

**BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA**

FILED
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CORPORATION COMMISSION
OF OKLAHOMA

APPLICANT: **GARY S. WALKER, DIRECTOR,**)
 PETROLEUM STORAGE TANK)
 DIVISION, OKLAHOMA)
 CORPORATION COMMISSION)

RESPONDENT: **GARY GREENE**)

CAUSE EN NO.
201000137

RELIEF SOUGHT: **PENALTY ASSESSMENT**)
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)

REPORT OF THE OIL AND GAS APPELLATE REFEREE

This Cause came on for hearing before **Michael J. Porter**, Administrative Law Judge ("ALJ") for the Corporation Commission of the State of Oklahoma, on the 11th day of February and the 6th day of April, 2011, at 8:30 a.m. in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

APPEARANCES: **Jeffrey P. Southwick**, Deputy General Counsel, and **Kathy L. Nelson**, Assistant General Counsel, appeared on behalf of applicant, Gary S. Walker, Director, Petroleum Storage Tank Division ("PSTD"), Oklahoma Corporation Commission ("Director"); **Gary Greene** ("Greene") did not appear at the hearing on February 11, 2011 and presented no evidence, but appeared Pro Se at the hearing on April 6, 2011. Greene was absent from the Appellate argument concerning the Director's Exceptions on June 13, 2011 and made no appearance; and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The ALJ filed his Report of the Administrative Law Judge on the 13th day of May, 2011, to which Exceptions were timely filed and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 13th

day of June, 2011. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

THE DIRECTOR APPEALS the ALJ's recommendation that Greene was not an operator or owner of a storage tank system as defined by 17 O.S. Section 303. The ALJ determined that Greene was an impacted party under OAC-OCC 165:27-1-2. The ALJ therefore recommended that Greene be designated an impacted party and directed to apply for fund eligibility. The Indemnity Fund deductible is not applicable to an impacted party.

The Director filed an application to assess penalties against Greene for various infractions of the Commission rules regarding a facility located at 374 S. 99 Highway, Tishomingo, Oklahoma. Specifically, Greene was alleged to have failed to register underground fuel tanks within 30 days of the date he became the owner of the tanks. Greene allegedly failed to operate and maintain corrosion protection in temporarily closed underground tank systems. Greene allegedly also failed to use a qualified cathodic protection tester to certify corrosion protection system at the facility. Director recommended a fine of \$4,000 plus a co-pay of \$1,000 for the PST Indemnity Fund program.

THE DIRECTOR TAKES THE POSITION:

- (1) The ALJ's recommendations in his Report are contrary to the evidence and contrary to law.
- (2) The recommendations of the ALJ set forth in the Report, if adopted, will result in an absolute conflict with prior Commission orders regarding ownership.
- (3) The ALJ Report is arbitrary, capricious, unreasonable, discriminatory and fails to effect the clear intent of the statutory scheme determining ownership.

THE ALJ FOUND:

- (1) The Director's application pertains to a facility known as "The Station" located at 374 S. Highway 99, Tishomingo in Johnson County, Oklahoma. A facility No. 35-00696 was assigned to this location. A confirmed release has been discovered at this location and a Case No. 064-3619 assigned. The Director in the Complaint filed proposed a fine of \$4,000 to be paid within 30 days of the date the order issues. The Director also sought that the order

require Greene to remit the statutory 1% deductible co pay of \$1,000 to the Commission within 30 days of the order date.

(2) The ALJ recommended dismissal of Count One. As a nonoperator Greene was not aware of the requirements to register the purchase of the abandoned facility known as "The Station". The tanks were not used during the time Greene took possession of them until the date he submitted the registration form. He complied with OCC-OAC Rule 165:25-1-41.

(3) Count Two in the Director's Complaint provided that if Greene did not pay the fine assessed and 1% deductible co pay amount as provided in Count One, then the Commission will proceed with corrective action of the site and may in turn file a cost recovery action against Greene.

(4) Count Three in the Director's Complaint provided that the Director could seek compliance as well as the maximum lawful amount provided, or such other fine or penalty as the law permits, whichever is greater. Unless dismissed, failure to appear at the time and place directed, shall be taken as a confession and the maximum lawful amount assessed.

(5) The ALJ dismissed Counts Two and Three. The Director stated in his Complaint that during the course of the investigation of the facility by the Commission Staff it was discovered that Greene failed to operate and maintain corrosion protection in a temporarily closed tank system in contravention of OCC-OAC Rule 165:25-2-133. Also, the Director stated in his application that during the course of the investigation of the captioned facility by Commission Staff it was discovered that Greene failed to use a qualified cathodic protection tester to certify corrosion protection every three years in contravention of OCC-OAC Rule 165:25-2-53.

(6) The ALJ stated that OCC-OAC Rule 165:25-2-133 requires the owner of a storage tank system, taken temporarily out of service, to continue the operation, testing, and maintenance of corrosion protection. The Rule also requires electricity be maintained for an impressed current CP system. It is apparent the previous owner allowed the corrosion protection system to lapse. The system was not tested by March 2002 as stated in the Notice of Violation issued in August 2002. The facility was closed by at least March 2003 as noted by an inspector. Finally, the tanks were taken out of service at least by May 2003 and electrical service was removed by August 2005. At that time, if there was a functioning corrosion protection system, the system would have become non-functional without electricity. The previous owner was required to continue the operation, testing, and maintenance of a corrosion protection system. Clearly, that owner did not comply with those requirements. The prior owners also did not comply with OCC Rule 165:25-2-135 regarding the tanks being out of service for more than 12 months. The prior owner/operators were

persons who were in the business of selling fuel and likely more aware of the requirements regarding storage tanks than Greene. No evidence was submitted regarding any enforcement actions for violations during that period from March 2003 to May 2006.

(7) After the Commission became aware of the change in ownership, enforcement action was initiated against Greene. Greene testified he knew there was one tank in the ground but did not know there were two additional tanks in the ground. Greene testified he did not know he was to maintain cathodic protection on the underground tank system. It would have been a waste of Greene's funds to re-install and maintain cathodic protection for a tank storage system that was not in use nor expected to be in use. Greene has removed the tanks at a cost in excess of \$4,000. As there is no tank system in place, there is no need to seek compliance from Greene regarding cathodic protection or testing of related systems.

(8) OCC Rule 165:25-2-53 requires all cathodic protection systems to be inspected for proper operation every three years by a qualified tester, and every 60 days after new installation by the owner, to ensure the equipment (impressed current cathodic protection system) is functioning properly. As noted above, the ALJ found that Greene would have had to install a cathodic protection system to have the ability to have it tested. The ALJ found that Greene was a rancher, not a gas station operator. Greene admitted he was aware the property had been a gas station in years past and admitted he thought there was only one tank in the ground. However, he did not know there were three tanks. Greene testified he paid \$4,000 to \$5,000 to have the tank system removed, by state qualified tank removers. He said this was after conversations with Commission staff members.

(9) The Director recommended that Greene pay a 1% co-pay in order to be eligible for the PST Fund program. OCC-OAC Rule 165:27-3-1. The ALJ found that Greene was not an operator as defined by 17 O.S. Section 303. Greene was a rancher and did not operate a fueling station. He did not place any regulated substance in the tank system. He did not store regulated substances in the tank system. He did not use the tank system for regulated substances, nor did he dispense regulated substances from the tank system. The ALJ found that Green was an impacted party pursuant to OAC-OCC Rule 165:27-1-2. An Impacted Party is defined as "...an owner whose property has been impacted by a release from an on-site or off-site petroleum storage tank system that was never owned or operated by the impacted party and who has no OCC regulatory responsibility." The ALJ therefore recommended that Greene be designated an Impacted Party and directed to apply for Indemnity Fund eligibility. The Indemnity Fund deductible is not applicable to an Impacted Party.

POSITIONS OF THE PARTIES

DIRECTOR

1) **Jeffrey P. Southwick**, Deputy General Counsel, appeared on behalf of the Director and stated that Greene was advised of the Director's exceptions to the ALJ's determination that Greene was an impacted party. The Director felt this was an important matter to review and address because the Director believes that this is an important issue. The Director believes that Greene does not have a position nor does he care one way or the other whether his status is owner/operator or impacted party. The Director has had discussions with Greene and his environmental consultant and Greene's concern was the fine that was recommended to be imposed. Since no fine was imposed by the ALJ, and the ALJ's determination that no fine is warranted was not appealed by the Director, Greene did not make an appearance at the Appellate argument concerning the Director's exceptions to the ALJ's Report.

2) Greene was fully informed about the Director's appeal and had an opportunity to be present at the Appellate hearing. The Director had an employee mail Greene a copy of the Director's exceptions and the notice of the appellate hearing and he was fully apprised of his opportunity to be present. Greene's environmental consultant came to the Commission to see the Director concerning the exceptions that he received and the notice of hearing. The Director explained to Greene that the Director was not going to appeal the finding by the ALJ that there would be no fine assessed against Greene. The Director's only concern in this particular case is the determination by the ALJ that Greene was an impacted party. As far as Greene is concerned it's just a matter of semantics, Greene does not care and he is not concerned as to whether he is or is not an impacted party.

3) This action was derived from the Senate Bill #342 which changed the law here in Oklahoma and allowed a party who was not otherwise substantially compliant to pay a fine or a penalty and access the Indemnity Fund. Prior to the statute's enactment a person could have a violation that would have been out of substantial compliance and they would still have to do the environmental work and they couldn't access the Indemnity Fund that was created to fund that work. The statute changed in about 1998. Since then we have done numerous SP#342 cases to provide a penalty alternative. This is what this complaint is about.

4) On Exhibit 1, page 5 is the Registration for Petroleum Storage Tanks form which states that the type of notification is closure with the date received by the Commission being July 14, 2010 and with the ownership of the tank being listed as Gary Greene. On the next page on that form the Contact Person

in Charge of Tanks is also listed as Gary Greene as owner. On page 9 of the from under penalty of perjury Gary Greene certifies that he has "personally examined and am familiar with the information submitted in this and all attached documents" and "believe that the submitted information is true, accurate and complete." Greene then signs this form as owner on June 18, 2010. The Commission thinks this is clearly refuting the decision of the ALJ that Greene is other than an owner. Exhibit 1 and the registration for petroleum storage tanks document states that Greene is the owner and Greene signs this under penalty of perjury and as far as the Commission is concerned that's an admission that he is the owner. What the Commission was asserting in this case was that Greene did not comply with the substantial compliance requirements so therefore he had to pay the suggested fine. Greene disputed the fine and the ALJ then decided that he was an impacted party.

5) There are three cases involving a man named Dale Jackson (PSD No. 200800051-Order No. 563282, PSD No. 200800063-Order No. 568662, and PSD No. 200900014-Order No. 567422) where Mr. Jackson was in the same circumstance as Greene except instead of purchasing the property Jackson had loaned money to a person that owned a piece of property that had storage tanks on them. That person went bankrupt and the property was abandoned to Mr. Jackson at bankruptcy as being the note holder. Mr. Jackson did not want to remove the tanks. There was an agreement between the Corporation Commission and Mr. Jackson since the property was dumped on him by the Bankruptcy Court that he could file as an impacted party and could apply to the Indemnity Fund. Greene, on the other hand, has property next to the subject property and he knows there was a service station there and he bought the property knowing that there was at least one tank on the property.

6) In the Hall Oil Company case (PSD No. 200900056-Order No. 576450) Mr. Hall was an above ground storage tank owner and operator in Guthrie. He had the tanks installed on railroad right-of-way. Mr. Hall walked away from the property and two to five years later the railroad gave the property to the Oklahoma Department of Transportation. The Oklahoma Department of Transportation now owns the property. They in turn go out and remove the tanks that had been left on the property and then try to claim that Mr. Hall was the responsible person that owned the tanks. The case concludes that it was not Mr. Hall that owned the property but it was the railroad.

7) The Greene case concerns the definition of owner found in 17 O.S. § 303 (22) which states:

22. "Owner" means:

a. In the case of a storage tank system in use on November 8, 1984, or brought into use after that date,

any person who holds title to, controls, or possesses an interest in a storage tank system used for the storage, use, or dispensing of regulated substances, or"

Greene admitted that the tanks in question were used for a retail storage tank service station. They were used for that purpose. Maybe not by Greene but that's not an important factor in this case as you will see in the Hall case. Oklahoma Department of Transportation never obtained a nickel's worth of gasoline or regulated substances from the tanks that were there that they exercised dominion and control over. That's what happened here. Greene exercised dominion and control over these tanks by removing the tanks just like we saw in the Hall Oil case.

8) 17 O.S. § 303 (22)(b) provides:

b. In the case of a storage tank system in use before November 8, 1984, but no longer in service on that date, any person who holds title to, controls, or possesses an interest in a storage tank system immediately before the discontinuance of its use.

This paragraph states that prior to November 8, 1984 we are not going to go out and try to determine ownership. It's just the last people that owned the property. Here it is evident from Greene's testimony and the record that these tanks were in use after November 8, 1984 so our interpretation of the statute is that anybody in the chain of title can be an owner whether they use the tanks or not. We look to who owns the tank where the release was discovered. If you own the tank system at the time the release occurred, you are the owner. And you are responsible, not the person before you and not the person after you. That is what is in the present case. Greene filed the tank closure report with the Commission on July 14, 2010 and Greene's environmental consultant subsequently reported to the Commission that they took samples when they pulled the tanks and found elevated levels of contamination. The Commission opened up a confirmed release case and informed Greene that he needed to file an application for the Indemnity Fund to be reimbursed for the corrective action work that was done and was necessary. Unfortunately Greene did not want to pay the fine that was recommended. The Commission is not arguing that today and is only interested in defining who is an impacted party. The ALJ crafted something that was outside the record as Greene was definitely an owner, not an impacted party.

9) The other factor that is important from 17 O.S. § 352 concerns an Eligible Person which means someone who can apply to and receive money from the Indemnity Fund. 17 O.S. § 352(6)(a) provides that an owner or

operator of a storage tank system can get into the Indemnity Fund. Under Section (6)(b)(2) the person who did not know that such storage tank existed also can get into the Indemnity Fund who purchased the property. The burden is on the purchaser to prove he did not know there existed a storage tank system. There was never in this case such a dispute. Green knew a storage tank system existed when he bought the property.

10) 17 O.S. § 352(6)(c) does not apply to Greene either. It provides:

c. person who acquired ownership of a tank through inheritance as denoted in an Order Allowing Final Account and Determination of Heirship and Decree of Final Distribution or is responsible for a release by reason of owning the real property through inheritance within which a tank or a release is or was located...

If you look at 17 O.S. § 352(6)(c)(4) it states that

(4) the person did not participate or was not responsible in any manner, directly or indirectly, in the management of the storage tank system or for the release and otherwise is not engaged in petroleum production, refining or marketing.

In the present case what the ALJ relied on in making this determination that Greene was an impacted party was only made available in the eligible person Section, 17 O.S. § 352(6)(c) for this limited circumstance of acquiring the property through inheritance. A person can use this to get into the Indemnity Fund as an eligible person.

11) From the Staff's point of view an impacted party would be where tanks were in use before November 1984 and no one knows that there were tanks involved and they're building another facility on the property and find out there are tanks there. If they can prove that the tanks were taken out of use prior to 1984 that would give them an impacted party status. In this particular instant Staff in the past has determined an impacted party is only under those limited circumstances and to expand it out to someone who goes out and buys a piece of property and knows the storage tank system is there is not an impacted party. The ALJ has the discretion not to impose the fine.

12) This tank system was noted by Staff to be temporarily out of use indicating that the tank system met EPA requirements with 1998 upgrade of cathodic protection, internal lining, and double walled tank. By placing in Temporarily Out of Use status the tanks could be put back into use if they maintained cathodic protection. That's all they needed to do, keep the

electricity on to keep the tank from corroding. By keeping the Temporarily Out of Use status it wasn't as if they had been abandoned or would never be used again. From the Staff's perspective the tanks were available for someone else to come in and use them. To do so, all they would have to do was pressure test the tanks and show the cathodic protection system was being used.

13) Title 17 O.S. Section 303(1) defines an abandoned system which means storage tank system which "has been permanently out of service as a storage vessel for any reason or is not intended to be returned to service", or "has been out of service for one (1) year or more prior to April 21, 1989, or has been rendered permanently unfit for use as determined by the Commission." None of the three qualifying criteria in this section apply to the present situation or to Greene's property.

14) Storage tank regulation has been around for a long time, probably close to 30 years. The federal government regulated these storage facilities first and then delegated it to the states, that any person who contemplates buying a piece of property is on inquiry notice that the operable statutes and laws may affect said property and perhaps adversely if they acquire a piece of property that has a storage tank system on it. The onus is upon that person to go out and do an environmental audit to make sure no problems exist when someone purchases a property that has a storage tank system on it and the fact that they didn't do what should be required to make the property safe should not prevent them from being named an owner. The recommendations of the ALJ as to the determination of respondent Greene as an impacted party should be reversed and Greene be determined to be the owner/operator as provided by law.

CONCLUSIONS

The Referee finds the Report of the Administrative Law Judge should be affirmed, but modified with respect to the finding that Greene is an impacted party.

1) The only issue that is being appealed by the Director is whether Greene should be denominated as an impacted party or as an owner/operator. It is also noted by the Referee that Greene was fully informed about the Director's appeal and had an opportunity to be present at the appellate hearing on June 13, 2011. Apparently Greene was only concerned about the fine that the Director recommended against Greene, and since the Director did not appeal the no fine determination by the ALJ, Greene apparently was not concerned as to whether he was an owner/operator or an impacted party. The ALJ states in his Report on page 8:

Mr. Greene appears to be an impacted party. OCC Rule 165:27-1-2 defines an impacted party as "...an owner whose property has been impacted by a release from an on-site or off-site petroleum storage tank system that was never owned or operated by the impacted party and who has no OCC regulatory responsibility."...The ALJ recommends Mr. Greene to be designated an impacted party and directed to apply for fund eligibility. The Fund deductible is not applicable to an impacted party."

2) 17 O.S. § 352 (9) provides:

9. "Impacted party" means an owner whose property has been impacted by a release from an on-site or off-site petroleum storage tank which the impacted person did not own or operate and for which the impacted person has had no responsibility under Commission rules. An impacted party may apply for an eligibility determination on reimbursement from the Petroleum Storage Tank Indemnity Fund. An impacted party is not subject to the Petroleum Storage Tank Indemnity Fund deductible."

3) This particular case concerns the definition of owner found in 17 O.S. § 303 (22) which states:

22. "Owner" means:

a. in the case of a storage tank system in use on November 8, 1984, or brought into use after that date, any person who holds title to, controls, or possesses an interest in a storage tank system used for the storage, use, or dispensing of regulated substances, or

b. in the case of a storage tank in use before November 8, 1984 but no longer in service on that date, any person who holds title, controls, or possesses an interest in the storage tank system immediately before the discontinuation of its use.

The term "owner" does not include a person who holds an interest in a tank system solely for financial security, unless through foreclosure or other related actions the holder of a security interest has taken possession of the tank system;

4) It is evident from Greene's testimony and the record that the three tanks that existed on Greene's property were installed on March 1, 1982 and were in use after November 8, 1984. Greene bought the subject property containing the three petroleum storage tanks on May 3, 2006. The record reflects that Greene knew when he bought the property that there was at least one petroleum storage tank on the property.

5) On Exhibit 1 entered in this proceeding on page 5 is the Registration For Petroleum Storage Tanks. This form states that the type of notification to the Oklahoma Corporation Commission Storage Tank Program is Closure. The Oklahoma Corporation Commission received this form from Greene on July 14, 2010. On page 1 of said form the ownership of the tanks is listed as Gary Greene. On page 2 of the Registration For Petroleum Storage Tanks form the Contact Person In Charge Of Tanks is listed as Gary Greene as Owner. The Underground Storage Tanks Attachment to the Registration For Petroleum Storage Tank form is a Certification Of Compliance. It states:

IV. CERTIFICATION (Read and sign after completing all sections) I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.

This is signed by Gary Greene with the title being "Owner." It is dated June 18, 2010.

6) The Director takes the position that it is evident from Greene's testimony and the record that these tanks were in use after November 8, 1984 and according to 17 O.S. § 303 (22) anybody in the chain of title can be an owner whether they use the tanks or not. The statute provides that the owner of the tanks when the releases were discovered is responsible, not the person before them and not the person after them. Greene filed the tank closure report with the Commission on July 14, 2010 and Greene's environmental consultant subsequently reported to the Commission that they took samples when they pulled the tanks and found elevated levels of contamination. The Commission opened up a confirmed release case and informed Greene that he needed to file an application for the Indemnity Fund to be reimbursed for the

corrective action work that was done and was necessary. In order to access the Indemnity Fund as an owner Greene would be required to remit the statutory one percent deductible co pay of the reimbursable costs for the remediation. See 17 O.S. § 356 (H). Greene, however, did not want to pay the \$4,000.00 fine that was recommended by the Commission. The ALJ however recommended that no fine be assessed and the Director has not appealed that decision.

7) In the Hall Oil Company case (PSD No. 200900056-Order No. 576450) the relief sought was a judicial determination of above-ground storage tank ownership and responsibility for activities pursuant to 17 O.S. § 301 et. seq. Mr. Hall was an above-ground storage tank owner and operator in Guthrie. He had the tanks installed on a railroad right-of-way. Mr. Hall walked away from the property and two to five years later the railroad, Burlington Northern and Santa Fe Railway Company ("BNSF") sold the property to the Oklahoma Department of Transportation. Hall alleged that in 1998 that BNSF sold the property to the Oklahoma Department of Transportation. At the time of the petroleum release on the property, the Oklahoma Department of Transportation owned the property. Oklahoma Department of Transportation knew that the tanks had been left on the property but claimed that Hall was the responsible person that owned the tanks. The Commission found that:

1. Neither BNSF nor Hall owns the subject AST system at this time, or did own the subject AST system at the time of the discovery of the petroleum release in this case. Furthermore, BNSF did not own the subject AST system at any time, and ceased to be a fee title holder of the real estate on which the AST system is located in 1998. Neither BNSF nor Hall is a potentially responsible party under the Oklahoma Storage Tank Regulation Act, 17 O.S. § 301-330 concerning the subject AST system.

2. ODOT is the owner of the subject AST system.

The Corporation Commission further found in the Hall case that:

1. That ODOT is the owner of the subject AST system and ODOT is responsible for environmental investigation and/or for any remediation work as may be required by the Petroleum Storage Tank Division at the referenced facility.

The Corporation Commission cites in support of its decision in the Hall case the Oklahoma Corporation Commission Order in *Smith v. Geo Engineering and Testing Corporation*, EN 980000098, where the Commission found that a party that exercises control over a tank system becomes the owner of the tank system. The Corporation Commission in the Hall case also cited an unpublished opinion of the Oklahoma Supreme Court (No. 92472) affirming the *Smith* decision that taking control of a tank system evidences indicia of ownership. The Corporation Commission also cited the case of *Jackson v. Walker*, OCC Cause No. PSD 200800063, where the Commission found that possession of the real property on which the tanks were located also evidences indicia of ownership.

8) For the above stated reasons the Referee would recommend that the recommendation of the ALJ as to the determination of Greene as an impacted party should be reversed and Greene should be determined to be the owner/operator as provided by the applicable statutes listed above, 17 O.S. § 301-330, 17 O.S. § 350-360.

RESPECTFULLY SUBMITTED THIS 12th day of July, 2011


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Cloud
Commissioner Anthony
Jim Hamilton
ALJ Michael J. Porter
Jeffrey P. Southwick
Kathy L. Nelson
Gary Greene
Office of General Counsel
Michael L. Decker, OAP Director
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