

## **Dean's Lecture: Owen L. Anderson, February 19, 2016, Houston IEL—CAIL**

Ladies and Gentlemen,

Thank you Professor Smith, the true Dean of oil and gas law, for your kind introduction. I have been pleased to know and work with Ernest since the early 1980s. I am especially pleased to now be one of his full-time colleagues at the University of Texas, after being partially seconded there since 2008. I also thank the leadership and program committees of this Institute for inviting me to give the Dean's lecture.

Since the initial Dean's lecture, given by The Honorable Joseph Morris in 2001, I have come to assume that you are asked to give this lecture about the time that the folks who proffer the invitation think that it is about time to put the old geezer out to pasture. I am pleased that I was given 15 years reprieve before being asked to speak. Although I have retired from OU, I have just taken a new full-time position at the University of Texas. So I hope to remain active for a few more years. By the way, in case some of you don't know, Joe Morris is still going strong at Gable Gotwals.

When I look back at the long list of distinguished men and women who have given this lecture, I am reminded of an old Irish story—one that I told when I and the other editors of the *Oil and Gas Reporter* were jointly presented the John Rogers Award in 1999. I think sufficient time has passed that I can tell it again.

Four Irish women, three Catholics and one Presbyterian, were sitting in a pub enjoying pints of Guinness. One of the Catholic woman started bragging on her son, Daniel, for recently becoming a priest. She said that he looked so distinguished in his black suit and white clerical collar and that she was so proud when he would walk into a room because all the people would greet him by calling him "Father." The other two Catholic women smiled and agreed. The Protestant woman sat silently.

A second Catholic woman then spoke up, saying that her son Seamus had been a priest but had recently become a bishop. She said that he looks so grand when he walks into a room wearing a bishop's cassock, purple sash, pectoral cross, and

episcopal ring. All the people rise, kiss his ring, and greet him as “Your Grace.” Once again, the other two Catholic women smiled and agreed. The Protestant woman sat silently.

The third Catholic woman then spoke up, saying that her son Patrick had been a priest, then a bishop, and had recently been named to the College of Cardinals. She said, I am so proud of Paddy, especially when he wears his beautiful scarlet cassock. When he walks into the room, the people rise, bow and say “Your Eminence.” And again, the other two catholic women smiled and agreed.

Finally, the Protestant woman had heard about all she could stand. She said, well I tell you what, my son William is a fine Presbyterian lad. He is young adult, extraordinarily handsome, has a very athletic physique, a square rugged jaw, jet black hair, and piercing blue eyes. When he walks into the room, all the women sigh and say “Oh my God.”

By tradition, those who have given the Dean’s lecture reflect and comment on their career, including the events that led them to become an oil and gas lawyer. In my case, it was entirely accidental. It was due to my personal good fortune, specifically to numerous people who provided opportunities, help, and inspiration along the way. What personal success I have enjoyed, I owe to a great many people—far too many to mention here today but some are here at today’s luncheon.

My paternal ancestors were farmers in Norway, Minnesota, and North Dakota. After visiting the rocky, steep landscape of my ancestral farm in Norway, I concluded that my immigrant ancestors must have thought the flat and relatively rock-free farms in Minnesota and North Dakota were close to heaven— notwithstanding the brutal winters.

My maternal ancestors are bit more complicated. My great-great-great grandfather was a teacher in County Fermanagh Ireland. My great-great grandfather escaped the Irish potato famine and became a coal miner in Dalry, Scotland while my great-great grandmother worked in large textile mills in Dalry and later Paisley, Scotland. The mill in Paisley was owned by an ancestor of my

former OU law Dean, Andrew Coats—quite a coincidence. My great-grandfather managed to escape the coal mines in Scotland in 1881 for the coal mines in southern Illinois. By the early 1900s, he and most of his sons and daughters somehow managed to buy farmland in North Dakota.

I grew up on my paternal ancestral North Dakota farm. My parents enrolled me—their only child—in first grade at age 5—perhaps a year early to get me out of the house. Willow Township No. 4 School was a one-room country school house, one of hundreds that operated in North Dakota at that time. My favorite place was the “library”—an 8’ by 10’ space near the back of the room. I probably read every book in that library, including the encyclopedia, but I was especially fond of atlases and any other books that had maps. I imagined myself traveling to exotic places in the world, but I never imagined that these dreams would come true. When the country school closed at the end of my sixth-grade year, I attended a small-town junior high and high school in Binford, North Dakota. The entire high school never had more than 80 students. I graduated in a class of 18.

In 2013, I received the highest award given by the University of North Dakota Alumni Association to a graduate of UND—an award that has been given to about 100 graduates of the University. Three graduates from tiny Binford High School have received this award. Fortunately, my grade, junior high, and high school teachers always encouraged me to follow my dreams.

By the way, if you wonder where Binford, North Dakota is located, it is about half way between Jessie and Mose!

In addition to school, I was active in 4-H, showing purebred Hereford cattle that I had raised. Had it not been for childhood asthma and allergies to grain and hay dust, I probably would have remained on the farm and ranch. But because of that affliction, I decided in my sophomore year of high school to become a lawyer. We had no lawyer in my extended family. I cannot tell you why I decided to become a lawyer except to say I enjoyed watching *Perry Mason* and reading *To Kill a Mockingbird*. I had pondered entering the priesthood, but puberty put an end to that idea!

I went to university, took the recommended pre-law liberal arts curriculum, just missed out on being drafted in the Vietnam War draft lottery, and went to law school. During law school, I laid the groundwork for a career in politics.

Right after graduation, I took a political job in Bismarck in 1974, serving primarily as an election-law lawyer as an Assistant Attorney General and as Deputy Secretary of State, studying for the bar at night. That job lasted less than a year. I quickly decided that politics was not for me and that I did not care to practice election law.

I did have one interesting election-law case out of several in that brief time period. A fellow named Torfin Teigen filed to run for an open seat on the North Dakota Supreme Court, an opening that resulted from the retirement of a long serving justice by the name of Obert Teigen. Torfin was not a lawyer, was not related to Justice Teigen, and had recently been released from a state institution officially named in the State Constitution as the State Asylum for the Insane. The state bar association, fearing that Torfin might be elected, commenced a lawsuit against Torfin and the Secretary of State to remove Torfin from the ballot on the ground that he was not “learned in the law,” as required by the State Constitution. The case was expedited to the North Dakota Supreme Court. I represented the Secretary of State, and owing to the fact that the Secretary was a co-defendant, I sat next to Torfin at oral argument.

Torfin represented himself, producing a letter discharging him from the State Asylum, arguing that he was the only candidate who could prove his sanity, which he further argued should be the only qualification to serve on the court. In making this argument, Torfin was actually following the lead of one of North Dakota’s most successful populist governors and United States Senators, William Langer. Langer campaigned for Governor in the 1930s arguing that he was the only politician who could prove his honesty because a federal court of appeals had overturned his conviction for criminal conspiracy to defraud the federal government. He went on to be elected governor and later US Senator, serving until his death in 1959. So the Bar Association may have had good reason to be

concerned that Torfin might win. Not surprisingly, the court ordered the Secretary of State to remove Torfin's name from the ballot.

Fortunately, about 10 months into my election law work, an opening occurred in the State Land Department—the state agency charged with managing the state's grant lands. I think the Attorney General gave me that job because I was the only lawyer on his staff that had been raised on a farm.

I addressed all legal issues pertaining to state lands in general, but this new job coincided with a huge boom in coal surface mining and oil and gas exploration. I drafted regulations and a lease form for coal and addressed any legal matters pertaining to coal surface mining on state lands. Shortly thereafter, I drafted new rules and a new lease form for oil and gas exploration and production on state lands and addressed any legal matters pertaining to oil and gas exploration and development, including some interesting questions about the first oil and gas leases issued to the bed of the Missouri River, which was state sovereign land. I also drafted at the request of ranching and oil producer trade associations the nation's first surface damages law.

Because the land department operated a farm loan department, financed by lending common school funds to farmers, I also wrote dozens of title opinions for lands that served as collateral for the loans. Common school funds were also used to finance an addition to the capitol building for the Supreme Court and Department of Health, so I gained first, and happily my last experience, with architect and construction contracts.

While working for the land department, I had a case against the United States over title to the bed of the Little Missouri River. The case went to the United States Supreme Court. I managed to win in district court and at the Eighth Circuit Court of Appeals, but I lost at the Supreme Court. Since that experience, my favorite Justice became Sandra Day O'Connor because she wrote a vigorous dissent.

In August 1978, the First Assistant Attorney General, Gerald Vandewalle, was appointed to the state Supreme Court. He still serves as the court's Chief Justice.

He had been the legal advisor to the North Dakota Industrial Commission, which among other duties, served as the state's oil and gas conservation commission. I took over that portion of his portfolio and also retained my land department portfolio. At that time, the Chairman of the School of Geology at the University of North Dakota also served as the State Geologist, which included being the chief administrative officer of the conservation agency. So I spent considerable time back at the University. Within a year, the law school asked me if I would be willing to return to teach oil and gas law and other courses as a visiting professor. This was supposed to be a one-year assignment but evolved into a tenure-track job. So from August 1979 through 1984, I was simultaneously a full-time law professor and the part-time lawyer for the both Board of University and School Lands and Industrial Commission.

During this time period, my wife, Kathie, who I met at UND in my undergrad years, taught in the English Department and earned her Master's degree.

After resigning my Assistant Attorney General appointment in 1984, I began to consult with various law firms, either as an advocate or as an expert witness.

In 1984, I taught at the University of Calgary, where I studied the Canadian, Australian, and Norwegian oil and gas regimes, and as a result, I became interested in the international oil and gas business. During one sabbatical, I worked for a year for Kerr McGee as an international transactional lawyer.

My diversion into the international petroleum arena was probably influenced by a conversation I had with my friend, Professor Smith, back in the 1990s when oil prices were below \$10 per barrel. We discussed how we were going to close out our teaching careers since the domestic oil and gas industry appeared to be dying out. Thankfully, a few years later, prices recovered and the shale boom began.

In late 1987, I received a call from a young professor at Texas Tech University by the name of Bruce Kramer. Much to our own surprise Bruce's call ultimately caused Kathie and me to leave North Dakota in 1988 for Texas Tech. In the summer of 1989 and then for the academic year of 1991-92, I taught at the University of Texas, permitting Kathie to begin earning her PHD at UT, which she

concluded in 2002. In 1991, while at UT, I applied for and ultimately accepted the Kuntz Chair at OU. I was at OU for 23 and ½ years—the best years of my professional life, at least so far.

Over time, I was able to greatly expand the oil and gas law curriculum and programs at OU, which now include over 30 hours of oil and gas and energy classes, begin an LLM program, begin an online Master's degree targeting landmen and other energy professionals who would like to learn oil and gas law, and begin an online oil, gas and natural resources journal at OU, which is available for free on the OU law website. While at OU, I was also able to teach international petroleum transactions at many overseas professional venues and universities, which led to regular summer classes at the University of Melbourne, the University of Sydney, and Dundee University, and occasional classes at a number of other universities on six continents.

As Ernest indicated, I am now a professor at the UT Law School, working in the Kay Bailey Hutchinson Center of Energy Law and Business—a partnership between the School of Law, the McCombs school of business, and the Jackson School of Geosciences.

I am not a self-made man. Like most people, I owe my good fortune to many people: most importantly my parents and my wife, my elementary and high-school teachers, my 4-H leaders, and even to my priests. I owe much to my fellow oil and gas teachers, including Bruce Kramer, Pat Martin, John Lowe, David Pierce, Laura Burney, Jaqueline Weaver, and of course, Ernest Smith. These folks and many others are the reason that I am standing here today.

My primary goal as a professor has been to help my students realize their dreams. Lawyers in Oklahoma, Texas, Colorado, North Dakota, and other states, along with a large number of energy companies, have supported my efforts by employing many of my students. I have been lucky indeed—starting with my upbringing, marrying my wife and editor, Kathie, having two wonderful children, and having the good fortune to spend nearly 24 years at OU and to now embark on closing out my career at the University of Texas. I have been especially pleased to help one of John Lowe's students, Monika Ehrman to become an oil and gas

law professor at OU and to help one of my own students, Chris Kulander, whom you heard yesterday, become an oil and gas law professor, first at Texas Tech and now at South Texas here in Houston.

It is customary at these Deans' lectures to also say something about the current state of oil and gas law. In pondering this talk, I was drawn back to early oil and gas law. I marvel at the wisdom of early oil and gas law jurists. First and foremost I marvel at courts' early adoption of the rule of capture. I wonder if today's courts, if facing a drainage case for the first time, would make a similar decision. Now some of you may be thinking that the rule of capture is a bad rule. Perhaps so, but as Professor Terry Daintith has said it is, at the very least, the "least-worst" rule.

The rule is a classic example of reasoning by analogy. Courts, believing like many early oil drillers, that oil moved beneath the surface in unpredictable ways, applied a rule applicable to wild animals to oil. Previously, the courts had applied this wild-animal rule to groundwater.

The courts could have gone in a different direction. For example, when some early courts held that an oil and gas right was in the nature of a profit, the courts might then have decided that the one-stock rule, governing profits in gross, should apply. That rule would have required joint development of common oil and gas reservoirs. While that may have the appeal of an ideal solution, it would have not been a very realistic rule without compulsory unitization, a reform that took decades to develop and is still not part of Texas oil and gas law.

While modern courts have occasionally applied the rule of capture, they more often have rejected it, or at least neglected to apply it, in many cases.

- The West Virginia Court refused to apply it to production that was stimulated by hydraulic fracturing.
- Although the Texas Supreme Court applied the rule in a similar fracking case, it did not foreclose the possibility that it might not apply the rule in a case brought by a person with a possessory interest in oil and gas.
- A Texas appeals court rejected the rule regarding production from a horizontal well.



- The Canadian Supreme Court rejected the rule in a phase severance case in favor of a rule inviting expert testimony to determine the state of the reservoir pre-drilling—even though the initial drilling occurred over 75 years before the dispute arose.
- Several courts have refused to apply the rule to oil produced as a result of enhanced recovery.
- Pennsylvania failed to consider the rule in the context of coalbed methane, although Alabama did so.
- A court in the Netherlands rejected the rule outright where a reservoir turned out to cross two blocks.

I could go on, but I won't.

I will leave you with something provocative. I recently read a piece on an oil and gas blog that argued that the US should take steps to set a benchmark price of \$70 for WTI. The writer made no mention of how the US might accomplish this, but it caused me to think about the historical role of the Interstate Oil Compact Commission.

Aided by the Seven Sisters, certain members of which entered into two separate agreements in 1928 that together helped curb world oil production, the IOCC, or some might say the Texas Railroad Commission, regulated oil production to reasonable market demand and hence stabilized prices from the mid-1930s until 1973, when OPEC assumed that role.

Query whether the IOCC, Saudi Arabia, and Russia might, through production quotas, cooperate to stabilize prices at a level that would sustain a reasonable level of oil investment. You may have noticed that Putin has recently discussed mutual production cutbacks with Saudi officials. Today's business publications headlines frequently include updates about the "break even" oil prices needed to sustain capital investment for the discovery and development of future reserves. \$70, the figure used in the op-ed piece that I read would be a sufficient price to support development in many countries, including many shale plays in the United States.

Might there be room for agreement among major producer nations, including the United States, through the IOCC, to support oil prices at a level that would encourage investment in at least some of the oil plays that are currently uneconomic? Saudi Arabia and other low-cost Middle East producers would benefit by making their production more profitable. Higher-cost producers would benefit by making their production at least marginally profitable to sustain a more stable level of investment.

Perhaps there are a multitude of reasons why this would not work, but I am curious that this idea has not been discussed by some think tank somewhere.

In conclusion, I want to mention the havoc caused by lower oil and gas on the budgets of producer governments both abroad and here in the United States, especially in Oklahoma. I wonder whether governments will ever learn the lesson of depleting resources and volatile prices. Norway has understood this, but other governments have not. Dependency on revenues from oil production is and always has been a bad bet. These revenues need to be invested in substitute assets, not used to pay for day-to-day operational budgets. Will this most recent bust cause governments to finally learn from past mistakes? Personally, I doubt it, but I wish it were otherwise.

Thanks to the University of Texas, I have been given an opportunity to have “one more rodeo.” Professor Smith, in the closing remarks of his Dean’s Lecture two years ago described his approach to life by quoting the words of a country song recorded by the Eagles. I prefer to quote the great philosophers. My approach to life is best described by that famous philosopher, Yogi Berra, who said: “When you come to a fork in the road, take it.” And to return to my theme of being a very fortunate person, Yogi Berra said: “If I had to do it over, I’d do it again.”

Thank you.