial on damages in connection with the Commission order because the statute affording the Commission jurisdiction to handle pooling issues ""does not confer jurisdiction upon the Commission to try damage suits") (citing *Kingwood*, 396 P.2d at 512). This long-established limitation confines the Commission's jurisdiction.

As noted above, the Commission acting in its adjudicative capacity is a tribunal of limited jurisdiction. In contrast, district courts in Oklahoma are courts of general jurisdiction. *Johnson v. Goodman*, 1987 OK 77, 941 P2d 990, 994. As found in such case, those district courts are vested with "unlimited original jurisdiction of all justiciable matters, except as otherwise provided in this Article [Okla. Const. Art. VII], and such powers of review of administrative action as may be provided by statute. Okla. Const. Art. VII Sec. 7(a). However, the district courts are 'constitutionally prohibited from interfering with the Commission's exercise of its adjudicative functions.' Okla. Const. Art. 9 Sec. 20; *Tenneco*

Oil Co. v. El Paso Natural Gas Co., 1984 OK 52, 687 P2d 1049, n. 6 (Opala, J. dissenting)."

The above recitations of general law applicable to the Commission apply directly to the present Motion filed in this cause. Mewbourne, at the inception of its pooling application, gave notice by certified mail to Optima in its Oklahoma City office, which Optima did not bother to open until after the pooling hearing. Mewbourne also gave notice by publication in Oklahoma County and in Ellis County. When the Pooling Order was affirmed by the Commission, Optima never elected to participate in the proposed well.

The Motion to Reopen filed in this cause is structured to seek money damages for what the federal courts described as "intrinsic fraud" practiced by Mewbourne in relation to the original Pooling Application filed in Cause CD No. 200604826. There are two (2) fundamental problems with that fact. First, as noted above the Commission lacks jurisdiction to award money damages to an Applicant, or Movant, under an oil and gas proceeding brought pursuant to the Oil and Gas Conservation Statute. Secondly, the concept of intrinsic fraud as applied to the proceedings which seek a pooling order is not a basis for a purported tort claim brought before the Commission. It is simply a concept used to identify an equitable basis for vacating final orders which otherwise might not be attackable.

In *Texas Oil and Gas Corporation v. Rein,* 1974 OK 8, 534 P.2d 1277, a mineral owner within a drilling and spacing unit which was pooled by Texas Oil and Gas Corporation claimed that he had not consented to the location of a well on the surface tract he owned within the pooled unit. He further contended that even if the Pooling Order was

valid he was entitled to a jury trial before the Commission on the issue of damages he would incur as a result of the well to be drilled. In denying that contention, the Oklahoma Supreme Court stated as follows:

> "We have previously held §87.1 does not confer jurisdiction upon the Commission to try damage suits. Neither of the Orders purport to award or deny any compensation to *Rein* for damages. *Kingwood Oil Company v. Hall-Jones Oil Corporation,* 1964 OK 231, 396 P.2d 510"

The *Kingwood* case cited by the Court in *Rein* involved, among other issues, the claim by a party that the Commission has exclusive jurisdiction over a trespass claim resulting from the alleged improper drilling of a well on a lease contained within a drilling and spacing unit, but not made subject to a Pooling Order covering such unit. The District Court had dismissed the tort action brought by the leasehold owner based upon a finding that the Commission had exclusive jurisdiction over such claim. The Court in *Kingwood* held as follows:

> "We find nothing in the quoted language from 52 O.S. 1961 §87.1(d), or in any other portion of said section, granting to the Corporation Commission jurisdiction to hear and render judgment in an action sounding in tort. While not denying that it is a tort action, *Hall-Jones* argues that such is immaterial, and that regardless of what kind of action it is, it is still merely a dispute between two lessees in a drilling and spacing unit growing out of their rights as such lessees . . ."

Hall-Jones had argued in *Kingwood* that the admitted general jurisdiction of the District Courts in Oklahoma to try damage claims could also be shared with the Commission in certain circumstances. This argument was refuted by the Court in *Kingwood* when it stated that:

> "It is the position of *Hall-Jones* that 52 O.S. 1961 §87.1, is a permissible statutory exception to the jurisdiction conferred upon the district court by the Constitution. Assuming this to be true, we hold

that §87.1 does not confer jurisdiction upon the Corporation Commission to try damage suits."

Despite all of this, Optima seeks damages (called "restitution to the injured party" in its motion) which the Commission cannot grant. The Commission should dismiss any claim by Optima seeking money damages because such relief exceeds the jurisdictional limits of the Commission.

PROPOSITION C: EVEN IF PROVED, INTRINSIC FRAUD UPON THE COMMISSION, CANNOT RESULT IN MONEY DAMAGES TO OPTIMA

In the many actions that preceded Optima's current motion, Optima attempted to cast itself as the victim of Mewbourne's purported fraud on the Commission in an effort to support a money damage claim on that purported fraud.[1] However, Optima's claim has been wrong minded from the beginning because a claim for intrinsic fraud upon a tribunal, cannot result in money damages to a litigant. Rather, the only remedies for such claim are limited to actions by the tribunal with respect to the order or judgment allegedly issued as a result of such fraud.

In *Patel v. OMH Med. Ctr., Inc.*, a doctor, who had litigated with two hospitals, sued the hospitals and their lawyers in a second action "for damages from various acts of fraud and deceit that allegedly occurred" in the first trial. 1999 OK 33, 987 P.2d 1185, 1188. Though the trial court vacated the judgment for the first trial, due to the facts alleged, the same court dismissed the claims for relief, including for intrinsic fraud, for failure to state

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[1] Mewbourne disagrees with just about every aspect of this hypothesis and, if required, will demonstrate that it has not deceived, and would not deceive, the Commission in any proceeding. However, and only, for purposes of the argument, Mewbourne focuses on the legal insufficiency of Optima's intrinsic fraud claim as a vehicle for money damages.

a claim. *Id.* at 1189. The Oklahoma Supreme Court considered "whether the litigation-related misconduct alleged here may be redressed through a civil action in tort" and, ultimately, answered "in the negative." *Id.* The Supreme Court held that the doctor's claims for money damages, flowing from far more egregious acts than Optima has alleged on Mewbourne's behalf, were barred as a matter of law:

> [W]e are asked to reverse the dismissal of Patel's tort action for failure to state a claim. In that action damages were sought for defendants' alleged fraud, deceit, perjury, and spoliation of evidence in the Patel I trial. In reviewing a *nisi prius* disposition by dismissal, the issues stand before this court for *de novo* review. The purpose of a motion to dismiss is to test the legal sufficiency of the pleadings, not to evaluate the underlying facts. The question before us is hence whether, taking all of plaintiff's allegations as true, she is precluded from recovering as a matter of law. We hold that she is barred. In *Cooper v. Parker–Hughey*, [1995 OK 35, 894 P.2d 1096,] this court held that in this state no civil action may be maintained for damages caused by perjury, whether the petition for damages refers to the tort as perjury or as fraud or deceit. The court's holding in *Cooper* reasoned that perjurious testimony constitutes a fraud or deceit on the finders of fact and on the judicial system as a whole, and not on an individual litigant. The court looked to the common law, the Oklahoma Constitution, and to Oklahoma statutory provisions. It found there no support for the adoption of a tort remedy to provide damages for perjury. To the extent Patel's petition relies on perjurious testimony as the basis of her claim for damages, whether denominated perjury, fraud, deceit, or "prima facie tort", the petition fails to state a claim. It was properly dismissed.

Id. at 1201-02 (emphasis added). The Supreme Court also noted that no civil action exists for a spoliation claim. *Id.* at 1203. Further, the Supreme Court pointed out that whatever other remedies might exist, money damages was not among same. *Id.* In conclusion, the *Patel* Court "acknowledge[d] the seriousness of litigation-related misconduct such as that alleged in Patel III" but "explicitly decline[d] . . . to provide redress

for that civil harm through the adoption of a new tort." *Id.* at 1203. The Court reminded litigants that the "available remedies," including both seeking to vacate a judgment and the other remedies the Court identified were "sufficient." *Id.*

Patel demonstrates the obvious fact that no cause of action for money damages exists for intrinsic fraud upon a judicial body because the victim of the fraud, to the extent the fraud exists, is the tribunal or the system of justice. Litigants that feel they have been aggrieved by intrinsic fraud may seek to vacate the judgment they believe resulted from the fraud. They may also seek such other remedies that might exist. However, the Supreme Court has held that money damages are not among such remedies.

In this proceeding, Optima is not seeking to vacate Order No. 528230. The Oklahoma Court of Civil Appeals vacated that order long ago. Rather than pursue the pooling application on remand, Optima engaged in a multi-year pursuit of money damages in the Federal Court based upon a claim of intrinsic fraud. The Commission must reject Optima's attempt in this case to twist the concept of intrinsic fraud into a claim for money damages from the Commission.

What is abundantly apparent from review of this Motion to Reopen is that Optima misconceives the concept of intrinsic fraud. That concept is not intended to create a civil cause of action for money damages. Rather, it is a form of equitable relief to be applied in an attempt to vacate or modify a final judgment or order. A delayed attack on a final order is generally controlled only by resort to proper statutory relief. However, the Oklahoma Courts have always exercised inherent authority to grant equitable relief from a judgment or order where statutory relief was unavailable or inadequate. See *Pettis v.*

Johnson, 1920 OK 224, 190 P. 681. Typical of the grounds that have been asserted in an action for equitable relief from a final order is fraud in the procurement of a judgment, or lack of jurisdiction over the person of a party discovered too late to be claimed in a statutory proceeding. See *Phillips v. Ball*, 1960 OK 145, 358 P.2d 193; and, *Pettis*, supra. As described in *Sadberry v. Hope*, 1968 OK 107, 444 P.2d 175, the term "intrinsic fraud" involves perjured testimony, or fraud perpetuated on a court in obtaining the final judgment. "Intrinsic fraud" is distinguished from "extrinsic fraud" which is fraud extraneous to the issues presented in a case and which prevents the complaining party from having a fair hearing. See *Calkin v. Wolcott,* 1937 OK 699, 77 P.2d 96.

Clearly, the concept of "intrinsic fraud" is not intended to create a civil cause of action for damages. It simply relates to the issue of whether a final order is insulated from a delayed attempt to vacate such order. Optima is not now seeking to vacate Order No,. 528230. That Order was previously vacated by the Oklahoma Court of Civil Appeals in Case No.193,742. This Motion to Reopen is a poorly disguised effort to vest the Commission with jurisdiction over a private rights dispute.

Optima's Motion on its face shows that it seeks damages which, as illustrated above, this Commission cannot grant. In the first paragraph of Optima's Motion, Optima seeks, ". . .proper sanctions and restitution . . . ." In the sixth paragraph Optima, again, seeks ". . .sanctions and/or restitution to the injured party." Also, in paragraph six, Optima states that it ". . .has incurred substantial economic loss in an amount which should be determined in an evidentiary hearing." In Optima's prayer, it again asks for, "proper sanctions and equitable restitution . . ." . These assertions, even if viable, would result

from a private rights dispute between Mewbourne and Optima.

In *Tenneco Oil Company v. El Paso Natural Gas Company,* 1984 OK 52, 687 P,.2d 1049, the Oklahoma Supreme Court found a distinction between public rights and private rights as follows:

> The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present case, for it suffices to observe that *a matter of public rights must at a minimum arise 'between the government and others.'* In contrast, *'the liability of one individual to another under the law as defined,' is a matter of private rights.* Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated legislative courts or administrative agencies of their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power."

The 1985 case of *Samson Resources Company v. Corporation Commission,* 1985 OK 31, 702 P.2d 19, found that the Commission did not have jurisdiction under the ""correlative rights" doctrine because the issue involved a dispute between private parties in which the public interest was not involved. The Court found at 22 and 23 that:

> Section 87.1 provides two other avenues for the exercise of Commission jurisdiction over the public interest in correlative rights. To prevent drainage from offsetting production the Commission may allow additional well locations in a spacing unit. To prevent drainage and the concomitant waste occurring in a unit in which interest owners are not able to come to terms regarding voluntary development, the Commission is empowered, upon proper application, to order those interests pooled. This allows an orderly development of the common source of supply. Aside from the recognized power to monitor certain terms and conditions of the contract imposed on the parties through a forced pooling order, no other powers to protect correlative rights are granted or implied by this statute.
>
> The relief requested by *Tenneco* in this case, the replacement of an operator designated under a voluntary pooling agreement in order to protect "correlative rights," is clearly beyond the Commission's conferred jurisdiction, as it concerns a dispute between

> private parties in which the public interest in correlative rights is not involved.

Later, in 1985 in *MM Resources, Inc. v. A.L. Huston,* 1985 OK 102, 710 P.2d 763, the Supreme Court determined that it was within the subject matter jurisdiction of the district court to decide whether an alleged private agreement, which was subject to a forced pooling order, could define the terms under which the assignee of the mineral interest would pay a proportionate share of drilling and operating expenses to the assignor who had elected to participate. The Court found at 765:

> "It is clear from *Tenneco* that the majority of this Court takes the position that the proper forum to decide private-rights disputes is in the district court. 687 P.2d at 1053.
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> * * *
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> In addition, the *Samson* holding recognizes the inability of the Commission to entertain a suit for money damages thereby placing a dispute for breach of a duty where damages are sought, particularly within the province of the district courts. 702 P.2d at 23.
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> * * *
>
> The present case clearly falls outside agency issues of public-law. This dispute does not present a matter involving protection of correlative rights or prevention of waste and is therefore outside the scope of the Commission's regulatory power as conferred by 17 O.S. 1981 § 52. The dispute presented in this case is of a proprietary private nature. We hence hold that the proper forum for appellant to enforce any contractual liability is the district court."

Probably one of the most clearly written and incisive opinions was the opinion in *GrayHorse Energy, LLC v. Crawley Petroleum Corporation*, 2010 OK CIV APP 145, 245 P.3d 1249. In that case, the Court of Appeals thoroughly and completely analyzed the distinction between private and public rights. The *GrayHorse* case involved working interest owners suing the operator for conversion, negligence, constructive fraud and unjust

enrichment for unauthorized use of the working interest owners casing, pipe, wellbore and other associated personal property from the subject well. The action was brought in the district court of Logan County, and the trial court sustained *Crawley's* Motion to Dismiss. This was reversed by the Court of Appeals where at 1253 it found:

> "Although the OCC has the authority of a court of record, it has limited jurisdiction. *Tucker v. Special Energy Corp.,* 2008 OK 57, ¶ 9, 187 P.3d 730,733. Any action by the OCC must be authorized by statute. *Id. See also Rogers v. Quiktrip Corp.,* 2010 OK 3, ¶6, 230 P.3d 853, 857 (the OCC "possesses only such authority as is expressly or by necessary implication conferred upon it by the constitution and statutes of Oklahoma."). Pursuant to 52 O.S. Supp. 2006 § 86.1 et seq., the OCC oversees the conservation of oil and gas and its jurisdiction is limited to the resolution of public rights. *Tucker* at ¶9, 187 P.3d at 733. "Public rights are involved [in the area of oil and gas conservation] when 'a unitization order, pooling order, or order setting the allowables on the unit's well' affects "the correlative rights of all mineral rights owners in [a] common source of supply [in a] unit.'" *Id.* (quoting *Leck v. Continental Oil Co.,* 1989 OK 173, ¶8, 800 P.2d 224,226).
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> As implied above, district courts have jurisdiction to resolve disputes over *private rights* involving mineral interests and oil and gas leaseholds. *Tucker v. Special Energy Corp.,* 2008 OK 57, ¶10, 187 P.3d 730. "[S]ubject matter jurisdiction rests solely with the district court to determine private rights in mineral interests and oil and gas leaseholds . . ." *Leck v. Continental Oil Co.,* 1989 OK 173, ¶6, 800 P.2d 224, 226. That is, the OCC "is without authority to hear and determine disputes between two or more private persons or entities in which the public interest is not involved." *Rogers v. Quiktrip Corp.,* 2010 OK 3, ¶7, 230 P.3d 853, 857 (footnote omitted). When the conflict between the parties does not affect the 'rights within a common source of supply and thus' does not affect 'the public interest in the protection of production from that source a s a whole,' the district courts, and not the OCC, have jurisdiction. *Samson Resources Co. v. Corporation Commission,* 1985 OK 31, ¶9, 702 P.2d 19, 22. *See also Rogers* at ¶6, 230 P.3d at 857 ("[t]he function of the [OCC] is to protect the rights of the body politic; private rights and obligations

of private parties lie within the purview of the district court."); and *Tenneco Oil Co. v. El Paso Natural Gas Co.,* 1984 OK 52, 687 P.2d 1049 (finding that the trial court has jurisdiction over a case between interested parties to a forced-pooling order and where no public issue within the jurisdiction of the OCC was challenged).

In the context of mineral interests and oil and gas leaseholds, the Oklahoma Supreme Court has held 'questions in an action concerning the relationship of private parties, their duties, rights and obligations, and the existence of liability for the breach of such duties to be matters particularly with[in] the province of the district court.' *Rogers* at ¶7, 230 P.3d at 858 (discussing *Samson Resources Co.,* 1985 OK 31, 702 P.2d 19). Furthermore, in *Kingwood Oil Co. v. Hall-Jones Oil Corp.,* 1964 OK 231, 396 P.2d 510, 512, the Oklahoma Supreme Court found no authority granting the OCC 'jurisdiction to hear and render judgment in an action of damages sounding in tort,' and held that the OCC does not have jurisdiction to try damages suits. As recently stated by the Court, "[t]he [OCC], although possessing many of the powers of a court of record, is without the authority to entertain a suit for damages.' *Rogers* at ¶6, 230 P.3d at 857 (footnote omitted).

* * *

Even in the context of oil and gas rights involving OCC orders, 'long-standing Oklahoma law recogniz[es] district court jurisdiction to provide a remedy for damages based on common law theories of recovery, such as private nuisance and negligence.' *NBI Services, Inc. v. Ward,* 2006 OK CIV APP 20, ¶19, 132 P.3d 619, 626. *Cf. Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 70, 102 S.Ct. 2858, L.Ed.2d 598 (1982)(observing that at a minimum, to be deemed a public rights dispute and, therefore, capable of being removed from Art. III courts and delegated to legislative courts or administrative agencies, a case must arise between the government and others, and that private rights disputes lie at the core of the historically recognized judicial power). As in *NBI Services, Inc.,* Crawley's argument, in its 'Motion to Dismiss for Lack of Subject Matter Jurisdiction,' Confuses the statutory grant of exclusive jurisdiction to the OCC to *regulate* oil and gas exploration and production activities in Oklahoma, with the jurisdiction [of the district courts] to *afford a remedy* to those whose common law rights have been infringed by either the violation of those regulations or otherwise.

Id. At ¶21, 132 P.3d at 626. We find that the trial court has

> subject matter jurisdiction over this case to afford a remedy for the alleged infringement of the GrayHorse group's common law rights. Therefore, we remand for further proceedings."

Even assuming there was ever a basis for finding that Mewbourne misled the Commission, and thereby obtained the pooling order, the remedy for that circumstance was vacation of such order. The remedy sought in the current motion is for money damages resulting from the dispute between Mewbourne and Optima.

PROPOSITION D: OPTIMA MAY NOT SUE OR DEFEND IN OKLAHOMA

Optima Oil & Gas, LLC (a Colorado entity) was registered on October 16, 2000, under the laws of Colorado. (*See* Affidavit of Tony Phillips, attached hereto as Exhibit "1". According to the Colorado Secretary of State, Optima is in good standing. Oklahoma Secretary of State records show that Optima became domesticated in Oklahoma on August 27, 2008. Those Oklahoma Secretary of State records, however, list Optima (the Colorado entity) as "inactive" on its status because the entity is no longer domesticated in Oklahoma. Because Optima has not maintained its domesticated status, it cannot maintain suit in Oklahoma.

"The law provides that persons or corporations have the capacity to sue or be sued in this state except as otherwise provided by law. *Century Inv. Grp., Inc. v. Bake Rite Foods, Inc.*, 2000 OK CIV APP 48, 7 P.3d 510, 512-13 (citing 12 O.S. § 2017(B) ("CAPACITY TO SUE OR BE SUED. Except as otherwise provided by law, any person, corporation, partnership, or unincorporated association shall have capacity to sue or be sued in this state.").) The Oklahoma Limited Liability Company Act, 18 O.S. § 2043, requires a foreign limited liability company to register with the office of the Secretary of

State and to continue that registered status. Without that registered status, Oklahoma law bars Optima from maintaining this action:

> [A] foreign limited liability company that has ceased to be registered in this state may not maintain any action, suit or proceeding in any court of this state until . . . the foreign limited liability company has been reinstated as a foreign limited liability company duly registered in this state. An action, suit or proceeding may not be maintained in any court of this state by any successor or assignee of the . . . foreign limited liability company on any right, claim or demand arising out of the transaction of business by the domestic limited liability company after it has ceased to be registered in this state until the . . . foreign limited liability company, or any person that has acquired all or substantially all of its assets, has caused the limited liability company to be reinstated . . . as a foreign limited liability company duly registered in this state . . . .

18 O.S. 2055.2(F) (emphasis added).

Courts have readily applied this and similar bars to suit. For example, in *Century Investment Group*, 7 P.3d at 512, the court affirmed the entry of a directed verdict on the ground that corporation had been suspended by the Secretary of State for failure to pay its state franchise tax. *See also V.I.P. Investment Corporation v. Mayes*, 1977 OK 145, 567 P.2d 86 (holding that a foreign corporation, not domesticated in Oklahoma pursuant to the then-existing statues, could not bring suit in Oklahoma to recover on a promissory note); *Aviation Data Service, Inc. v. A.C.E. Copier Service, Inc.*, 1992 OK CIV APP 41, 832 P.2d 31, 32-33 (holding that "it was reversible error" to permit a suspended corporation to defend the suit against it and, in the meanwhile, refusing to consider the suspended corporation's appellate brief because the "statute plainly states that a suspended corporation shall be denied its right to sue or defend in state courts").

The *Century Investment Group* court reasoned that the foreign entity was "charged with knowing its corporate status in Oklahoma, and Oklahoma law" and, as a result, "could have cured its problem." *Id.* at 513. And the Court concluded that the trial court (or, as applied here, the Commission) was not required to permit the foreign entity the ability to cure its deficiency during the litigation:

> It is a decision by the Legislature that a corporation which has been suspended "shall be denied the right to sue or defend in any court of this state." We feel constrained to hold that this statute may be enforced by bringing the suspension to the attention of the court with appropriate proof at any time during the proceeding.

The Court explained that Oklahoma law did not contemplate a "right to reinstate" or "a grace period" during the litigation to cure the problem. *Id.* "All that the trial court was charged with at the time of the motion for directed verdict," the Court reasoned, ""was a determination whether 'the corporation shall in fact, be denied the right to sue or defend.'" *Id.* (quoting *Sapulpa Travel Services, Inc. v. White*, 1996 OK CIV APP 21, 915 P.2d 396). That is all the Commission should consider here.

The information from the office of the Oklahoma Secretary of State leaves no doubt that Optima is "a foreign limited liability company that has ceased to be registered in this state." 18 O.S. § 2055.2(F). The records also show that Optima has not "been reinstated as a foreign limited liability company duly registered in this state." *Id.* As a consequence of these deficiencies, Oklahoma law dictates that Optima "may not maintain any action, suit or proceeding in any court of this state." *Id.* The Commission is not required to afford Optima time to domesticate; rather, it should rule based on the materials in the record at the time. *See Century Inv. Grp.*, 7 P.3d at 513. The Commission should dismiss Optima's

motion to reopen this matter because, under established Oklahoma law, Optima "may not maintain any action, suit or proceeding in any court of this state."

PROPOSITION E: THE DOCTRINE OF LACHES BARS ANY CLAIM BY OPTIMA RELATING TO THE 2006 COMMISSION PROCEEDING

""Laches is an equitable defense against the tardy prosecution of stale claims not yet barred by limitations." *Hedges v. Hedges*, 2002 OK 92 ¶¶8, 66 P.3d 364, 368. "[T]he doctrine is discretionary depending on the facts and circumstances of each case as justice requires." *Smith v. The Baptist Foundation of Oklahoma*, 2002 OK 57, ¶ 9, 50 P.3d 1132, 1138. As a result, "[t]he party invoking the laches defense must show unreasonable delay coupled with knowledge of the relevant facts resulting in prejudice." *Id.*

As to the issue of unreasonable delay, the doctrine of laches recognizes that ""[o]ne must be diligent and make such inquiry and investigation as the circumstances reasonably suggest and means of knowledge are equivalent to actual knowledge."" *Winn v. Shugart*, 112 F.2d 617, 622 (10th Cir.1940). But courts have recognized that the duty to act without delay takes on a heightened importance in speculative fields, like oil and gas matters:

> ""the duty to act with dispatch is especially imperative where one claims an interest in property that is highly speculative. One may not withhold his claim to a highly speculative venture, such as was involved in these wildcat oil and gas leases and permits, to await the outcome of an effort to develop them put forth by another, and then when his efforts are crowned with apparent success, come in and claim the fruits thereof. "

Winn, 112 F.2d at 622; *see also Chesapeake Op., Inc. v. Carl E. Gungoll Expl., Inc.*, 2005 OK CIV APP 45, 116 P.3d 213, 216 (applying the doctrine of laches in the oil & gas context because the claim was "stale, unexcused, and prejudicial").

The Oklahoma Court of Civil Appeals issued its opinion on the matters at issue in this case on April 8, 2008. At that time, the appellate court ordered "the matter remanded to the Corporation Commission for a full hearing on the merits of Mewbourne's Pooling Applications and any further proceedings consistent with this Opinion." But, after that instruction, Optima did not pursue any proceeding consistent or otherwise with the Oklahoma appellate court's opinion. Nothing happened at the Commission.

Optima made no effort to renew leases in the area to pursue its purported prospects. Nor did it seek any relief before the Commission on remand. Instead, Optima chose to sue Mewbourne for money damages and engage in what has become an endless (and expensive) litigation campaign.

Having failed in all such efforts, Optima has returned to the Commission. However, Optima's purpose is no longer related to the pooling application. Rather, five years and nine months after the order remanding the cause issued in April of 2008, Optima returned to the Commission to pursue money damages. Another three (3) years has now passed and only in 2016 did Optima seek to prosecute the latest motion.

To the extent it thought it had valuable prospects in Section 1, Optima should have pursued appropriate relief from the Commission while its leases existed. In the alternative, it should have made an effort to lease the properties after the leases expired. Rather it sat on its rights, wasting time and money litigating the doomed lost-profits claims. Optima's failure to pursue proper remedies before the Commission, including litigation of the pooling application upon remand, cost Mewbourne hundreds of thousands of dollars in attorneys' fees and costs in the various courts. All of this prejudices Mewbourne. The Commission

should not countenance either Optima's delay or its tactics. The Commission should apply the doctrine of laches to bar Optima's motion to reopen.

CONCLUSION

Optima's efforts to seek money damages for purported fraud on the Commission cannot find relief here. For any and all of the reasons set out above, the Commission should dismiss Optima's motion to reopen this matter. It is time for this to end.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 1st day of February, 2017, a true and correct copy of the above and foregoing document was sent via First Class U.S. Mail, postage prepaid thereon to the following:

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