

FILED
SUPREME COURT
STATE OF OKLAHOMA

FEB 20 2018

JOHN D. HADDEN
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CITIZEN ENERGY II, LLC, AN
OKLAHOMA LIMITED LIABILITY COMPANY

PETITIONER,

v.

THE HONORABLE PAUL HESSE,
CANADIAN COUNTY DISTRICT JUDGE

PRIMARY RESPONDENT,

and

THE CITY OF MUSTANG,
A MUNICIPAL CORPORATION

SECONDARY RESPONDENT.

SUP. CT. CASE No. PR-116710

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* OKLAHOMA
INDEPENDENT PETROLEUM ASSOCIATION**

Applicant, Oklahoma Independent Petroleum Association ("OIPA"), an Oklahoma Corporation in Oklahoma County, State of Oklahoma, respectfully requests permission pursuant to Rule 1.12(b) of the Oklahoma Supreme Court Rules, for leave to file as *amicus curiae* in this matter. OIPA represents more than 2,200 independent oil and natural gas operators that explore for and produce crude oil and natural gas in the State of Oklahoma. OIPA also represents a number of oilfield service companies that provide important services that support exploration and production activities. OIPA members do not refine oil into gasoline or heating fuels, nor do they market gasoline. OIPA members believe that they should act responsibly when producing oil and natural gas, assuring that the anecdotal "social license to operate" is maintained with the localities in which they operate.

While agreeing with the primary result sought by the real party in interest, The City of Mustang ("Mustang" or "the City"), OIPA contends that the standard of review applied in this matter should be a *de novo* standard not the more restrictive "arbitrary and capricious" standard claimed by Petitioner. Further, OIPA raises issue with a statement made in *amicus curiae* The City of Ponca City's application for leave to file.

OIPA asks the Court to consider four specific issues as it contemplates this appeal:

- a) Petitioner is wrong in asserting an "arbitrary and capricious" standard in reviewing 52 O.S. §137.1. To the contrary, Mustang's actions should be reviewed *de novo* for "reasonableness" as defined in the statute.
- b) Petitioner is in error to claim that municipalities "no longer have an ability to regulate oil and gas," subject to 52 O.S. §137.1. Rather, the legislature *granted* municipalities authority to regulate oil and gas in four specific areas, leaving the authority over all other areas of oil and gas regulation to the Oklahoma Corporation Commission.
- c) While Petitioner is correct to state that Mustang "cannot prohibit or ban drilling," there is no ban on drilling present in the requirement that sound barriers be placed around the specific well in question directly across the street from a residence.
- d) *Amicus* Ponca City states in its application to file as *amicus* that the City will, "address the importance of allowing a charter municipality the ability to govern themselves [*sic*]." According to Oklahoma Attorney General Opinion 2015-12, such a statement is unnecessary because the provisions of 52 O.S. §137.1 "apply equally to charter municipalities...and non-charter municipalities."¹

¹ 2015 OKAG 12, at 12.

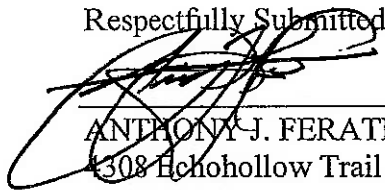
In support of this motion, OIPA has attached the brief that it would file if this motion is approved by the Court.

CONCLUSION

For these reasons, *amicus* OIPA respectfully requests that the Court grant this motion for leave to file the attached brief in the present matter.

Dated this 20 day of FEB, 2018.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed this ____ day of ____, 2018, by depositing it in the U.S. Mail, postage prepaid, to:

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No. PR-116710

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**CITIZEN ENERGY II, LLC,
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**THE HONORABLE PAUL HESSE,
CANADIAN COUNTY DISTRICT JUDGE**

Primary Respondent,

-and-

**THE CITY OF MUSTANG,
A MUNICIPAL CORPORATION**

Secondary Respondent.

**BRIEF OF *AMICUS CURIAE*
OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION**

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Dated: February 20, 2018

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INTEREST OF AMICI CURIAE

The Oklahoma Independent Petroleum Association (“OIPA”) represents more than 2,200 independent oil and natural gas operators that explore for and produce crude oil and natural gas in the state of Oklahoma. OIPA also represents a number of oilfield service companies that provide important services that support exploration and production activities. OIPA members do not refine oil into gasoline or heating fuels, nor do they market gasoline.

As part of its mission to its membership, OIPA engages as *amicus curiae* in legal matters it views as holding exceptional importance—matters that have the ability to impact the production of oil and natural gas. To this end, OIPA has submitted *amicus* filings in numerous cases, including *Charles Pummill, et al. v. Hancock Exploration LLC, et al.*, No. 114703 (Oklahoma Court of Civil Appeals), *Bank of America, N.A. v. El Paso Natural Gas Co.*, No. IN-107,510 (Oklahoma Supreme Court, 2015), and *Murphy v. Royal*, Nos. 07-7068 & 15-704 (U.S. Circuit Court of Appeals for the 10th Circuit.)

OIPA participates in this case on the basis that the briefing filed in this case does not fully represent the issues that may need contemplation if this case is decided on the merits. OIPA wishes to provide the Court insight into issues it believes are pertinent to resolving this case.

ARGUMENT

A. MUSTANG’S ACTIONS SHOULD NOT BE REVIEWED UNDER AN “ARBITRARY AND CAPRICIOUS” STANDARD, BUT RATHER UNDER A DE NOVO STANDARD IN COMPLIANCE WITH A STATUTORY GRANT OF AUTHORITY.

Petitioner advances a theory that 52 O.S. §137.1, as applied to this case, should be considered under an “arbitrary and capricious” standard. OIPA questions the rationale to this claim. An “arbitrary and capricious” standard traditionally derives from interpretations of the granting of administrative authority, such as that in the seminal administrative law case, *Chevron U.S.A.*,

*Inc. v. Natural Resources Defense Council, Inc.*² *Chevron* stands for the proposition that when the question of an administrative agency's authority is at question, and the granting authority is ambiguous, the Court is limited to determining if the agency's own determination of authority is based on a permissible construction of the statute.³ The real issue in this matter is the authority granted to municipalities under 52 O.S. §137.1. Municipalities are not administrative agencies, but the primary law-making authority in a municipality. Questions of review derived from actions of city council that are allowed by state statute are subject to a *de novo* standard of whether an action of the municipality is "reasonable."⁴ OIPA asks this Court, if it must reach a decision on the merits, that a *de novo* standard is applied to the matter in opposition to Petitioner's request.

B. WHEN APPLYING THE *DE NOVO* STANDARD TO 52 O.S. §137.1 AND THE ACTIONS OF MUSTANG, IT IS REASONABLE FOR THE CITY TO HAVE REQUIRED SOUND WALLS ON PETITIONER'S DRILLING SITE DIRECTLY ACROSS THE STREET FROM A RESIDENCE.

Petitioner claims that Mustang "no longer ha[s] an ability to regulate oil and gas operations that occur within their city limits."⁵ OIPA was a proponent of 52 O.S. §137.1 prior to its passage in the legislature. It is fair to say that Petitioner's assertion is incorrect, and it is reasonable for Mustang to require sound walls on a well being drilled immediately across a neighborhood street from a residence.

In 2015, OIPA supported legislation that has since become 52 O.S. §137.1. Prior to passage of the law, there was conflicting jurisdiction on issues related to oil and gas. For example, in

² *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, (1984).

³ *Id.*

⁴ See *Hargrave v. Tulsa Board of Adjustment*, 2002 OK 73, ¶3, "[I]ssues of law...are reviewed *de novo*."

⁵ Petitioner's Brief at 2.

recent years many localities passed or sought to pass ordinances regulating oil and gas to the point that they would create or created *de facto* drilling bans in the municipalities adopting the ordinances, conflicting with 17 O.S. 52(A)(1), which assigns “exclusive jurisdiction, power and authority” over oil and gas to the Oklahoma Corporation Commission. To address the conflict, the legislature clarified the Corporation Commission authority and for the first time, granted municipalities specific authority over four areas of oil and gas regulation: road use, traffic, noise, and odors. 52 O.S. §137.1 went on to require that any regulation in these four areas must be “reasonable” so as to avoid *de facto* drilling bans.

When Mustang allowed Petitioner a drilling permit on the condition that sound barriers be installed during drilling to prevent excessive noise, this was allowed within the authority of §137.1 because a) the permit was approved, b) the condition placed on drilling related to sound, and c) the condition was reasonable in the given circumstances. Petitioner’s assertion that Mustang has no authority in the regulation of the four areas §137.1 lists is not correct, and for this reason, Petitioner’s requests of this Court should be denied.

C. *AMICUS* CITY OF PONCA CITY’S ASSERTION THAT 52 O.S. §137.1 MAY NOT APPLY TO CHARTER CITIES IS INCORRECT, AND CONFLICTS WITH SUPREME COURT PRECEDENT AND ANALYSIS IN 2015 OKAG 12.

In Ponca City’s application to file an *Amicus Curiae* brief, *amicus* states that “applicant will address the importance of allowing a charter municipality the ability to govern themselves with ‘home rule’ and regulate commercial activities within its boundaries.”⁶ OIPA requests that this Court, if necessary to the court’s finding, follow its past precedent on the issue, as well as the comprehensive review of this Court’s opinions comprised in 2015 OKAG 12.

⁶ *Amicus* application at 3.

In Oklahoma Attorney General Opinion 2015 OKAG 12,⁷ the Attorney General conducts a thorough review of this Court's holdings related to state law authority and how conflicts with charter city authority should be addressed. The opinion references this Court's holding in *Vinson v. Medley*, 1987 OK 41, stating, "In cases of conflict between charter provisions and state law, the charter will control if the provision 'affects a subject that is deemed to lie *exclusively within municipal concern*.'"⁸ Any claim that oil and gas is exclusively a municipal concern in Oklahoma should study the budget issues our state has faced during the past two years as oil prices have slumped.⁹ In fact, even this Court explained the state importance of petroleum well when it stated:

it cannot be disputed that the production of petroleum and its various products is one of the major industries of the state, and one in which many of its citizens are vitally concerned. The almost universal use of oil, gasoline and other petroleum products, together with the fact that a major portion of the revenues to support our educational and eleemosynary institutions and other departments of state government is derived from taxes levied upon this industry, makes the conservation of this great natural resource a matter of grave concern to the state and every citizen thereof.

-*C.C. Julian Oil & Royalties Co. v. Capshaw*, 1930 OK 452, ¶13, 292 P. at 844.

While OIPA believes that Ponca City's statement was not intended as an effort to seek expansion of charter city authority, OIPA nonetheless believes that the well-established case law on this

⁷ See *Grand River Dam Authority v. State*, 1982 OK 60, 645 P.2d 1011, "In this state it has been held that such an opinion is binding on the officials affected by it. The basis rationale for this is that an official who has sought an opinion from the attorney general should, even though not compelled to do so by statute, follow the advice which is given to him. This duty extends only until the public official is relieved thereof by a court of competent jurisdiction or until this court holds otherwise than the attorney general's opinion.

⁸ 2015 OK AG 12 at 3.

⁹ See "Oil Groups support Step Up Oklahoma," *The Oklahoman*, <http://newsok.com/oil-groups-support-step-up-oklahoma/article/5579808> (viewed February 19, 2018)

matter is deserving of review in light of the statement and asks this Court to reaffirm past precedent if necessary.

RULE 1.12(f) STATEMENT

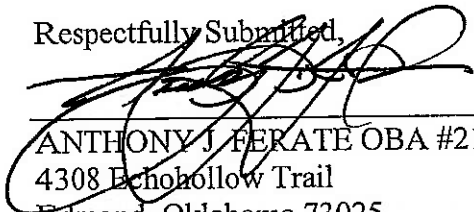
OIPA does not request the opportunity to present at oral argument, but if the Court would like to ask questions based on any issue presented in this brief, *amicus* will address the Court's questions, upon order.

CONCLUSION

For the foregoing reasons, OIPA respectfully requests that this Court accept the motion for leave to file as *amicus* and the accompanying statements of law which bear on the issues in this case.

Dated this 20th day of FEB, 2018.

Respectfully Submitted,



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