Oil and Gas Litigation Update

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Quiet Title Actions

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Base v. Devon Energy Prod. Co., 2024 OK 3

- Plaintiff executed two leases:
  - 1973 lease for 1/8 royalty until 12/4/1978
  - 1978 lease for 3/16 royalty commencing on 12/4/1978
- A well was drilled and completed as a producer in November 1978, operated by the lessee of the 1978 lease.
- DOs were signed and royalties paid based on 1973 lease. 1973 lease was later assigned many times.
- 2008: Chesapeake drilled and paid 3/16 royalty.
- 2018: Devon drilled 8 multi-unit laterals and paid 1/8.

Base v. Devon Energy Prod. Co., 2024 OK 3

- Issues:
  - Nature of the plaintiff's claim
    - Held: Quiet Title
  - Applicability of any limitations period
    - Held: Yes
  - Which limitations period
    - Held: 15 years (12 OS 93(4))
  - When did plaintiff's quiet title claim accrue
    - Held: 1979 (signing DOs)

When, if ever, is a quiet title action subject to a limitations period?

- "[T]he right of an owner in possession to remove a cloud from his title is a continuing right and never barred by limitations." Maloy v. Smith, 1959 OK 69
- However, one who sues to recover possession, or to claim title to property in the possession of another, must sue within the period of limitations.
- *Base* holds that a severed mineral owner sues to recover "possession" of minerals when:
  - Suing a trespasser to interrupt adverse possession, OR
  - Suing to remove an encumbrance on record title.

When, if ever, is a quiet title action subject to a limitations period?

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- However, one who sues to recover possession, or to claim title to property in the possession of another, must sue timely.
- *Base* holds that a severed mineral owner sues to recover "possession" of minerals when:
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  - Suing to remove an encumbrance on record title.

"[Plaintiff] should have seen that her possession of the mineral interests was encumbered by the existence of two leases and should have been on notice that she needed to quiet title in favor of her preferred lease through cancellation of the opposing lease. Her quiet title claim would consequently fall under the exception to the general rule and would be subject to a statute of limitations." Para. 45

When does a claim to quiet title accrue?

- Generally, statutes of limitations accrue when the legal injury occurs.
- For suits to recover possession, the period begins to run once there has been an ouster sufficient to put an owner on notice that his/her possessory rights to the real estate have been challenged. Am Jr. *Quieting Titles* 47.
- Claude C. Arnold Non-Operated Royalty Interest Properties v. Cabot Oil & Gas Corp., 2021 OK 4: statute accrued for claim quieting title to ORRIs when demand for payment was made, not when subsequent OGL was recorded creating a cloud on ORRI ownership.

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"The present case is more akin to *Calvert* and *Scott* than to *Arnold*. [Plaintiff] executed both the 1973 and 1978 Lease. Thus, it is reasonable to expect that she—as lessor who negotiated, read, and signed both leases—should be on notice of the potential conflict between the two leases and the cloud created when the second lease purportedly became effective." Para. 62.

Joint Operating Agreements

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Latigo Oil & Gas v. BP America Prod. Co., 2024 OK 35

- BP and Latigo are parties to a JOA containing a preferential right to purchase.
- BP signed a PSA with a third party to sell assets across the country including some in the JOA contract area.
- In its offer to Latigo, BP allocated $60,000 of the package-deal price to each of the burdened interests.
- Latigo sought to enjoin BP's package-deal sale, alleging breach of the JOA.

Latigo Oil & Gas v. BP America Prod. Co., 2024 OK 35

- Issue: Did the trial court abuse its discretion by temporarily prohibiting BP's sale of the preemption-affected interests?
- Standard of review: Abuse of discretion, but *de novo* on underlying questions of law.
- Held: Trial court did not abuse its discretion in finding that Latigo met its evidentiary burden for a temporary injunction.

The underlying legal standard

- Oklahoma recognizes the implied covenant of good faith and fair dealing in all contracts.
- *Olli v. Rainbolt*, 1983 OK 79, held that the duty of good faith prohibits a seller from defeating a bargained-for preferential right by offering the preemption-affected interests as a package-deal with property "which lies dehors the preemption obligation."
- Courts in other states hold that a package deal must be broken up and the price of the preemption-affected interests must be "the actual price that the third-party buyer would have offered for the burdened property."

Oklahoma Federal Courts

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Joint Operating Agreements and Participation Agreements

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Chaparral Energy v. Tenn-Tex Partners, 2024 WL 3543455 (W.D. Okla. 2024)

- In suit by operator for unpaid JIBs, nonoperators counterclaimed for breach of contract and promissory estoppel based on an alleged "netting agreement" ancillary to the parties' JOA.
- Operator alleged to have promised to net nonops' JIBs from runs as sole remedy; later asserted liens, etc.
- Held: Dismissed under 12(b)(6) because it is implausible to infer that the alleged exchanges between the parties constituted a separate netting agreement apart from the JOA, which already allowed netting.
- Still in play: whether the parties' exchange modified the operator's remedies under the JOA.

New Dominion v. H&P Investments, 202 WL 8788951 (N.D. Okla. 2023)

- Operator under participation agreements and JOAs moved for SJ on claims against nonoperator for legal expenses arising from third-party earthquake and insurance coverage litigation.
- Exhibit C to JOA—the COPAS—allow operator to charge the joint account for "Joint Operations," defined as "all **operations** necessary or proper for the development, operation, protection, and maintenance of the **Joint Property**."
- "Joint Property" is "the real and personal property subject to the Operating Agreement."

New Dominion v. H&P Investments, 202 WL 8788951 (N.D. Okla. 2023)

- Although not defined in the JOA, “operations” is only ever used to refer to oil and gas wells drilled, deepened, extended, etc. on the Contract Area.
- Held: While saltwater disposal wells are necessary to operate oil and gas wells, they are not themselves “operations” within the meaning of the COPAS.
- Moreover, the operator’s SWD wells are not “Joint Property” because participation agreements expressly provided that nonops received NO interest in the SWDs.
- Suits to defend the continued operation of SWDs were not necessary to protect or defend Joint Property. Operator could have disposed elsewhere.

In re Chisolm Oil and Gas Nominee, 660 B.R. 593 (Bankr. Ct. D. Del. 2024) (Okla.)

- Nonoperators went nonconsent on wells under JOA with operator before operator entered Chapter 11 bankruptcy; risk penalties not satisfied.
- In bankruptcy, operator rejected the JOA as an executory contract under B.R.C. 365.
- Issue: What is the effect of the operator's rejection of the JOA on the nonoperators' elections under the JOA?

In re Chisolm Oil and Gas Nominee, 660 B.R. 593 (Bankr. Ct. D. Del. 2024) (Okla.)

- Nonoperators: rejection restored the JOA parties to a tenancy in common under Oklahoma law, and the nonoperators' working interests reverted as of the date of the bankruptcy petition.
- Operator: rejection breached the JOA such that pre-petition elections remain binding and the nonconsent parties do not share in revenues until penalties are satisfied.
- Held: rejection of an executory contract in bankruptcy operates as a breach and not a rescission and thus operator's rejection did not unwind pre-petition JOA elections.

Oil and Gas Leases

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Cory v. Ovintinv Inc., 2024 WL 3933916 (W.D. Okla. 2024)

- Pro se lessor alleged lessee breached its oil and gas lease by drilling a horizontal oil well on a 640-acre unit established by OCC despite pooling clause limiting oil units to 160 acres.
- Held: No breach because "the OCC's regulatory authority, e.g., to space wells for the conservation of oil, gas, and other natural resources, is incorporated into private oil and gas leases by operation of law," and "[i]t is therefore the expectation and intention of the contracting parties that a valid exercise of the OCC's regulatory authority will supersede conflicting lease provisions."
  - Hladik v. Lee, 1975 OK 99 (OCC-created unit trumps privately declared unit)
  - OK Nat. Gas Co. v. Long, 1965 OK 153 (OCC spacing order modifies lease habendum clause to count production from anywhere on the unit)

Jeter v. Bullseye Energy LLC, 2024 WL 2875042 (N.D. Okla. 2024)

- Plaintiffs' motion to certify three classes under Rule 23 in royalty deduction case:
  - "Gross Proceeds Class" consisting of lessors with leases that authorize no deductions for expenses.
  - "Net Proceeds Class" consisting of lessors with leases authorizing some deductions.
  - "RICO Class" consisting of lessors who received royalty statements showing "0.00" in the "deducts" column.
- Cert. denied for Net Proceeds and RICO Classes because they expand upon the claims in the original class definition.

Jeter v. Bullseye Energy LLC, 2024 WL 2875042 (N.D. Okla. 2024)

- Cert. denied on Gross Proceeds Class on predominance grounds.
- 1) Whether gas produced from plaintiffs' wells was marketable at the wellhead.
  - *Contra Naylor Farms*, plaintiffs failed to show that the gas from all class wells underwent some form of gathering, compression, dehydration, treatment, or processing to be made marketable.
  - Evidence showed that some wells produce pipeline-ready gas.
- 2) Whether the leases "waived the implied duty to market gas."
  - *Contra Naylor Farms*, plaintiffs failed to construct a sufficient "lease chart" to accurately categorize the leases as not including special language.
  - Many class leases contained exhibits and addenda that require individual analysis.

Property Issues

United States v. Osage Wind, LLC, 719 F. Supp. 3d 1018 (N.D. Okla. 2023)

- In 2017, 10th Circuit held that excavating and crushing rocks for backfill for wind turbines constituted "mining" of the Osage mineral estate, requiring a lease/permit, which defendant never obtained.
- This court finds the continued use of backfill constitutes a continuing trespass under Oklahoma law and the Indian canons of construction.
- Court also grants "permanent injunctive relief in the form of ejectment," finding irreparable harm to the tribe's sovereignty and that the balance of harms favors injunction.

Lazy S Ranch Properties v. Valero, 92 F.4th 1189 (10th Cir. 2024)

- Appeal of district court's grant of SJ for pipeline defendant on plaintiffs' claims of nuisance and negligence, on grounds that evidence of only trace amounts of refined hydrocarbons was inadequate as a matter of law to establish liability.
- Held: Reversed. Evidence that odors in caves caused headaches, prevented cave mapping, and made geologist hesitate about using a lighter could establish nuisance.
- Additionally, plaintiff's expert evidence was sufficient to create an issue of fact about causation because it purported to eliminate other potential sources of contamination.

Lazy S Ranch Properties v. Valero, 92 F.4th 1189 (10th Cir. 2024)

- Two provisions may apply for purposes of negligence per se:
  - Okla. Stat. tit. 27A, sec. 2-6-105(A): declaring it is public policy "to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to effect such waters."
  - Okla. Admin. Coe 165:10-7-5: providing that pipeline companies "shall at all times conduct their operations in a manner that will not cause pollution"
- Breach may be shown by a showing of nuisance or environmental harm.

Osage Pipe Line Co. v. RSUI Indemnity Co., 2024 WL 4341566 (W.D. Okla. 2024)

- Insured pipeline company brought coverage suit in federal court against excess insurers following pipeline spill on restricted tribal land of the Sac and Fox Nation.
  - Total cleanup bill: $36 million.
- Dismissed for lack of subject matter jurisdiction because no diversity or substantial federal question.
- Raises this issue: Property damages may be different depending on location of damage:
  - Lands subject to federal common law: costs of remediation
  - Lands subject to Oklahoma law: costs of remediation up to the diminution in the land's market value. Peevyhouse v. Garland Coal & Mining Co. (Okla. 1962)

Landmen

Gaedeke Holdings VII v. Stamps Bros. Oil and Gas, 2024 WL 3732050 (W.D. Okla. 2024)

- Suit by contract landman for unpaid fees. Development company counterclaims alleging the contract landman (and its sole officer and director) submitted false invoices for lease acquisition and other payments that were not made.
- Development company's SJ motion on counterclaims for breach of fiduciary duty and constructive trust is denied for want of evidence.
- Court indicates that an agency relationship and fiduciary duties likely exist "in the nature of things," but that the development company's acquiescence or ratification might be proven if "loyal and uncompromised" employees acting within scope of employment had knowledge of the landman's conduct.

Oklahoma State Courts

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Landmen

State ex rel. OBA v. Dyer, 2024 OK 72

- Attorney convicted of "conspiracy to commit honest services wire fraud" under 18 USC 371 is disbarred for violating ORPC 8.4.
  - USA v. Dyer, 2024 WL 2782113 (W.D. Okla. May 30, 2024)
- As outside lawyer for Continental Resources hired to perform title work, "[t]he Respondent along with the landman [who engaged him] and several others conspired to make copies of Continental's confidential drilling and leasing plans in exchange for kickback payments to the landman."
- "Through numerous entities created to avoid detection, the coconspirators purchased and leased the minerals of interest and then re-sold and re-leased those minerals to Continental and other oil and gas companies."
- "The coconspirators also obtained various bank accounts and wired money between them in furtherance of their scheme."

Thank You

Special thanks to Andy Schuman, 3L at OU College of Law, who provided substantial=-and excellent—research assistance in preparation of these materials.

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Pickering Energy Partners

The U.S. Needs A Larger Energy Boat

Dan Romito – Managing Director, Consulting & Advocacy

Speaker Introduction

Expertise Centers On Energy Policy, Capital Markets & Regulatory

Dan Romito

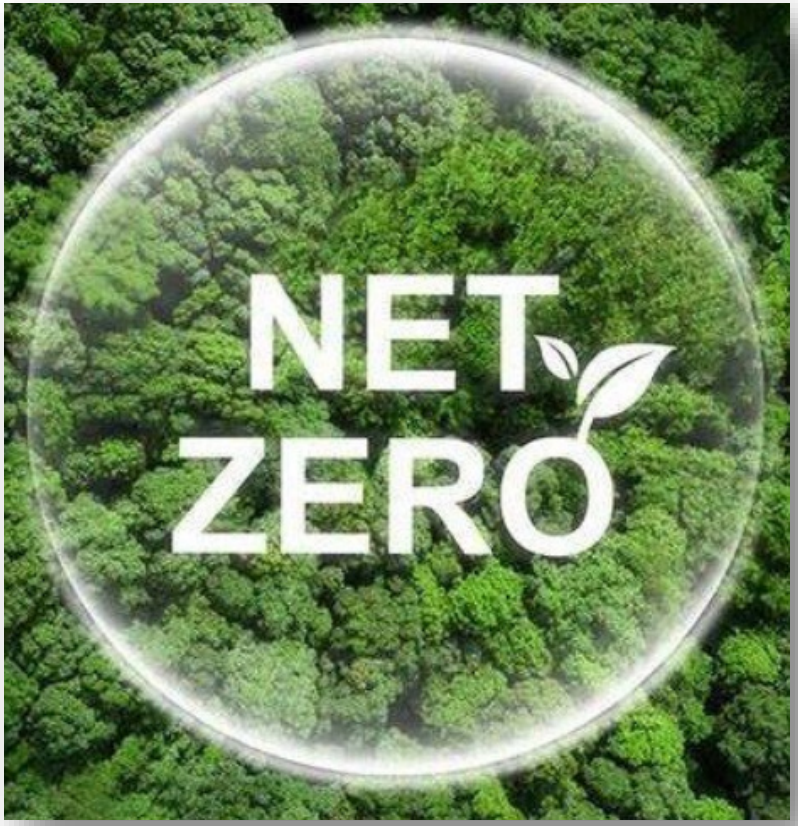
Dan Romito is a Managing Director at Pickering Energy Partners, overseeing the Consulting & Advocacy practice

- Dan's career has centered on helping capital-intensive businesses efficiently navigate the ever-evolving capital markets and global regulatory landscape.
- Has authored over fifty publications on Energy Policy, Sustainability, ESG, Index Ownership, Investor Behavior, and Shareholder Activism, which have been featured in Harvard Business Review, the Harvard Law School Forum on Corporate Governance, CNBC, Bloomberg, TD Ameritrade Network, Hart Energy, Global Investor Magazine, and IR Magazine.
- Dan has developed several technology solutions and platforms focused on investor behavioral analytics, including Nasdaq's ESG Advisory Service, Insight360 Analytics, Activist Diagnostic, Capital Deployment Scenario Analysis, and the Small Cap Investor Targeting Service.
- He received a BA from the University of Chicago, an MBA in Finance from DePaul University, and was working on his MS in Mathematics from the University of Chicago before COVID-19 (he became a proverbial drop-out)
- Dan sits on the IPAA Capital Markets Committee, serves as an Advisory Board Member for Marquette University's Sustainability Lab, and is an adjunct professor at Marquette University

Pickering Energy Partners Nasdaq THE UNIVERSITY OF CHICAGO MARQUETTE UNIVERSITY BE THE DIFFERENCE. SASB SUSTAINABILITY ACCOUNTING STANDARDS BOARD ESG CERTIFICATE IN ESG INVESTING

PEP ESG Partnerships Span The Entire Capital Markets Spectrum

Introduction:
We Need To Judge Policy By Results, Not Intentions



"ONE OF THE GREAT MISTAKES IS TO JUDGE POLICIES AND PROGRAMS BY THEIR INTENTIONS RATHER THAN THEIR RESULTS"

U.S. Policy Moving Forward Must Remain Centered On Fossil Fuels

The Biden-Harris administration's regulatory decisions **did <u>not</u> facilitate** the long-term ability to remain economically competitive or environmentally sensible

Facilitating future economic competitiveness, environmental stewardship, socio-economic growth, and geopolitical stability is contingent upon adopting an **"all of the above"** set of fossil fuel and renewable energy solutions

Global competitive relevance, geopolitical stability, and improved domestic socio-economic dynamics will **remain heavily contingent** upon the fossil fuel industry

The incessant promotion of "net zero or bust" fosters a **lack of capital discipline** conviction that is so detrimental that it hinders pragmatic decarbonization efforts.

All capital markets participants, including the government, must continually **refrain from prematurely** and pre-emptively selecting energy winners and losers

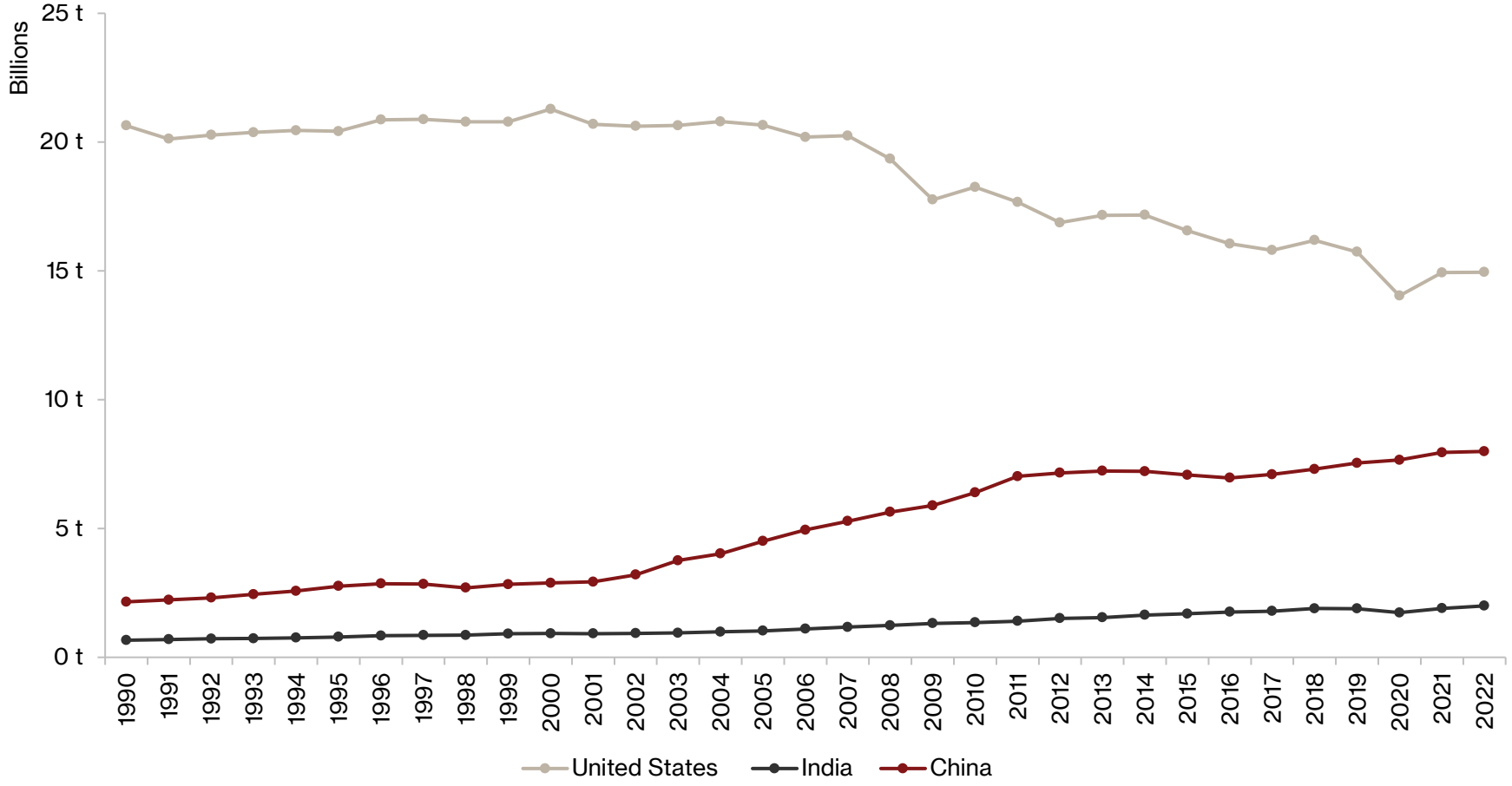
Level Setting:

Empirically Speaking, U.S. Energy Boasts The Most Impressive Emissions Efficiency On The Planet

U.S. CO_2 Emissions/Capita Have Been Cut By One-Third Since 1990

Per capita CO_2 emissions

Carbon dioxide (CO_2) emissions from fossil fuels and industry. Land-use change is not included.



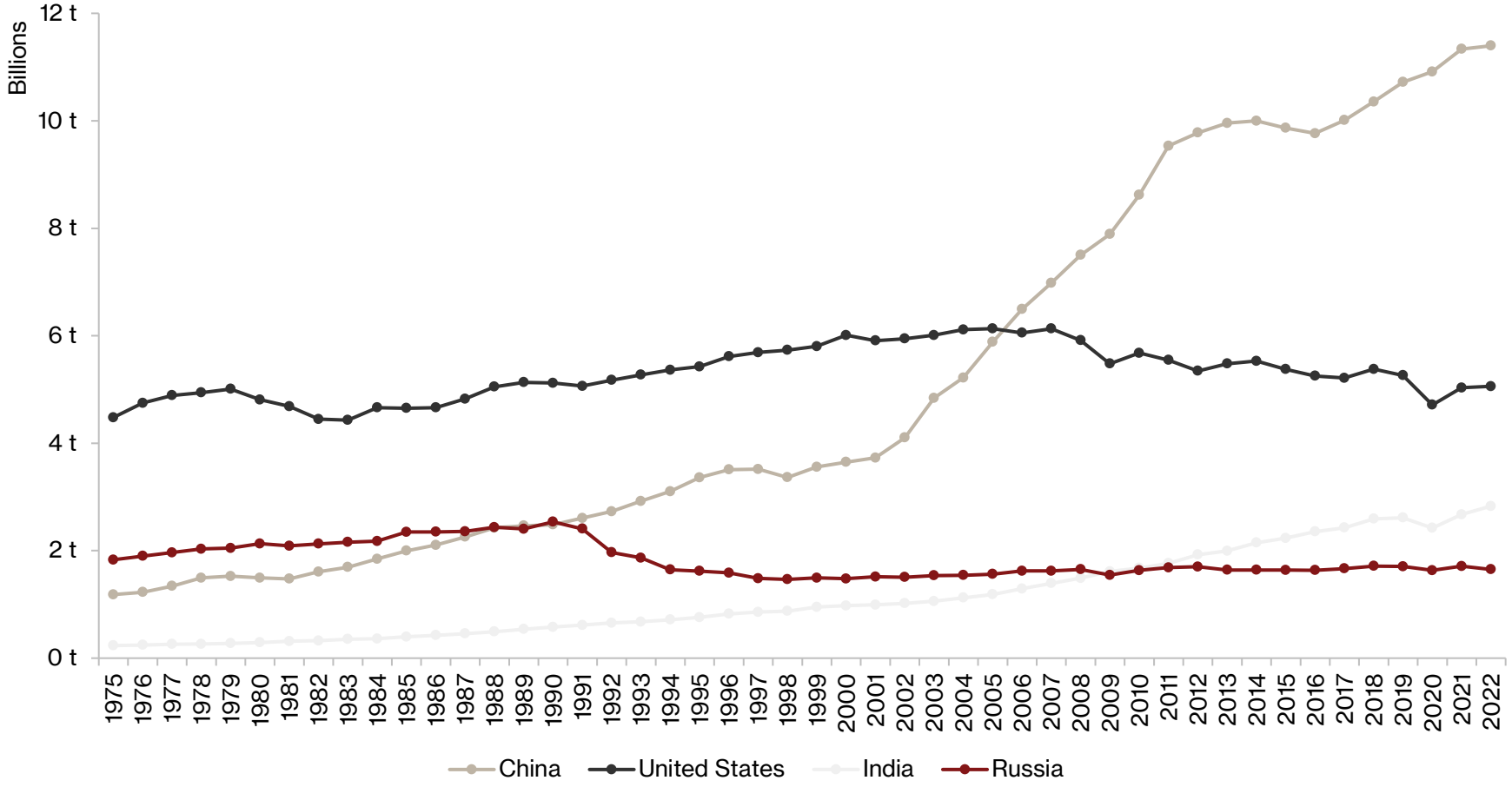
Pickering Energy Partners

Data source: Global Carbon Budget (2023); Population based on various sources (2023) – Learn more about this data
OurWorldInData.org/co2-and-greenhouse-gas-emissions | CC BY

U.S. Annual CO_2 Emissions Have Remained Flat Since 1975

Annual CO_2 emissions

Carbon dioxide (CO_2) emissions from fossil fuels and industry. Land-use change is not included

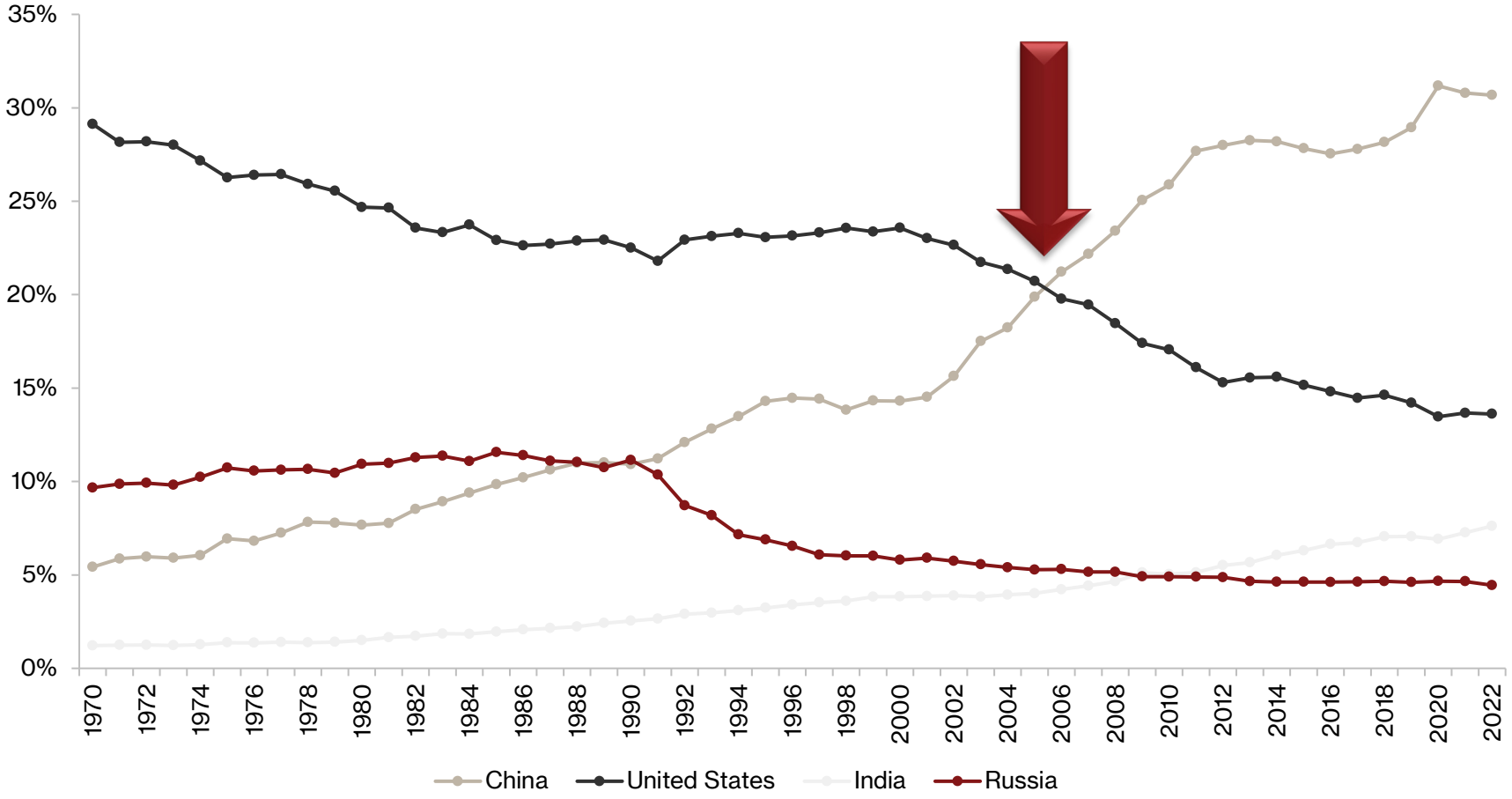


Data source: Global Carbon Budget (2023)
OurWorldInData.org/co2-and-greenhouse-gas-emissions | CC BY

China's Global Share Of CO_2 Emissions Have **DOUBLED** Since 2000

Share of global CO_2 emissions

Carbon dioxide (CO_2) emissions from fossil fuels and industry. Land-use change is not included.



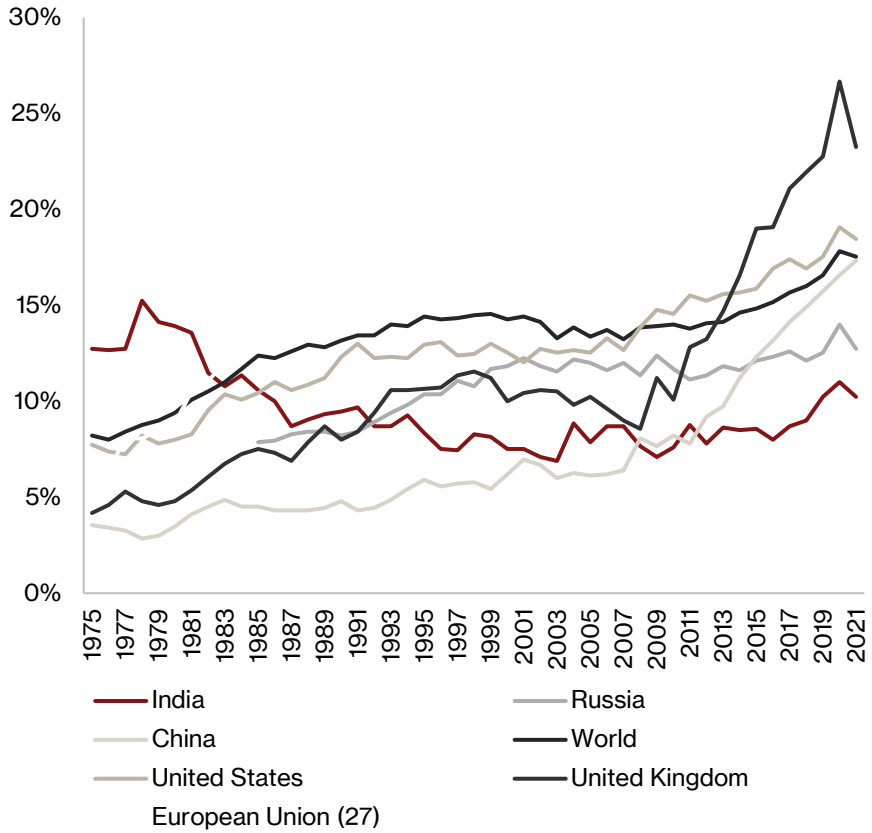
Pickering Energy Partners

Data source: Global Carbon Budget (2023)
OurWorldInData.org/co2-and-greenhouse-gas-emissions | CC BY

Global Natural Gas Use Up ~3.5x Since 1975 With **One Glaring Exception**

Share of primary energy from low-carbon sources

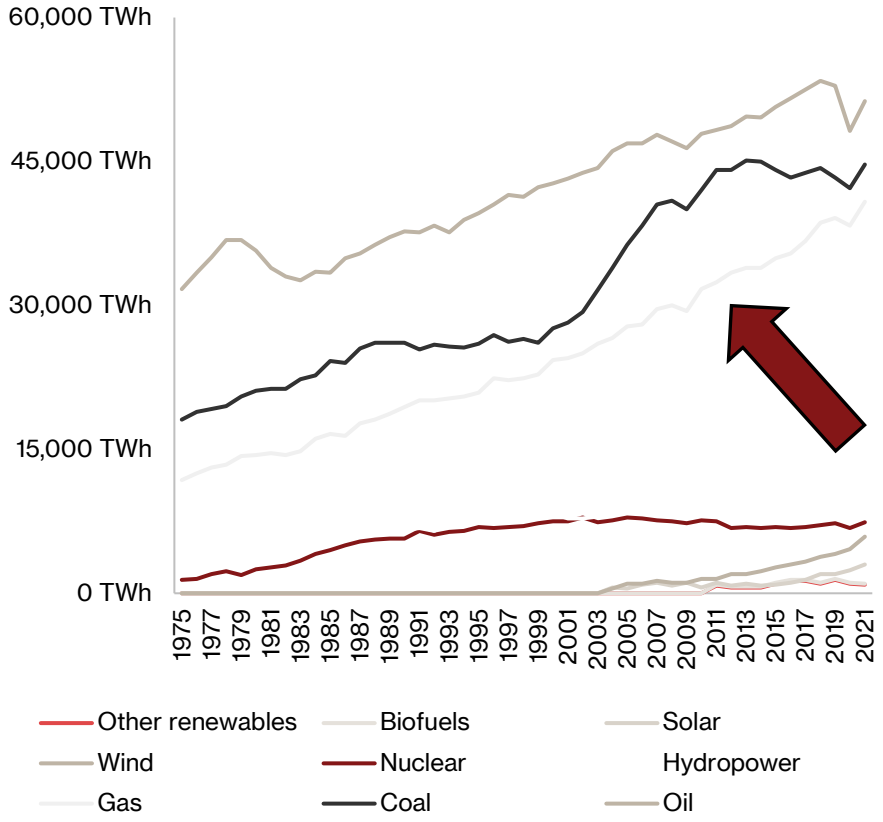
Low-carbon energy is defined as the sum of nuclear and renewable sources. Renewable sources include hydropower, solar, wind, geothermal, wave and tidal and bioenergy. Traditional biofuels are not included



Source: Our World in Data based on BP Statistical Review of World Energy (2022)
Note: Primary energy is calculated using the 'substitution method', which accounts for the energy production inefficiencies of fossil fuels.
OurWorldInData.org/energy

Primary energy consumption by source, World

Primary energy is shown based on the 'substitution' method which takes account of inefficiencies in energy production from fossil fuels

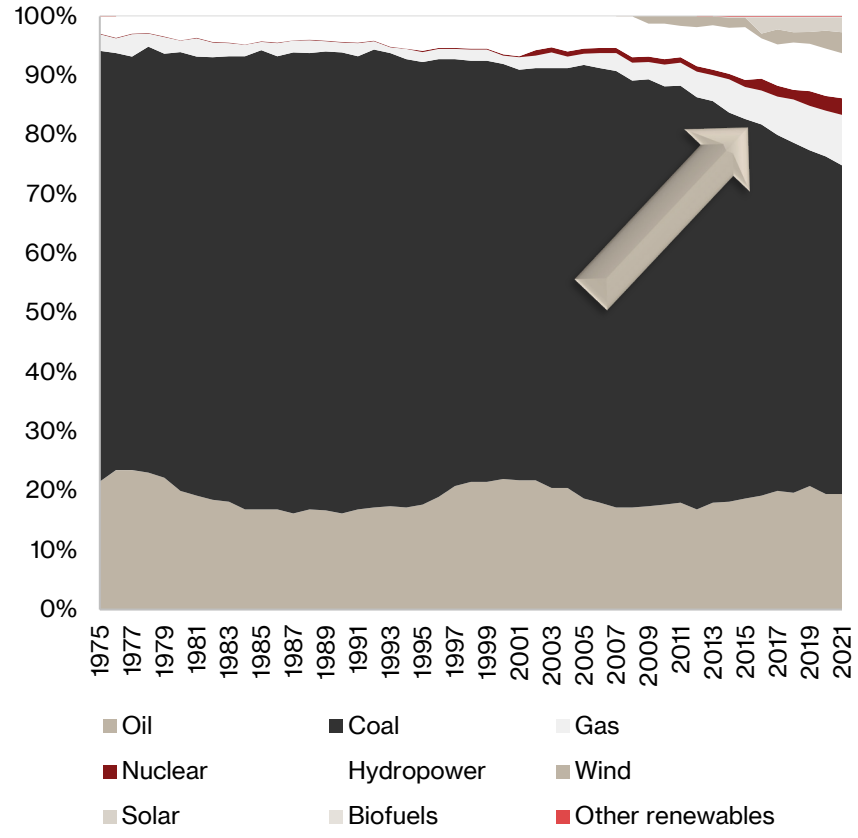


Source: Our World in Data based on BP Statistical Review of World Energy
OurWorldInData.org/energy

China Is NOT Going Renewable, And They Barely Utilize Natural Gas

Energy consumption by source, China

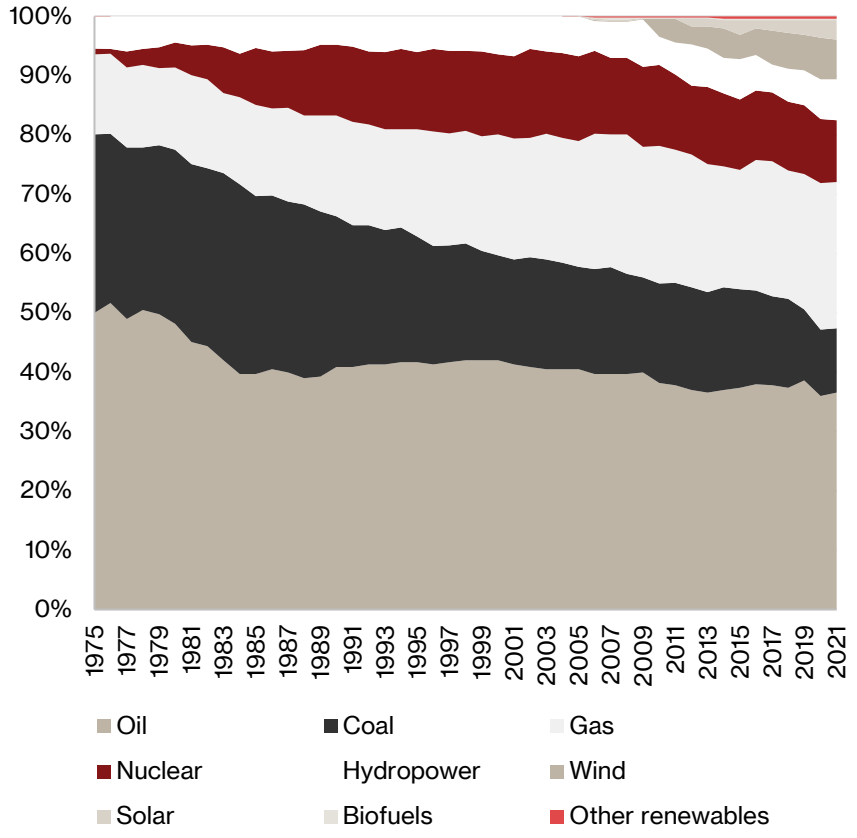
Primary energy consumption is measured in terawatt-hours (TWh). Here an inefficiency factor (the 'substitution' method) has been applied for fossil fuels, meaning the shares by each energy source give a better approximation of final energy consumption



Source: BP Statistical Review of World Energy
Note: 'Other renewables' includes geothermal, biomass and waste energy
OurWorldInData.org/energy

Energy consumption by source, European Union

Primary energy consumption is measured in terawatt-hours (TWh). Here an inefficiency factor (the 'substitution' method) has been applied for fossil fuels, meaning the shares by each energy source give a better approximation of final energy consumption

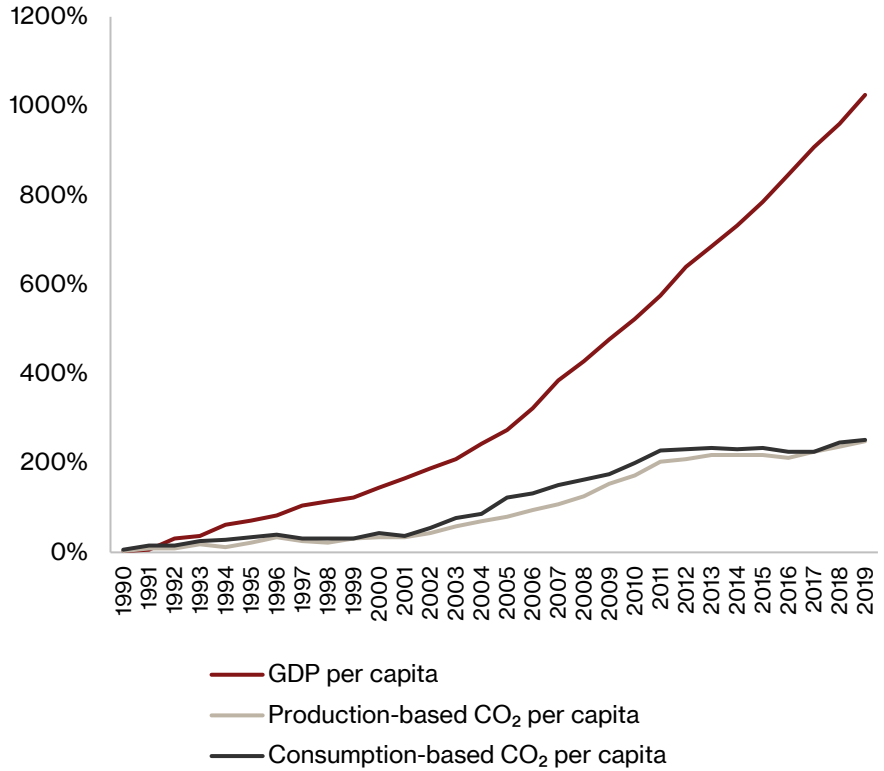


Source: BP Statistical Review of World Energy
Note: 'Other renewables' includes geothermal, biomass and waste energy
OurWorldInData.org/energy

China & India GDP v. CO_2 Emissions Growing Proportionally Since 1990

Change in per capita CO_2 emissions and GDP, China

Consumption-based emission are national emission that have been adjusted for trade. This measures fossil fuel and industry emissions. Land use change is not included.



Source: Data complied from multiple sources by World Bank, Our World in Data based on the Global Carbon Project
Note: GDP figures are adjusted for inflation.
OurWorldInData.org/co2-and-greenhouse-gas-emission

Change in per capita CO_2 emissions and GDP, India

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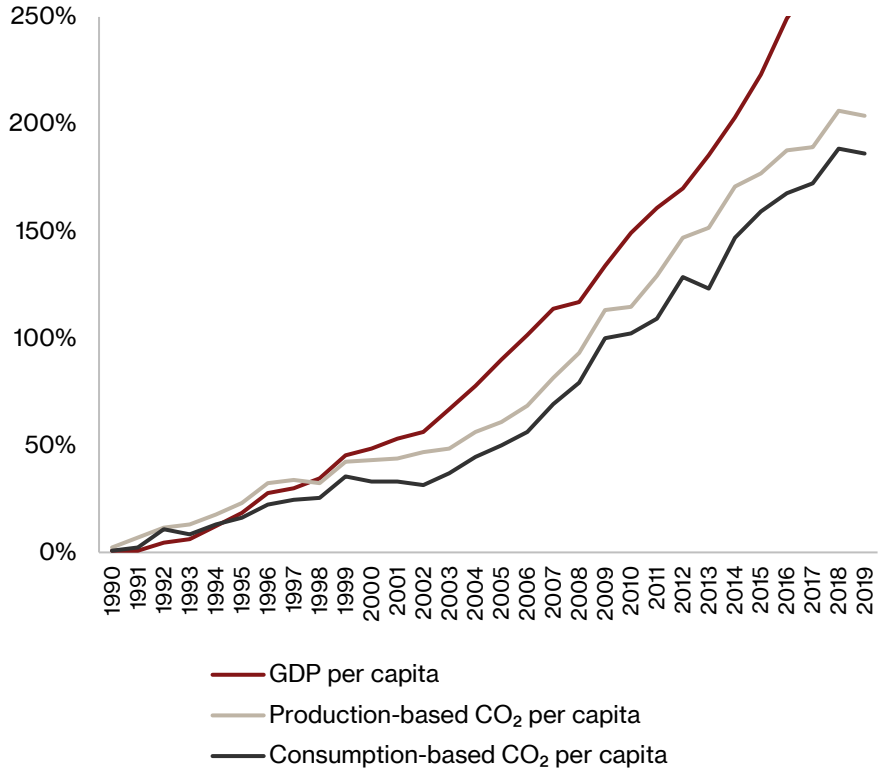

Source: Data complied from multiple sources by World Bank, Our World in Data based on the Global Carbon Project
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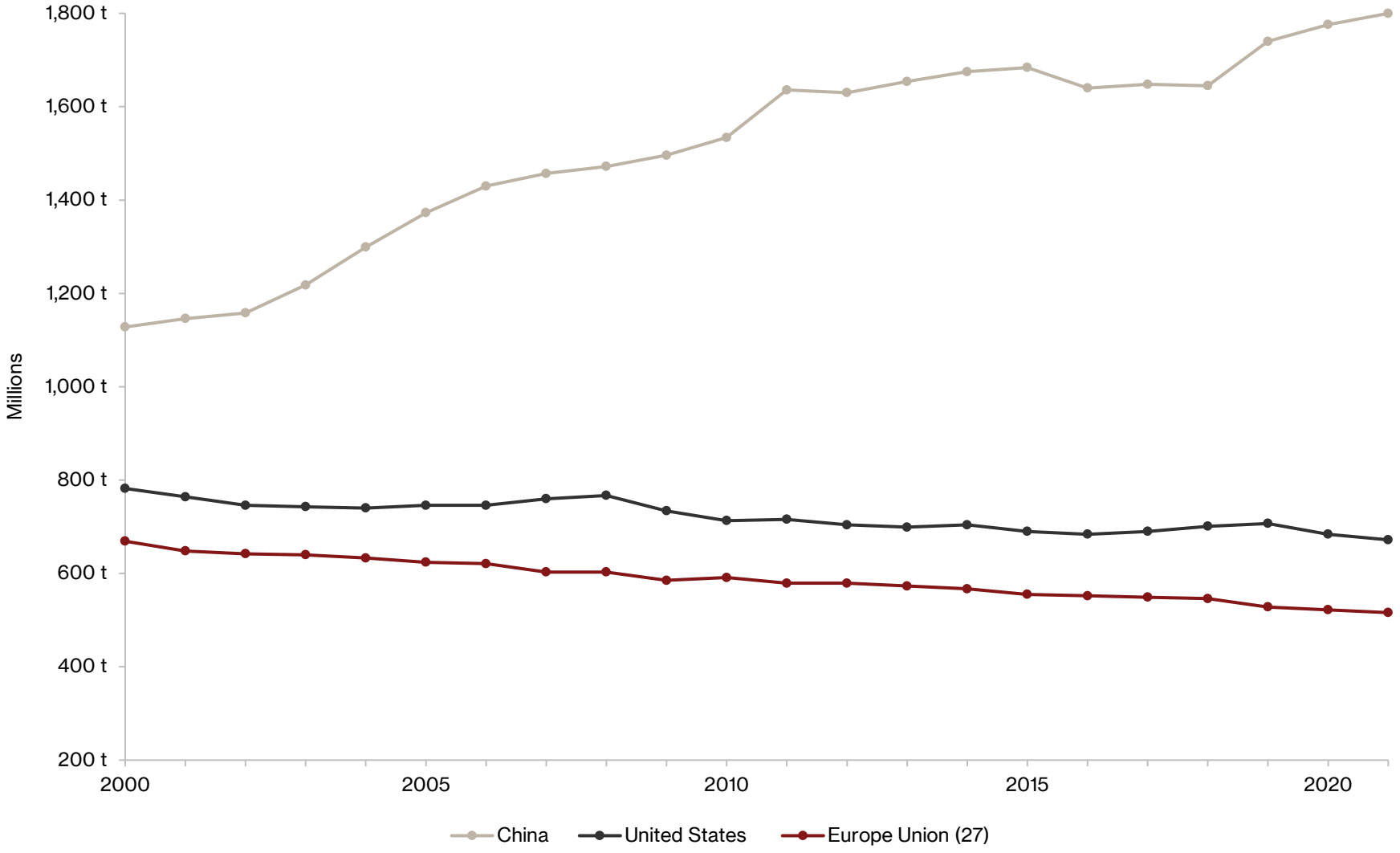
China Emits ~2.5x More Methane Than The United States

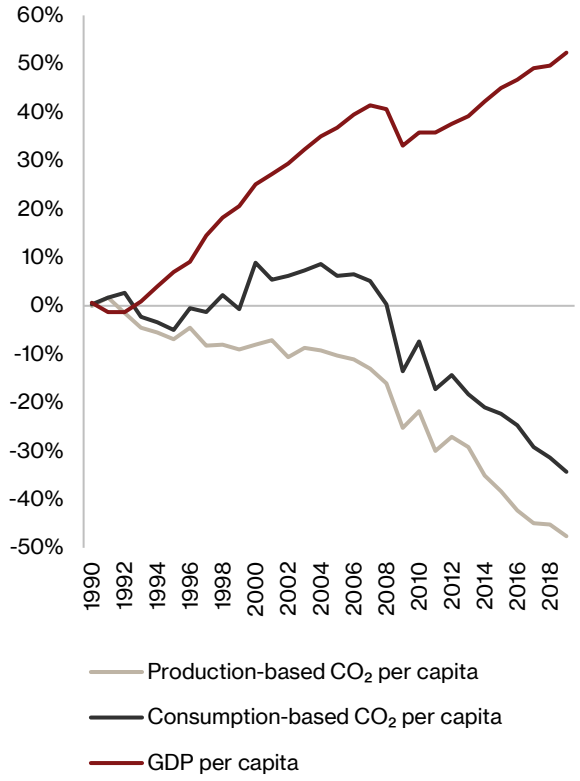


https://ourworldindata.org/grapher/methane-emissions?tab=chart&time=1985..latest&region=NorthAmerica&country=USA~CHN~OWID_EU27

Western Economies Have Been Decoupling For The Last Thirty Years

Change in per capita CO_2 emissions and GDP, United Kingdom

Consumption-based emissions are national emissions that have been adjusted for trade. This measures fossil fuel and industry emissions. Land use change is not included.



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OurWorldInData.org/co2-and-greenhouse-gas-emission

Change in per capita CO_2 emissions and GDP, United States

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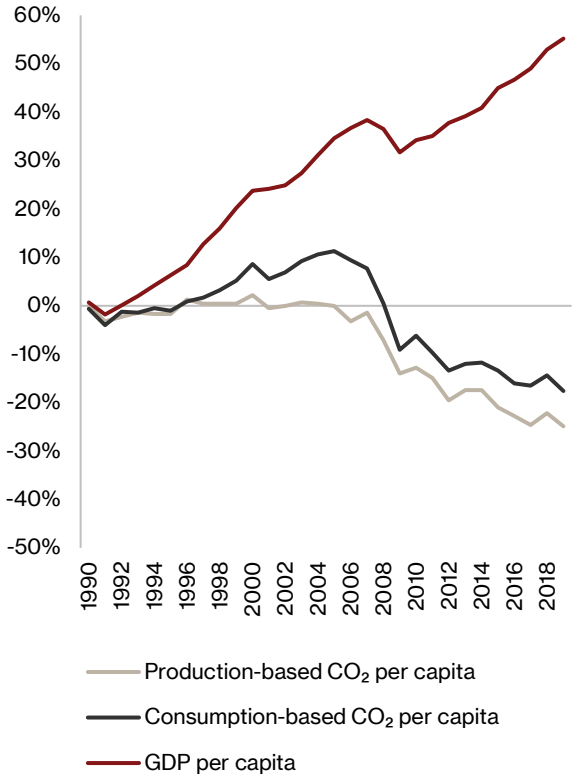

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OurWorldInData.org/co2-and-greenhouse-gas-emission

Change in per capita CO_2 emissions and GDP, Germany

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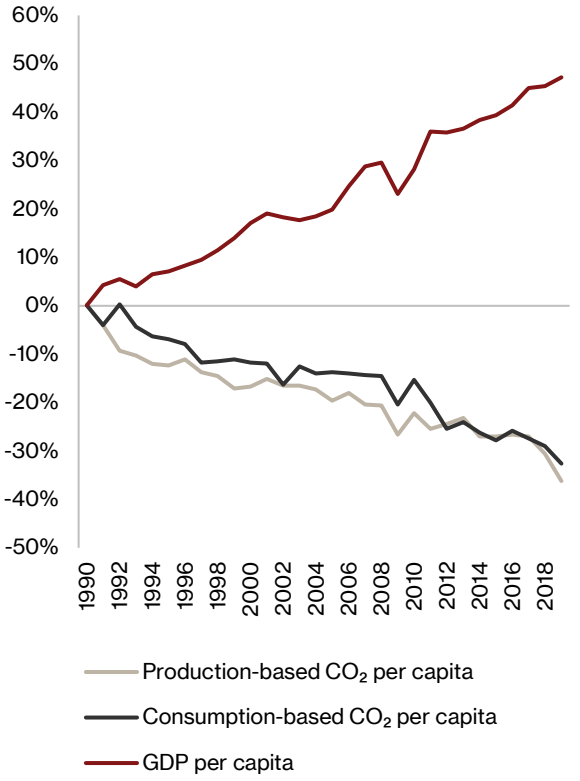

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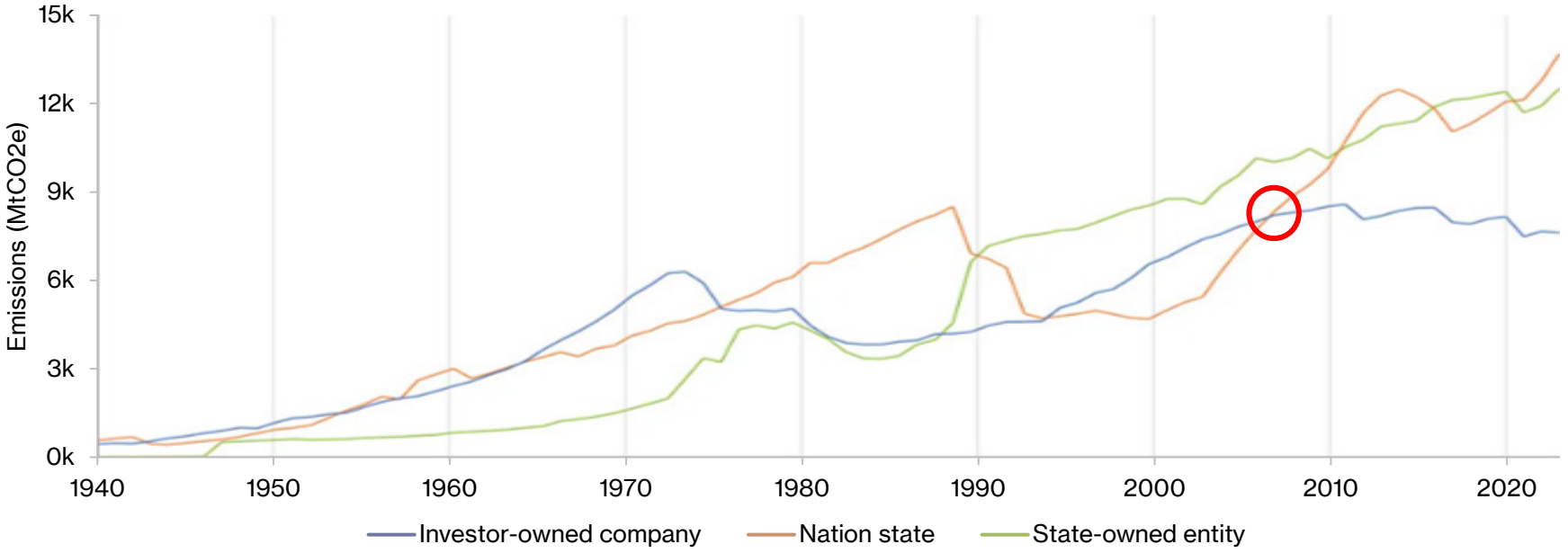
Nation-State & SOE Emissions Have Surpassed Investor-Owned CO_2



The five largest nation-states (by population)	The five largest SOEs in the world	The five largest investor-owned companies in the world (by revenue)
India (1.5B)	Industrial & Commercial Bank of China	Walmart ($650B USD)
China (1.4B)	China Construction Bank	Amazon ($575B USD)
United States (345M)	Agricultural Bank of China	Apple ($383B USD)
Indonesia (283M)	State Grid Corporation of China	UnitedHealth ($372B USD)
Pakistan (250M)	Saudi Aramco	Berkshire Hathaway ($364B USD)

80 Percent of Global CO2 Emissions Come From Just 57 Companies, Report Shows | Smithsonian (smithsonianmag.com)

The U.S. Displays Carbon "Advantages" vs. The Rest Of The World

	USA	Brazil	Canada	China	EU	India	Mexico	Russia	World
Agriculture, forestry and fishing	1.0	1.2	1.4	1.2	1.2	0.9	1.6	1.8	1.0
Mining and extraction of energy producing products	1.0	1.1	1.6	2.2	0.9	5.9	1.5	2.2	1.3
Mining and quarrying of non-energy producing products	1.0	0.6	1.6	2.2	0.8	4.7	1.0	3.2	1.4
Mining support service activities	1.0	1.8	1.5	5.2	1.9	2.5	1.6	4.2	1.9
Food products, beverages and tobacco	1.0	1.0	1.0	1.4	0.8	1.5	0.9	1.8	1.1
Textiles, wearing apparel, leather and related products	1.0	0.8	1.0	1.8	0.8	2.3	1.1	1.9	1.5
Wood and products of wood and cork	1.0	1.0	1.3	1.8	0.9	3.7	1.7	2.9	1.4
Paper products and printing	1.0	0.9	1.0	1.7	0.8	2.3	1.1	2.4	1.2
Coke and refined petroleum products	1.0	0.9	1.3	1.6	1.3	1.8	1.9	1.7	1.3
Chemicals and pharmaceutical products	1.0	0.9	1.5	2.6	0.8	2.1	1.2	5.5	1.6
Rubber and plastic products	1.0	0.9	1.0	2.7	0.7	2.1	1.1	2.9	2.0
Other non-metallic mineral products	1.0	0.7	0.9	1.6	1.0	2.5	0.9	2.7	1.3
Basic metals	1.0	1.3	1.0	1.8	0.9	2.7	0.7	3.7	1.5
Fabricated metal products	1.0	1.3	0.9	3.1	0.9	6.1	1.4	4.8	1.8
Computer, electronic and optical products	1.0	2.5	2.3	5.7	2.1	8.0	3.4	7.4	4.0
Electrical equipment	1.0	1.5	1.2	3.1	1.0	3.9	1.4	4.8	2.2
Machinery and equipment	1.0	1.0	0.9	2.8	0.8	4.0	1.2	4.5	1.8
Motor vehicles, trailers and semi-trailers	1.0	1.2	0.9	2.4	0.7	3.5	1.0	3.6	1.3
Other transport equipment	1.0	1.3	0.9	2.8	0.8	3.5	1.3	3.2	1.5
Other manufacturing; repair and installation of machinery and equipment	1.0	1.0	1.0	2.8	0.7	4.2	1.7	4.1	1.9
Economy-Wide	**1.0**	**1.1**	**1.3**	**3.2**	**0.9**	**3.8**	**1.4**	**4.2**	**1.8**

U.S. Carbon Advantage
(foreign competitors less carbon efficient)

U.S. Carbon Disadvantage
(foreign competitors more carbon efficient)

U.S. Carbon Efficiency or Equivalent

Source: MarcoDyn Group calculations based on **data from the International Energy Agency**, the World Input-Output Database environment accounts and the Global Trade Analysis Project.

https://citizensclimatelobby.org/blog/policy/carbon-border-adjustments-prove-it-act/

https://clcouncil.org/reports/americas-carbon-advantage.pdf

Electricity Generation & Energy Efficiency Will Largely Influence Economic Expansion Over The Next Century

Fossil Fuels Will Remain A Global Necessity Over The Foreseeable Future

The global energy mix at the end of 2023 remained **~82% reliant on fossil fuels**, down only five percent from 2010

If this trend remained at its current pace, fossil fuels would cease to exist within the global energy mix in **approximately 2225**

The United States accounted for **only approximately 20%** of the twenty-six million metric tons of CO_2 released by the world's **ten largest emitters** in 2022

For perspective, China, India, and Russia comprise nearly **62% of the emissions** released by the world's top ten emitters during the same period

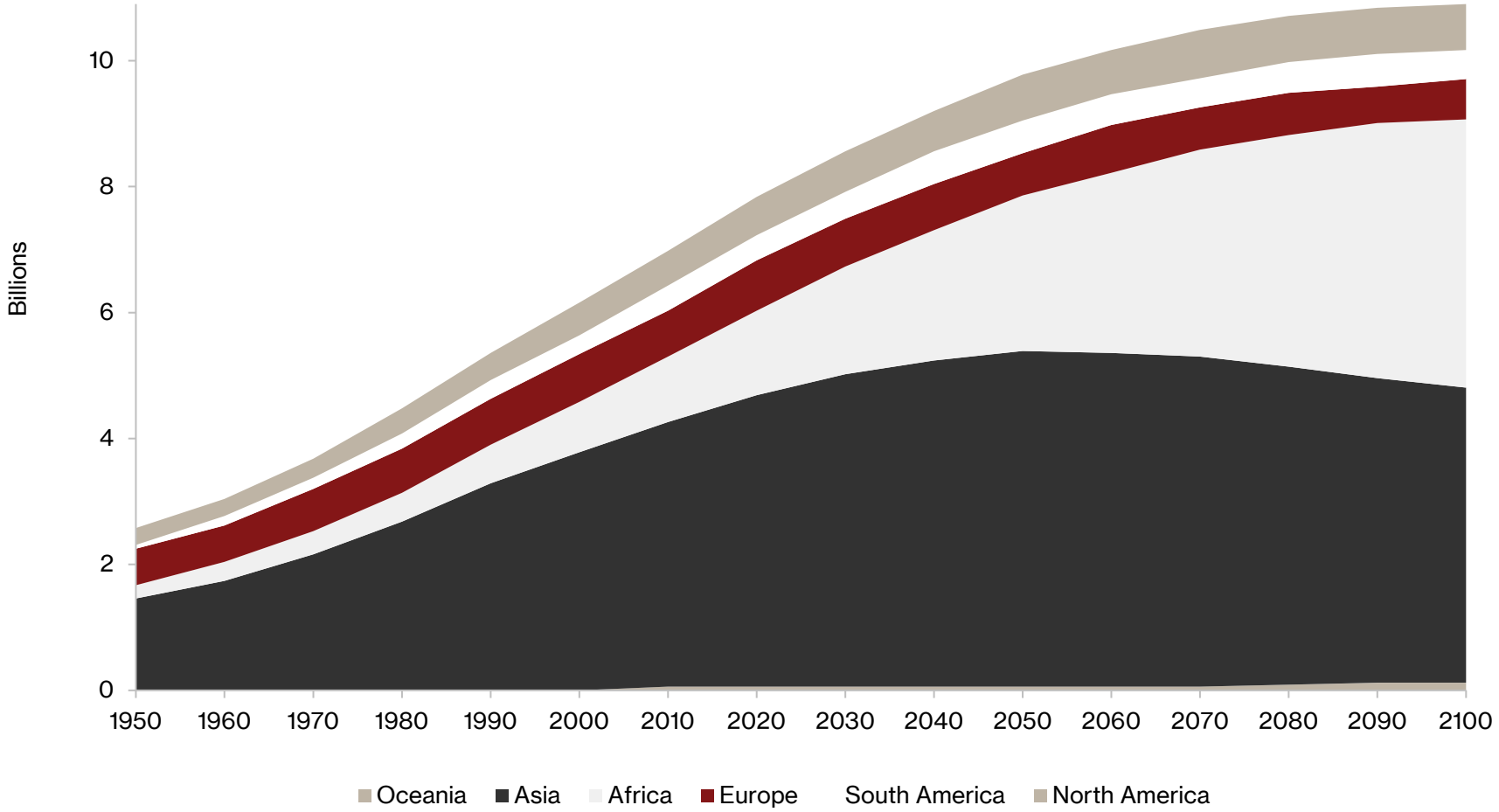
As of 2022, **~43% of Africa's total population lacks access** to electricity; for Africans who do have access, natural gas, coal, and hydropower account for 40%, 19%, and 17% of the electricity generated, respectively

Fossil fuels 'stubbornly' dominating global energy despite surge in renewables: Energy Institute
Distribution of Energy Production in Africa - Statista

Growth Dominated By Areas Currently Experiencing Energy Poverty

World population by region

Projected population to 2100 is based on the UN's medium population scenario.

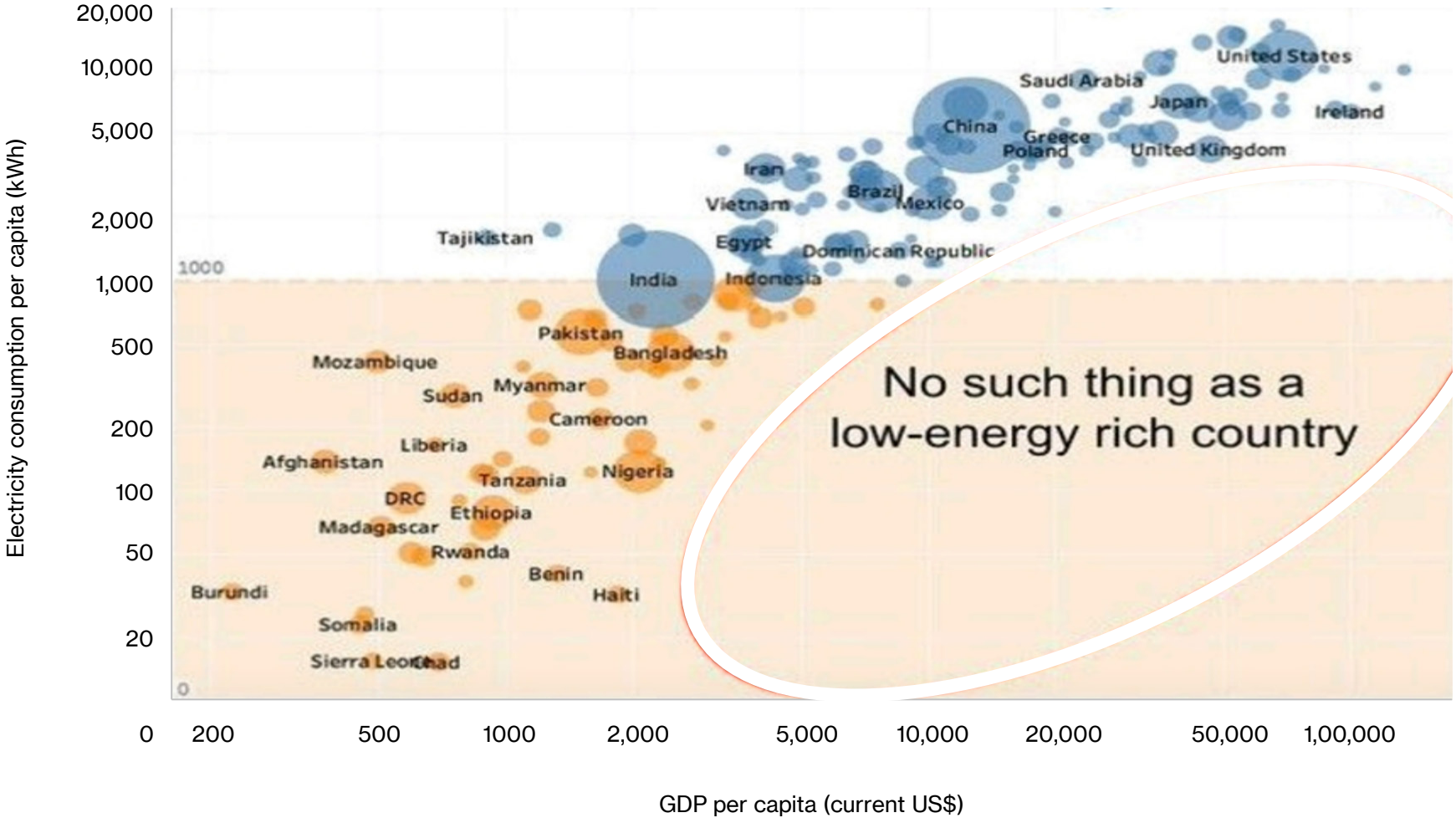


Pickering Energy Partners

Source: Gapminder (v6,) HYDE (v3.2), UN (2019)
https://ourworldindata.org/future-population-growth

GDP per Capita Is Directly Correlated To Electricity Consumption

Electricity & Income (per capita, all countries)



Source: IEA, World Bank
https://ourworldindata.org/grapher/energy-use-per-capita-vs-gdp-per-capita

The U.S. Middle Class Is Shrinking While India and China's Expands

- Expanded from **39.1 million people (3.1% of the population)** in 2000 to approximately 707 million (50.8% of the population) in 2018
- This represents an impressive **increase of 667.9 million** individuals or 47.8 percentage points
- More than **70%** of these new middle-class individuals emerged from third-tier cities or smaller provincial capitals, highlighting the **rising consumption power** in these regions

- Between **1995 and 2021,** the middle class expanded at an impressive rate of **6.3% per year**
- Currently, the middle class represents 31% of the population
  - Projections indicate that by 2031, it will reach 38%
  - By 2047, the Indian middle class could constitute **60% of India's population**

In 2022, the middle class constituted 51% of the U.S. population, **down from 61%** in 1971

Pickering Energy Partners

Pew Research Center - Global Middle Income Class Income Calculator
How The Middle Class Will Play The Hero in India's Rise as a World Power

Middle-Class “Anyone” Will NOT Accept High Electricity Prices

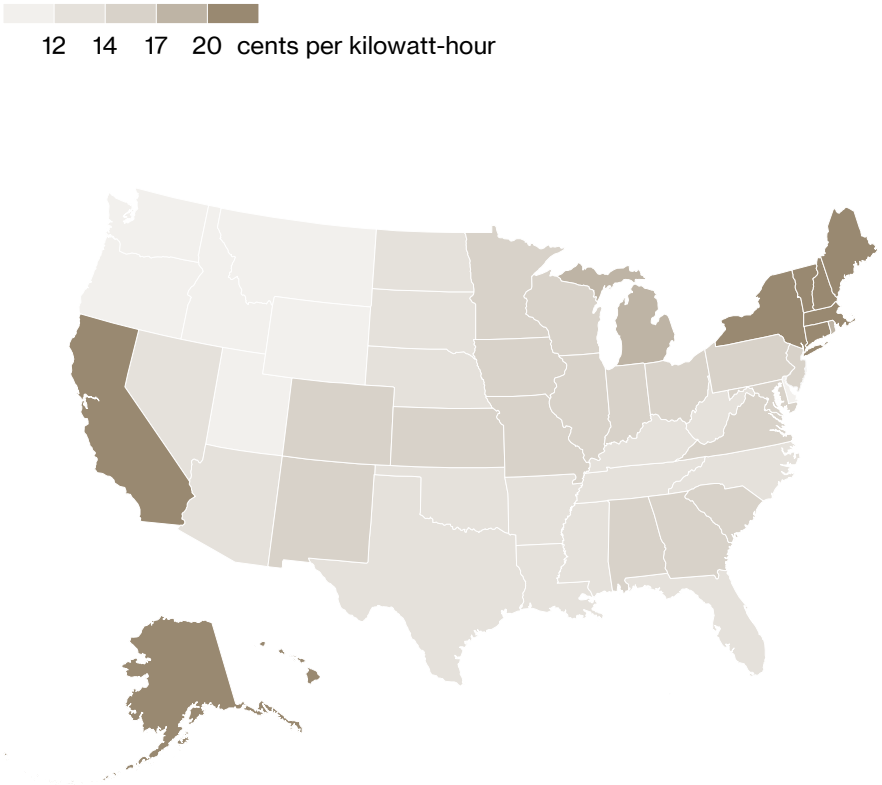
	U.S.	China	India
Total electricity generated (petawatts)	4.2	8.5	1.8
Total percentage of world population - 2023	4%	17%	17%
Total percentage of global CO_2 emissions - 2023	15%	26%	7%
2023 avg annual per capita HH income ($USD)	50,491	5,421	2,485 (est.)
GDP per capita ($USD)	65,020	12,174	2,485
Avg residential electricity rate ($USD/kilowatt hour)	$0.23	$0.08	$0.08
Avg commercial electricity rate ($USD/kilowatt hour)	$0.13	$0.09	$0.13

Pickering Energy Partners

China: residential electricity prices 2023 | Statista

Poor Policy Has Resulted In A Variety Of Unnecessary Consequences

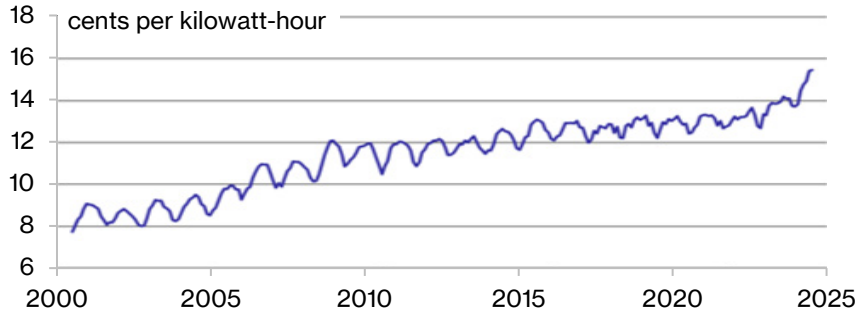
Cost of residential electricity



Data source: Energy Information Administration

Average cost of residential electricity in the US

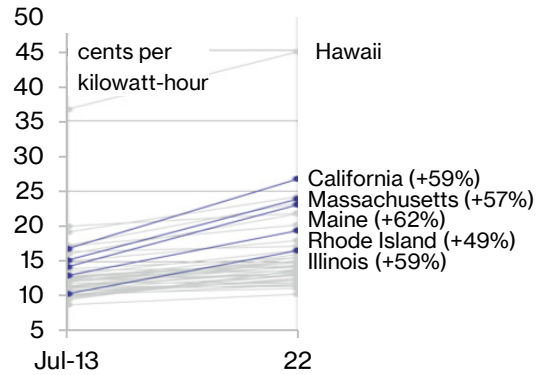
Electricity prices typically peak during summer months and the cost of electricity was 11.5% higher this July than last



Data source: Energy Information Administration

Where the cost of residential electricity has increased most over the past decade

Note: Highlighted lines represent states with the greatest percent change in electricity cost in cents. per kilowatthour between July 2013 and July 2022



Data source: Energy Information Administration

The Global Economy Will NOT Be Able To Eliminate Coal Anytime Soon

CNBC

WATCH LIVE

FUTURES & COMMODITIES

World's two largest coal consumers won't be weaning off the fossil fuel anytime soon

PUBLISHED WED, JAN 10 2024 6:10 PM EST

Lee Ying Shan
@LEEYINGSHAN

WATCH LIVE

KEY POINTS

- Both countries are the world's largest consumers of the dirtiest fossil fuel, and continued modernization puts their energy consumption on a rapid growth trajectory.
- Global coal use in 2023 has hit a record high, surpassing 8.5 billion tons for the first time, on the back of strong demand in countries like India and China, said IEA.

The World Will Shortly Experience The Unprecedented Demand For Affordable & Reliable Power

The AI Economy Will Not Allow Operational Net Zero To Occur

Climate & Energy | Grid & Infrastructure | Coal | Gas | Clean Energy

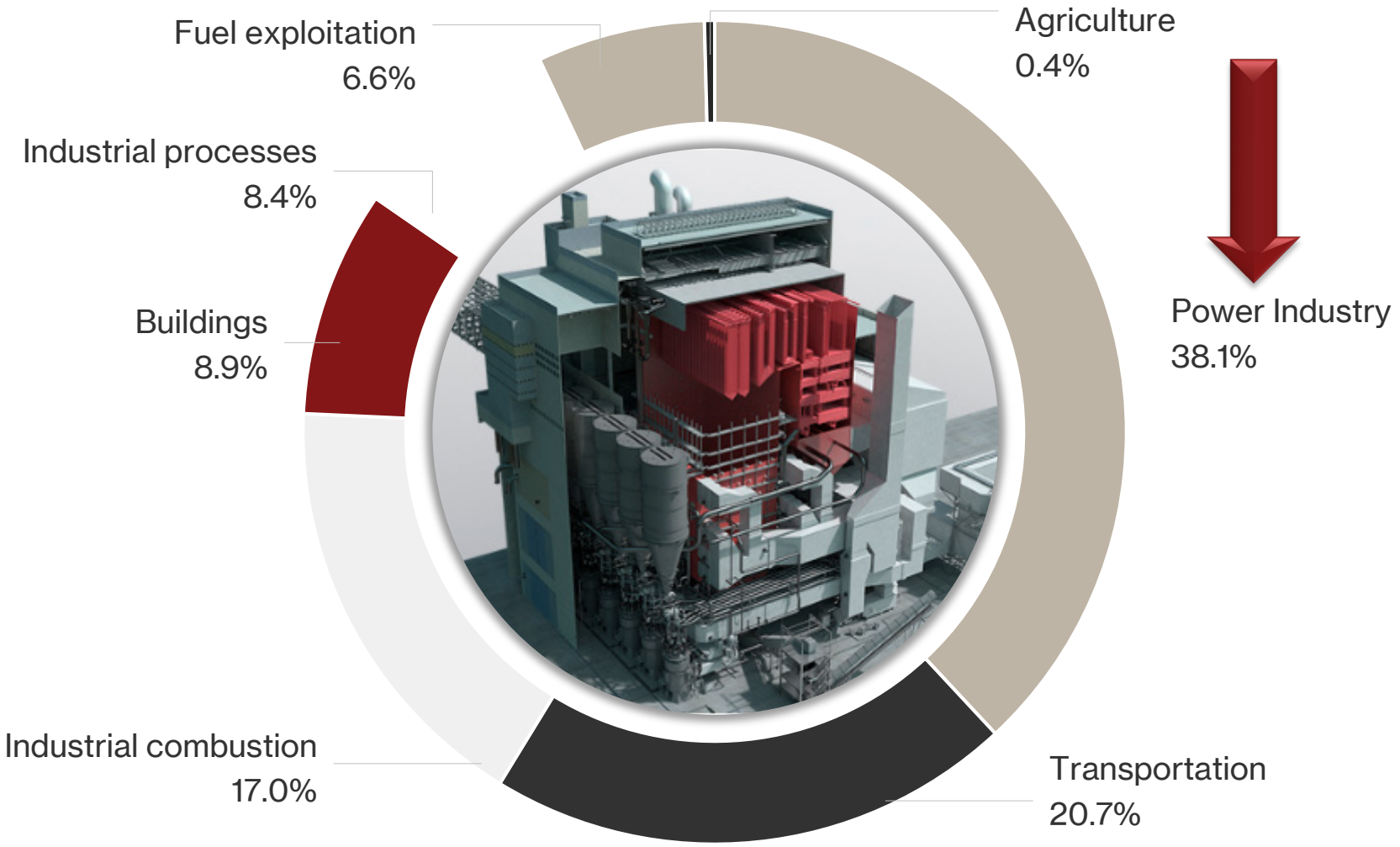
US power use to reach record highs in 2024 and 2025 -EIA

Reuters

March 12, 2024 2:41 PM CDT · Updated 10 days ago

The Power Industry Overwhelmingly Dominates Global CO_2 Emissions

Distribution of Carbon Dioxide Emissions Worldwide in 2022



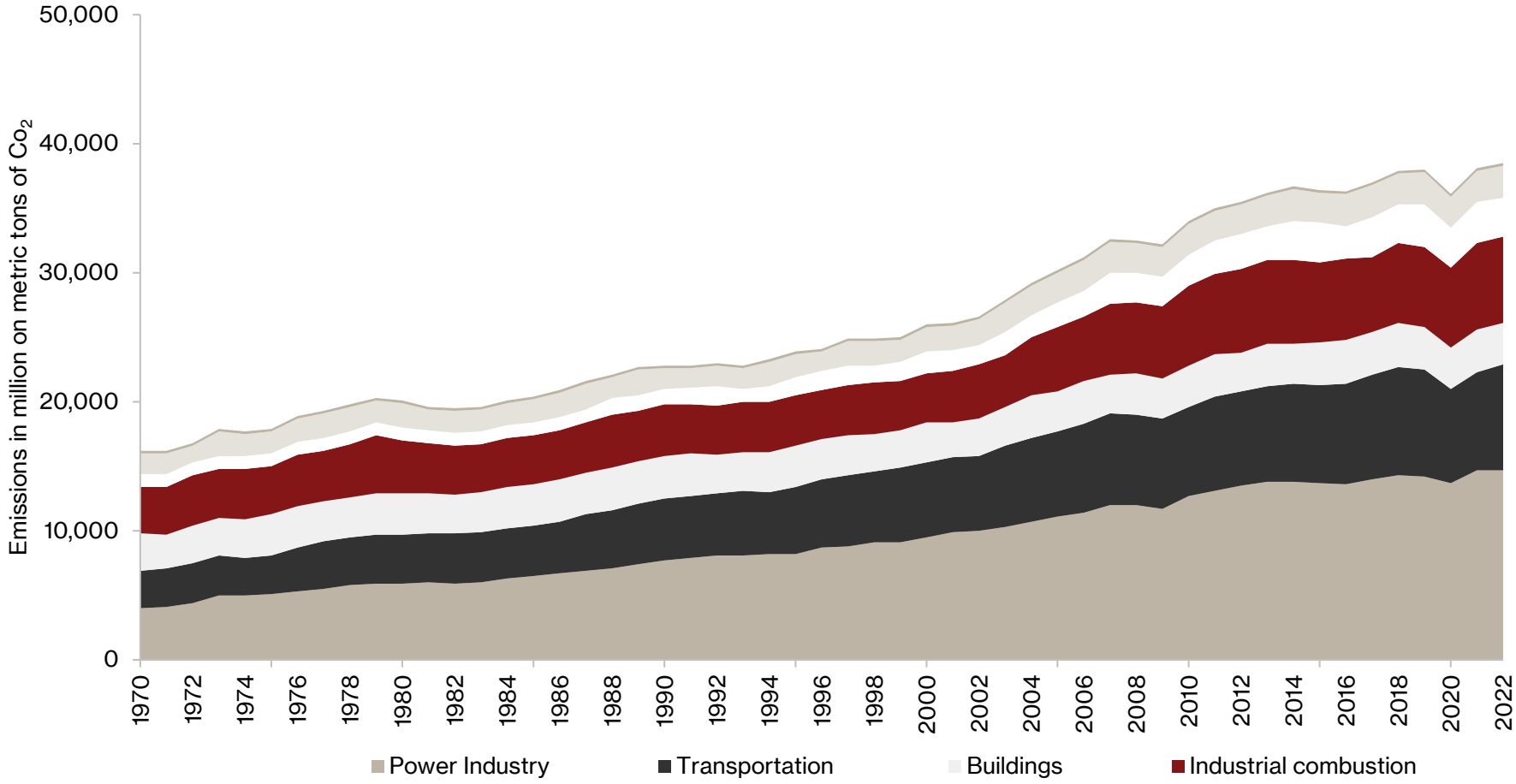
Pickering Energy Partners

https://www.statista.com/statistics/1129656/global-share-of-co2-emissions-from-fossil-fuel-and-cement/#:~:text=The%20power%20industry%20was%20by,at%20just%20over%2020%20percent.

Global CO_2 Emissions From Power Industries Have Doubled Since 2000

Global carbon dioxide emissions from 1970 to 2022 by sector

(in million metric tons of carbon dioxide)



The “New Economy” Will Unequivocally Require More RELIABLE Power


TECHNOLOGY ARTIFICIAL INTELLIGENCE KEYWORDS: CHRISTOPHER MIMS

AI Is Ravenous for Energy. Can It Be Satisfied?

The revolution in artificial intelligence may soon require more electricity than all electric vehicles combined


The New York Times

A.I. Could Soon Need as Much Electricity as an Entire Country

Behind the scenes, the technology relies on thousands of specialized computer chips.


Bloomberg US Edition

• Live Now Markets Economics Industries Tech AI Politics Wealth Pursuits Opinion Businessweek Equality **Green**

Green
New Energy

Artificial Intelligence Is Booming—So Is Its Carbon Footprint

Greater transparency on emissions could also bring more scrutiny

https://www.wsj.com/tech/ai/ai-energy-consumption-fc79d94f
https://spectrum.ieee.org/ai-energy-consumption

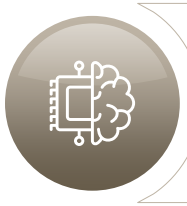
Future Global Economic Relevance Is Highly Contingent On AI Adoption

The AI industry is anticipated to experience a **20x increase** by 2030, propelling it to nearly a **two trillion U.S. dollar business**

The AI market is projected to reach a staggering **$407 billion by 2027**, experiencing substantial growth from its estimated $86.9 billion revenue in 2022

AI is expected to contribute a significant **21% net increase** to the United States GDP by 2030

It is expected that **10% of vehicles will be driverless by 2030**, as the global market of self-driving cars is forecasted to increase from 20.3 million in 2021 to 62.4 million in 2030



A significant **64% of businesses** believe that artificial intelligence will help increase their overall productivity, as revealed in a Forbes Advisor survey

https://www.forbes.com/advisor/business/ai-statistics/

How Much Energy & Power Will The Generative A.I. Economy Demand?

The AI Economy Will Require Exponentially More (Fossil Fuel) Power

According to The New Yorker, ChatGPT is probably using more than **half a million kilowatt-hours** of electricity to respond to some 200 million requests **per day**.

Assuming the average US household uses around 29 kilowatt-hours daily, ChatGPT uses **more than 17,000 times** the amount of electricity

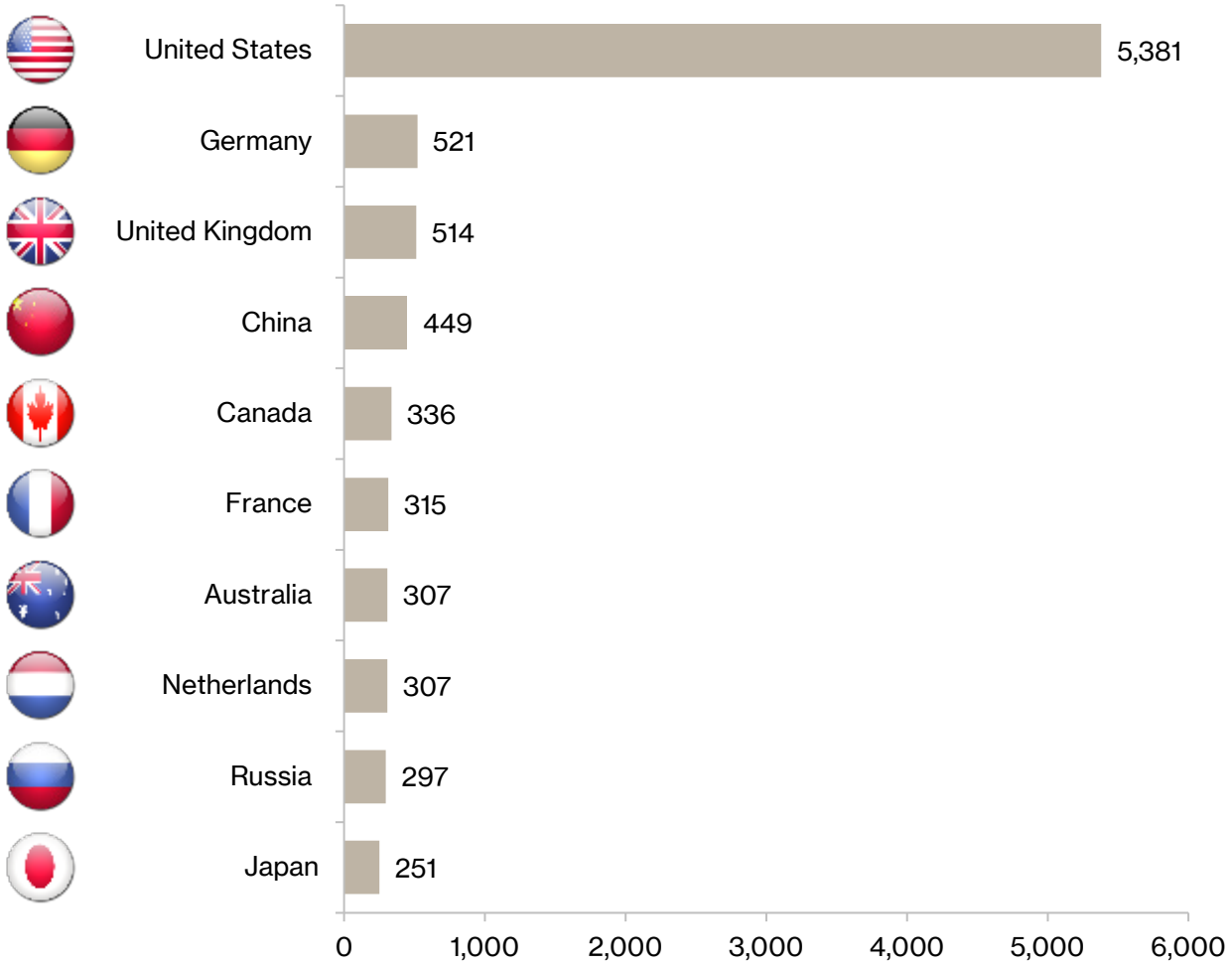
By 2027, the entire AI sector could be using a staggering **85 to 134 terawatt-hours annually**, which would essentially be 50% of ALL global electricity consumption (1TW = 1M kilowatts)

https://www.theverge.com/24066646/ai-electricity-energy-watts-generative-consumption

https://www.energy.gov/energysaver/cost-charge-electric-vehicle-explained#:~:text=If%20using%20an%20EV%2C%20which,cost%20nearly%20%2460%20per%20month.

“Hyper-Scale” Data Centers Powering AI Consume 20-50 MW Annually

Leading countries by number of data centers as of March 2024



135 terawatt-hours is equivalent to 135M kilowatt hours, which is over **12,000x the electricity** consumed by one household

Tokyo, population ~37M, consumed ~285M kilowatt hours of electricity in 2022

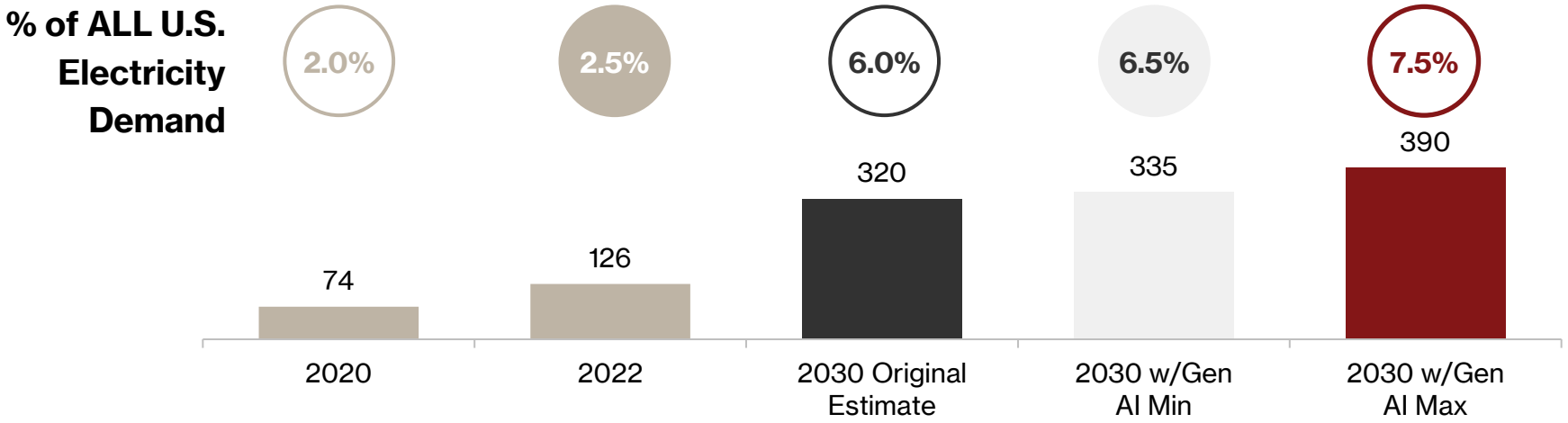
On an annual basis, the upper end of electricity demand forecasted to power generative AI is the same amount of power that would **power Tokyo for 173 days**

Pickering Energy Partners

Source - https://www.statista.com/statistics/1228433/data-centers-worldwide-by-country/

Hyper-Scale Data Centers Will Require ~3.5x More Electricity

Data center electricity consumption in the U.S. is growing (TWhs)



Technology

Microsoft, OpenAI plan $100 billion data-center project, media report says

By **Reuters**

March 29, 2024 4:14 PM CDT · Updated 4 days ago

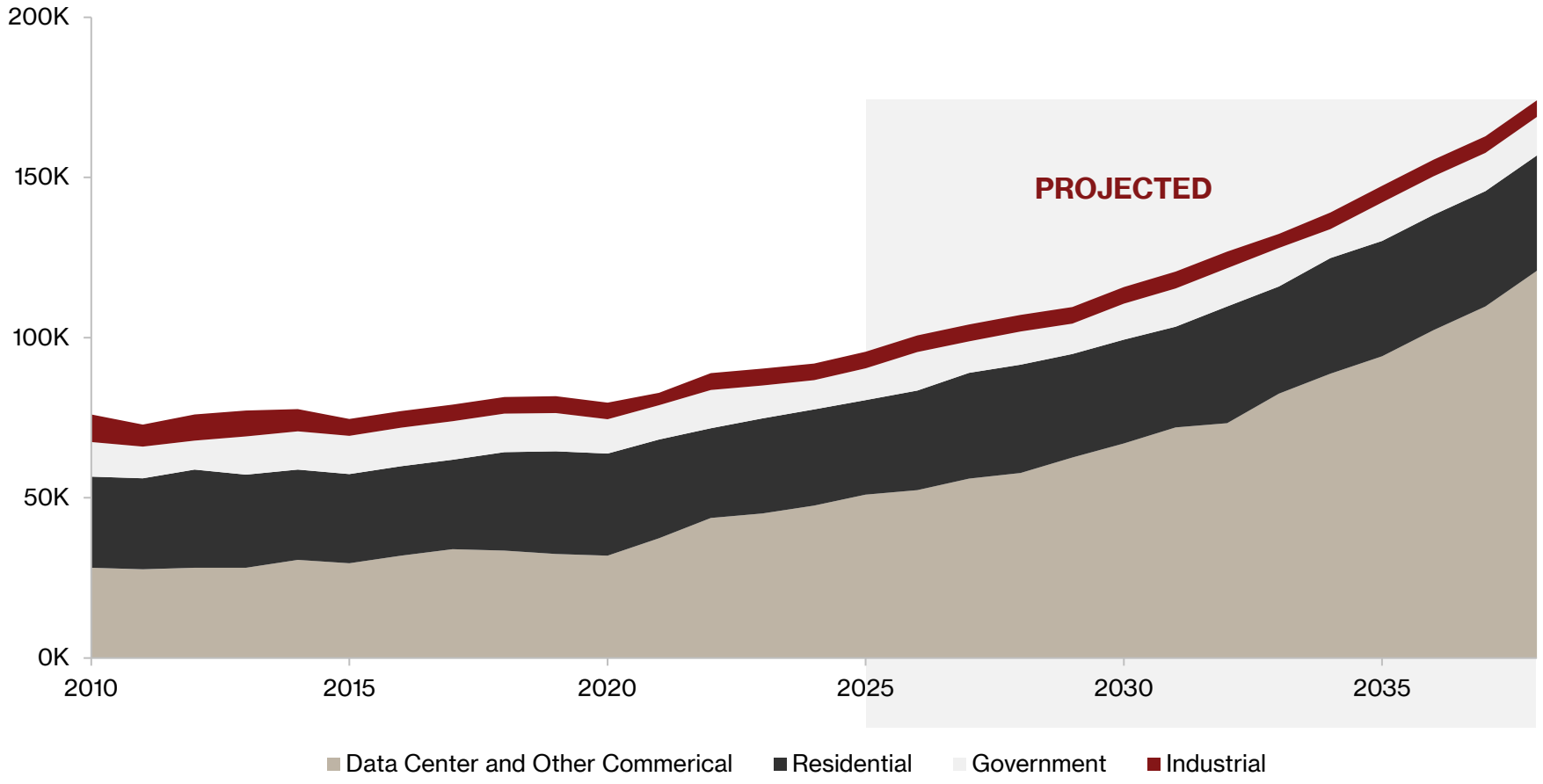
https://www.nextplatform.com/2023/04/12/energy-efficiency-pays-its-way-in-the-datacenter/

https://mishtalk.com/economics/ai-cryptocurrency-will-double-data-center-energy-consumption-by-2026/

Data Centers Will Create An Exponential Increase In Energy Demand

Data centers expected to drive "stratospheric" energy demand in Virginia

Dominion Energy customer demand in Virginia, in gigawatt hours



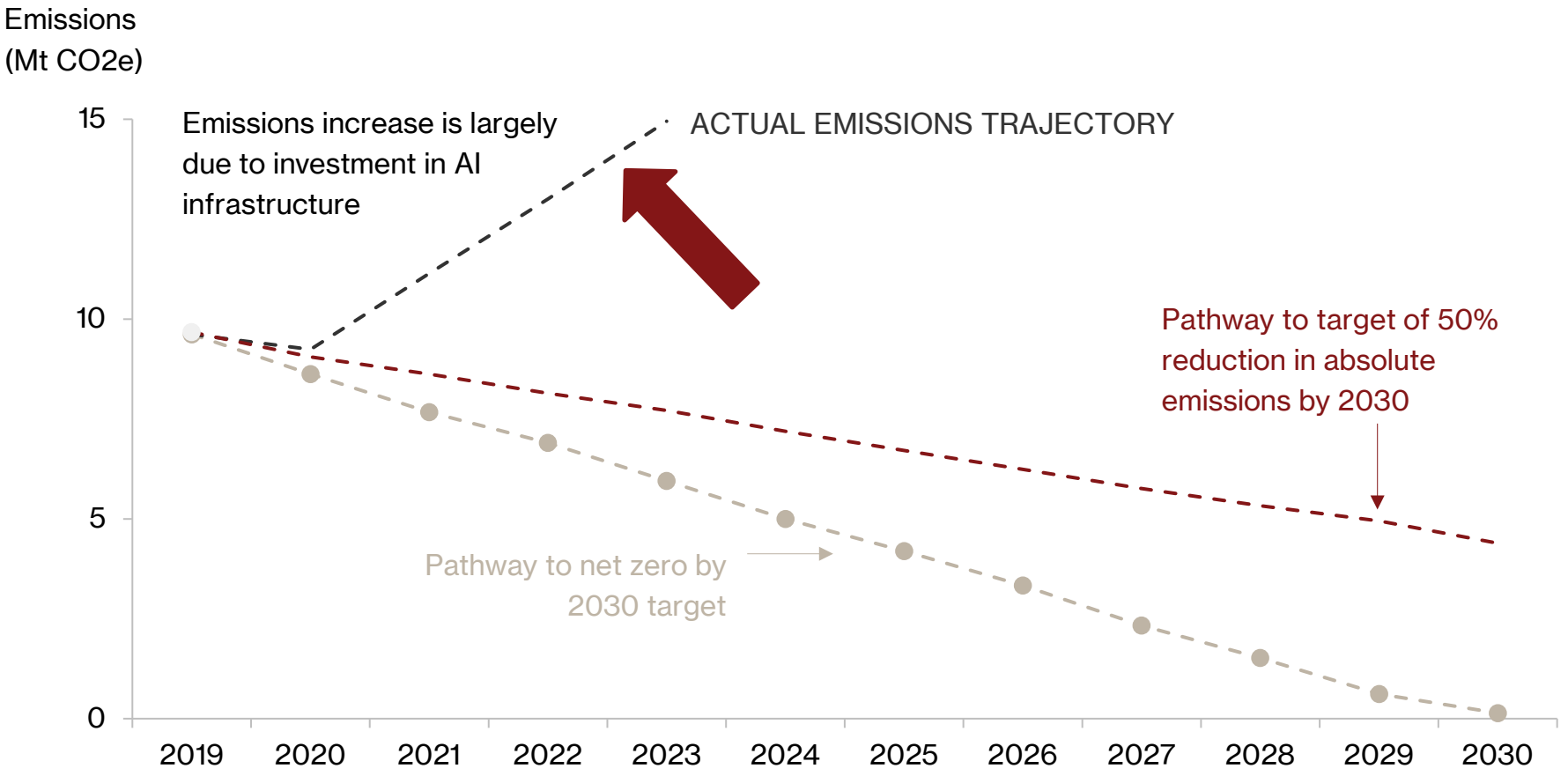
Pickering Energy Partners

Why invest in the data center economy | McKinsey

Source: Dominion Energy's Virginia Electric and Power Company Integrated Resources Plan

There Exists An Immense Emissions Delta Between Goals And Reality

Google Is No Longer Claiming To Be Carbon Neutral



Pickering Energy Partners

Google Is No Longer Claiming to Be Carbon Neutral - Bloomberg

Chart adapted from Bloomberg Green; Data source: Google (Scope 1, 2 and 3 emissions)

Achieving Net Zero "Organically" Unlikely To Happen

ALL Companies Will Miss Net Zero Goals Without At Least Doubling Rate of Carbon Emissions Reductions by 2030

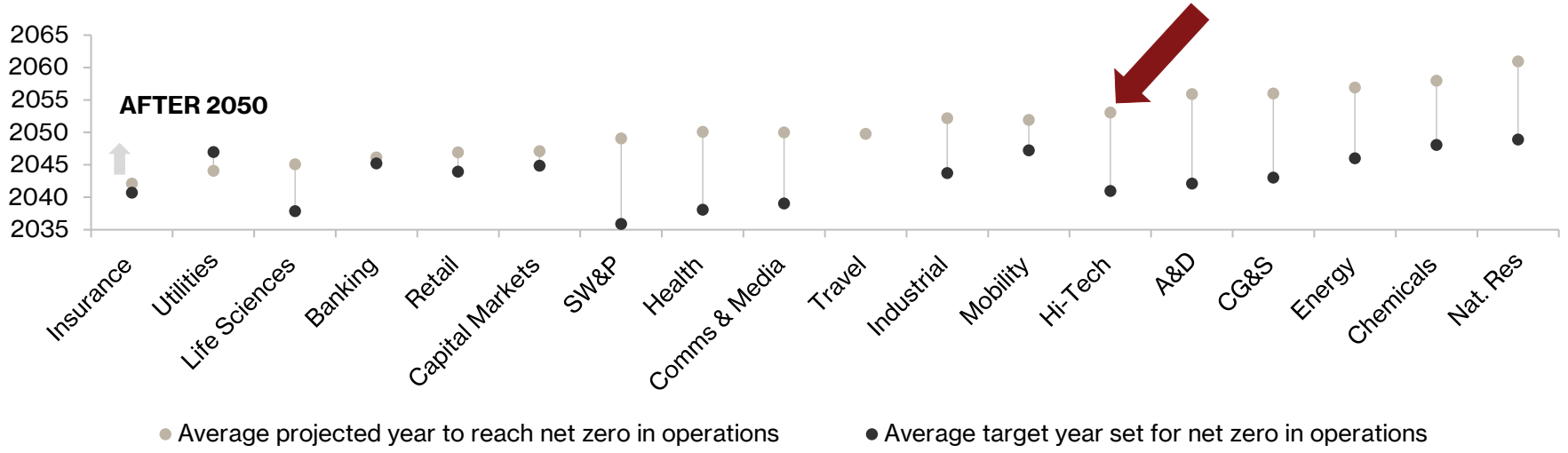
More than one-third of the world's largest companies have a Net Zero commitment, but **93% of them will fail** to achieve their goals if they do not at least double the pace of emissions reduction by 2030

Many industries are not on track to meet net zero by 2050 and need to accelerate

Even on a consensus pathway, in which projected emissions reduction speeds double over the next decade, many industries will still fail to meet net zero by 2050.

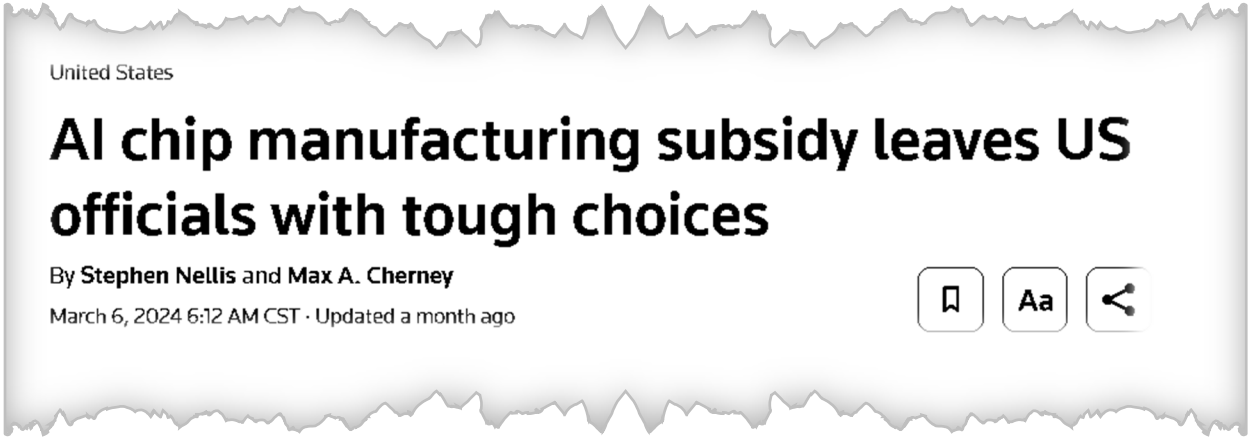
Net Zero by Industry

Emissions scope 1 & 2 - consensus pathway scenario for an average company projected year of achievement



Existing U.S. Energy Policy & Absolute Net Zero Goals Undermine Long-Term Economic Prosperity & Geopolitical Stability

Protecting American Interests Directly Conflicts With Net Zero Targets



United States

AI chip manufacturing subsidy leaves US officials with tough choices

By **Stephen Nellis** and **Max A. Cherney**

March 6, 2024 6:12 AM CST · Updated a month ago

ARTIFICIAL INTELLIGENCE

Congress pushes aggressive use of AI in the federal government, says AI 'under-utilized' in agencies

The effort comes as Congress is still struggling to develop AI regulations

By **Peter Kasperowicz** · **Fox News**

Published June 30, 2023 2:00am EDT

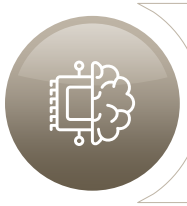
CBRE Underscores The Market's Struggle To Secure RELIABLE Energy

Supply in primary markets **increased by 491.5 MW (12%)** in H1 2023 compared to H2 2022 and 738.2 MW (19.2%) year-over-year.

A lack of readily available power and extended lead times for critical pieces of electrical infrastructure is delaying construction timelines.

Most major markets are grappling with **severe power constraints**

Power availability and capacity **will remain top issues** for developers and operators in 2023.



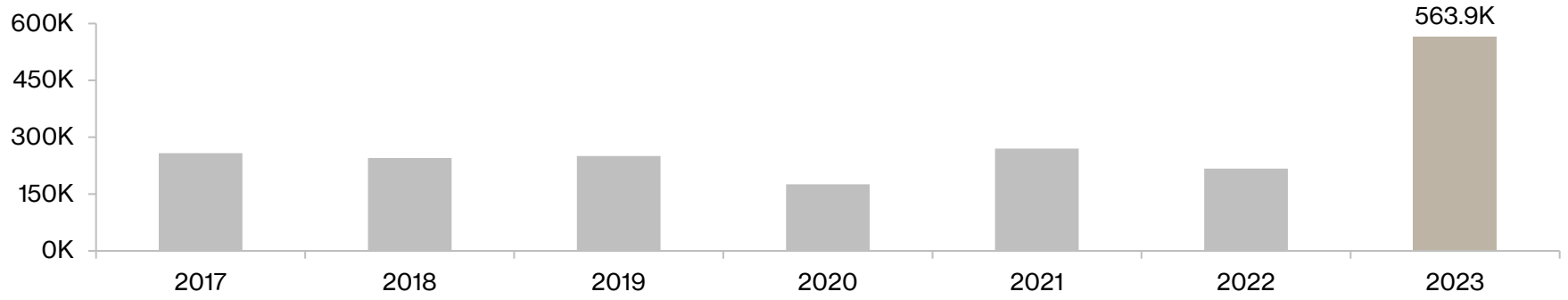
U.S. data center operators will have **the significant challenge of decreasing** Scope 1, 2, and 3 emissions for carbon reduction mandates while overcoming supply chain delays and power shortages.

https://www.cbre.com/insights/reports/north-america-data-center-trends-h1-2023

The Existing U.S. Grid Will Struggle To Provide Projected Power Demand

Projected new energy demand in North America will double

9Y growth forecast of demand for new electricity in gigawatt hours

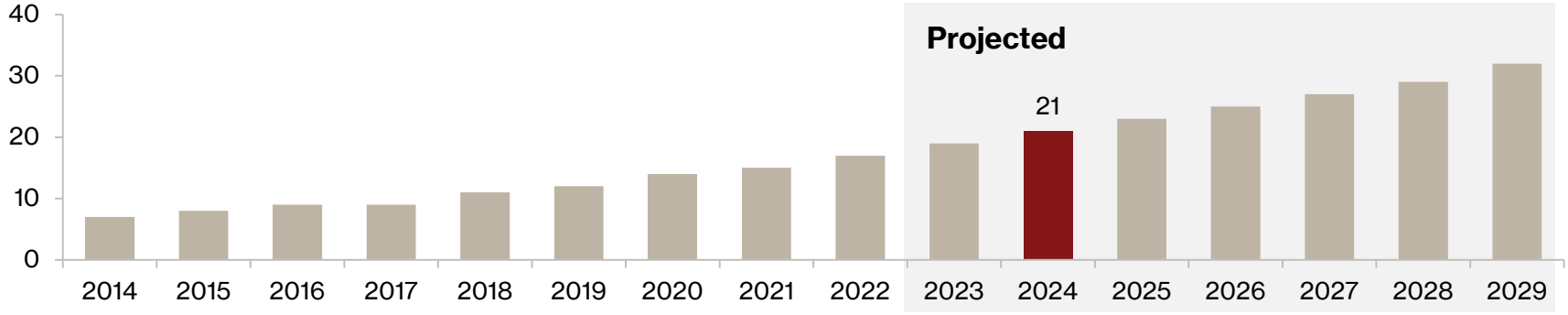


Data covers U.S., Canada and part of Baja California, Mexico

Source: North American Electric Reliability Corp. Long Term Reliability Assessment

U.S. data centers tax the power grid

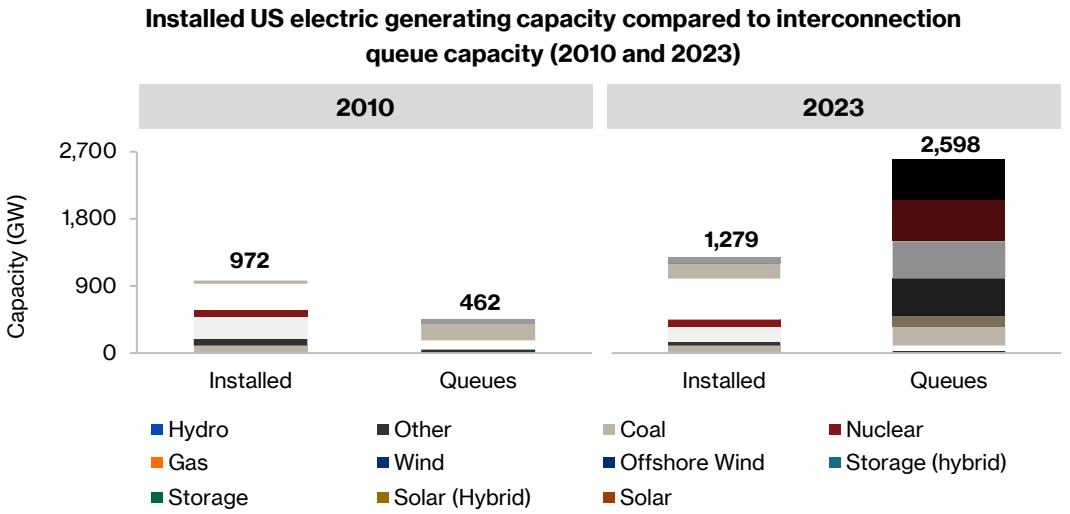
Data center energy demand, in gigawatts. Each gigawatt is roughly the amount of power generated by a large nuclear plant

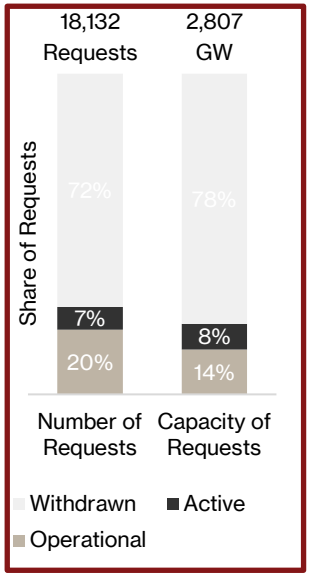


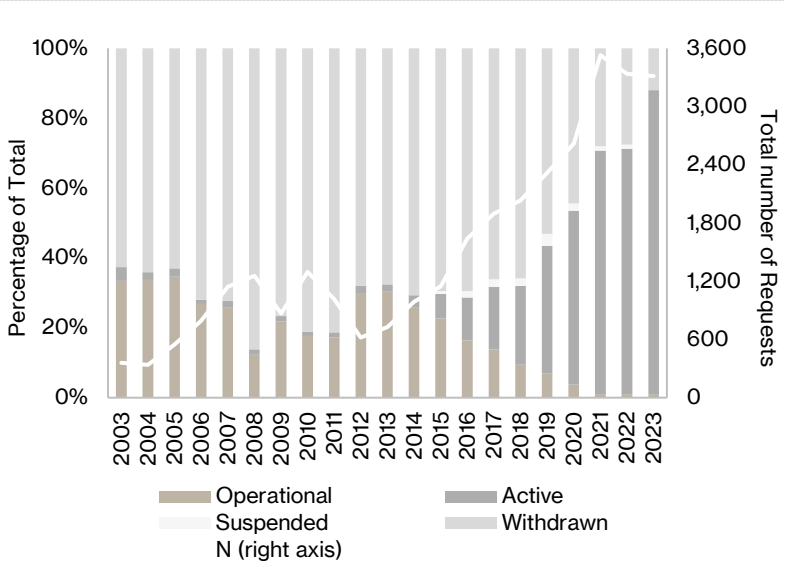
Source: McKinsey and Company, January 2023

The Backlog Of New Power Generation Is Problematic & Expensive

- Connecting new electric generation and storage presents a distinct dilemma in the U.S. due to the increased demand for new data centers
- The backlog of new power generation and energy storage seeking transmission connections across the U.S. grew again in 2023, with **nearly 2,600 gigawatts of generation** and storage capacity now actively seeking grid interconnection
- The **growing backlog** of new power generation and storage has become a significant bottleneck for project development, resulting in proposed projects and most interconnection requests being canceled and withdrawn.
- The majority (>70%) of interconnection requests are withdrawn
- Just 20% of requests (14% of capacity) submitted from 2000-2018 had been built as of the end of 2023







https://emp.lbl.gov/news/grid-connection-backlog-grows-30-2023-dominated-requests-solar-wind-and-energy-storage

https://emp.lbl.gov/sites/default/files/2024-04/Queued%20Up%202024%20Edition_R2.pdf

How Much Power Is 1GW?

2.469 Million Photovoltaic (PV) Panels

310 Utility-Scale Wind Turbines

100 Million LED Bulbs

9,090 Nissan Leafs

Pickering Energy Partners

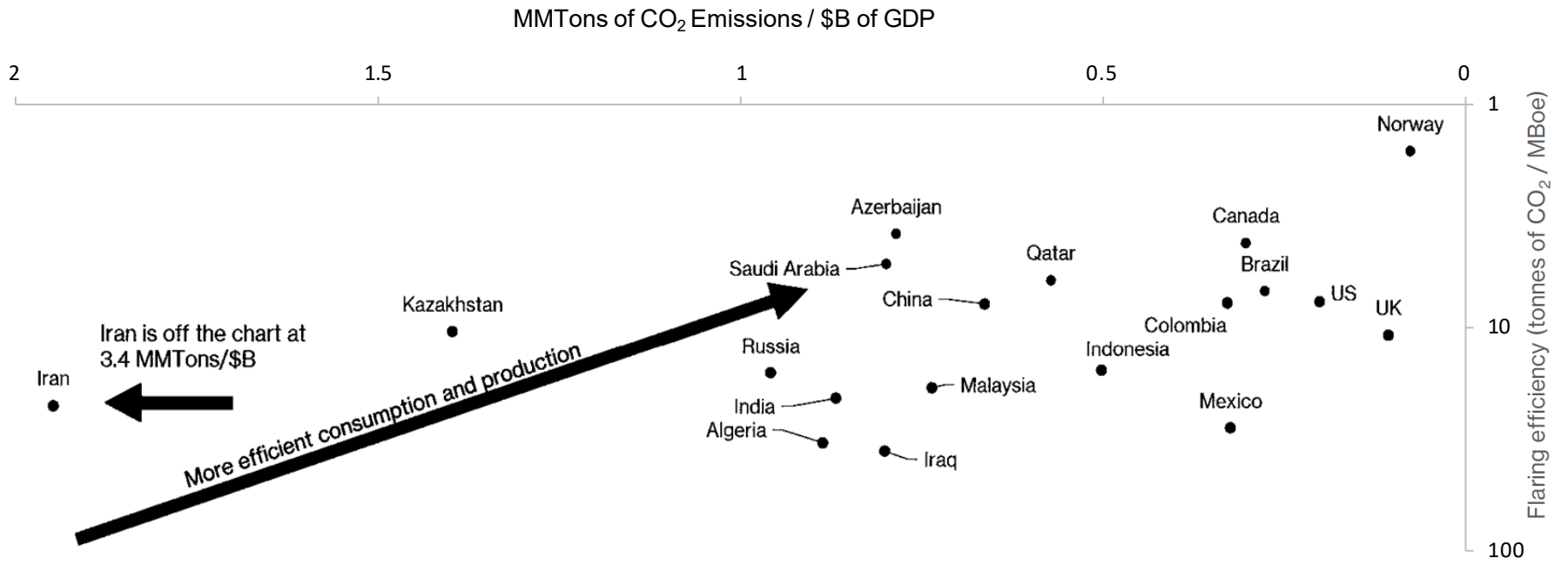
https://www.energy.gov/eere/articles/how-much-power-1-gigawatt

Developing Economies Want Energy To Have Three Key Traits:

Price, Price, and Price

The U.S. Has Created An Optimal Blueprint For Emissions Management

Emissions Relative to GDP vs. Flaring Efficiency

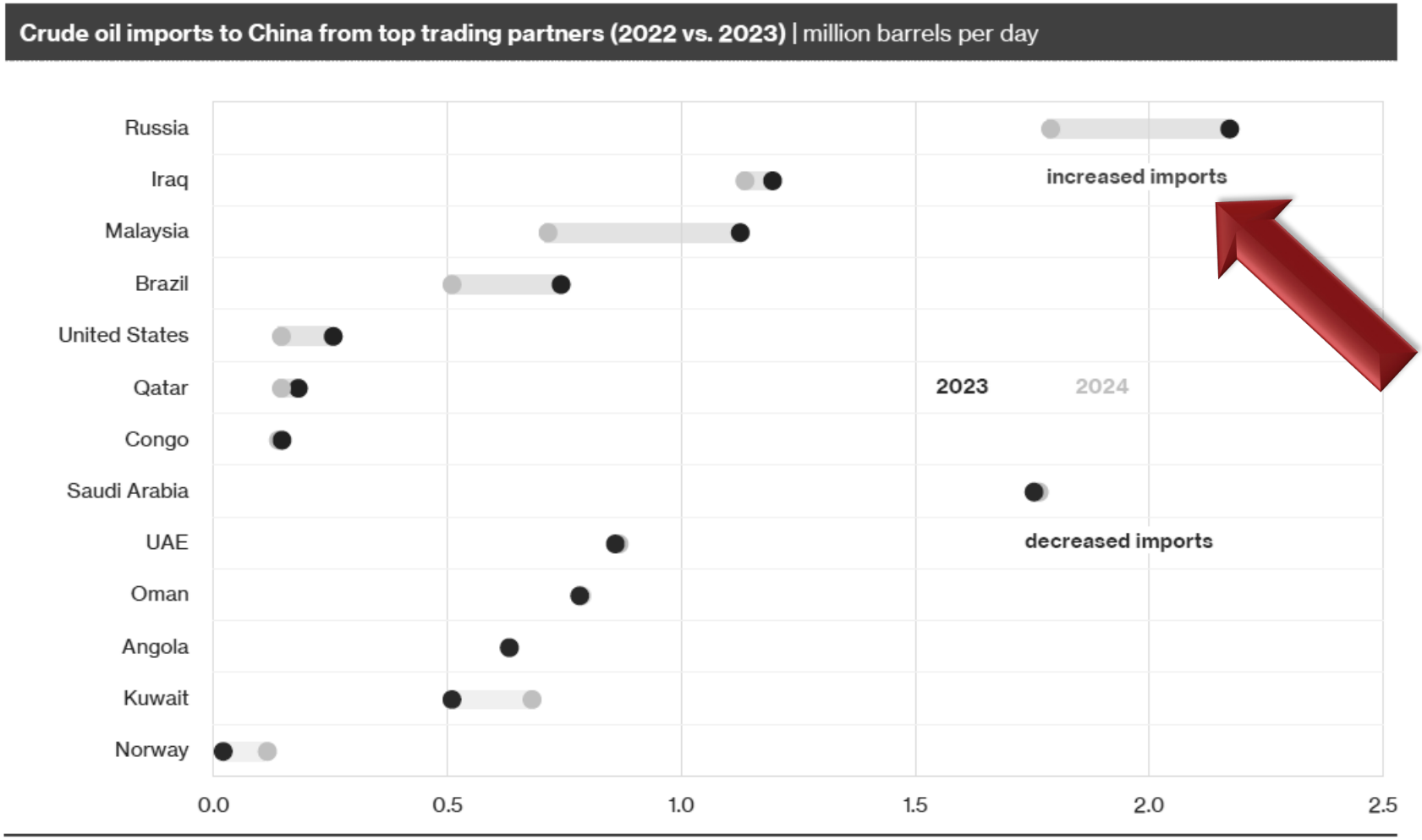


- Norway, the U.S., and the U.K. lead the pack as the **cleanest global producers** who have consistently increased annual GDP
- In 2022, **five countries were responsible for ~52%** of total global oil production – the United States (15%), Saudi Arabia (13%), Russia (13%), Canada (6%), Iraq (6%)
- In 2022, the **top five leading global natural gas** producers were the U.S. (1,027 bcm), Russia (699 bcm), Iran (244 bcm), China (219 bcm), and Canada (205 bcm)
- Russia, Iran, Iraq, and Venezuela together account for **~72% of global natural gas flaring** (the U.S. accounts for ~6.5%)

Pickering Energy Partners

Source – BP Statistical Review of World Energy 2021, World Bank, Pickering Energy Partners Analysis, https://www.energyinst.org/__data/assets/pdf_file/0004/1055542/EI_Stat_Review_PDF_single_3.pdf, https://www.eia.gov/energyexplained/oil-and-petroleum-products/where-our-oil-comes-from.php https://yearbook.enerdata.net/natural-gas/world-natural-gas-production-statistics.html, https://www.worldbank.org/en/programs/gasflaringreduction/global-flaring-data

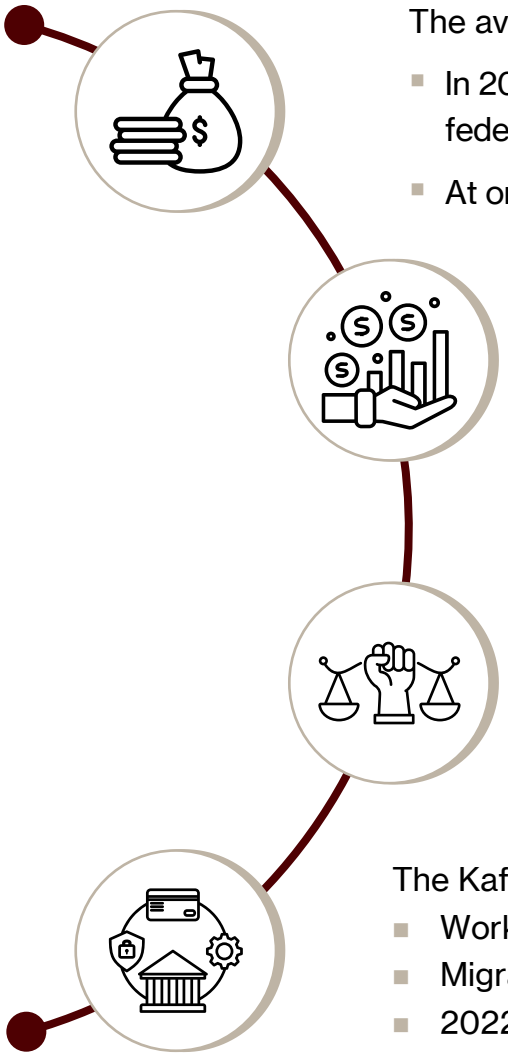
China Does Not Care Where Or Whom They Get Energy From...



Data Source: China General Administration of Customs, as compiled by Bloomberg L.P.

Note: Many imports attributed to Malaysia, the United Arab Emirates (UAE), and Oman originated in Iran and were relabeled to avoid detection. Top trading partners are all countries from which China imported more than 150,000 barrels per day of crude oil from 2020 to 2023. Congo=Congo-Brazzaville

Social Justice Warriors Tend To Overlook The Real Egregious Offenders



The average cost of Russian Ural crude is **$60**/barrel

- In 2022, Russia's oil and gas revenues increased by 28%, contributing ~$37USD to their federal budget
- At one point in 2022, Russia was earning $20B USD/month from oil exports

95% of Iraq's total government revenues derive from crude oil exports

Malaysia faces significant human rights violations, including

- The criminalization of free speech (Sedition Act and Communications Act)
- Authorities may arrest individuals for social media posts that criticize the government
- The Malaysian Communications & Multimedia Commission has blocked access to online news portal

The Kafala System in the Gulf Cooperation Council, including Qatar, continues to

- Workers are often prevented from leaving or changing jobs without permission
- Migrant workers experience incredibly low wages and poor working conditions
- 2022 FIFA World Cup brought these issues to light

Pickering Energy Partners

World Report 2024: Malaysia | Human Rights Watch (hrw.org)
What Is the Kafala System? | Council on Foreign Relations (cfr.org)

Renewables' Supply Chain Is Complex, Controversial & Corrupt

01 Investors and stakeholders continue to **underestimate** the supply chain risk for transition metals

02 Copper – years of recent uncertainty around royalties and taxation in Chile and Peru

03 Lithium – Chile pursuing "public-private" model & China is increasingly making a "run" at cornering the market

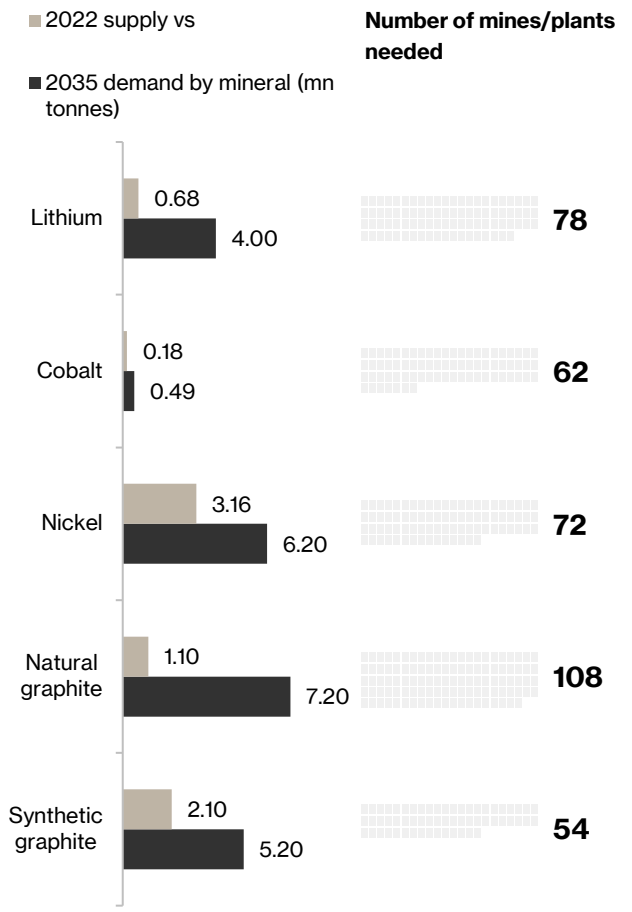
2022 Key Transition Metals Production By Source Country – The Public Tends To Underestimate Concentrations

	Copper	Nickel	Lithium	Cobalt	Graphite
1	Chile	Indonesia	Australia	Congo	China
2	Peru	Philippines	Chile	Indonesia	Mozambique
3	DRC	Russia	China	Russia	Madagascar
4	China	New Caledonia	Argentina	Australia	Brazil
5	USA	Australia	Brazil	Canada	South Korea
Top 5 %	**58%**	**76%**	**98%**	**84%**	**95%**

Source: USGS

There Literally Does Not Exist Enough Rare Earth Minerals...

The critical minerals needed to meet global battery demand by 2035



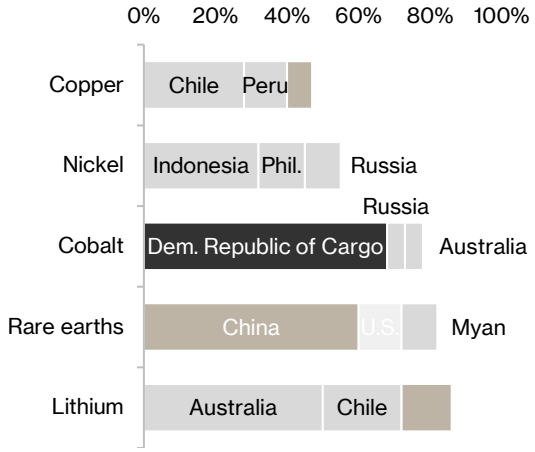
Source: Benchmark Mineral Intelligence

2022 Key Transition Metals Production By Source Country - The Public Tends To Underestimate Concentrations

	Copper	Nickel	Lithium	Cobalt	Graphite
1	Chile	Indonesia	Australia	Congo	China
2	Peru	Philippines	Chile	Indonesia	Mozambique
3	DRC	Russia	China	Russia	Madagascar
4	China	New Caledonia	Argentina	Australia	Brazil
5	USA	Australia	Brazil	Canada	South Korea
Top 5%	58%	76%	98%	84%	95%

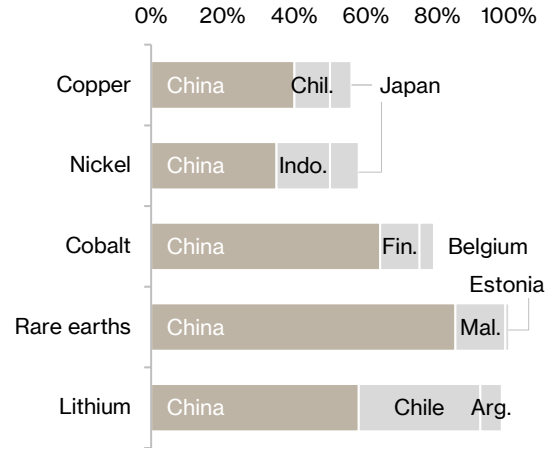
Where Clean Energy Metals Are Produced

Production of key mineral resources is highly concentrated today. Charts show top three producers.



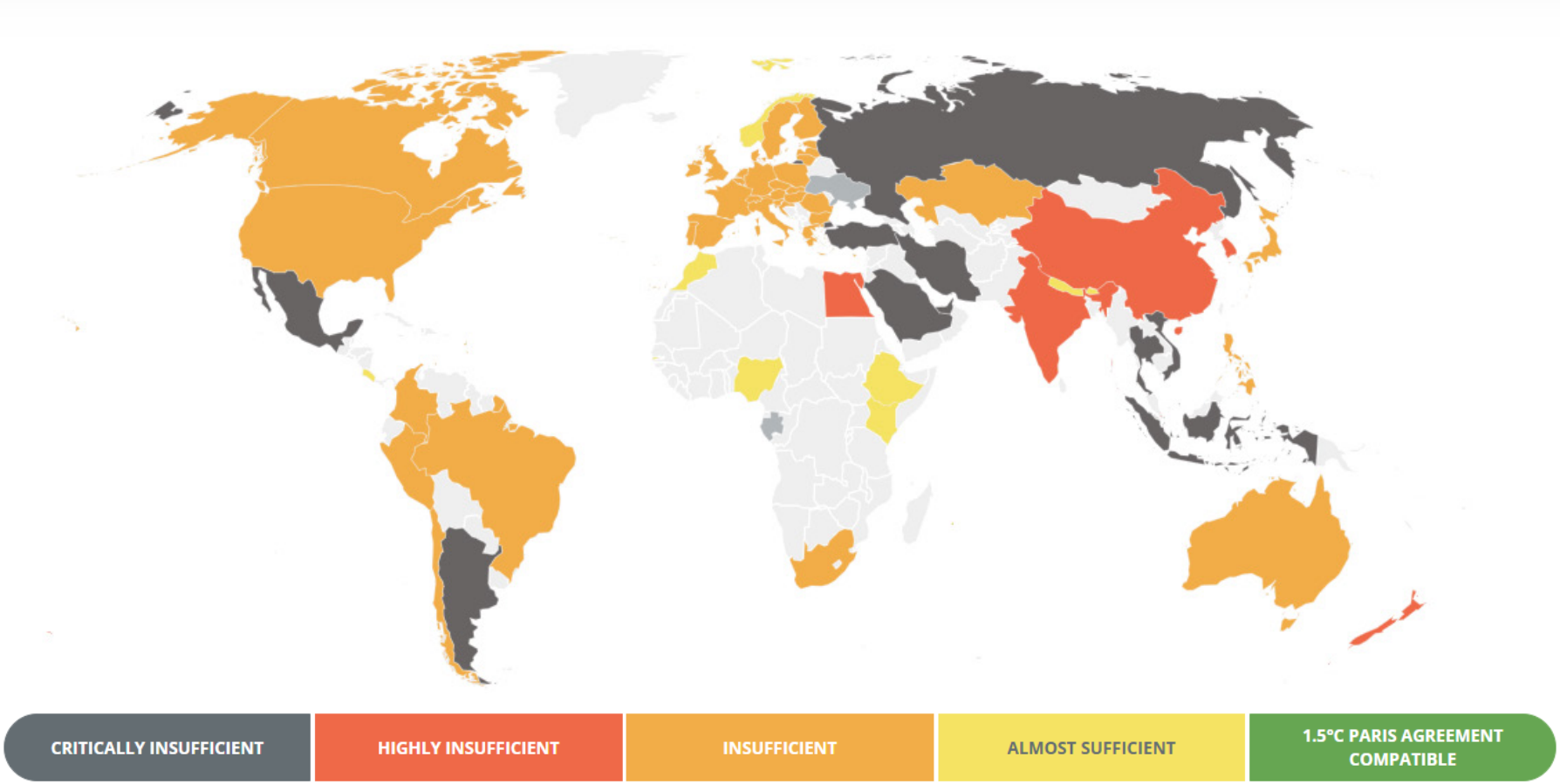
And Where They Are Processed

China dominates the refining and processing of key metals.



Source: International Energy Agency By The New York Times

The Paris Agreement Has Resulted In Insufficient Progress



None of the world's leading economies, including every single G20, have a climate action or are on track to meet the commitments made under the Paris Agreement

Gambia is the only country with a climate plan compatible with meeting climate goals.

Pickering Energy Partners

Every G20 Country Is Failing to Meet Paris Agreement On Climate Change (earth.org)

The United States Already Has A Winning Energy Mix Blueprint

Absolute Net Zero Results In Unintended Consequences

Net-Zero Emissions Operations by 2050, including a 65% reduction by 2030

- + Use 100 percent carbon pollution-free electricity by 2035.
- + Achieve 100 percent zero-emission vehicle acquisitions by 2035.
- + Achieve net-zero emissions buildings by 2045.
- + Achieve net-zero emissions procurement by 2050.
- + Partner with public, private, and nonprofit sector leaders.

‘Net-zero’ targets neither feasible nor realistic

— Appeared in the Financial Post, May 29, 2024

Google, Amazon and the problem with Big Tech’s climate claims

Analysis: Anti-Fossil Fuel Groups Outspend Industry Groups More Than 2-1

While "Big Oil" is said to be funding campaigns fighting a transition away from fossil fuels, data shows that anti-fossil fuel groups also have large war chests to advance their agenda and outspend industry more than 2-1.

March 16, 2023 • 8 min read

Virginia Currently Provides Case Study For An A.I.-Centric Energy Mix

- MIT studies have highlighted that a single data center can consume the equivalent electricity of **50,000 homes**
- In most data centers today, cooling accounts for over **40% of electricity usage.**
- U.S. National Security Agency (NSA) data centers can guzzle **seven million gallons of water DAILY**

About 70% of the world's internet traffic, at some point, makes it through Ashburn, Virginia

Utility-Scale Net Electricity Generation (share of total)	Virginia	U.S. Average	Period
Petroleum-Fired	0.3%	0.3%	Dec-23
Natural Gas-Fired	**59.6%**	42.2%	Dec-23
Coal-Fired	1.8%	16.2%	Dec-23
Nuclear	30.8%	19.9%	Dec-23
Renewables	8.1%	20.9%	Dec-23

The Staggering Ecological Impacts of Computation and the Cloud | The MIT Press Reader
https://www.eia.gov/state/data.php?sid=VA
https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=table_1_01

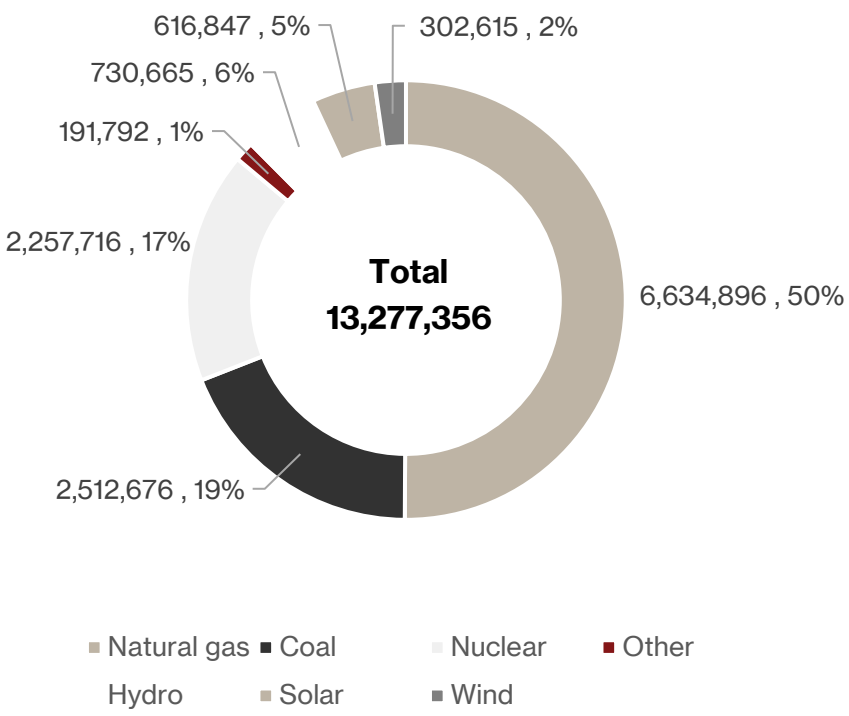
The Reliance On Natural Gas Skyrockets During “Tough Times”

With July heatwaves, US 'probably' saw highest natural gas generation in history, EIA says

The spike in natural gas-fired generation on July 9 was because of both high temperatures across most of the country and a steep drop in wind generation.

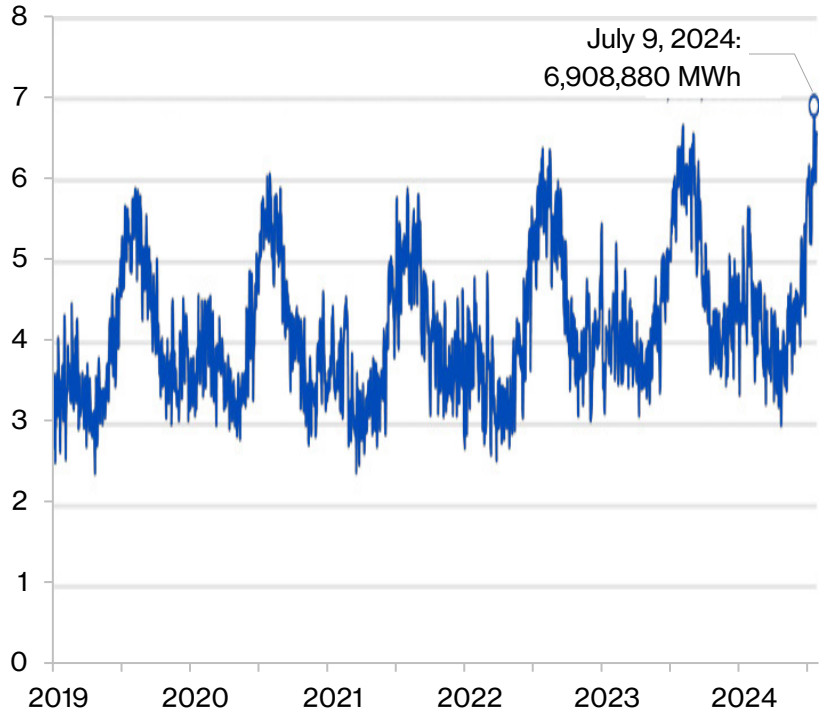
U.S. daily generation mix 7/23/2024, Eastern Time

In MWh



Daily Natural gas electricity in the Lower 48 states (Jan 1, 2019 – July 16, 2024)

In million MWh



Pickering Energy Partners

Data source U.S. Energy Information Administration

Generative AI Will Require At Least 2X More Electricity Generation

Total electricity produced 2023 (kWh)		4,200,000,000,000
Existing U.S. Energy Mix	**Existing Energy Mix (%)**	**Electricity Generated Today (kWh)**
Natural Gas	43%	1,806,000,000,000
Nuclear	19%	798,000,000,000
Coal	16%	672,000,000,000
Wind	10%	420,000,000,000
Hydropower	6%	252,000,000,000
Solar	5%	210,000,000,000
Biomass	2%	42,000,000,000
Total	**100%**	**4,200,000,000,000**

Total Estimated Electricity Required - AI		840,000,000,000
Existing U.S. Energy Mix	**Existing Energy Mix (%)**	**Electricity Generated Today (kWh)**
Natural Gas	43%	3,612,000,000,000
Nuclear	19%	1,596,000,000,000
Coal	16%	1,344,000,000,000
Wind	10%	840,000,000,000
Hydropower	6%	504,000,000,000
Solar	5%	420,000,000,000
Biomass	2%	8,400,000,000
Total	**100%**	**8,400,000,000,000**

In 2022, the United States produced ~36.35 trillion cubic feet (Tcf) of dry natural gas, which averages to about 96.60 billion cubic feet per day – a record-high

Annual electricity generation from nuclear power over the last decade has remained relatively consistent, ranging between 770 and 810 TWh since 2013

The U.S. must unleash natural gas and nuclear to satisfy even the most conservative electricity demand estimates

Pickering Energy Partners

Where our natural gas comes from - U.S. Energy Information Administration (EIA)

The U.S. **Cannot** Compete Without Increasing Natural Gas Production

Existing U.S. Energy Mix	Existing Energy Mix (%)	Electricity Generated Today (kWh)	Virginia Energy Mix (%)	Virginia Electricity Generated – AI
Natural Gas	43%	1,806,000,000,000	60%	5,040,000,000,000
Nuclear	19%	798,000,000,000	30%	2,520,000,000,000
Coal	16%	672,000,000,000	0%	
Wind	10%	420,000,000,000	5%	420,000,000,000
Hydropower	6%	252,000,000,000	0%	
Solar	5%	210,000,000,000	5%	420,000,000,000
Biomass	2%	42,000,000,000	0%	
Total	**100%**	**4,200,000,000,000**	**100%**	**8,400,000,000,000**

Northern Virginia is home to **10M square feet (about 69 Costcos)** of data center space, spread across 118 data centers, with an additional 43 potential sites marked for growth

Virginia's energy mix currently provides "data center alley" electricity prices that are **~30% cheaper** than the national average

If the U.S. adopted the energy mix displayed by Virginia, we would need **3X the electricity generated** from natural gas

Pickering Energy Partners

Source - PEP Consulting analysis extrapolates electricity generated by source based on U.S. EIA data
https://lightyear.ai/blogs/ashburn-colocation-data-center-alley

Relying Solely On Solar & Wind Electricity Generation Is Fantasy Land

Existing U.S. Energy Mix	Existing Energy Mix (%)	Electricity Generated Today (kWh)	Virginia Energy Mix (%)	Electricity Generated Today (kWh)	Aspirational Energy Mix (%)	Electricity Generated Today (kWh)
Natural Gas	43%	1,806,000,000,000	60%	5,040,000,000,000	10%	840,000,000,000
Nuclear	19%	798,000,000,000	30%	2,520,000,000,000	10%	840,000,000,000
Coal	16%	672,000,000,000	0%		0%	
Wind	10%	420,000,000,000	5%	420,000,000,000	40%	3,360,000,000,000
Hydropower	6%	252,000,000,000	0%		0%	
Solar	5%	210,000,000,000	5%	420,000,000,000	40%	3,360,000,000,000
Biomass	2%	42,000,000,000	0%		0%	
Total	**100%**	**4,200,000,000,000**	**100%**	**8,400,000,000,000**	**100%**	**8,400,000,000,000**

- The National Renewable Energy Laboratory estimates that ~22,000 square miles of solar panel-filled land, or the size of Lake Michigan, is needed to power the entire U.S. at ***current*** electricity demand
- Assuming the U.S. can achieve 20% efficiency (which is aggressive), this land footprint can be reduced to ~10,000 square miles, or the size of Lake Erie
- To facilitate an 80% solar/wind energy mix and meet the demand created by generative AI, **the U.S. needs to increase current solar/wind electricity generation by ~91x**

Pickering Energy Partners

Source - PEP Consulting analysis extrapolates electricity generated by source, data derived from the EIA website
How Much Land is Needed to Power the U.S. with Solar? (visualcapitalist.com)

Why Do Western Economies Display Such A Disproportionate Fixation With Emissions?

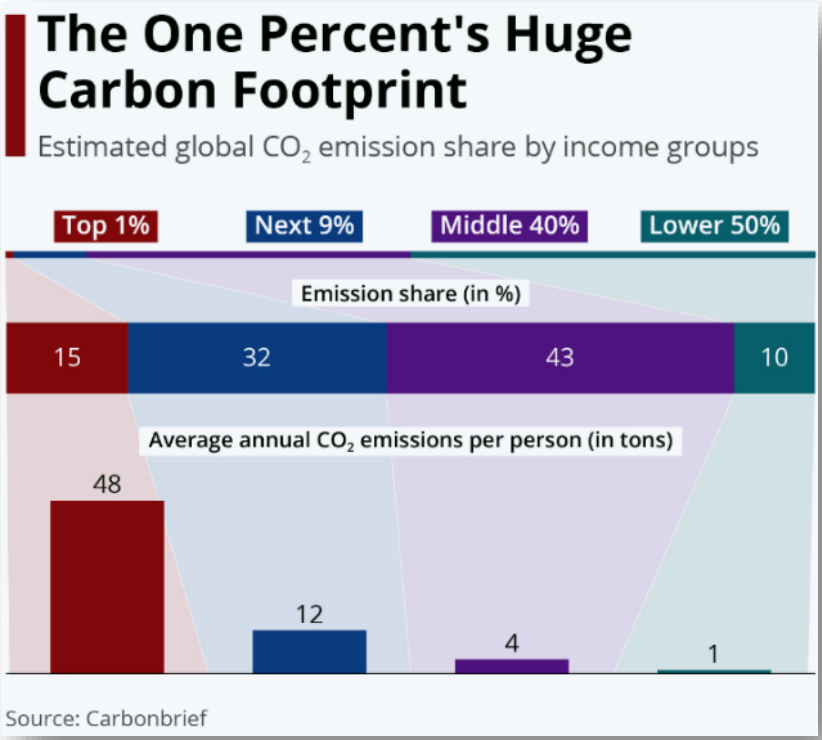
Poor Policy Is Adversely Impacting Those Who Can Least Afford It

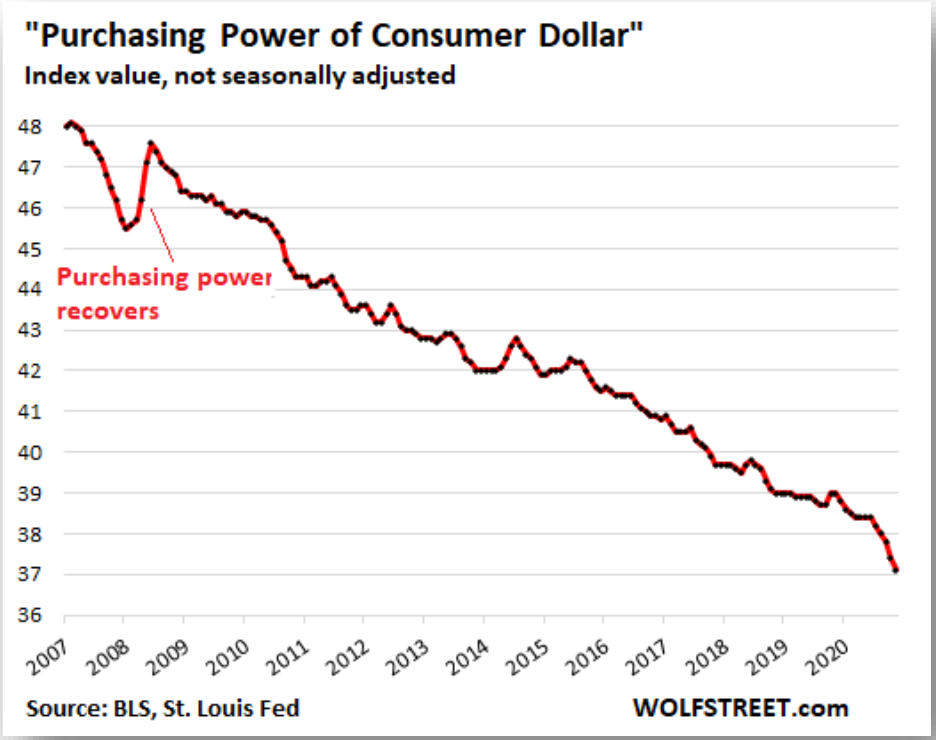
The richest Americans account for 40 percent of U.S. climate emissions

By Kasha Patel

August 17, 2023 at 2:22 p.m. EDT

The world's top 1% of emitters produce over 1000 times more CO2 than the bottom 1%





https://www.washingtonpost.com/climate-environment/2023/08/17/greenhouse-emissions-income-inequality/

https://www.iea.org/commentaries/the-world-s-top-1-of-emitters-produce-over-1000-times-more-co2-than-the-bottom-1

Why Are We Prioritizing Emissions Over Waste and Water?

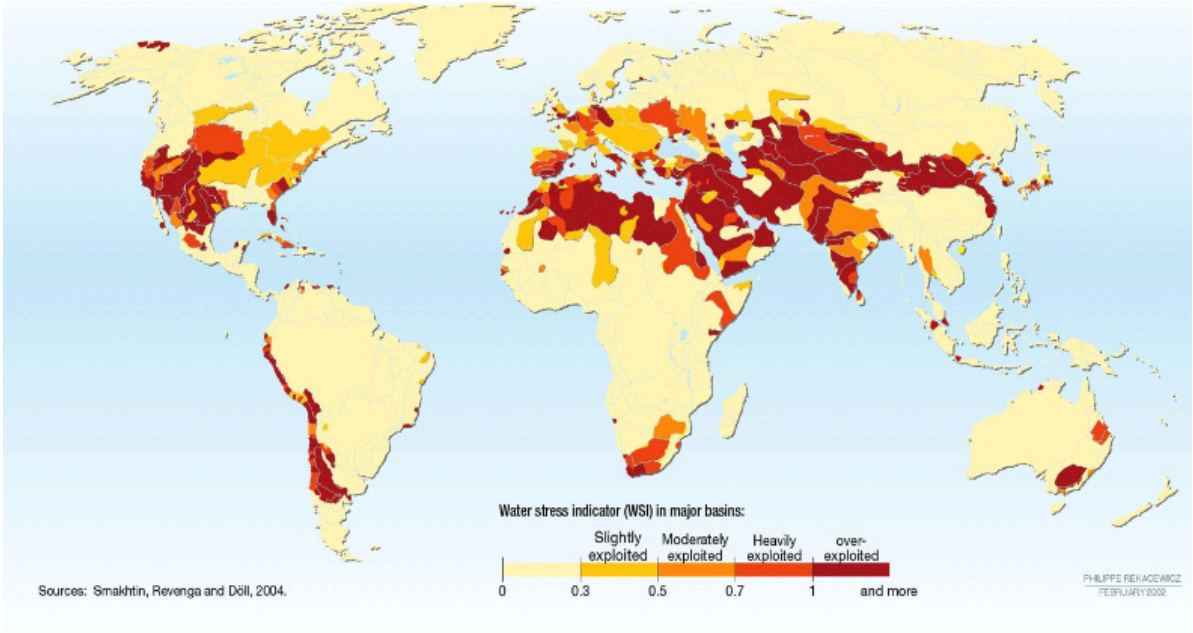
The world is losing the battle against managing electronic waste

- **~600,000 metric tons** of photovoltaic panels were estimated to have been discarded in 2022
- **62 million metric tons** of mobile devices were dumped on the planet in 2022
- Mobile device dumping expected to **increase by ~30%** by 2030 (62M to ~84M metric tons)
- Since 2007, 7B+ devices have been manufactured, and their lifespans average **less than 2Y**
- These toxic metals contain radioactive elements that **take millennia to decay**.
- A single desktop computer **requires 240 kilograms of fossil fuels**, 22 kilograms of chemicals, and 1,500 kilograms of water to manufacture.

World 'losing the battle' against electronic waste, UN finds | Reuters

U.S. Policy Must Effectively Address Future Water Scarcity Risks

Water Scarcity Map of the World



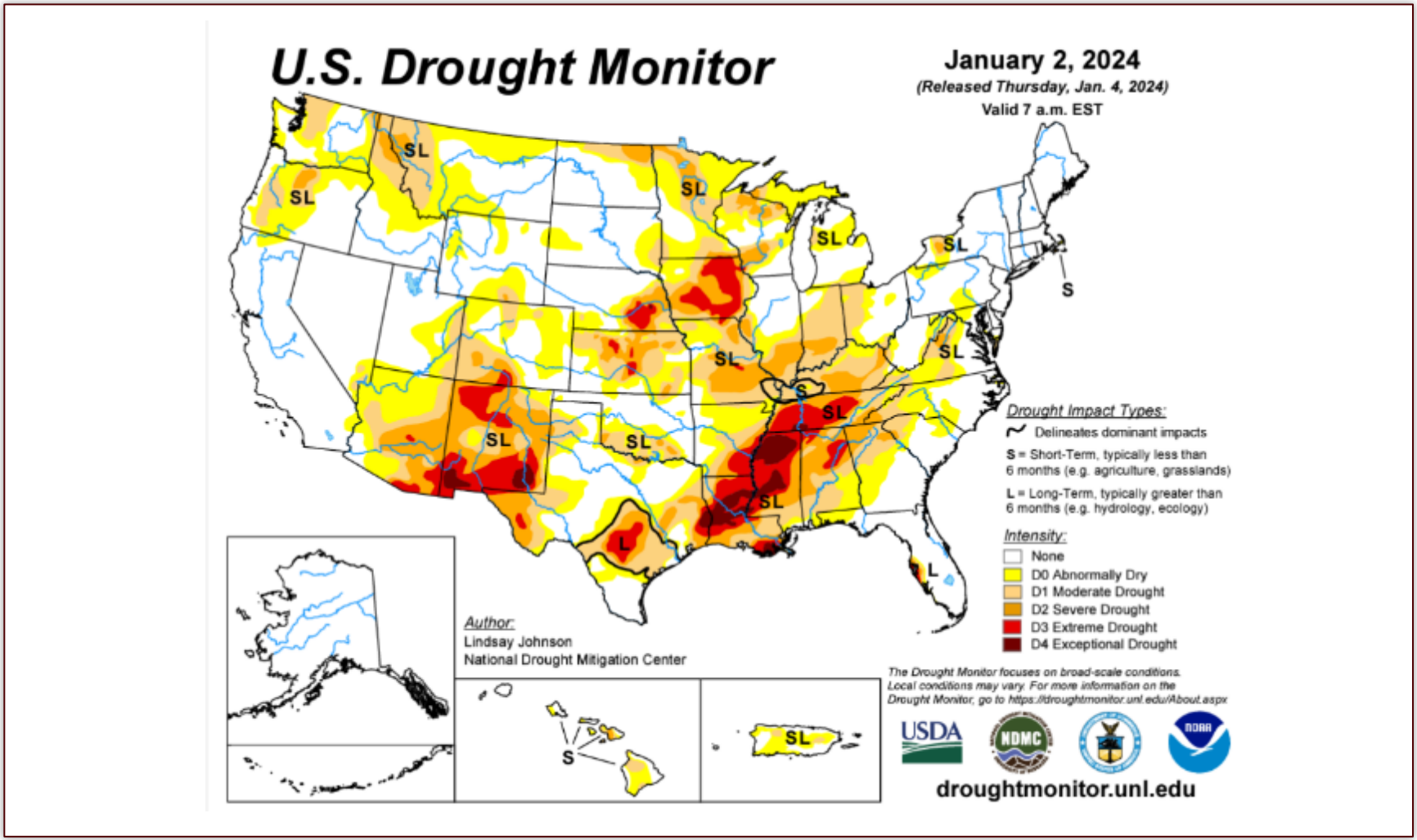
Source: United Nations Environment Programme, Map of Water Stress Indicator in Major Basins, 2004.

Water-Intensity Industries

- Agriculture
- Apparel
- Beverages
- Biotechnology/ Pharmaceuticals
- Electric power
- Forest products
- **High-tech, i.e., semiconductor manufacturing**
- **Metals/mining**

https://www.epa.gov/sustainability/lean-water-toolkit-chapter-2#:~:text=Overall%2C%20two%20of%20the%20most,water%20supplies%20in%20some%20areas.

The General Public Underestimates How Water Intensive AI Really Is



https://www.bloomberg.com/news/articles/2024-01-04/texas-oil-frackers-are-facing-water-disposal-bans-after-a-slew-of-earthquakes

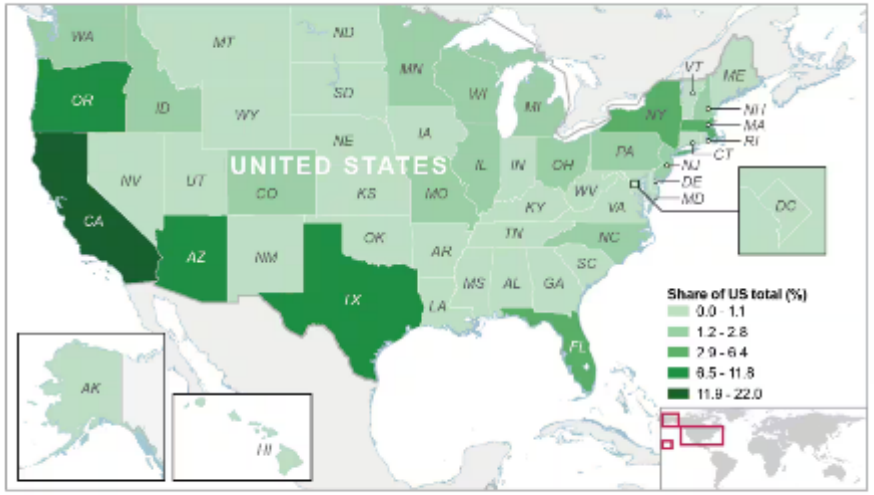
https://droughtmonitor.unl.edu/data/pdf/20240102/20240102_usdm.pdf

Phoenix Is In A Desert And ~1,750 Miles From The Great Lakes…

How Arizona Is Positioning Itself for $52 Billion to the Chips Industry

The state has become a hub for chip makers including Intel and TSMC, as the government prepares to release a gusher of funds for the strategic industry.

Employment in semiconductor and other electronic component manufacturing, 2022



Data compiled Oct 4, 2023.
Source: S&P Global Market Intelligence, 2010982.

Drought Information

Share this page

In an era of climate change, one advantage Phoenix has over others is this: desert cities know that drought is a constant threat, and plan accordingly. Long-range planning, investments in water supply alternatives, and a history of successes in water conservation have allowed Phoenix to weather every drought without resorting to mandatory water use restrictions or prohibitions. Phoenix is built for drought. However, the city is prepared to establish such restrictions in future years if absolutely necessary to ensure the safety and health of our residents.

Learn about Drought and Climate Change

Though Phoenix has more than an adequate supply of water in non-shortage years, residents and business owners are encouraged to embrace a desert lifestyle.

Phoenix Water Services and Drought

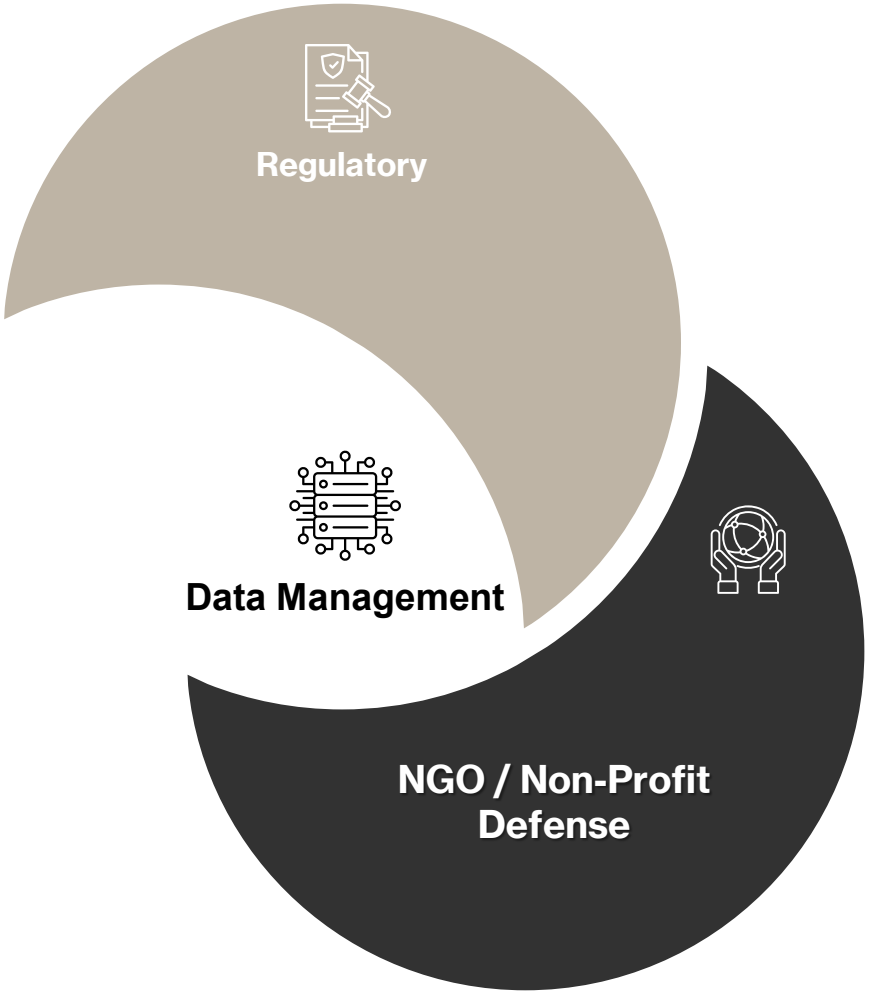
In Arizona, the current drought is approaching 15 years in length and has surpassed the worst drought in more than110 years of official recordkeeping. Beyond the written record, tree ring research reveals that 20 to 30 year droughts have occurred several times over the past 1,000 years in the major watersheds serving the city of Phoenix and surrounding municipalities.

During the current drought, Phoenix has been able to manage its available water supplies to meet the community's water demands. However, this record-setting drought is a warning. Given that we can't accurately predict when the drought will end, we all need to become more aware about the facts of drought and what the future possibilities and impacts from drought could be.

https://www.phoenix.gov/waterservices/resourcesconservation/drought-information#:~:text=Though%20Phoenix%20has%20more%20than,to%20embrace%20a%20desert%20lifestyle.&text=In%20Arizona%2C%20the%20current%20drought,than110%20years%20of%20official%20recordkeeping.

The World Requires An Energy Expansion, Not A Transition

Showcasing The Prowess Of US Energy Requires Improved Data



The Path Forward Advocates An "All Of The Above" Set Of Solutions

"Transitioning" the U.S. to 100% Renewable Is Socioeconomic & Geopolitical Suicide

The Global Shift Away From Fossil Fuels Being Reported Is NOT Taking Place

- As developed countries adopt cleaner energy options, coal-fired power plants are being used less frequently, but developing economies, particularly in Asia and Africa, are increasingly relying on coal
- Natural gas plants emitting fewer greenhouse gases now serve as a primary baseload source

Intermittency Challenges Will Perpetually Plague The US Grid

- Unlike coal and natural gas, renewables like solar and wind **are intermittent**
- Renewable availability depends on weather conditions, and to maintain reliability, grid operators must balance these variable sources with more predictable ones
- Natural gas is the "go-to" energy source when it matters

Flexible Baseload Provides Expanded Optionality

- Geothermal and hydropower are considered flexible baseload options and can provide continuous power, but there are distinct regional and geographical constraints

The *Pursuit* Of Net Zero Makes Sense, But Storage Solutions Must Evolve and Scale

- Energy storage technologies, i.e., batteries, help store excess renewable energy during peak production times, **however**, China currently dominates its supply chain

Grid Modernization Must Occur If We Want to Experience the Benefits of Renewables

- Introducing a higher proportion of renewable energy undeniably necessitates vast grid upgrades
- Smart grids, demand response systems, and improved transmission infrastructure enhance flexibility and reliability, but it is estimated to cost an excess of USD $3T

U.S. Energy Is The Cleanest, Safest And Most Efficient!

Questions & Discussion

The Emerging Legal Landscape of Water, Energy, and Critical Minerals

Burke W. Griggs

Washburn University School of Law

COLLEGE OF LAW
The UNIVERSITY of OKLAHOMA

USGS
science for a changing world

What is Critical?

Risk + Importance -> Criticality

Critical Minerals

2018 Draft List:
OFR 2018-1021

Pursuant to Executive Order No. 13817

35 minerals/mineral groups, really they are elements.

Including rocks/minerals (bauxite, fluorspar, graphite), and
Platinum-Group Metals (PGMs)
Rare Earth Elements (REEs)

2021 Revision:
OFR 2021-1045

Pursuant to Energy Act of 2020

Updated methodology, and updated draft list.

+Ni, Zn
-He, Re, Sr, U, potash

SPOF -> Be, Ni, Zr

2022 Final List:
86 FR 62199
87 FR 10381

Methodology from OFR 2021-1045

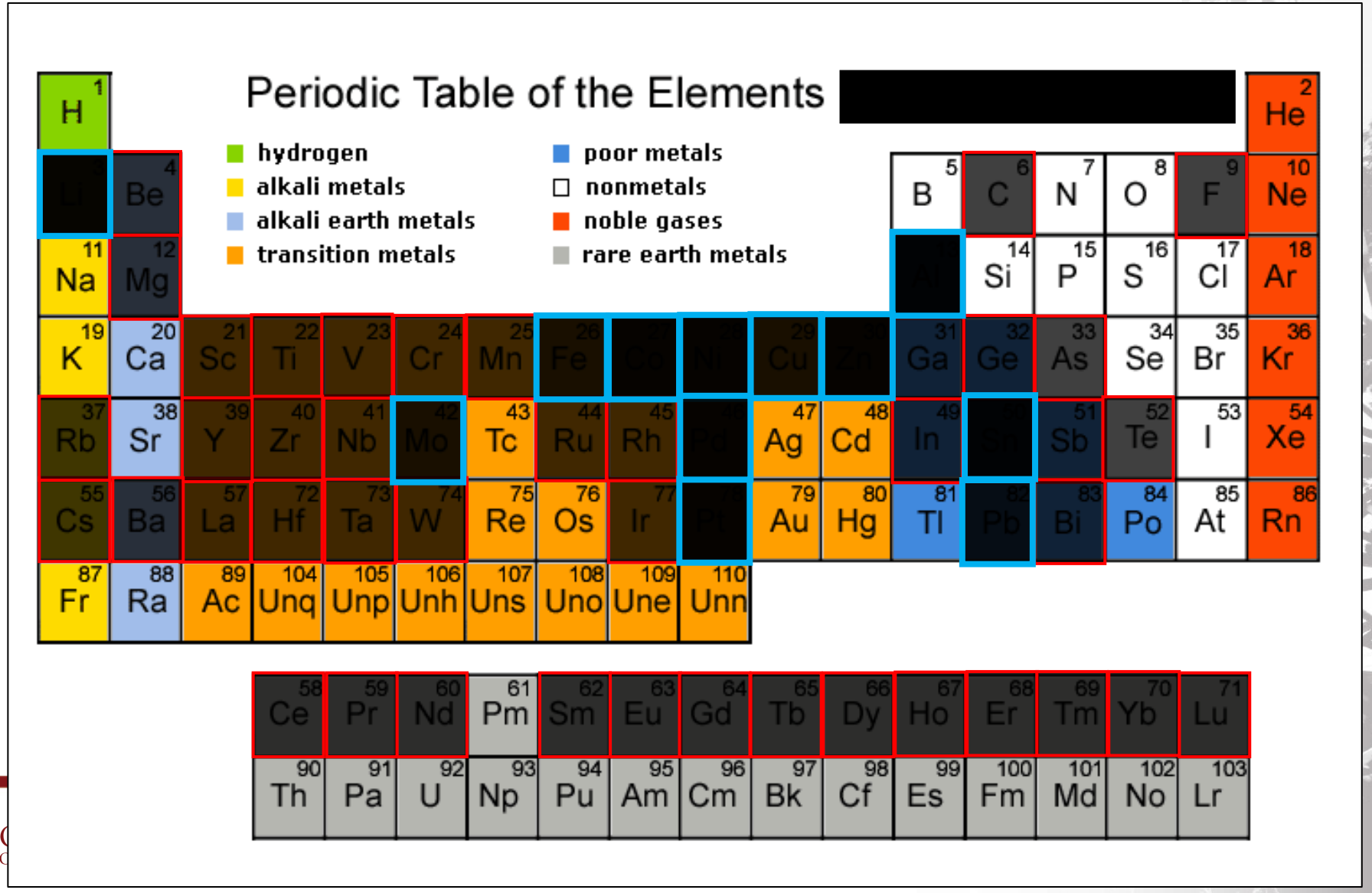
50 “minerals”, to be revised no less than every 3 years.

*See also
88 FR 51798
2023 DOE Critical Materials List

What is Critical?

Plus:
barite
fluorspar,
graphite.

Traded
on the
London
Metal
Exchange



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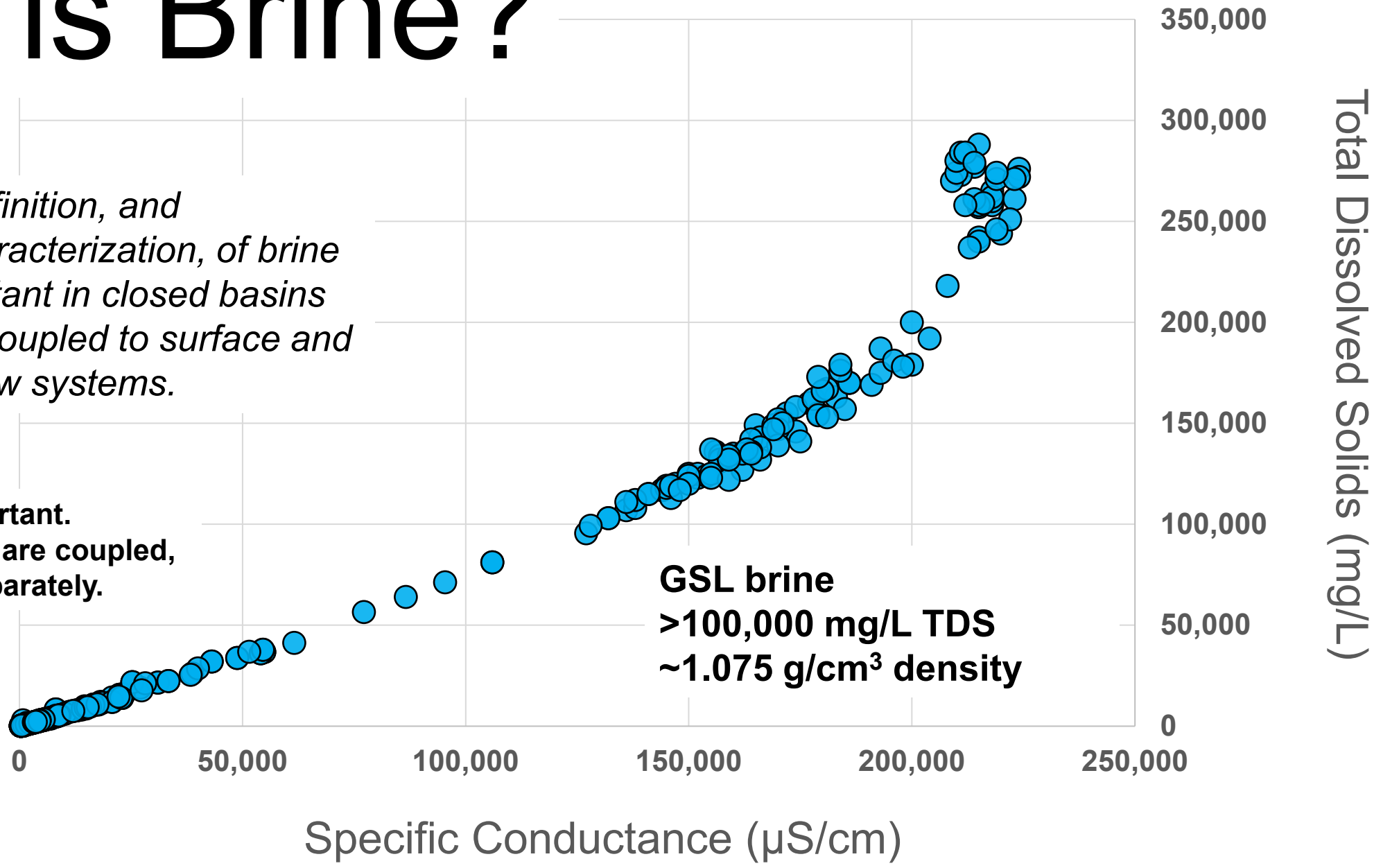
The UNIVERSITY of

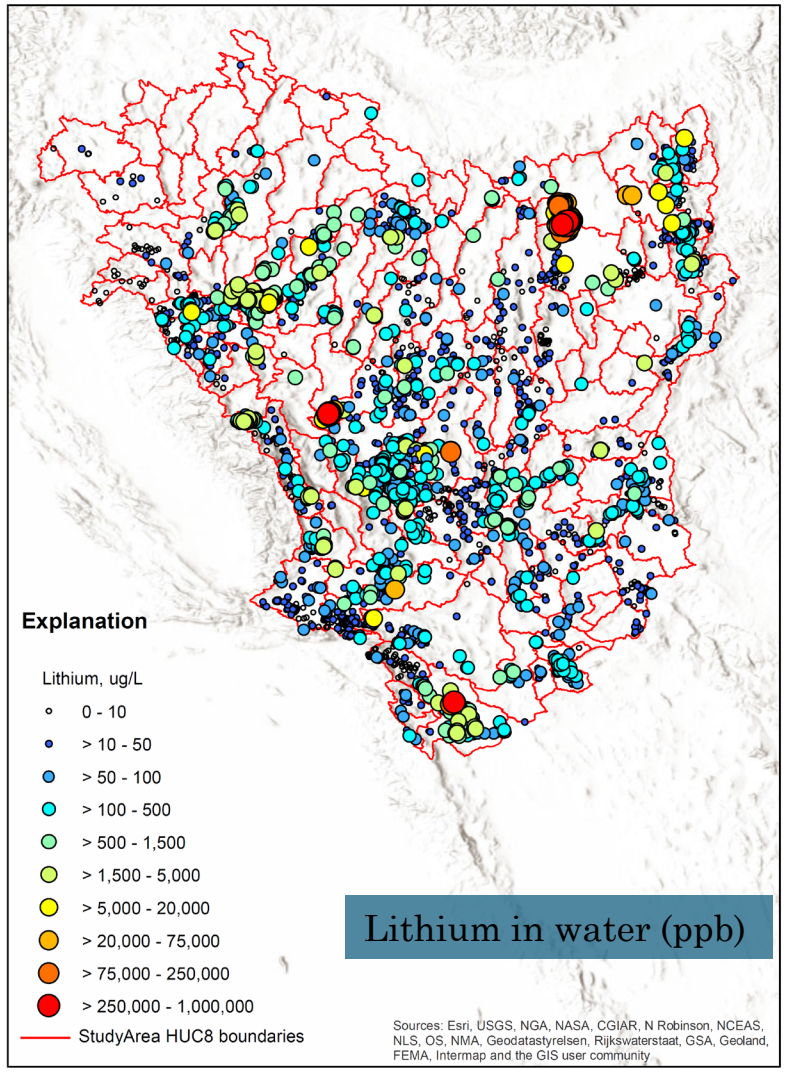
What is Brine?

An objective definition, and appropriate characterization, of brine becomes important in closed basins where brine is coupled to surface and near-surface flow systems.

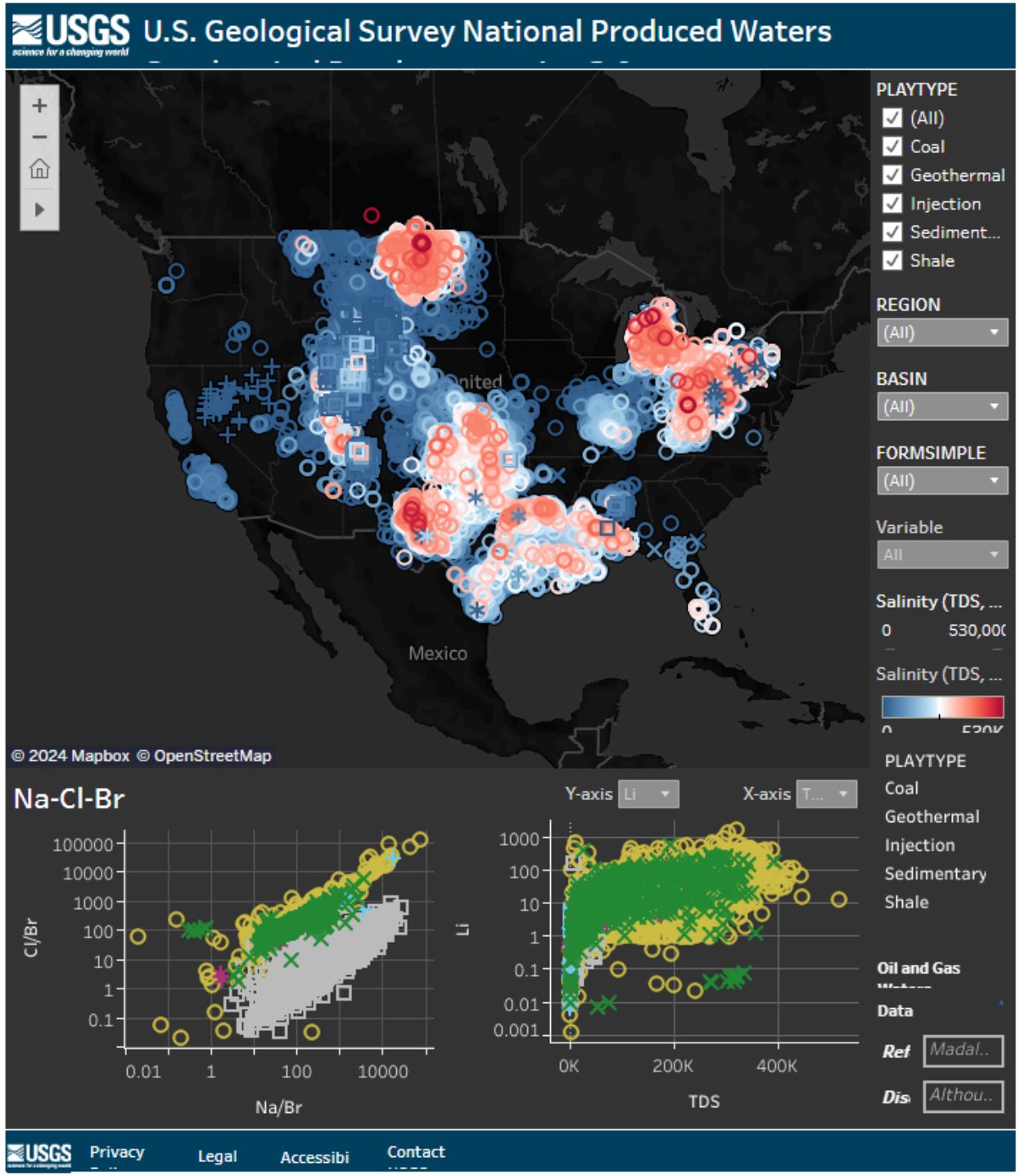
Mass budgets are important.
Water and salt budgets are coupled, but must be treated separately.



Lithium Source to Sink (LiS2S):
Great Basin SA water chemistry database



Lithium in water (ppb)



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diversity of brine chemistry

critical mineral prospectivity

III.

A. **highest**

high

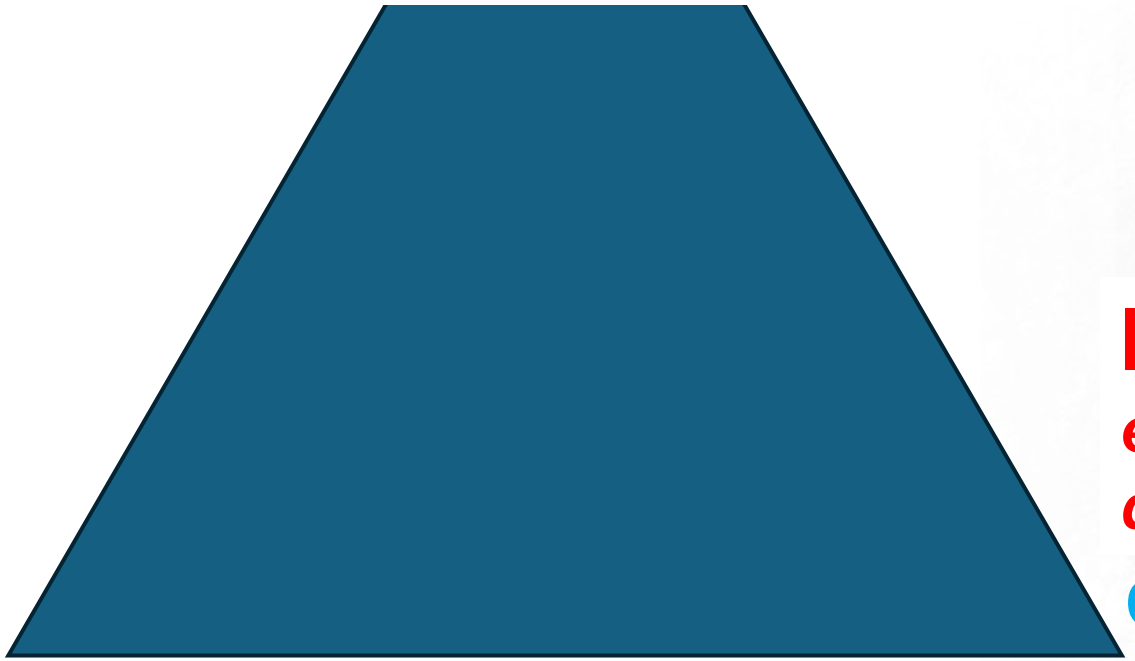
depth of resource

Closed basin brines

shallow

connection to surface environment

strongly coupled



limited,
except during extraction

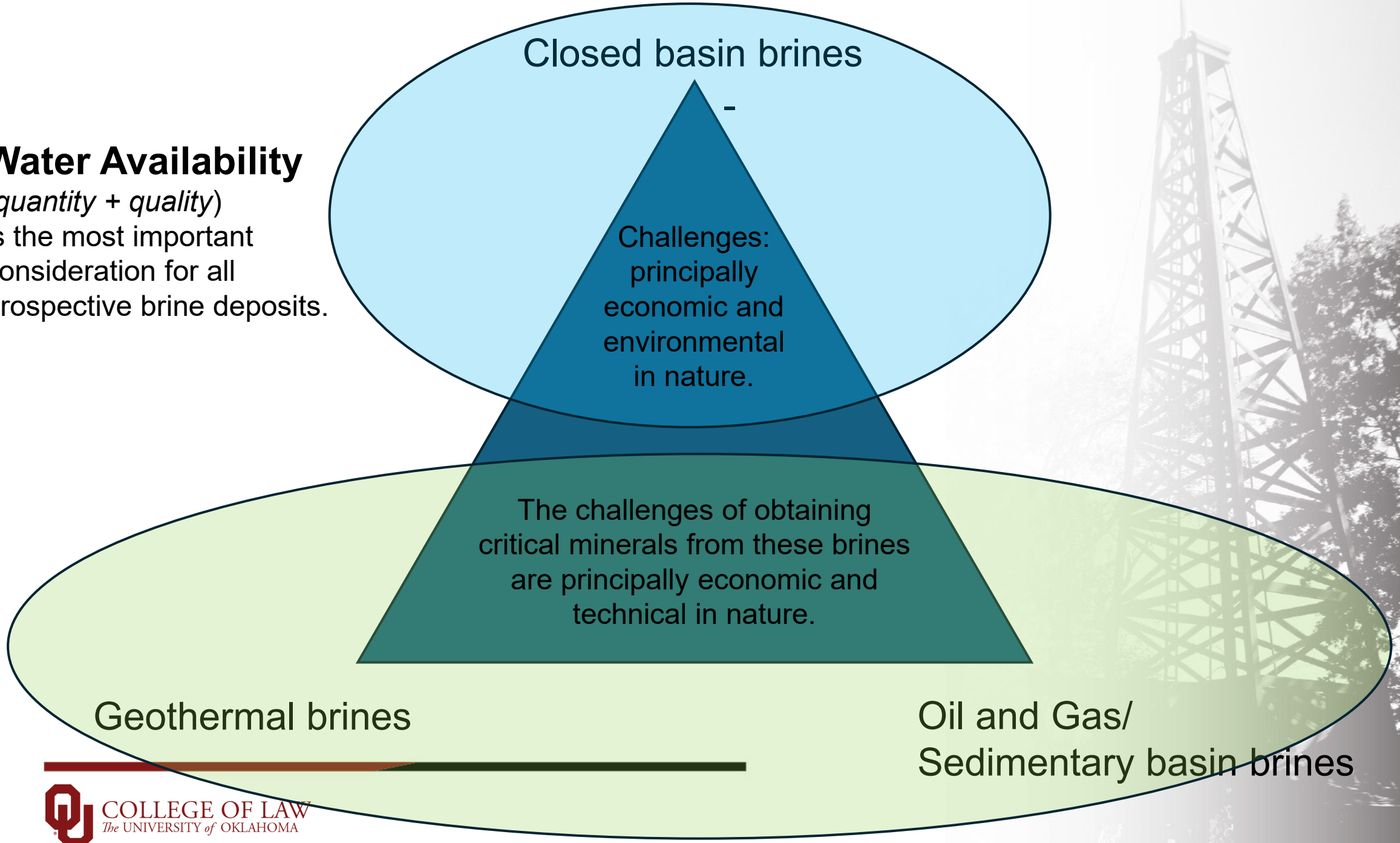
variable
deep->shallow

deep

Geothermal brines

Oil and Gas/
Sedimentary basin brines

Water Availability
(*quantity* + *quality*)
is the most important consideration for all prospective brine deposits.

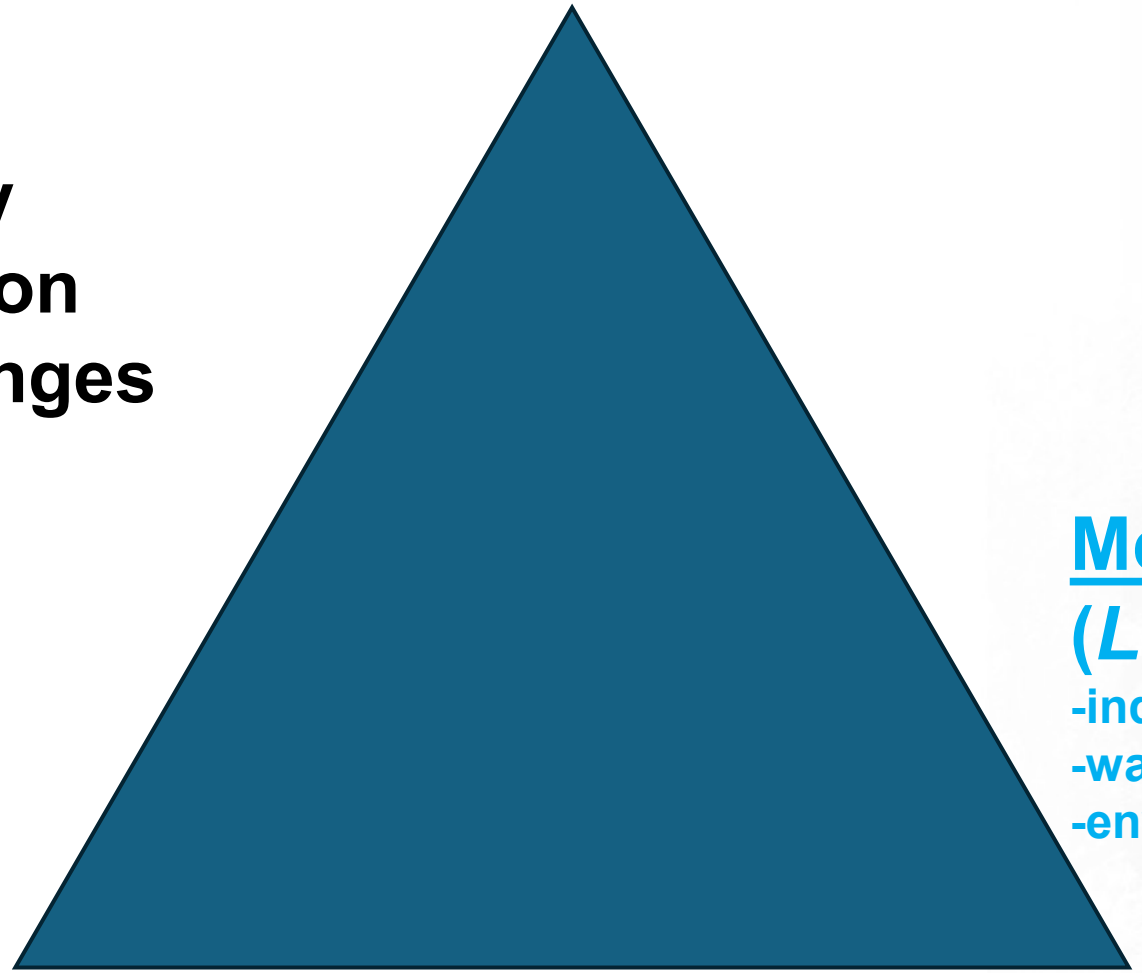


Responsible Development of Brine Resources

Technical considerations:

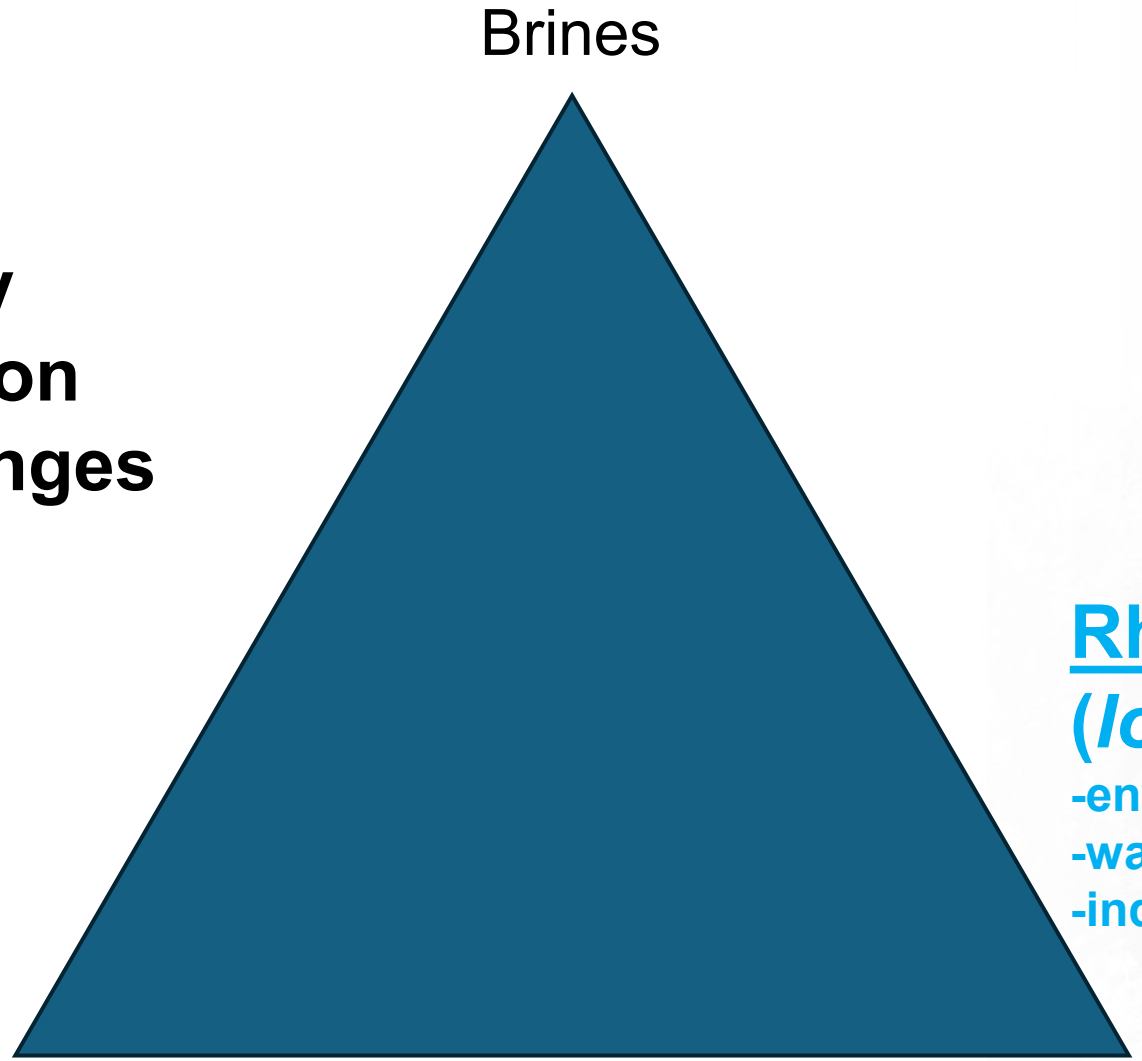
-**Numerical Models**, *a necessary complexity*
  -groundwater flow
  -reactive transport
  -reservoir models
-**Conceptual Models**, *a necessary simplification*
  -stakeholder consensus
  -iterative with monitoring and modeling
  -give results of numerical models authority
-**Mass Budgets**, *required for accounting*
  -water (inflow, ET, consumption)
  -salt (mineral/ion specific)
  -reagents, products, waste
  -carbon (consumption, sequestration)

-carbon
-water
-local community
-time to production
-technical challenges



McDermit Caldera
(*Lithium Americas*)
-indigenous community
-water
-environment/species (snail)

-carbon
-water
-local community
-time to production
-technical challenges



Rhyolite Ridge
(*Ioneer*)
-environment/species (plant)
-water
-indigenous community

Re-mining for Critical Minerals

- We need 3bt of minerals and metals to reach the Paris Climate Goal. There are **282 bt** of abandoned tailings and 16bt of active tailings globally– a huge resource. (World Bank)
- Public and private recognition for re-mining:
  - USGS: 2023 grants for state-level studies in USA
  - Rio Tinto: RESOLVE program
  - Barrick-Newmont Joint Venture (Copper mines in Arizona, USA)
- Investment in Surveying:
  - The Atlas of Australian mine waste: https://portal.ga.gov.au/persona/minewaste (2023)
  - USGS: National Mine Waste Inventory; Earth Mapping Resource Initiative (EMRI)

Critical Minerals from Produced Water

1. A rapidly evolving area of the law, which is trying to catch up to the industry's impressive technical achievements in using salt water and reusing/recycling produced water.
2. Ideally, property rights in critical minerals drawn from produced water should combine elements of mining law and oil and gas law. That ideal will be difficult to achieve.
3. In many situations, such property rights probably begin with recent produced water statutes.

16 Tex. Admin. Code § 3.8, summarized.

1. Reuse and recycling of produced water requires a permit from the TRRC.
2. **Unless** the reuser is a "non-commercial" recycler. Who are these recyclers? The oil and gas developer/lessee– as opposed to recyclers that are in the business of recycling water (rather than producing oil and gas).
3. Multiple oil and gas operators can work together under this regulation to share in the reuse and recycling of produced water, apparently (and so far) without running afoul of the permit requirement for "commercial recyclers."
4. **This is classic water law for oil and gas: the exception eats the rule.**

New Mexico's Produced Water Act (2019)

- Default 1: working interest owner has control of and a possessory interest in the produced water; can thus convey it.
- Default 2: purchaser or other transferee obtains the same control and responsibility for liability for it.
- Default 3: transferees, including **recyclers,** obtain the same rights.
- These are default provisions that **can be** modified by contract.

Texas and New Mexico

- Dramatically different legal and regulatory regimes for water.
- But intentionally very similar statutory regulatory regimes for the ownership and reuse of produced water.
  - Oil and gas operators generally exempt from permitting requirements for subsequent **reuse** of produced water in oil and gas operations.
  - Oil and gas operations that contain a produced water facility are exempt from permitting requirements.
  - However, facilities whose principal purpose is recycling **are** required to secure a permit.
  - **Query: is a critical minerals extractor required to obtain a permit?**

Does severance of the mineral estate include critical minerals?

*O → A all of the oil, gas, **and other minerals** in and under Blackacre, but O reserves the surface to Blackacre.*

- A has severed and conveyed the mineral estate. Are critical minerals included in this severance? Depends upon the language of the conveyance and the jurisdiction's rules concerning deed interpretation.
  - Surface destruction test? Likely passes.
  - Eiusdem generis? Likely does not pass.
  - Ordinary and natural meaning test? Likely passes.
- Something that can be clarified, where possible, in the severance instrument.

Does the lessee operator own the produced water under an oil and gas lease?

- Probably. See statutes for produced water.
- Issue: does the lessee/owner of produced water require a permit from the state water agency for the extraction of critical minerals?
  - This is a different "use" of water than reinjection through Class II wells.
  - It is likely a beneficial use of water (mining– an industrial use)– and so could, potentially, require a water right, absent statutory or regulatory exclusion.
  - Produced water is often too salty to fall within the permitting requirements of a water right. (Check your geological and legal jurisdictions!)
  - But produced water statutes tend to exclude produced water from the jurisdiction of the state water engineer, even in prior appropriation states such as CO and NM.

Extracting critical minerals from produced water: a competitive source?

- **No:** energy requirements and water requirements are greater for produced water than for lake brines, clays, and new lithium plays such as the Smackover Formation in Arkansas.
- **Yes:** the global demand for critical minerals so exceeds supply that they cannot be conventionally priced. So,
  - Will critical-minerals dependent companies (Ford, Panasonic) directly invest in produced water extraction operations?
  - Oh, the irony!
- DISCLAIMER: I am a Kansas attorney, not licensed in OK, and am not an economist!

Further Reading

- Griggs, *Water: Practical Challenges and Legal Rights to Acquire and Recycle Water for Hydraulic Fracturing*, 56 ROCKY MTN. MINERAL L. FOUND. J. 69-109 (2019).
- Griggs, *Asking the Right Questions about Lithium*, 61 FOUND. NAT. RESOURCES J. 59-95 (2024).

Thank You

Reexamining Nesbitt

How Horizontal Wells Have Changed Pooling in Oklahoma Oil and Gas Law

Ron M. Barnes and Grayson M. Barnes

Oklahoma Bar Journal,
vol. 95, no. 5 (May 2024)

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Authors

- Ron Barnes- OU PLM Undergrad, OCU Law School- 40 years of OCC experience, including first job after law school Trial Examiner
- Grayson Barnes- OU Undergrad and Law School- Started interning at Barnes Law in 2012
- Denver Nicks- SMU Undergrad, Columbia Masters of Journalism, Tulane Law School- Attorney and Journalist
    - **Local Legal Initiative Staff Attorney**
    - **Conviction: The Murder Trial That Powered Thurgood Marshall's Fight for Civil Rights (2019)**

“A Primer on Forced Pooling of Oil and Gas Interests in Oklahoma”

Oklahoma Bar Journal (1979)

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Author

- Charles Nesbitt
  - Yale Law School
  - Oklahoma's Attorney's General
  - Corporation Commissioner- 7 years
  - In private practice with an ongoing case at the time of publication

Force Pooling by Nesbitt

- “The law provides that where there are separately owned tracts, of undivided interests, or both, within an established spacing unit, and the owners have not voluntarily agreed upon joint development, and one owner proposes to drill a well on the unit, the Corporation Commission may ‘require such owners to pool and develop their lands in the spacing unit as a unit’”
- Largely true today

Designation of Operator by Nesbitt

- “All other things being equal, the owner of the largest share of the working interest has the best claim to operations,”
- Not necessarily true today

A Primer on Forced Pooling of Oil and Gas Interests in Oklahoma

- Frequently cited by ALJ's and Appellate Referees and mirroring Nesbitt's position
  - FMV
  - Selections of Operators
- Appellate Courts cite Reports- Adoption of Mr. Nesbitt's positions into case law
- Published in the *Oklahoma Bar Journal* 1979
- Does **NOT** cite any case law

State of Oil and Gas production in 1979

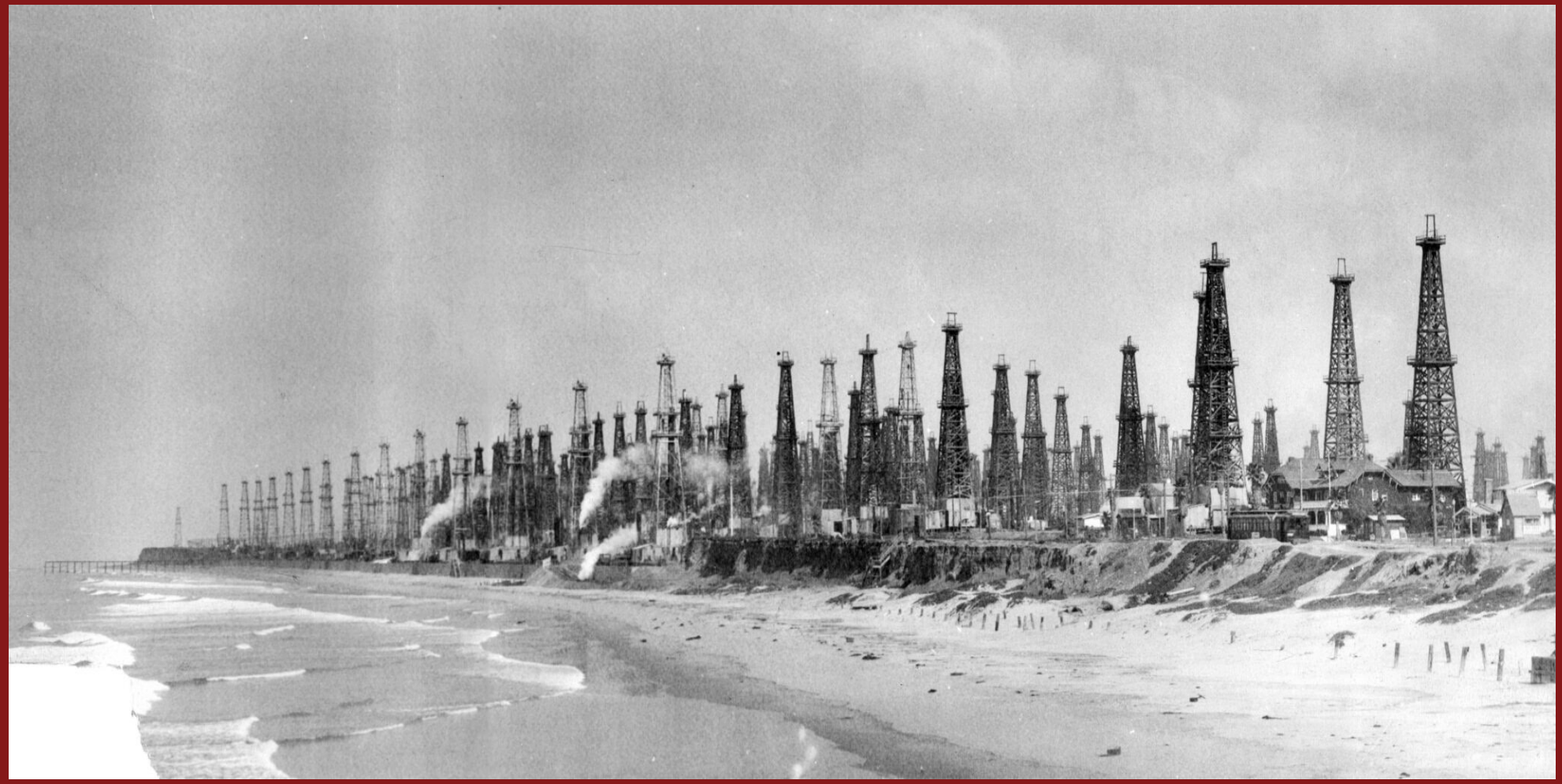
- Oil
  - 8,552 thousand barrels per day produced
  - 6,519 thousand barrels per day imported
  - 235 thousand barrels per day exported

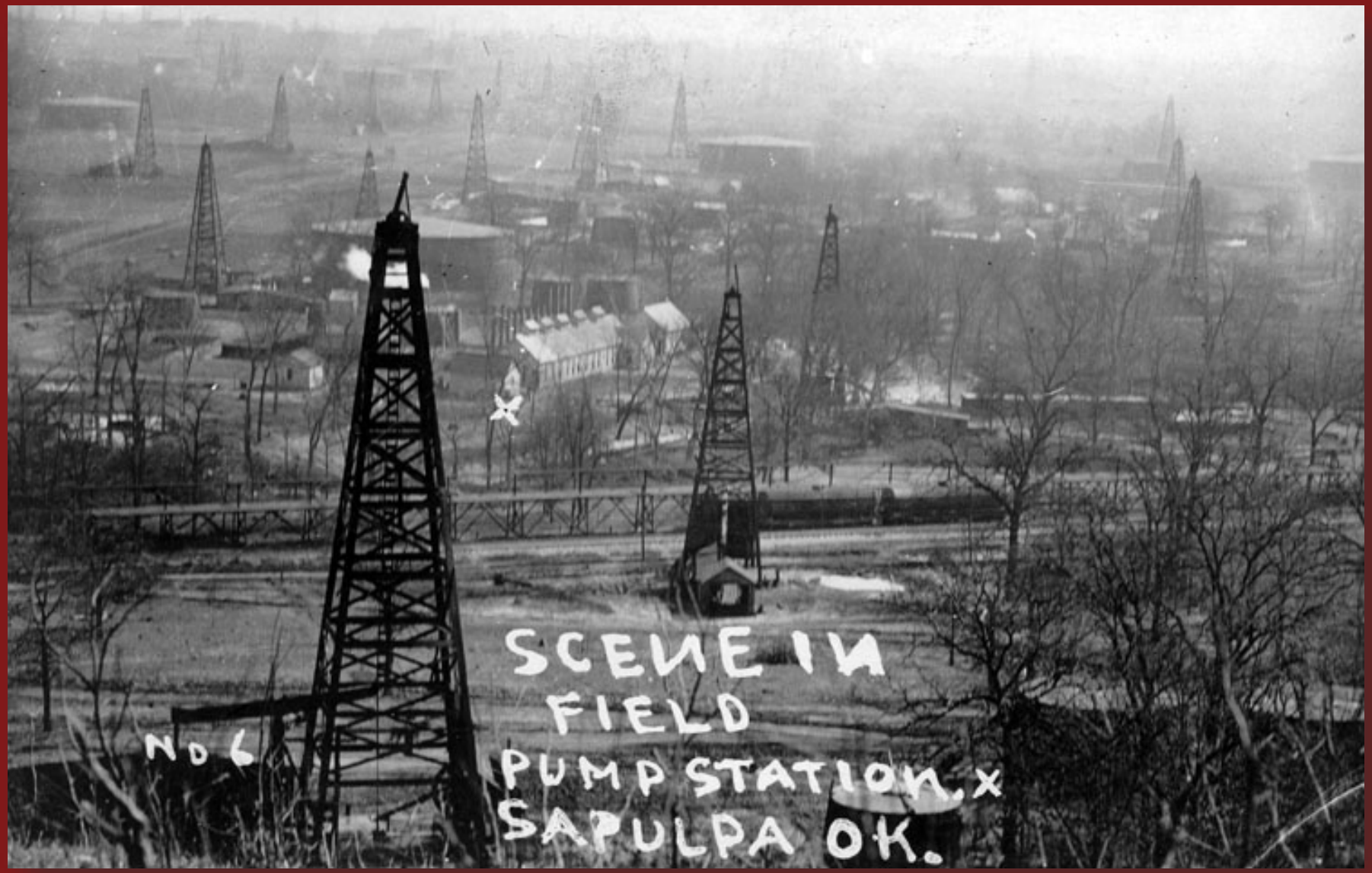
- Natural Gas
  - 20.47 trillion cubic feet produced
  - 1.25 trillion cubic feet imported
  - .06 trillion cubic feet exported

* U.S. Energy Information Administration

WHY DOES THE CORPORATION COMMISSION REGULATE OIL AND GAS IN THE FIRST PLACE?

- Massive over production practices in the 1920's
  - All over the country, Huntington Beach
  - "Wild wells, flood of crude, and almost uncontrollable flows of natural gas"
- Legislature tasked OCC with fixing this problem by regulating oil and gas production

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FIELD
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"Munn v. People of State of Illinois" – 94 U.S. 113 (1876)

- Court recognized the sovereign authority of state governments to regulate private industry within their borders when that industry is of a kind that affects the public interest
- Munn and Scott were found liable for violating a properly enacted statute that set maximum rates for storage and transportation of grain
- Munn and Scott's conviction upheld
- Finding- Illinois had properly exercised its inherent police power to regulate the use of private property when such use will be "of public consequence, and affect the community at large"

"*Munn v. People of State of Illinois*" – 94 U.S. 113 (1876)

- Author-Chief Justice Morrison Waite
  - Former corporate railroad lawyer
  - "When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit it be controlled by the public *for the common good*, to the extent of the interest he has thus created"
  - The social contract implicitly authorizes, "the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government and has found expression in the maxim *sic utere tuo ut alienum non laedas*"
    - The Latin maxim meaning – one ought not use that which is his in such a way as to harm that which is someone else's.
    - Police Powers of the State originate from this maxim

"*Munn v. People of State of Illinois*" – 94 U.S. 113 (1876)

- Foundation of our early Republic- Looked to Britain
- Police = Economy
- Sir William Blackstone- English jurist
  - "By the public police and **oeconomy** I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, *like members of a well-governed family,* are bound to conform their general behavior to the rules of propriety, good neighbourhoood, and good manners; and to be decent industrious, and inoffensive in their respective stations."
  - **Oeconomy**- Greek
    - Oikos- house
    - Nomos- law
    - Government is paternalistic
      - Fundamental underpinning of Western civilization
      - Father looks after family like government looks after betterment of public good

Forced Pooling Law

- Passed by the Oklahoma Legislature in 1947
- Where there are separately owned tracts or undivided interests within a spacing unit and the mineral and/or leasehold owners have not agreed on joint development and one owner proposes to drill, the OCC can require owners to pool and develop their interest as a unit

Hunter Co. v. McHugh, 320 U.S. 222 (1943)

- Upheld the constitutional power of a state "to regulate production of oil and gas so as to prevent waste **and** to secure equitable apportionment among the landholder"
- Whom is the prevention of waste to benefit? – The next 4 cases will answer this question

1. *Anderson v. Corp. Comm'n*, 1957 OK 39, 327 P.2d 699

- "To curtail over-production and waste for the benefit and protection of the general public, restraints had to be placed around the individual's rights to develop and produce [oil and gas] …"
- Meaning- the curtailment of waste is a benefit bestowed on the general public of the state
- OCC exercises the state's police power – the state's power to regulate the use of private property in the interest of the common good
- Common good- interest that all citizens of Oklahoma have in the full development of the mineral resources of the state

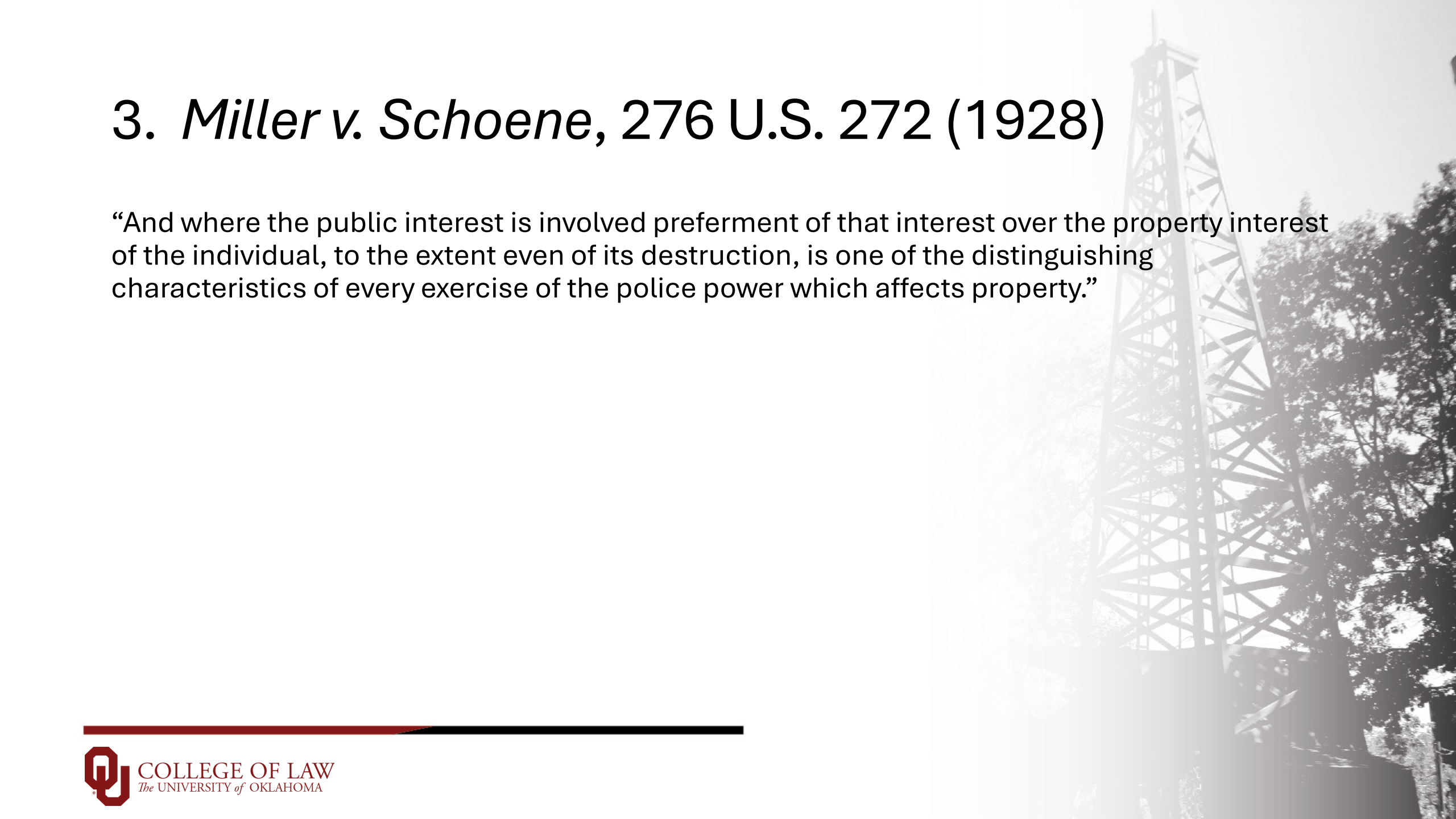
2. *Champlin Ref. Co. v. Corp. Comm'n of State of Oklahoma*, 51 F.2d 823, 833 (W.D. Okla. 1931)...*

" The state has no title to oil and gas in place, and is without power to appropriate the oil and gas in and under the lands of one owner to the use and benefit of another owner. *The only interest the state has under its police power is to prevent actual waste* and to provide equal privileges to every landowner to reduce such products to possession and place them in the channels of legitimate commerce"

* *Champlin Ref. Co. v. Corp. Comm'n of State of Oklahoma*, 51 F.2d 823, 833 (W.D. Okla. 1931), modified sub nom. *Champlin Ref. Co. v. Corp. Comm'n of State of Okl.*, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932)

3. *Miller v. Schoene*, 276 U.S. 272 (1928)

"And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."



4. *Sterling Ref. Co. v. Walker*, 1933 OK 446, 165 Okla. 45, 25 P.2d 312

"Gas energy should be preserved and properly utilized in order to extract all of the oil from oil-bearing sands. This theory recognizes the interest of the state in the proper utilization of all its resources. After all, such theory is particularly proper in Oklahoma, because oil and gas constitute to a large degree the basic wealth of the state. *This basic wealth and basis of taxation and income should not be wasted. The waste of any natural resource that cannot be replaced should be and is against public policy.*"

OCC Jurisdiction Over Oil and Gas Industry

- Prevention of waste

  and

- Protection of correlative rights

Changes in Law and Technology since 1979

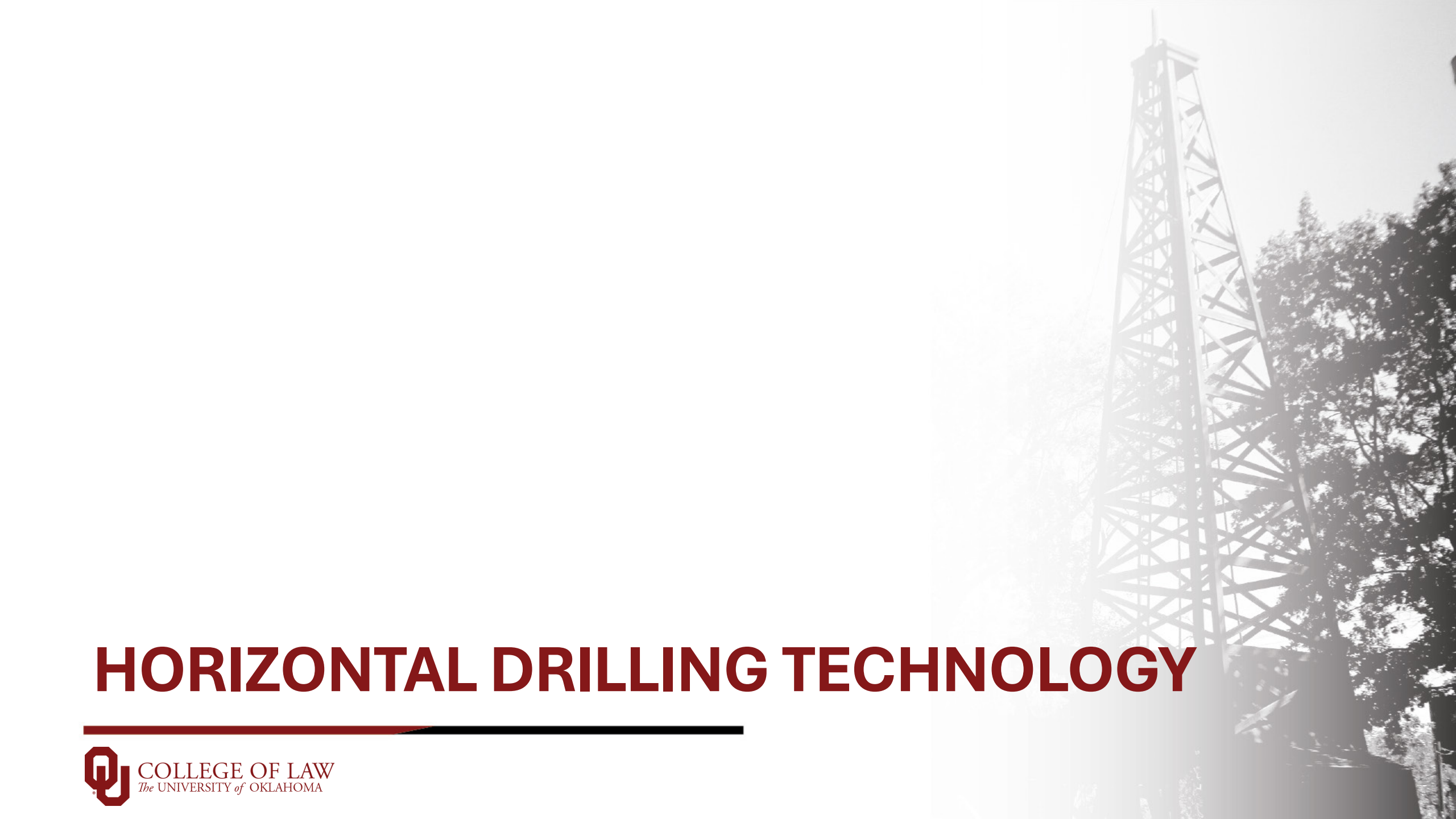
- Case Law
- Horizontal Drilling
- Statute

Wellbore vs. Unit pooling

- *Amoco Production v. Corporation Com'n*, 1986 OK CIV APP 16, 751 P.2d 203
  - Oklahoma Court of Civil Appeal's decision adopted and published by Oklahoma Supreme Court 1987
- Pooling orders provide for subsequent wells- After *Amoco*
  - If have more than one pooling before *Amoco* the first typically is the controlling pooling and the subsequent are anomalies

Wellbore vs. Unit pooling

- *Amoco Production v. Corporation Com'n*, 1986 OK CIV APP 16, 751 P.2d 203
  - John R. Reeves



HORIZONTAL DRILLING TECHNOLOGY

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Shale Reservoir Development Act, SRDA (April 15, 2011)-Gov. Fallin

- Allowed for Horizontally spacing a unit
  - Up to 640 acres (regardless of anticipation of predominantly gas)
    - Shale and Shale like Common Sources of Supply only
  - Can concurrently exist with non-horizontal units
    - Parallel Universe inception
- Changed offset requirements for well locations in horizontally spaced reservoirs (less restrictive)
- Allowed for multiunit well development

Oklahoma Energy Jobs Act, OEJA (2017 May 31, 2017)-Gov. Fallin

- Increased horizonal spacing unit size up to 1280 acres (previously 640 acres)
- Allows for horizontally spacing any common source of supply that horizontal development is fit for (not just shale and shale like reservoirs)

Designation of Operator

“All other things being equal, the owner of the largest share of the working interest has the best claim to operations,” Mr. Nesbitt.

- Other things
  - Most wells in the area
  - Experience
  - Availability of personnel
  - *Mr. Nesbitt’s article only mentioned the word ”waste” one time
    - Not in the context of selection of operator

Designation of Operator

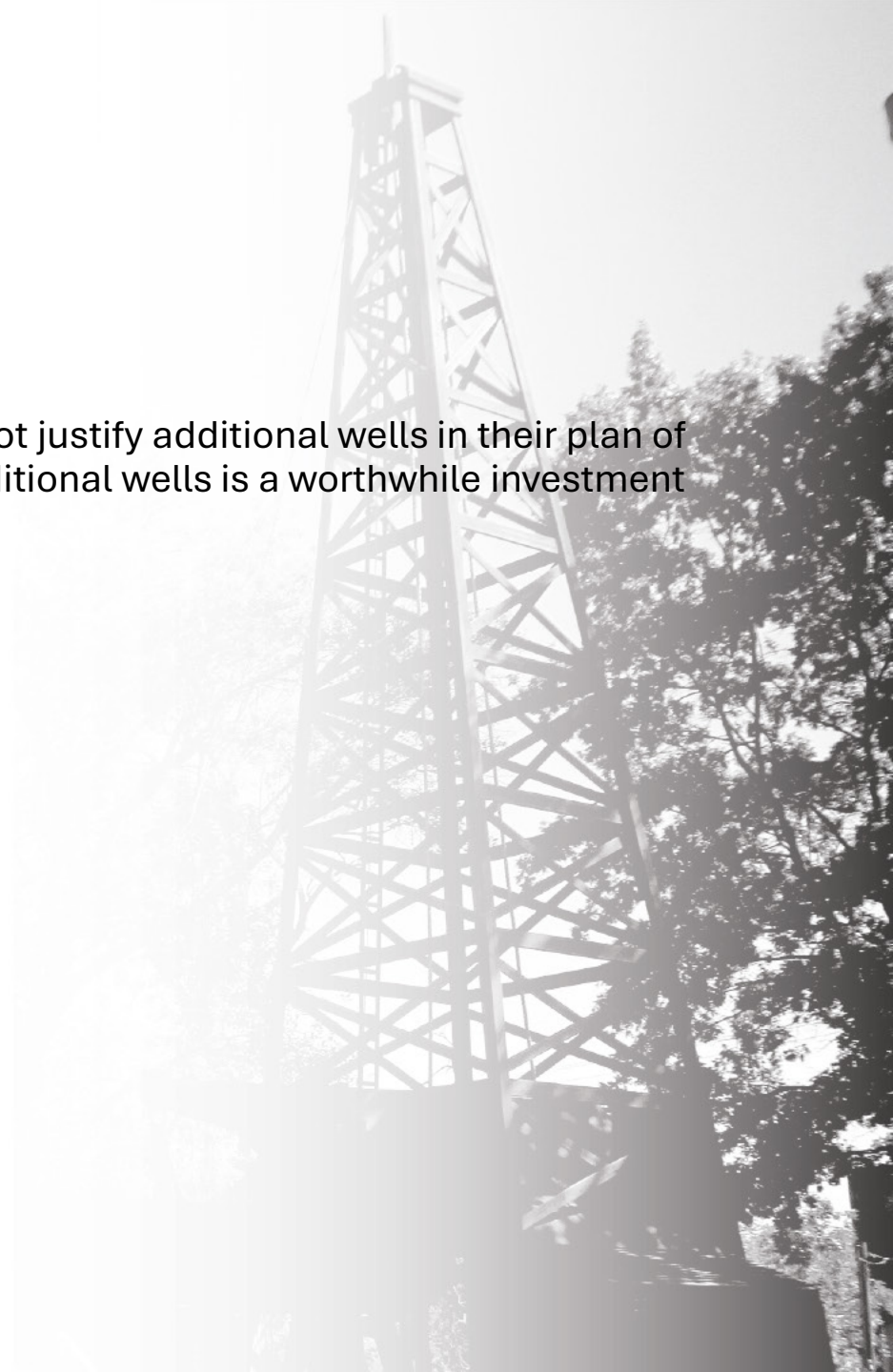
- Today- all other things are rarely equal
  - Relative competence of an operator
    - Number of wells planned for the unit (rarely only need one well now days)
    - Timing to drill and complete the wells
      - Parent-child effect
    - Experience
    - **WASTE**

Designation of Operator

- Waste
  - Parent Child Effect

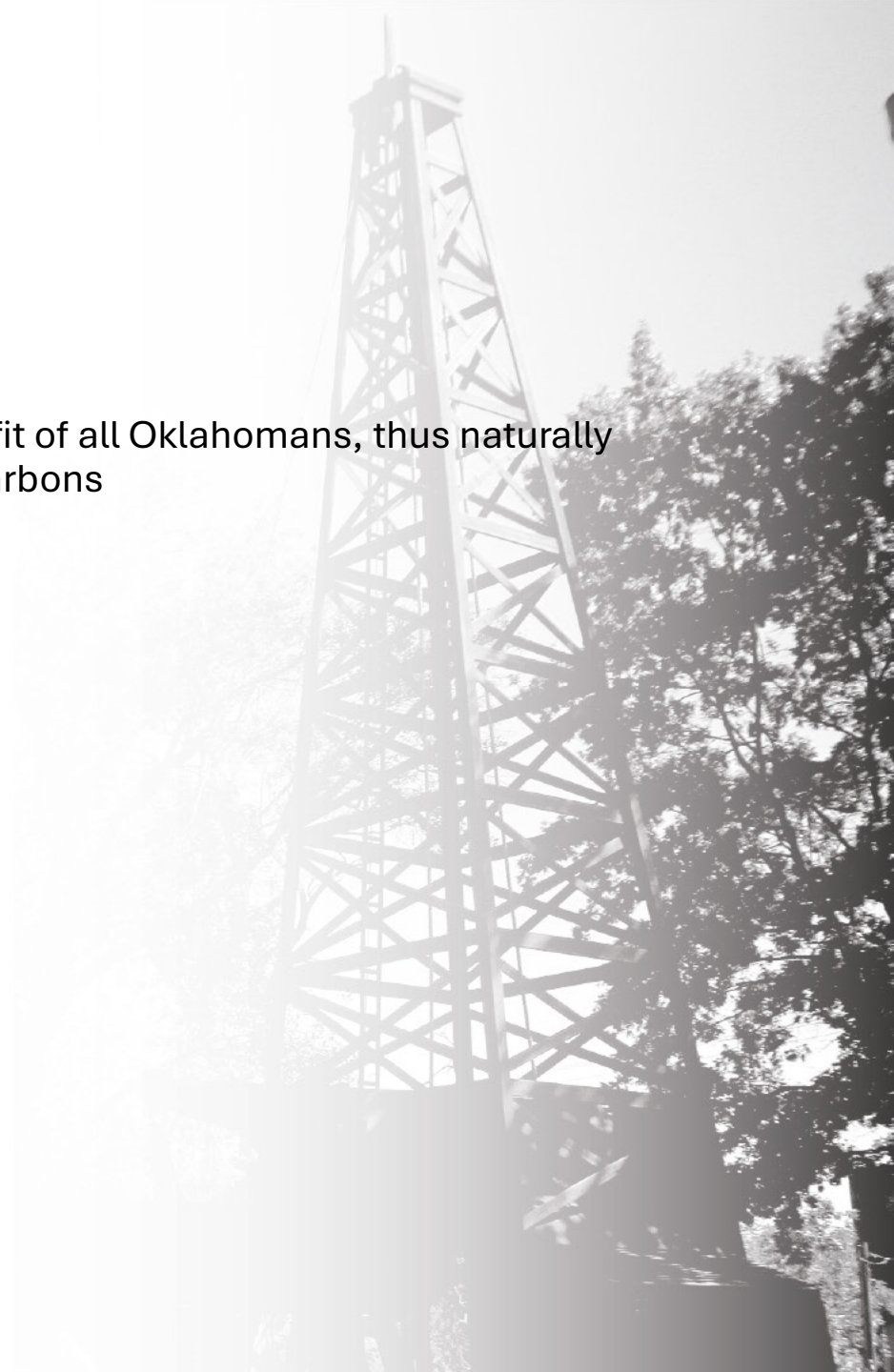
Designation of Operator

- Waste
  - Example- Operator A calculates a higher ROI for fewer wells thus cannot justify additional wells in their plan of development vs Operator B producing the additional reserves with additional wells is a worthwhile investment



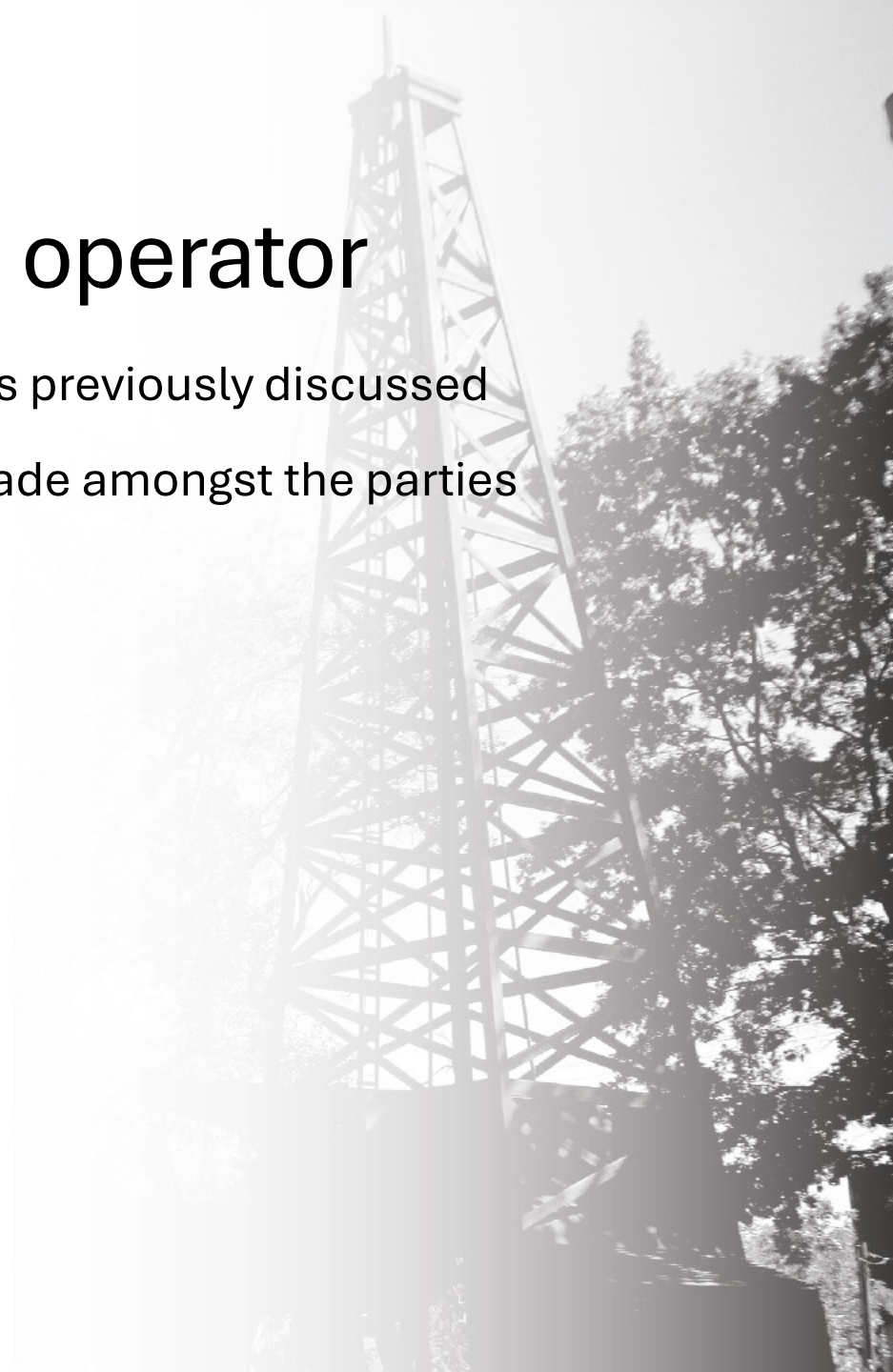
Designation of Operator

- Waste
  - OCC exists to prevent waste as it relates to hydrocarbons for the benefit of all Oklahomans, thus naturally should select the operator who proposes to produce the most hydrocarbons



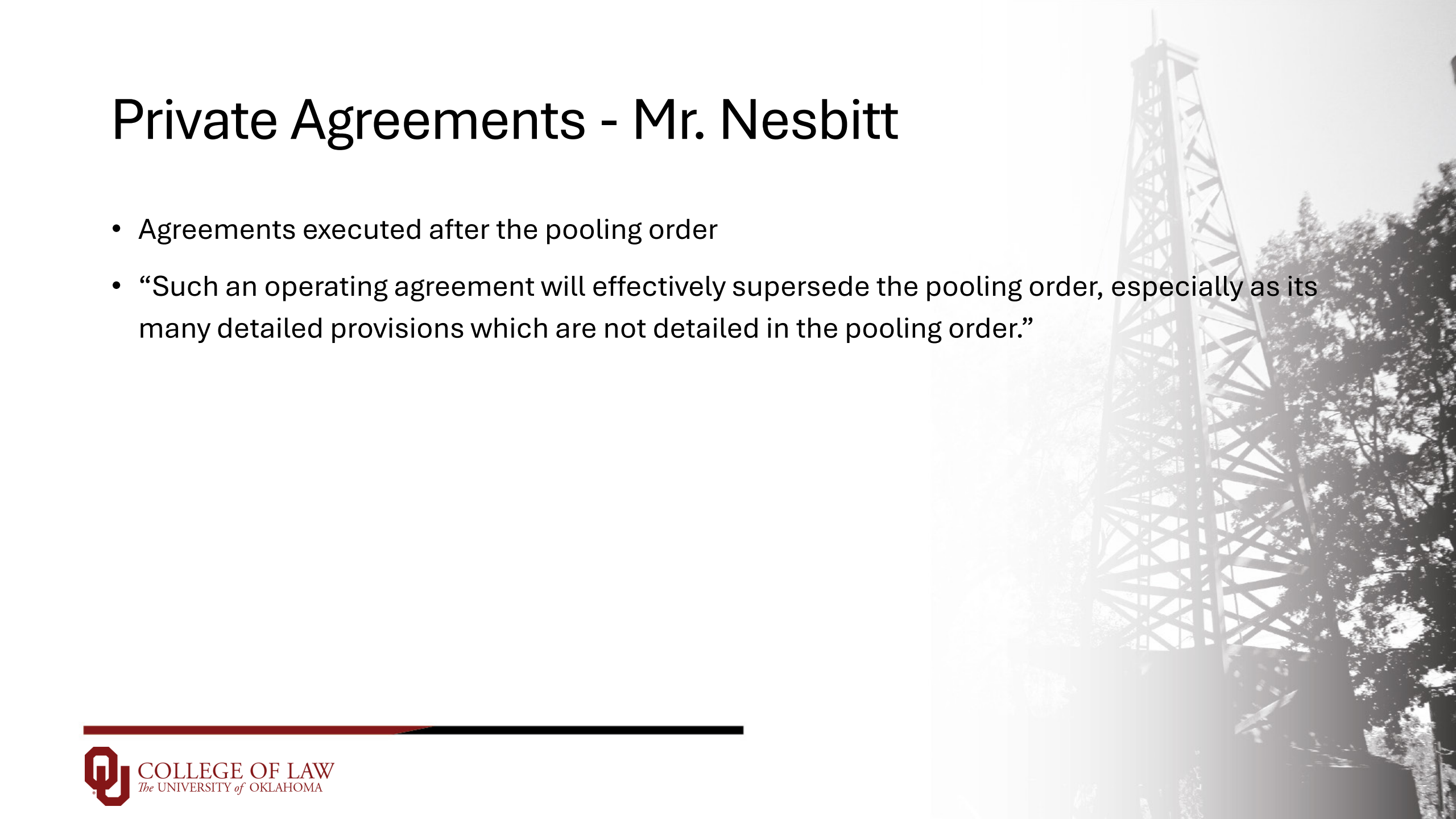
Private Agreements - considerations when selecting an operator

- OCC responsibility to select an operator based on the factors previously discussed
- Pooling statute is triggered when an agreement cannot be made amongst the parties
- Pooling Orders- are bare-bones documents



Private Agreements - Mr. Nesbitt

- Agreements executed after the pooling order
- “Such an operating agreement will effectively supersede the pooling order, especially as its many detailed provisions which are not detailed in the pooling order.”



Private Agreements - Oklahoma Supreme Court

- Contracts that implicate the private rights and obligations of parties to the agreement, and the power to adjudicate matters related to private agreements properly belongs to the district courts. (*Tenneco Oil Co. v. El Paso Nat. Gas Co.*, 1984 OK 52, 687 P.2d 1049)

Tenneco Oil Co. v. El Paso Nat. Gas Co., 1984 OK 52, 687 P.2d 1049

- Richard K. Books

Private Agreements - considerations when selecting an operator

JOA- Joint Operating Agreement

- Often govern succession of operator as well as many other terms not found in the bare-bones Pooling Order
  - Recent reports of the OCC have asserted that the power to select an operator belongs solely to the OCC in every instance, regardless of the existence of a private agreement that dictates the succession of operator between the parties to the agreement
    - Seem to conflict with Mr. Nesbitt's position that they supersede the pooling order and exceed the OCC's jurisdictional mandate to decide matters of public, not private, rights

Private Agreements - considerations when selecting an operator

Pre-Pooling Letter Agreement-PPLA

- Not much case law on these yet

JURISDICTION - OCC / DISTRICT COURT

Jurisdiction - *Halpin v. Corporation Comm'n*, 1977 OK 140, 575 P.2d 109

- OCC- administrative body with quasi-judicial authority of limited jurisdiction that exists to exercise the state's police power
- District Courts- tribunals of general jurisdiction that exist to resolve controversy

Jurisdiction - *Gulfstream Petroleum Corp. v. Layden*, 1981 OK 56, 632 P.2d 376

- Who has the jurisdiction to determine reasonableness of costs?
  - Unknown in Nesbitt's time
  - Gulfstream Petroleum Corp. v. Laden (OK Sup Ct. 1981).
    - Except with respect to inquiries into the OCC's jurisdiction, "[g]enerally, the district courts of this state lack the jurisdiction to even inquire into the validity of [OCC] orders"

Gulfstream Petroleum Corp. v. Layden, 1981 OK 56, 632 P.2d 376

- Richard K. Books

Jurisdiction - *Tenneco Oil Co. v. El Paso Nat. Gas Co.*, 687 P.2d 1049 (Okla. 1984)

- OCC- jurisdiction when public rights are at issue
  - Spacing orders
  - Pooling orders
  - “other enactments for the conservation of oil and gas”

Jurisdiction - Deborah B. Barnes, Interpretation of Corporation Commission Orders: The Dichotomous Court/Agency Jurisdiction, 8 OKLA. CITY U.L. REV. 311 (1984)

- "[T]he power to clarify or interpret any Commission order" in its aspects that implicate public rights rests squarely with the Commission
- District Court - has jurisdiction when "[r]espective rights and obligations of parties are to be determined"

Jurisdiction - *Toklan Oil & Gas Corp v. Citizen Energy III, LLC*, 2022 OK CIV APP 37, 520 P.3d 848

- One party accused the other of transferring ownership of a large overriding royalty interest to a third party with the alleged intent of burdening the leasehold rendering development financially nonviable for the other party
- Court of Civil Appeals
  - Did not address whether the other party was frustrating development (causing waste)
  - Holding- “the Commission does not have jurisdiction to alter the ownership of royalty or to shift royalty away from the party taking the working interest pursuant to a pooling order”
    - OCC does not have jurisdiction to adjudicate matters of contract, ie private rights

NOTICE

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Notice - Nesbitt

- “Neither law nor policy requires prior contact to other lease owners” prior to pooling

Notice - 52 O.S. §87.1(e) require

- 52 O.S. §87.1(e) require
  - Notice by mail with return receipt requested
  - Notice by publication at least 15 days prior to the hearing date
    - Paper of general circulation in Oklahoma County

      and

    - In county(s) where minerals are located

Notice - Court Clarity

- *Harry R. Carlile Trust v. Cotton Petroleum*, 1986 OK 16, 732 P.2d 438
  - Involved notice requirements in a Spacing preceding with the Court holding notice by publication in a periodical was inadequate in that instance
- *Purcell v. Parker*, 2020 OK 83, 475 P.3d 834
  - When "affected landowners are known or reasonably discoverable, notice provided by publication results in an unconstitutional exercise of jurisdiction and a denial of due process"
  - Reasonably Discoverable
    - Google
    - Accurint
    - TLO
    - Much more reasonably discoverable today

Notice - Pre Pooling requisite

- Bona fide effort to reach an agreement prior to pooling
  - Good faith attempt to reach an agreement
    - Industry standard
      - Well proposal sent at least 10 days prior to filing a pooling
        - Bare-bones
        - Same terms as Pooling Order- pooled by election or pooled by force
      - JOA's very rare
      - Pre-pooling letter agreement
        - Court has not weighed in on this practice yet

Conclusion

- OCC has a tremendous undertaking
  - Balance encouraging oil and gas development while preventing waste, ensuring it is used for the benefit of all Oklahomans for another 100 years, and protecting correlative rights
- May 2022 to May 2023 alone- taxes collected from oil and gas production $1.91 billion – (Oklahoma Policy Institute Gross Production Taxes (August 13, 2013).
  - 1% of all gross production tax returned to the Counties and schools where the wells are located
  - Remaining 6% goes to the state

Conclusion - 1979

- Oil
  - 8,552 thousand barrels per day produced
  - 6,519 thousand barrels per day imported
  - 235 thousand barrels per day exported

- Natural Gas
  - 20.47 trillion cubic feet produced
  - 1.25 trillion cubic feet imported
  - .06 trillion cubic feet exported

* U.S. Energy Information Administration

Conclusion - 2020

- 2020 U.S. net petroleum exporter for the first time since at least 1949
- 2021 net petroleum exporter
- 2022 net petroleum exporter
- 2023 net petroleum exporter

* U.S. Energy Information Administration

Conclusion - 2023

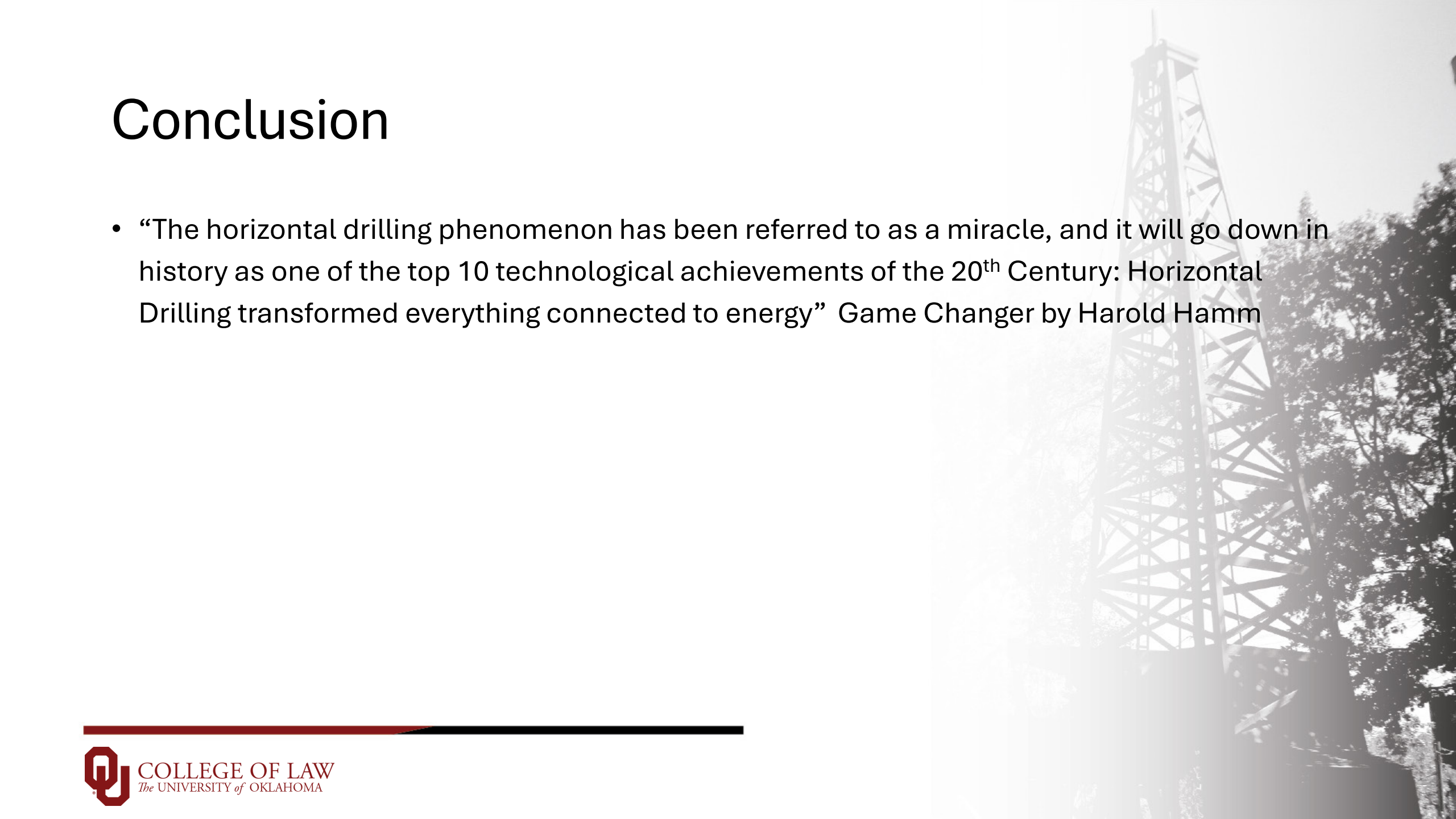
- Oil
  - 12,935 thousand barrels per day produced
  - 6,489 thousand barrels per day imported
  - 4,082 thousand barrels per day exported

- Natural Gas
  - 41.2 trillion cubic feet produced
  - 2.93 trillion cubic feet imported
  - 7.61 trillion cubic feet exported

* U.S. Energy Information Administration

Conclusion

- “The horizontal drilling phenomenon has been referred to as a miracle, and it will go down in history as one of the top 10 technological achievements of the 20th Century: Horizontal Drilling transformed everything connected to energy” Game Changer by Harold Hamm



Thank you to the OCC

- Commissioners
- Technical experts
- Lawyers
- Administrative courts and staff

A PRIMER ON FORCED POOLING OF OIL AND GAS INTERESTS IN OKLAHOMA

By Charles Nesbitt

Today's energy crisis has caused a great, and welcome, upsurge in exploration for oil and gas. Oklahoma shares in this activity primarily because of its geological promise; but also because of conservation laws which encourage development. The forced pooling law is one of those; and often succeeds through relatively mild judicial coercion to bring about oil and gas exploration which otherwise would not occur.

The Oklahoma forced pooling law, 52 O.S 1971 §87.1 (e), was first enacted in 1947, and has remained virtually unchanged since that date. It is surprising how little reported judicial authority there is in the field, and how many important legal issues involving forced pooling remain completely unadjudicated. The purpose of this article is not to engage in learned speculation about what the law might or should be in these gray areas; but instead to give the non-expert a brief general outline of forced pooling procedure, and hopefully to point out a few pitfalls to avoid.

THE FORCED POOLING LAW

The forced pooling provisions of the statute are couched in extremely general terms, a legislative accident which doubtless has been a major factor in the law's practical success. The law provides that where there are separately owned tracts, or undivided interests, or both, within an established spacing unit, and the owners have not voluntarily agreed upon joint development, and one owner proposes to drill a well on the unit, the Oklahoma Corporation Commission may "require such owners to pool and develop their lands in the spacing unit as a unit."

As to the specific terms and conditions of the forced pooling, the statute says only that the Commission's Order shall "make definite provisions for the cost of development and operation" and that the pooling order "shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas." Virtually all of the major provisions of the pooling order are the quasi-judicial creatures of the Oklahoma Corporation Commission, selected as the most effective means of carrying out a broadly-defined statutory mandate.

RIGHTS OF CO-TENANTS

Oklahoma has adopted the general rule that owners of undivided oil and gas interests in a tract of land are co-tenants, and as such, any mineral owner, or his lessee, may drill for, produce and sell oil and gas from the tract, subject only to an obligation to account to the other co-tenants for their respective shares of the production, less reasonable operating costs. See *Earp v. Mid-Continent Petroleum Corp.*, Okl. 1933, 27 P.2d 855. The rights and obligations of a developing co-tenant and those arising by a forced pooling order are similar, with one significant difference: if a co-tenant drills a dry hole, he cannot legally require the other co-tenants to contribute their shares of the cost. Thus, a major purpose of forced pooling is to equalize the risk of loss by forcing non-consenting co-tenants to choose in advance whether they will share in both the benefits and the risks of oil and gas exploration.

THE SPACING ORDER

The statute refers to the "established spacing unit" as the tract of land within which oil and gas interests may be pooled. That unit also is created by an Order of the Corporation Commission; but it is an entirely different order, having as its purpose the prevention of the waste which often occurred in the past from drilling too many wells too close together. A spacing order is issued pursuant to authority contained in 52 O.S. 1971 §87.1 (a), and by its terms specifies the producing formations spaced, establishes the size and identity of each separate spacing unit, and prescribes the boundaries within

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which a well may be drilled on the unit. Thereafter, only one well may be drilled on the unit except by permission of the Commission and deviation from the permitted well location also requires a special order. The statute prescribes a maximum size of 40 acres as a spacing unit for oil-producing formations lying less than 4,000 feet below the surface, and an 80 acre maximum at depths between 4,000 and 9,990 feet. Below 9,990 feet there is no restriction on the size of oil spacing units and 160 acres is standard.

A recent legislative enactment prescribes a maximum size spacing unit for gas producing formations of 640 acres at all depths. A very rough rule of thumb would be that where oil spacing is 40 acres or less, 160 acre gas spacing is most common; with 320 or 640 acre spacing imposed as the depth increases. All spacing units covering any portion of the same common source of supply of oil or gas must be uniform in size and shape, subject only to a rarely encountered exception of units along the gas-oil contact line of a combination reservoir.

It is significant that the royalty interest (defined by statute as 1/8 of the oil and gas produced) is by law pooled by a spacing order. This means that upon completion of a well anywhere on a spacing unit, the 1/8 royalty interest is divided proportionately among the royalty owners of the entire area embraced in the spacing unit, even though their ownership may be in a smaller tract within the unit. Production from a well anywhere on the spacing unit is by law "considered as if produced" from each separately owned tract in the unit, for purposes of compliance with drilling and production covenants of oil and gas leases.

THE POOLING ORDER

At the outset, it is wise to remember that there are two general types of oil and gas interests which most commonly are pooled: unleased mineral interests and oil and gas leasehold interests. There necessarily will be slight differences in the provisions of a pooling order as it affects these different interests.

Reduced to its simplest terms, the pooling order offers the non-consenting owner of oil and gas rights a choice: either (1) to pay his proportionate share of the cost of the well and receive the same share of the working interest; or (2) to receive a bonus in lieu of the right to participate in the working interest in the well.

In order to make an intelligent election between these alternatives, the non-consenting owner is entitled to know how much it will cost for him to participate in the well and what he will receive as bonus if he chooses to forego participation.

WELL COST

The pooling order establishes the estimated cost of the proposed well, ordinarily expressed as two figures: an estimated dry hole cost and an estimated cost as a completed well. This device is one of custom, rather than legal necessity, inasmuch as the order normally requires each participating party to advance his share of the completed cost, subject to a partial refund if the well is dry.

The order specifies the individual formations pooled and the well cost ordinarily is calculated to the deepest formation to be tested. Occasionally, it is necessary to establish well costs separately as to individual formations; for example, where the spacing units are not the same as to all formations (e.g. some spaced for oil and others for gas) or where an owner appears and claims the right to participate in the well as to some but not all formations to be tested.

It should be emphasized that the well cost contained in the pooling order is an estimate only and a party, by

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electing to participate in the well, assumes an obligation to pay his proportionate share of the actual cost of the well (so long as the actual cost is a reasonable cost) whether it be more or less than the estimated cost. However, the cost of participation is limited to the owner's proportionate share of actual cost, without any "promotional interest" or other compensation or benefit to the operator, except a "reasonable charge for supervision."

The statute provides, and the Order recites, that the Commission retains jurisdiction to determine "proper costs" in the event of a dispute as to the actual cost; or more likely, a later dispute whether certain expenditures were "reasonable." The nature of this retained jurisdiction, the enforcement of the Commission's findings of "proper costs," and whether its judgment is binding on district courts in litigation arising out of a dispute over costs is, curiously enough, a legal question which remains unadjudicated.

THE BONUS

Forced pooling extends to a non-consenting owner an alternative to financial participation in the cost and in the risk of the contemplated well. This is called a "bonus," and legally is considered compensation in lieu of the right to participate in the working interest. By electing the bonus, an unleased mineral owner gives up his share of the working interest (defined by statute as 7/8 of production), but retains his 1/8 "royalty" interest unaffected by the forced pooling. In the event of a producing well, this owner will still receive his proportionate share of the 1/8 royalty free and clear of expense.

On the other hand, when the non-consenting owner of an oil and gas lease elects to receive the bonus, he surrenders his share of the working interest, which generally is all of his leasehold rights. If a non-participating lease owner is to salvage any share of production from the proposed well, it must be as part of the bonus granted to him.

The bonus usually takes the form of cash, or an overriding royalty (or excess royalty) interest, or a combination of the two. As to an unleased mineral interest, the amount and elements of the bonus are intended to equal the current fair market value of an oil and gas lease; that is, the bonus which would be paid for a lease between willing contracting parties, neither under compulsion.

In practice, this generally becomes an inquiry into the "highest price actually paid" for an oil and gas lease in the vicinity. Scant consideration is paid to transactions outside a nine section area of which the subject section is the center, or to a lease bonus paid during a past period of hot activity which since has cooled. Interestingly enough, the Commission's current policy is totally to disregard the bonus paid for an oil and gas lease on state lands, which leases are sold at a public sale on sealed bids, a process probably most nearly meeting the traditional legal concepts of fair market value.

Experienced operators are aware of these policies, and make allowances for them in their negotiations. They are well aware that the highest price actually paid as a lease bonus for any interest will be a minimum bonus which, under forced pooling, must be paid to all remaining unleased interests.

While there is some true price competition for oil and gas leases, primarily in "hot" areas, far more often an operator who contemplates exploration will simply decide unilaterally the maximum bonus he is willing to pay. In negotiating for leases, he simply never offers more than this amount. Some, noteably non-residents and owners of small interests, will accept the offer, and the rest will be pooled. At the hearing, these sales or offers are submitted as the bonus which should be paid to the remaining non-consenting parties. A mineral owner who is being contacted by lease brokers would be well advised to get their offers in writing, even if he intends not to accept any of them.

"The pooling order offers the non-consenting owner of oil and gas rights a choice: either (1) to pay his proportionate share of the cost of the well and receive the same share of the working interest; or (2) to receive a bonus in lieu of the right to participate in the working interest in the well."

In past years, the bonus for unleased minerals generally was established in the form of cash, expressed in dollars per acre. More recently, both the cash bonus paid for leases and the owner's retained royalty share have tended to increase and the bonus specified in pooling orders has reflected the trend. Accordingly, the order often will specify a bonus, for example, of an "excess royalty of 1/16" (identical in effect to a lease reserving a 3/16 royalty); or an "overriding royalty of 1/16 of 7/8 on oil or 1/8 of 7/8 on gas," over and above the statutory 1/8 landowner's royalty, or a combination of cash and the excess interest.

The bonus to be paid the owner of an existing oil and gas lease who chooses not to participate in the well is established upon similar principles. In this case, the bonus is intended to represent terms upon which willing parties, neither under compulsion, would agree to farm-out the lease for development. Again, if the operator has actually secured farm-outs, the most generous terms given will be extended to all pooled leasehold owners.

A lease owner seldom is satisfied with a cash bonus, at least unless it is much greater than the amount he paid, and actual sales of existing leases for cash are rare. Accordingly, the bonus for a force pooled leasehold most commonly is expressed in terms of a retained overriding royalty. Although by no means a standard provision, an overriding royalty of 1/16 of 7/8 on oil or 1/8 of 7/8 on gas at present is considered a farm-out provision "common in the industry."

Frequently, a voluntary farm-out agreement includes a "back-in" interest, whereby the owner retains an overriding royalty interest until the cost of the well is paid out of production, at which time he has the option of converting the overriding royalty to a larger working interest. This and similar, more exotic farm-out terms are not frequently incorporated in the bonus provisions of pooling orders; but they are not unknown either.

The pooling order seldom establishes separate bonus terms for unleased minerals and leasehold interests, but instead generally establishes a single bonus for all pooled interests, regardless of their nature. A lease owner must be especially cautious lest his leasehold be indiscriminately lumped together with unleased minerals in establishing the bonus. The unleased mineral owner retains a cost-free royalty interest in any event, while the lease owner may find his rights extinguished altogether unless the bonus reserves him an interest in future production.

Difficulty can arise in establishing the bonus when overriding royalties, excess royalties, production payments and other cost-free interests exist as "burdens" on leases being pooled. When the owner of such a burdened leasehold elects to participate in the well, the law itself provides that he must pay those obligations out of his share of the working interest. The problem arises when the owner of such a burdened lease elects *not* to participate.

Not much ingenuity is required for a lease owner facing forced pooling to conceive the idea of creating large overriding royalties (examples of a ½ override are recorded) and then simply electing not to participate on the theory that the operator must take the working interest subject to that cost-free interest. The order can and does require this type of interest to be paid out of the established bonus, but only if the bonus at least equals the burden.

Where it can be shown that such burdening interests are part of a scheme directly or indirectly to benefit the owner of the pooled leasehold, they can safely be extinguished in the process of pooling. However, absent collusion, when an operator resorts to judicial coercion for development, he must expect to take the outstanding interests as he finds them. He cannot ask that legitimate contractual relations be rearranged just because the interest he would acquire through pooling is less than he would prefer.

One other aspect of bonus merits brief comment. In some states, an owner whose unleased mineral interest is

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pooled is permitted to "ride the well down." In this arrangement, the pooled owner is not required to pay his share of the well cost, but instead the operator is reimbursed a multiple of that party's share of well costs out of his share of the proceeds of production. The effect is that an owner extended this option escapes all risk in exchange for an economic penalty if the well is successful. In past years, this option was incorporated in Oklahoma pooling orders, called the "third alternative," subject to a "penalty" ranging up to 300 per cent. At present, the device is deemed an excessive burden upon those who would have to bear the risk of loss and the option is not extended to any owner.

ELECTION AND PAYMENT

The pooling order specifies the time within which a non-consenting owner must elect either to participate or receive the bonus. A period of 15 days after the date of the order is common. The election must be in writing, directed to the unit operator. The Order always provides that any owner who fails to make any election is deemed to have elected the bonus.

Occasionally, unusual circumstances such as expiration of leases or a well actually drilling, cause the operator to seek a shorter election time. When a well is drilling, a postponement of the deadline for election might give the pooled owner added information as to the well's potential. In theory, each party should make his decision whether or not to participate based upon substantially the same information and before the outcome is known. Other factors that may affect the election time actually ordered include whether the owners pooled are knowledgeable oil operators, and whether they are located at a distance.

The order also prescribes a time within which an owner electing to participate must pay his share of the well cost and a time within which the operator must pay the cash portion of the bonus to any person making that election. A period of 30 days after the date of the Order is common in each instance.

The pooling order provides, in substance, that an owner electing to participate in the well must "pay his proportionate part of the well cost, or furnish security for payment thereof acceptable to the operator" within the time provided.

It is common practice for the operator to accept the written election to participate followed by execution of an operating agreement as satisfactory security, especially where the parties have engaged in joint operations before, or the pooled owner is a substantial operator of established reputation. In other cases, the operator will accept security in the form of an irrevocable letter of credit or an escrow deposit. However, the operator lawfully may demand payment in full in cash if he desires, and there are times where good business judgment compels him to insist on prepayment.

An operator should remember that if he accepts the pooled owner's credit without further security, and the owner later fails to pay, the collection process may be both cumbersome and risky, while the operator must himself advance that owner's share of the well cost. The statute gives the operator a lien upon the interests of other participating owners for their shares of the well cost (52 O.S. 1971 §87.1 (e)), but the lien must be filed and enforced in the same manner as other liens.

By statute the operator also has the right to a non-operator's share of production until well costs are paid; but in the event of a dispute the purchaser will want to hold the proceeds in suspense rather than voluntarily pay them to the operator. And if the well is dry, neither the lien nor any other statutory remedy is of any practical value whatsoever.

It is equally important for the owner who elects to participate actually to pay his share of the well cost, or

be certain that any other arrangements are "acceptable to the operator," on or before the payment date specified in the order. Upon failure to comply with this provision, the right to participate is deemed rescinded and the owner automatically is relegated to the bonus. The notice of election to participate should include an offer to pay well costs on current invoice, thereby placing the burden of demanding advance payment on the operator.

The order also prescribes a time within which the operator is required to pay the bonus, or the cash portion of a bonus comprising cash and an interest. No forfeiture of rights occurs upon failure to pay the bonus on time and the order prescribes no penalty. Occasionally an operator decides not to drill the well and simply defaults on payment of the bonus. However, the order itself undoubtedly has created an enforceable legal obligation in the amount of the bonus in favor of the owner entitled to receive it.

The order also commonly requires the operator to "establish a fund" for holding the cash bonus due any owner whose address is unknown. In practice, no escrow account or actual sequestration is required, and the provision merely creates an obligation to pay an unknown owner if he ever comes forward.

DESIGNATION OF OPERATOR

A deceptively important provision of the pooling order is the designation of the operator of the proposed well. In most cases the applicant already owns the majority interest in the spacing unit, and is routinely named operator. However, there are noteable exceptions where a spirited battle occurs between lessees over operations. The working interest ownership of non-participating pooled owners inures to the operator, at least in absence of a claim by other participants to share therein. A lessee who is promoting the proposed well for a carried interest, or similar remuneration, has a significant financial stake in being designated operator.

Several factors are considered in the selection of the operator, the most important being working interest ownership. All other things being equal, the owner of the largest share of the working interest has the best claim to operations. However, this is not always true, and other factors can outweigh majority ownership.

Second in importance is actual bona fide exploration activity. This is not a simple race to the courthouse, with the earliest applicant getting the nod, but involves such matters as when a well was first proposed and by whom, whether the proposed well is part of a multi-well exploration program, whether a rig has been contracted for, and so on.

Other factors having a bearing on the final selection include the number of wells operated in the vicinity, the extent of developed and undeveloped lease ownership, the availability of operating personnel and facilities, a comparison of proposed costs of drilling and operating the well, and, rarely, the relative experience and competence of the contenders for operating rights.

TIME TO COMMENCE THE WELL

The pooling order specifies a date within which the well must be commenced, generally expressed as a number of days after the date of the order. At present, the Commission seldom grants a period in excess of 120 days. The order always provides that if the well has not been commenced at the expiration of the time prescribed, the pooling order thereupon becomes null and void by its own terms. Just as failure to commence a well within a period prescribed in an oil and gas lease causes the lease to expire, a similar failure causes loss of all rights acquired through the pooling order. An expired pooling order cannot be reinstated and thereafter the pooling process must be repeated from the beginning, including the payment of a new bonus to any party so electing.

The Commission does entertain a motion to extend the time for well commencement, filed in the original cause, providing the motion is filed prior to expiration of the original commencement period. If the motion is timely filed, the hearing and entry of order extending the time may occur after the original deadline.

The most common ground for the request involves rig availability, and in the absence of a protest, the extension of time is granted more or less routinely. Surprisingly, non-participating owners seldom, if ever, appear at the hearing to demand another bonus, to which they would seem entitled as for an extension of a lease.

EFFECT OF POOLING

The detailed rights and obligations of those who by quasi-judicial decree have become partners in the operation of an oil and gas property is a subject requiring far more extended discussion than is possible here. However, a few brief comments may be appropriate.

The legal rights and obligations of the parties stem from the provisions of the pooling order alone, together with those which can be implied from the provisions of the order, or as a matter of law, can be deemed to be created thereby. A party who elects to participate in the well very often executes an operating agreement in a form commonly used in the industry. Such an operating agreement will effectively supersede the pooling order,

especially as to its many detailed provisions which are not detailed in a pooling order. However, the non-operating participant has no legal obligation to execute an operating agreement.

Similarly, an owner of unleased minerals not electing to participate is not required to execute an oil and gas lease. Forced pooling does not amount to a judicial sale of an oil and gas lease or its equivalent and, in fact, the rights gained by the operator under a pooling order are substantially less than those granted the lessee by an oil and gas lease. The practice of demanding execution of a lease prior to paying the bonus prescribed in the pooling order is clearly illegal.

In general, a forced pooling order is effective only as to the well authorized thereby and as to the pooled formations in which it is completed. Remaining largely unsolved are questions such as whether the operator may later deepen or plug back to formations originally pooled but in which not earlier completed and whether the operator may drill a substitute well or additional wells on the unit.

It is unwise in any event to assume that the rights of the respective parties are the same as those arising under an oil and gas lease or an operating agreement. A lease, for all its fine print, is a contract voluntarily created by the parties, as is an operating agreement. By contrast, a pooling order forcibly modifies the parties' property rights in the interests of securing development. Accordingly, the rights and powers imposed by the order should be the minimum necessary to accomplish joint development, and "afford the owner the opportunity to receive his just and fair share of the oil and gas."

POOLING PROCEDURE

It has often been said that nobody should undertake forced pooling except by retaining an Oklahoma City lawyer specializing in oil and gas law, an idea enthusiastically fostered by those very specialists. The fact is, any competent lawyer can handle proceedings before the Corporation Commission with no more uncertainty than is normal in appearing before any tribunal of specialized jurisdiction. The actual problems are those of time and distance inherent in attempting to conduct anything but a major case outside one's home city.

A first essential step is to obtain a copy of the Oklahoma Corporation Commission Rules of Practice (cited OCCRP). These rules contain procedural requirements, especially involving notice, which are superimposed on the requirements of the statute. The rules are not available in any legal publication, but a current copy may be obtained from the Office of the Secretary of the Oklahoma Corporation Commission, Jim Thorpe Building, Oklahoma City 73105.

PRELIMINARY REQUIREMENTS

An application for pooling may be filed by any person who "owns the right to drill" in the spacing unit. No minimum percentage of ownership is required and pooling may be sought by the owner of leasehold interest or unleased mineral interest, however small.

Contrary to widespread popular belief, the applicant is not required by law to negotiate with or even contact the other owners prior to filing an application for forced pooling. Failure to contact owners of unleased minerals may subject the applicant to a tongue lashing at the hands of a landowner-oriented Commission and it would seem good business practice, prior to commencing the proceeding, to make a written offer to each owner to lease on terms which will be offered as the bonus provisions for the pooling order. Neither law nor policy requires prior contact of other lease owners and inasmuch as prior contact may sometimes set off a race to the courthouse to claim operations, an applicant may safely file first and negotiate later with other lessees.

The drilling and spacing unit is the tract of land within which the oil and gas interests are pooled for joint development. Consequently, the lands involved must have been designated by a spacing order as a single drilling and spacing unit for each formation sought to be pooled. Care must be exercised to include in the pooling application every potentially productive formation; recognizing that spacing orders entered some years ago may omit formations later determined to be potentially productive.

The designation of the names for the various formations is a geological process which remains a mystery to the uninitiated and regrettably, there is a good deal of inconsistency in the terminology. Different names are used for the same formation in different areas and the same formation is found at widely differing depths. A series of formations, each bearing a recognized name, is sometimes spaced under a generic name for the group and sometimes by the names of the individual members. A single named formation may be further broken down into sub-classifications (upper, lower, middle, etc.) and separately spaced. The only assistance that can be offered is that there is a formation correlation chart in wide circulation which sets out in order of depth the names of the major series and the indivudual formations for various areas of Oklahoma.

Any formation not already spaced must be spaced before the Commission has jurisdiction to pool interests therein. A separate application to space all or some of the formations involved may be filed contemporaneously with the pooling application. The spacing applicaton is given the earlier number, and docketed ahead of the pooling application. The causes normally are set for

hearing at the same time and the spacing application is heard first. Upon request, the Commission will designate the date of the hearing as the effective date of the spacing order. Then, the pooling order, bearing the later date on which signed, will meet the jurisdictional requirement that the spacing unit be in existence at the time pooling of interests therein is ordered.

APPLICATION

Rule 10, OCCRP, prescribes contents of pleadings. Of utmost importance in a pooling case is the caption which requires an accurate recital of the following: (1) the name of the applicant, (2) that the application is for pooling interests, (3) the names of the formations to be pooled, and (4) the description of the spacing unit involved, including description, section, township, range and county. Each application should involve a single drilling and spacing unit.

Under Rule 14 (d), OCCRP, there can be no amendment to an application for pooling, and any errors in the above information can be corrected only by dismissing the action and filing a new one. The reason for this seemingly over strict rule is that the filing of an application sets in motion an intricate process of record-keeping and reporting, which would become hopelessly confused by a liberal policy as to amendments. Meticulous draftsmanship is wise in any event, because there are times when the necessity of dismissing and refiling a cause not only will cause the lawyer embarrassment, but will result in serious financial consequences to the applicant.

Under Rule 10 (c), OCCRP, the body of the application consists of four paragraphs: (1) parties, (here normally limited to name and address of the applicant), (2) allegation of facts, (3) legal authority (here 52 O.S. 1971 §87.1) and (4) relief sought. The allegations will constitute a modest expansion of the information in the caption.

The mechanics of filing an application include: (1) calling the Office of the Secretary to obtain the cause number, and a hearing date; (2) sending or delivering an original and six copies of the application and an original and two copies of the notice (described below) to the Secretary, of which one of each will be returned; (3) there is no filing fee.

NOTICE

An application for pooling must be accompanied by a Notice and Order for hearing. Pooling applications are automatically referred to a Trial Examiner, unless an emergency exists which justifies a setting before the Commission en banc. A form of Notice and Order Referring and Setting the Cause for Hearing is set out in Rule 11 (c), OCCRP, which can be adapted for hearing before the Commission.

The Notice and Order must be published one time in a newspaper in Oklahoma County (usually the Daily Law-Journal Record) and also one time in a newspaper published in each county where any part of the land is located. Publication must be at least ten days prior to the hearing. The applicant's attorney must transmit the notice for publication and should direct that two copies of the affidavit of publication be mailed direct to the Commission. This publication is a jurisdictional requirement.

In addition to publication, Rule 8 (d), OCCRP, requires the applicant to mail a copy of the application and notice by regular mail to "each owner within the drilling and spacing unit." While the Commission's jurisdiction over the application is not dependent upon compliance with this rule, it can be accepted as a principle that the interest of an owner is pooled only if notice is mailed to him pursuant to this rule.

Mailing is excused in the event the owner's address is unknown, and it is easy enough to list an owner as "address unknown" when his whereabouts is not readily available. However, there is great risk in this method, because if such an owner later comes forward and proves that he could have been located with reasonable diligence, his status is that of an unpooled co-tenant. If the well by then has proved to be a profitable one, he can claim his share of total production, less his share of drilling and operating expense.

Pooling is not ordinarily intended to serve as a substitute for a quiet title action and the Commission has no power to cure titles or adjudicate adverse claims by means of a pooling order. However, if all possible claimants to an interest are joined, and none participate, the result ordinarily is that the purchaser will release the working interest portion of sales proceeds to the operator, holding only the royalty in suspense.

The names and addresses of parties pooled must be set out in an Affidavit of Mailing, which by Rule 8 (d) (1) must be filed prior to the hearing. Owners whose addresses are unknown also should be listed in this affidavit. The affidavit often is filed contemporaneously with the application; although sometimes it is withheld until the hearing in an effort to confound the "vultures" who make a business of scanning these affidavits and then attempting to locate and lease outstanding interests, armed with knowledge that a well soon will be commenced on the unit.

HEARING AND ORDER

On the day set for hearing, the Trial Examiner's docket is sounded by the Chief Trial Examiner and the causes assigned to individual examiners. A great majority of conservation applications are uncontested and those causes are heard first. At the conclusion of an uncontested hearing, if the examiner is satisfied with the evidence, the cause is recommended. Thereupon, a proposed order is prepared by counsel for the applicant and delivered to the Trial Examiner, where it is reviewed by him and other affected staff members and, if in proper form, it is forwarded to the Commission for official consideration and signature.

When a case is protested, the Trial Examiner prepares and files his own written report. This report is mailed to all parties appearing in person or by counsel, along with a letter setting out when the report will be officially filed. Rule 24, OCCRP, provides that any party may file written exceptions to the Trial Examiner's report within five days after it is filed. A copy of the exceptions must be mailed to each party of record. If exceptions are not filed, the applicant's counsel prepares an order embodying the Trial Examiner's report.

The Commission gives notice by mail to all parties of the date upon which it will hear exceptions filed by any party. The exceptions are presented to the Commission en banc in the form of argument only, without presentation of any evidence. The Commission prepares and enters its final order in due course thereafter.

Appeal from an Order of the Corporation Commission is to the Supreme Court of Oklahoma, by Petition in Error filed within 30 days after the date of the Order appealed from. Although Rule 26, OCCRP, authorizes a Motion for Rehearing, or for other modification of the Order, such a motion does not extend the time for filing an appeal, as is the case in District Courts.

CONCLUSION

In all conservation proceedings before the Corporation Commission, the emphasis is upon speed. The size of investment involved in every proceeding makes delay extremely costly. The oil and gas industry simply could not function if its regulatory process proceeded at the normal pace of even the speediest of court systems. As a result, a conservation application such as forced pooling can be fully processed in as little as about three weeks and even a hotly contested proceeding, including appeal to the Commission en banc, can be fully concluded in about 90 days.

The Commission and its staff are entitled to high praise for successfully administering the conservation laws rapidly and with a minimum of confusion. Today the federal Department of Energy is moving rapidly to take over the entire oil and gas regulatory process and no doubt eventually will succeed in the effort. Rest assured that whenever the regulatory process is under the control of the federal energy bureaucracy, both speed and common sense in its administration will rapidly disappear.

Reexamining Nesbitt: How Horizontal Wells Have Changed Pooling in Oklahoma Oil and Gas Law

By Ronald Merrill Barnes, Grayson Merrill Barnes and Denver Morrissey Nicks

IN 1979, THE *OKLAHOMA BAR JOURNAL* PUBLISHED AN ARTICLE titled "A Primer on Forced Pooling of Oil and Gas Interests in Oklahoma," which detailed the intricacies and applications of the state's forced pooling statute. Authored by Oklahoma attorney Charles Nesbitt, the article may have had an unassuming title, but its effect was anything but modest. In the years since it first appeared, Mr. Nesbitt's primer on forced pooling has become extremely influential. Decisions of the Oklahoma Corporation Commission (Corporation Commission) on pooling matters frequently cite the piece and generally mirror Mr. Nesbitt's positions.

Reports of administrative law judges and referees routinely cite Mr. Nesbitt's article as the authority for decisions on fair market value determinations, selections of operators and other matters related to forced pooling. Thus, when appellate courts cite the Corporation Commission in their decisions, they are very often adopting Mr. Nesbitt's positions into case law. Perhaps that level of impact was to be expected from an article authored by a Yale-educated lawyer who served as the state's attorney general before spending seven years as a member of the Corporation Commission, nearly all of them as its chair.

Mr. Nesbitt defined forced pooling thusly: "The law provides that where there are separately owned tracts, or undivided interests, or both, within an established spacing unit, and the owners have not voluntarily agreed upon joint development, and one owner proposes to drill a well on the unit, the Corporation Commission may 'require such owners to pool and develop their lands in the spacing unit as a unit.'"

While that description remains as serviceable today as ever, and Mr. Nesbitt's 1979 article has remained influential, the energy industry has changed considerably in the 40-plus years since the article first appeared in print. Many of those changes have direct ramifications on some of Mr. Nesbitt's assumptions and conclusions, particularly with respect to well spacing, correlative rights, operator selection and, most importantly, the doctrine of waste. Some of these changes relate to the development of case law, in which questions of law that had not been definitively answered in 1979 are settled today, while others reflect changes to the standard terms now common in pooling orders and operating agreements reached privately between the parties. Technological changes since Mr. Nesbitt wrote his seminal article – most notably

the advent of horizontal drilling – have upended some of his basic presuppositions, which warrants reconsideration of his core conclusions. This article will revisit the landscape of forced pooling in Oklahoma, see where Mr. Nesbitt's piece remains relevant and explain where it's in need of an update.

But first, let us consider a question, the answer to which will form the foundation for the rest of this article:

WHY DOES THE CORPORATION COMMISSION REGULATE OIL AND GAS IN THE FIRST PLACE?

The mayhem in the early years of oil and gas production in Oklahoma was aptly captured by one historian describing the scene after an oil field was discovered under Oklahoma City in 1928: "wild wells, floods of crude, and almost uncontrollable flows of natural gas."[1]

It is this state of affairs that the Corporation Commission was tasked with bringing under control – massive overproduction, barrels of wasted oil, mere black sludge on the ground, some untold amount left unrecoverable beneath the surface and natural gas escaping freely into the air.

The power of the Corporation Commission to regulate the exploitation of subsurface oil and gas deposits is premised upon the United States Supreme Court's 1877 decision in *Munn v. People of State of Illinois*, in which the court recognized the sovereign authority of state governments to regulate private industry within their borders when that industry is of a kind that affects the public interest.[2] Munn & Scott had been found liable for violating a properly enacted statute that set maximum rates for the storage and transportation of grain.[3] In upholding Munn & Scott's conviction, the court held that the state of Illinois had properly exercised its inherent police power to regulate the use of private property when such use will be "of public consequence, and affect the community at large."[4] Chief Justice Morrison Waite – a former corporate and railroad lawyer[5] – wrote for the court, stating, "When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public *for the common good*, to the extent of the interest he has thus created."[6]

Importantly, Justice Waite found support for the court's position in the very foundations that underlie all human society and governance. The social contract, he wrote, implicitly authorizes "the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government and has found expression in the maxim *sic utere tuo ut alienum non laedas*," the Latin maxim meaning that one ought not use that which is his in such a way as to harm that which is someone else's.[7] "From this source," writes Justice Waite, "come the police powers."[8]

For the founding generation of the early republic who laid the foundations of our legal traditions and political culture – most of it imported wholesale from Britain – the terms *police* and *economy* were effectively interchangeable.[9] As is ever the case, we can look to the same place the founders looked – the authoritative English jurist Sir William Blackstone – to better understand the concept of the police power and how it is meant to fit into the greater American polity, to wit: "By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, *like members of a well-governed family*, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations."[10]

Mr. Blackstone's deployment of the metaphor of a well-governed family is no accident. As Mr. Blackstone well knew,[11] the very idea of economy comes to us from the ancient Greeks, for whom economy meant "government of the household for the common good of the whole family."[12] Hence Mr. Blackstone's odd-to-modern-eyes spelling of the word with an "o" up front: *oeconomy,* from the Greek *oikos*, meaning house, and *nomos*, meaning law.

Thus, the government's power over police and economy is essentially and inextricably paternalistic, albeit in a rather more positive sense of the word than that to which the modern ear is accustomed; the police power is a power that, according to the very most fundamental ideas that underpin Western civilization, ought ever to be directed toward the betterment of the common good, in the same way a father looks after the well-being of his entire family.[13]

The Corporation Commission was created by Article 9 of the Oklahoma Constitution to exercise the state's police power – the power to regulate private industry for the public good.

The Oklahoma Legislature gave teeth to this purpose in the domain of oil and gas when, in 1915, it passed the Oil and Gas Conservation Act, specifically conferring upon the Corporation Commission the power to regulate oil and gas drilling in the state for "the protection of the rights of all parties entitled to share in the benefits of oil and gas production."[14]

To the 21st-century reader, the Oil and Gas Conservation Act of 1915 has a rather misleading name in that its purpose is not to conserve resources in the sense of preventing their exploitation but to conserve them in the sense of ensuring their full – *i.e.*, not wasteful – exploitation. The act directs the Corporation Commission to regulate the industry so as to ensure that oil and gas stays in the ground until it "can be produced and utilized without waste."[15] The act is careful to establish that, in addition to its ordinary meaning, the word *waste* in the statute refers also to "economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands."[16] Waste, as defined by the statute, is not only oil that may spill onto the ground or gas that escapes into the air, it is also underground waste, oil and gas that could technically be extracted but instead is left in the ground by a producer, as well as economic waste, hydrocarbons extracted at too high a cost or sold at too low a price to be financially advantageous to mineral owners, operators and the tax-funded state coffers.

In 1947, as part of the ongoing effort to minimize waste and encourage the full development of the state's mineral resources, the Oklahoma Legislature passed the forced pooling law.[17] The law provides that where there are separately owned tracts or undivided interests within a spacing unit and the mineral and/or leasehold owners have not agreed on joint development and one owner proposes to drill, the Corporation Commission can require owners to pool and develop their interests all together, as a unit.[18]

In 1943, in the case of *Hunter Co. v. McHugh*, the United States Supreme Court upheld the constitutional power of a state "to regulate production of oil and gas so as to prevent waste *and* to secure equitable apportionment among the landholders."[19] Here, we have an instance of an extremely important three-letter conjunction: *and*. The purpose of the power is to prevent waste *and* secure benefits to landholders – two separate purposes. If the latter is a benefit to landholders, then to whom is the former a benefit?

The Oklahoma Supreme Court provided a direct answer to that question in 1957 when it held, "To curtail over-production and waste *for the benefit and protection of the general public,* restraints had to be placed around the individual's rights to develop and produce [oil and gas]."[20] The curtailment

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of waste in the production of hydrocarbons, the Supreme Court said, is a benefit conferred on the general public of the state.[21]

This position is consistent with the purpose of the Corporation Commission: to exercise the state's police power, which is to say, the state's power to regulate the use of private property in the interest of the common good. While mineral owners and oil and gas companies have an obvious pecuniary interest in the development of hydrocarbons, the doctrine of waste points to the interest that all citizens of Oklahoma have in the full development of the mineral resources of the state.

Even decisions that circumscribe the rights and interests of the state acknowledge the state's underlying interest in preventing waste for the common good, including in instances where it has no other claim to a right or interest, to wit: "The state has no title to oil and gas in place, and is without power to appropriate the oil and gas in and under the lands of one owner to the use and benefit of another owner. *The only interest the state has under its police power is to prevent actual waste* and to provide equal privileges to every landowner to reduce such products to possession and place them in the channels of legitimate commerce."[22] The United States Supreme Court has similarly endorsed the idea that, where they are in conflict, certain public interests (such as the prevention of waste in oil and gas production) take precedence over private property interests.[23]

The plain fact that the doctrine of waste exists to protect the interests not merely of mineral owners but of all Oklahomans was once self-evident. The Oklahoma Supreme Court said as much in terms that could hardly be clearer when it held in 1933: "Gas energy should be preserved and properly utilized in order to extract all of the oil from oil-bearing sands. This theory recognizes the interest of the state in the proper utilization of all its resources. After all, such theory is particularly proper in Oklahoma, because oil and gas constitute to a large degree the basic wealth of the state. *This basic wealth and basis of taxation and income should not be wasted. The waste of any natural resource that cannot be replaced should be and is against public policy.*"[24]

Resting, as it does, on the police power, the mandate of the Corporation Commission is thus to regulate those businesses in which the general public has an interest in such a way as to benefit the general public. With respect to the Corporation Commission's jurisdiction over the oil and gas industry, that amounts to the prevention of waste and protection of correlative rights.[25]

SPACING AND POOLING ORDERS

In some respects, little has changed since 1979 concerning the pooling of hydrocarbons for development. Mr. Nesbitt wrote that in "simplest terms, the pooling order offers the non-consenting owner of oil and gas rights a choice either 1) to pay his proportionate share of the cost of the well and receive the same share of the working interest; or 2) to receive a bonus in lieu of the right to participate in the working interest of the well." That remains broadly true, though these days, an irrevocable letter of credit satisfactory to the operator securing the payment is often included among the options, as is a no-cash, higher royalty alternative. Pooled mineral owners are entitled to know how much it will cost to participate in the well if they elect to do so and what bonus (or other consideration) they will receive if they do not. Though so-called "back-in" interest arrangements were once an option commonly offered to owners, they are virtually nonexistent these days.[26]

Pooling orders specify the deadlines for certain events, like the number of days in which an owner must elect to participate or not, and many of these time frames have changed since Mr. Nesbitt's article was published over 40 years ago. A pooled mineral owner now has 20 days (formerly 15) in which to elect to participate in the well or receive an option in lieu of participation, a participating owner now has 25 days (previously 20 days) to pay their portion of the well cost, and an operator now has 35 days (formerly 30 days) to pay the bonus to a non-participating owner. In the 1970s, the Corporation Commission very seldom allowed an operator to begin drilling a well more than 120 days from the issuance of a pooling order, but because of the technical complexity involved, fractional ownership and the unpredictable availability of rigs and rig hands, operators today are frequently allowed up to a full year to commence the initial horizontal well. Even that deadline can be extended for good cause, though if an extension is granted, the operator is typically required to increase the size of the bonus by an amount proportionate to the number of days the order is extended as compared to the total days to commence operations under the original order. Also, no new election is authorized under the extension.

Well into the 1980s, it was uncertain whether each pooling order covered only a single wellbore or an entire spacing unit, regardless of how many wells were drilled within the unit into the pooled common sources of supply. In order to clarify its position on this issue, the Corporation Commission enacted a policy declaring each pooling to be for a single wellbore, not the unit. The Court of Civil Appeal's decision in *Amoco Production Company v. Corporation Commission* put an end to that practice, holding that a pooling must be done by the unit, not the wellbore, which remains the law today.[27] Because the courts have concluded that poolings are by the unit, not the wellbore, pooling orders subsequent to the *Amoco* decision include language concerning elections in subsequent wells.

During the turbulent early years of Oklahoma's oil boom, oilmen drilled wells nearly on top of one another in a mad race to suck as much black gold from the ground as possible faster than the competition. Thus, in Mr. Nesbitt's day, as it is today, one of the chief ways regulators went about preventing waste was by limiting the number of wells allowed in any given area. Spacing units for oil formations less than 4,000 feet deep were capped at 40 acres and 80 acres for formations between 4,000 and 9,990 feet deep.

Properly spacing wells is still an important consideration, but horizontal drilling has radically changed the calculus by adding to the types of reservoirs that can be developed and increasing the amount of reserves that can be recovered by a single well. Consequently, spacing units in today's energy environment have dramatically increased in size – up to 1,280 acres for horizontal wells comprised of multiple sections.

Horizontal drilling has introduced novel challenges too numerous to address in full in this article, but one challenge of particular concern is what is known as the "parent-child effect," which can have a detrimental impact on all wells throughout an entire spacing unit. This pernicious phenomenon can occur when an operator does not drill, frack and open for production multiple horizontal wells in a spacing unit all at once ("batch drilling" is the industry term for the practice of drilling multiple wells together, and "simultaneous completion" is the industry term for completing, fracking and producing the wells at the same time) and instead waits to assess the productive capacity of the first well before drilling additional wells. When drilling horizontally in this way, the first well can alter subsurface conditions – for example, by depressurizing the area around the "parent" well – such that the efficacy of fracks on subsequent "child" wells is reduced. The "child" wells, in turn, sap the vitality of the preexisting "parent" well. The productive capacity of all wells in a spacing unit is thus likely to be diminished when wells in the unit are not drilled and fracked together so as to maintain underground pressure until the wells are turned on in unison. The net result is a waste of hydrocarbons left in the ground that would have been recovered had the wells been batched drilled and simultaneously completed.[28]

Due to the potential harm of the parent-child effect, merely ensuring that wells are spaced a certain distance from one another can be an insufficient means of fulfilling the Corporation Commission's all-important directive to minimize waste. Instead, a comprehensive development plan may be required, wherein all the wells planned for a spacing unit are batch drilled and simultaneously completed, which can affect how well cost is tabulated and allocated.

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Mr. Nesbitt wrote that a pooling order "specifies the individual formations pooled and the well cost ordinarily is calculated to the deepest formation to be tested."[29] Though that remains broadly true, when a unit is batch drilled, calculations of well cost in the pooling order must take into account all of the planned wells at the outset. On the other hand, batch drilling generally results in significant cost savings on the whole, an additional consideration today's pooling orders must consider.

Horizontal drilling and the creation of multiunit horizontal wells have also changed the way royalties are allocated. When a multiunit horizontal well crosses a section line, the amount of royalty allocated to royalty owners in a section corresponds to the proportion of the completion interval – the segment of a horizontal pipe that is perforated to allow for the flow of hydrocarbons – in the lateral in that section. So, for example, if a hypothetical horizontal well cuts across two units and three-fourths of the completed lateral portion of the well is in one unit and one-fourth is in the adjacent unit, royalties and costs alike would be allocated in equivalent proportions (75% and 25%, respectively).

Another novel issue that did not exist before the introduction of horizontal drilling is the practice of drilling the downhole portion of the well by starting outside the unit. This presents the question of whether or not it is necessary to lease some part of the minerals drilled offsite and the question of whether information learned from the offsite hole is the property of the mineral owner(s) to whom none of the well's actual production will be attributed. This matter remains unresolved but is likely to be taken up by courts in the coming years.

Fair market value (FMV) as a legal term has the same meaning it did when Mr. Nesbitt defined it as "the bonus which would be paid for a lease between willing contracting parties, neither under compulsion."[30] However, the advent of multisection units has necessitated changes in how FMV is calculated. For instance, the sheer size of today's spacing units encompasses more units in the calculation. Traditionally, FMV takes into consideration the amounts paid to mineral owners in a unit and the surrounding units in the past year. Larger spacing units have a larger perimeter, which means there are more surrounding units to bring into the calculus. Multiunit transactions are excluded from the determination of FMV, as are transactions made by third parties for lands in the unit to be pooled after the filing of the pooling. Any transactions that do not qualify as "arm's-length transactions" under the law likewise are not considered when determining FMV.

The mechanics of horizontal drilling have also led to a change in what exactly is pooled in a pooling order. In a vertical well – which is to say all wells in Mr. Nesbitt's day – all the subsurface spaced and named zones in the pooling above the deepest point of the well (uphole zones) are included in the pooling, and the operator is thus able to complete whatever uphole portions of the well they choose to. But horizontal wells work differently. They are rarely, if ever, constructed in a manner such that it is technically feasible to complete for production the uphole zones from the target zone of the lateral component of the well. Thus, in a pooling for a horizontal well, operators are only permitted to pool, at most, the target zone and the zones directly above and below it. Unlike the operators in Mr. Nesbitt's day, today's operators do not get to hold all the uphole zones in a well. Because a pooling order for a horizontal well does not automatically include every zone spaced between the surface and the target zone, when a unit has prior production, parties being pooled have the option of electing in or out of pooled zones. For example, if zones one and two are pooled, parties have the option of electing to participate in zone two (the deeper zone) while electing out of zone one, or they can elect out of both zones. A party is only entitled to receive the portion of the FMV allocated to zones they elect out of. So, in the above scenario, if zone one is allocated 40% of the bonus and zone two is allocated 60% of the bonus, the party electing out of zone one and participating in zone two would receive 40% of the FMV bonus.

Because of the size of today's spacing units and the fact that pooling is done by the unit rather than the wellbore, more often than not, operators know before they ever start drilling in a unit that it will require multiple wells to fully develop the unit. Operators may reduce the bonus associated with subsequent wells, as each well reduces the remaining reserves available to wells that follow. Only a party that participated in the initial well has the right to elect differently in a proposed subsequent well. Additionally, only an owner who continues to elect and properly participate in a subsequent well maintains the right under a pooling order to elect differently in future wells. Once a party elects out of a subsequent well, that party is out of that well and any subsequent wells that may follow, but they remain in any well they properly elected to participate in, assuming they also properly paid their share of costs.

Because of the complexity involved in horizontal drilling and, in many cases, efforts to curtail the parent-child effect, the relative competence of an operator is a more important consideration today than it was in the days when wells were only drilled vertically.

DESIGNATING THE OPERATOR

One aspect of Mr. Nesbitt's article that is ripe for wholesale reappraisal, in light of the monumental changes in the way the industry drills for hydrocarbons, is the designation of the operator of a spacing unit subject to a pooling order. In Mr. Nesbitt's time, as he put it, "[a]ll other things being equal, the owner of the largest share of the working interest has the best claim to operations."[31] Other factors to consider, Mr. Nesbitt added, include the extent of an operator's activity in the area, the availability of personnel and facilities, cost comparisons "and, rarely, the relative experience and competence of the contenders for operating rights."[32]

Due to the innovation of horizontal drilling – with its added complexity and the potential of triggering the parent-child effect – this is no longer necessarily true. While the relative size of a proposed operator's ownership stake in the working interest is still an important consideration, all other things are rarely equal.

Because of the complexity involved in horizontal drilling and, in many cases, efforts to curtail the parent-child effect, the relative competence of an operator is a more important consideration today than it was in the days when wells were only drilled vertically. Furthermore, taking waste into account, it works differently today than it once did.

In Mr. Nesbitt's list of factors to consider when designating an operator, the primacy of waste as a consideration was merely implied. In 1979, it could be presumed that the operator with the greatest working interest ownership (*i.e.*, the greatest investment in the outcome), the most wells in the vicinity, the highest availability of personnel, etc. would operate the well most effectively and efficiently – which is to say, with the least amount of waste. Today, however, because of horizontal drilling, the parent-child effect and other potential problems, an operator often must devise a plan that accounts for waste from the very beginning and make highly consequential decisions that weigh the cost of extracting reachable hydrocarbons against the value of doing so in light of the operator's unique financial situation. One operator may assess that the return on investment of extracting a certain amount of recoverable oil and gas, though still profitable, would not be profitable *enough* and choose to leave it in the ground, whereas for another operator, extracting that extra amount might be a worthwhile investment. Here, waste becomes a consideration unto itself in a way it was not before. Mr. Nesbitt's other factors should still be taken into account when designating an operator, but because the Corporation Commission's reason for being – as it relates to hydrocarbons – is to minimize waste for the benefit of all Oklahomans, the proposal that will result in the least amount of waste naturally ought to receive preferential consideration.

The role of private agreements in selecting the operator following a pooling is another subject ripe for appellate review. At the outset of a pooling, it is the Corporation Commission's responsibility to select an operator based on the various considerations detailed above. But it has long been industry practice that a pooling order is a bare-bones document, lacking

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many terms that may be included in a more detailed private agreement executed after the pooling order is in place, such as, for instance, terms that govern succession of operator. As Mr. Nesbitt wrote, "Such an operating agreement will effectively supersede the pooling order, especially as to its many detailed provisions which are not detailed in a pooling order."[33] As stated previously, private agreements are contracts that implicate the private rights and obligations of parties to the agreement, and the power to adjudicate matters related to private agreements properly belongs to the district courts, as expressed by the Oklahoma Supreme Court in *Tenneco Oil Co. v. El Paso Nat. Gas Co.* Though this remains true, in recent years, reports of the Corporation Commission have at times asserted that the power to select an operator belongs solely to the Corporation Commission in every instance, regardless of the existence of a private agreement that dictates the succession of operator between the parties to the agreement. This position would seem to contravene Mr. Nesbitt's assertion – as true today as it was when he made it in 1979 – that private operating agreements supersede the pooling order with respect to terms not addressed in the order, as well as exceed the Corporation Commission's jurisdictional mandate to decide matters involving public, not private, rights.

JURISDICTION

Identifying the precise boundaries of the Corporation Commission's jurisdiction is a persistent and recurring point of controversy, and for good reason. Determining whether the power to decide an issue properly belongs to the district courts, tribunals of general jurisdiction that exist to resolve controversy, or the Corporation Commission, an administrative body with quasi-judicial authority of limited jurisdiction that exists to exercise the state's police power, can have a significant influence on the outcome of a dispute.[34]

Mr. Nesbitt notes that certain legal questions around orders and costs – namely regarding the enforceability of the Corporation Commission's judgments and whether or not they are binding on district courts in litigation arising out of a dispute over costs – remained, at the time, unsettled. Oklahoma's appellate courts have since issued decisions to offer some clarity around these and other issues.

In *Gulfstream Petroleum Corp. v. Layden*, the Oklahoma Supreme Court stated with refreshing finality that the Corporation Commission's decisions regarding costs are indeed binding on district courts, holding that, except with respect to inquiries into the Corporation Commission's jurisdiction, "[g]enerally, the district courts of this state lack the jurisdiction to even inquire into the validity of [Corporation Commission] orders."[35]

This is not to say that the district courts are powerless in matters related to the Corporation Commission. In *Tenneco* and other cases in its lineage, the Oklahoma Supreme Court delineated the boundaries of the jurisdictional tug-of-war between these two fonts of judicial authority. In keeping with the Corporation Commission's essential purpose as it relates to oil and gas – that being, in simplest terms, the protection of correlative rights and prevention of waste – the Corporation Commission holds sway when public rights are at issue, such as in questions regarding spacing orders, pooling orders and other "enactments for the conservation of oil and gas."[36] Furthermore, "the power to clarify or interpret any Commission order" in its aspects that implicate public rights rests squarely with the Commission.[37] Meanwhile, private rights, including – in at least some respects – interpreting Corporation Commission orders, are the province of the district courts, to wit: "Respective rights and obligations of parties are to be determined by the district court."[38]

In *Toklan Oil & Gas Corp. v. Citizen Energy III, LLC,* one party accused the other of transferring ownership of a sizable overriding royalty interest to a third party with the purported intention of so burdening the leasehold as to make developing it financially nonviable for the other party. Without addressing the ultimate issue of whether or not the party was hindering development (*i.e.*, causing waste) by transferring ownership of an override for a dubious purpose, the Oklahoma Court of Civil Appeals held that "the Commission does not have jurisdiction to alter the ownership of royalty or to shift royalty away from the party taking the working interest pursuant to a pooling order."[39] Were the Corporation Commission to do so, it would be adjudicating matters of contract, which is to say matters of private rights, which would exceed the bounds of its limited jurisdiction.

NOTICE

One significant and conspicuous change in the law since Mr. Nesbitt's article was published has to do with notice requirements. Mr. Nesbitt wrote in 1979 that "[n]either law nor policy requires prior contact to other lease owners" before initiating a pooling proceeding.[40] Today, 52 O.S. §87.1(e) requires that an applicant first make a bona fide effort to reach an agreement with lease owners and explicitly requires that notice be attempted by mail with return receipt requested as well as published in a newspaper of general circulation in Oklahoma County and in some newspaper, at least 15 days prior to the date of the hearing, in the county (or in each county if there is more than one) in which the lands embraced within the spacing unit are situated. Furthermore, efforts to give notice to landowners must be more than merely perfunctory. In *Harry R. Carlile Tr. v. Cotton Petroleum Corp.*, a case involving notice requirements in a spacing proceeding before the Corporation Commission, the Oklahoma Supreme Court held that notice by publication in a periodical was inadequate in that instance.[41] Today, it may be inadequate for any purpose, at least in the absence of more robust attempts to contact a landowner. In 2020, the Oklahoma Supreme Court held in *Purcell v. Parker* that when "affected landowners are known, or reasonably discoverable, notice provided by publication results in an unconstitutional exercise of jurisdiction and a denial of due process."[42]

What precisely happens once notice has been given – or is *supposed* to happen, particularly with respect to the offer of a private agreement versus forced pooling – has become a tricky question of late, and an apparent conflict between law and custom suggests that the matter may require judicial attention in the coming years. However, the law appears on its face to require that operators make a good faith attempt to reach a private accord with mineral owners before subjecting them to forced pooling. Since the early 2000s, operators have tended to make less than vigorous efforts to reach such agreements before resorting to pooling, and the joint operating agreement (JOA) of old is rarely seen today. Instead, operators often send owners a bare-bones well proposal with terms identical to those in the forced pooling, in effect offering mineral owners the option of being pooled by election or pooled by force, a distinction without a difference if ever there was one. Appellate courts have yet to weigh in on the validity of the practice.

COMMISSION PROCEDURE

The procedure followed during proceedings at the Commission is, in broad strokes, largely the same as it was in Mr. Nesbitt's day, but there have been significant changes as well.

As in Mr. Nesbitt's day, the majority of conservation applications are still uncontested, and procedure, as it regards uncontested applications, is little changed – uncontested cases are heard the day the notice sets them for hearing. Contested cases, on the other hand, are another matter.

Today, contested cases are heard Wednesday through Friday on a docket dedicated solely to protests – an innovation that allows more time for the responding party to prepare for a protested proceeding. Prior to the hearing, a pre-hearing conference agreement is filed setting out the issues, stipulations, timeline for exhibit exchanges and witness lists. In many cases, once an application has been heard as a protest, the prevailing party prepares the initial draft of the report and submits it to the administrative law judge (ALJ, a position called the trial examiner in Mr. Nesbitt's day), who reviews the report, makes changes as they may deem appropriate and then files it. A nonprevailing party can still take exception to the report, in which instance the commissioners usually remand the case to an

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appellate referee. If the nonprevailing party is unsuccessful at that stage, they can again request that the Corporation Commission take up their appeal for an en banc hearing, though the commissioners rarely grant such requests. Unlike the ALJs and referees, when the commissioners do take up an appeal, they can make a decision without hearing new arguments from either side.

CONCLUSION

The Oklahoma Corporation Commission has an enormous job with great responsibility. Those who come to the Corporation Commission to do their business have invested millions of dollars in oil and gas exploration, and the success or failure of their investment depends, in part, on decisions made by the Corporation Commission on a daily basis. The Corporation Commission helps generate millions of dollars of revenue for owners of oil and gas rights and millions more in taxes that fund Oklahoma's state coffers. The Oklahoma Policy Institute reported in August of this year that, from May 2022 to May 2023 alone, taxes collected from oil and gas production totaled $1.91 billion, providing a vital source of funding for schools and state and local government alike. One percent of all gross production taxes is returned to the counties and schools where the wells are located, and the remaining revenue goes to the state.[43] The Corporation Commission is tasked with making decisions that encourage oil and gas development, all the while endeavoring to prevent waste and ensure that this precious nonrenewable resource is used for the benefit of all Oklahomans today and in the future.

The other most basic charge to the Corporation Commission is to ensure that all owners get their fair share of proceeds from the production of hydrocarbons produced from minerals owned by leasehold owners as well as mineral owners. The Corporation Commission works tirelessly to protect the correlative rights of all owners whose minerals are affected by drilling operations.

Thanks to the companies and individuals who spend hundreds of millions of dollars drilling horizontal wells within our state and groundbreaking advancements in drilling technology in recent years, we have seen a wonderful resurgence of productivity in Oklahoma's hydrocarbon deposits. Thanks to the Corporation Commission – including commissioners, technical experts, lawyers, administrative courts and staff – that resurgence of productivity is responsibly managed to prevent waste of hydrocarbons and ensure they are efficiently exploited. Our state continues to be a national leader in both endeavors. With the incredible innovations made over the past 50 years and new innovations sure to be just over the horizon, Oklahoma will remain a leader in bringing dependable energy to the citizens of our state and beyond. We have come a long way since the Oklahoma conservation statutes were first codified, and we expect there remains a long and bright future for Oklahoma's oil and gas industry for many years to come.

It is hard to believe how far the oil and gas industry, in partnership with the Oklahoma Corporation Commission, has come since Mr. Nesbitt's article was published in 1979. In his recent book, *Game Changer,* founder of Continental Resources and pioneering innovator in horizontal drilling Harold Hamm aptly summed up the significance of the horizontal drilling revolution and its effect on all our lives: "The horizontal drilling phenomenon has been referred to as a miracle, and it will go down in history as one of the top 10 technological achievements of the 20th century. Horizontal Drilling transformed everything connected to energy."

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4. *Id.* at 126.
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8. *Id.*
9. Markus Dirk Dubber, "'The Power to Govern Men and Things': Patriarchal Origins of the Police Power in American Law," 52 *Buff. L. Rev.* 1277, 1345 (2004).
10. 4 William Blackstone, *Commentaries on the Laws of England* 162 (University of Chicago Press, 1979) (emphasis added).
11. "... forms a part of oeconomics, or domestic polity; which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases." 1 William Blackstone, *Commentaries on the Laws of England* 264 (University of Chicago Press 1979).
12. Jean-Jacques Rousseau, *Discourse on Political Economy, in On the Social Contract with Geneva Manuscript and Political Economy* 209, 209 (Roger D. Masters ed. and Judith R. Masters trans., 1978) (1755).
13. 4 Blackstone, *supra* note 16, at 127.
14. Oklahoma Corporation Commission, "Oklahoma Corporation Commission History," https://oklahoma.gov/occ/about/history.html. Last accessed April 26, 2022.
15. Okla. Stat. tit. 52, §238 (1915).
16. Okla. Stat. tit. 52, §273 (1915).
17. Charles Nesbitt, "Primer on Forced Pooling of Oil and Gas Interests in Oklahoma," *OBJ* 50, no. 13 (1979): 648-656.
18. *Id.*
19. *Hunter Co. v. McHugh*, 320 U.S. 222 (1943) (emphasis added).
20. *Anderson v. Corp. Comm'n,* 327 P.2d 699, 701 (1957) (emphasis added).
21. *Id.*
22. *Champlin Ref. Co. v. Corp. Comm'n of State of Oklahoma*, 51 F.2d 823, 833 (W.D. Okla. 1931), modified sub nom. *Champlin Ref. Co. v. Corp. Comm'n of State of Okl.*, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932) (emphasis added).
23. *See Miller v. Schoene*, 276 U.S. 272, 279–80 (1928) ("And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").
24. *Sterling Ref. Co. v. Walker*, 1933 OK 446, 165 Okla. 45, 25 P.2d 312, 316 (emphasis added).
25. *Champlin* at 833.
26. Though once common, "back-in" interest is almost never offered as an option today. "Back-in" interest refers to an arrangement whereby an owner retains an overriding royalty interest until the cost of the well is paid off, at which time the owner has the option to convert the override into a larger working interest. *See* Practical Aspects of Examining Title, Preparing Worksheets, Chains of Title, and Document Interpretation, 2019 No. 4 RMMLF-INST 3, 3-19.
27. *Amoco Production v. Corporation Com'n*, 751 P.2d 203, 1986, modified by Supreme Court order on certiorari Dec. 16, 1987, and adopted as the opinion of the Supreme Court. Rehearing denied Feb. 9, 1988.
28. An in-depth, technical explanation of the parent-child effect can be viewed in a video produced by ResFrac, titled "Results from a Collaborative Parent/Child Industry Study: Permian Basin," which you can find at https://bit.ly/3vQOcZY.
29. Nesbitt at 649.
30. Nesbitt at 650.
31. Nesbitt at 653.
32. *Id.*
33. *Id.* at 654.
34. *Halpin v. Corporation Comm'n,* 575 P.2d 109, 111 (Okla. 1977).
35. *Gulfstream Petroleum Corp. v. Layden*, 1981 OK 56, ¶¶5-6, 632 P.2d 376, 378.
36. *Tenneco Oil Co. v. El Paso Nat. Gas Co.*, 1984 OK 52, ¶20, 687 P.2d 1049, 1053.
37. Deborah B. Barnes, "Interpretation of Corporation Commission Orders: The Dichotomous Court/Agency Jurisdiction," 8 *Okla. City U.L. Rev.* 311 (1984).
38. *Id.*
39. *Toklan Oil & Gas Corp. v. Citizen Energy III, LLC*, 2022 OK CIV APP 37, ¶9, 520 P.3d 848, 852; Petition for certiorari denied Oct. 10, 2022. Mandate issued Nov. 2, 2022.
40. Nesbitt at 654.
41. *Harry R. Carlile Trust v. Cotton Petroleum*, 732 P.2d 438, 1986 OK 16 (Okla. 1987).
42. *Purcell v. Parker*, 2020 OK 83, ¶24, 475 P.3d 834, 844.
43. Oklahoma Policy Institute Gross Production Taxes. Last updated Aug. 13, 2023.

Statements or opinions expressed in the Oklahoma Bar Journal *are those of the authors and do not necessarily reflect those of the Oklahoma Bar Association, its officers, Board of Governors, Board of Editors or staff.*

Landmen vs. Lawyers

Things that Landmen and Lawyers Do that Drive each other Crazy

Timothy C. Dowd, Jordan Volino, and Heath Robinson

COLLEGE OF LAW
The UNIVERSITY of OKLAHOMA

Landmen v. Lawyers
Disclaimer

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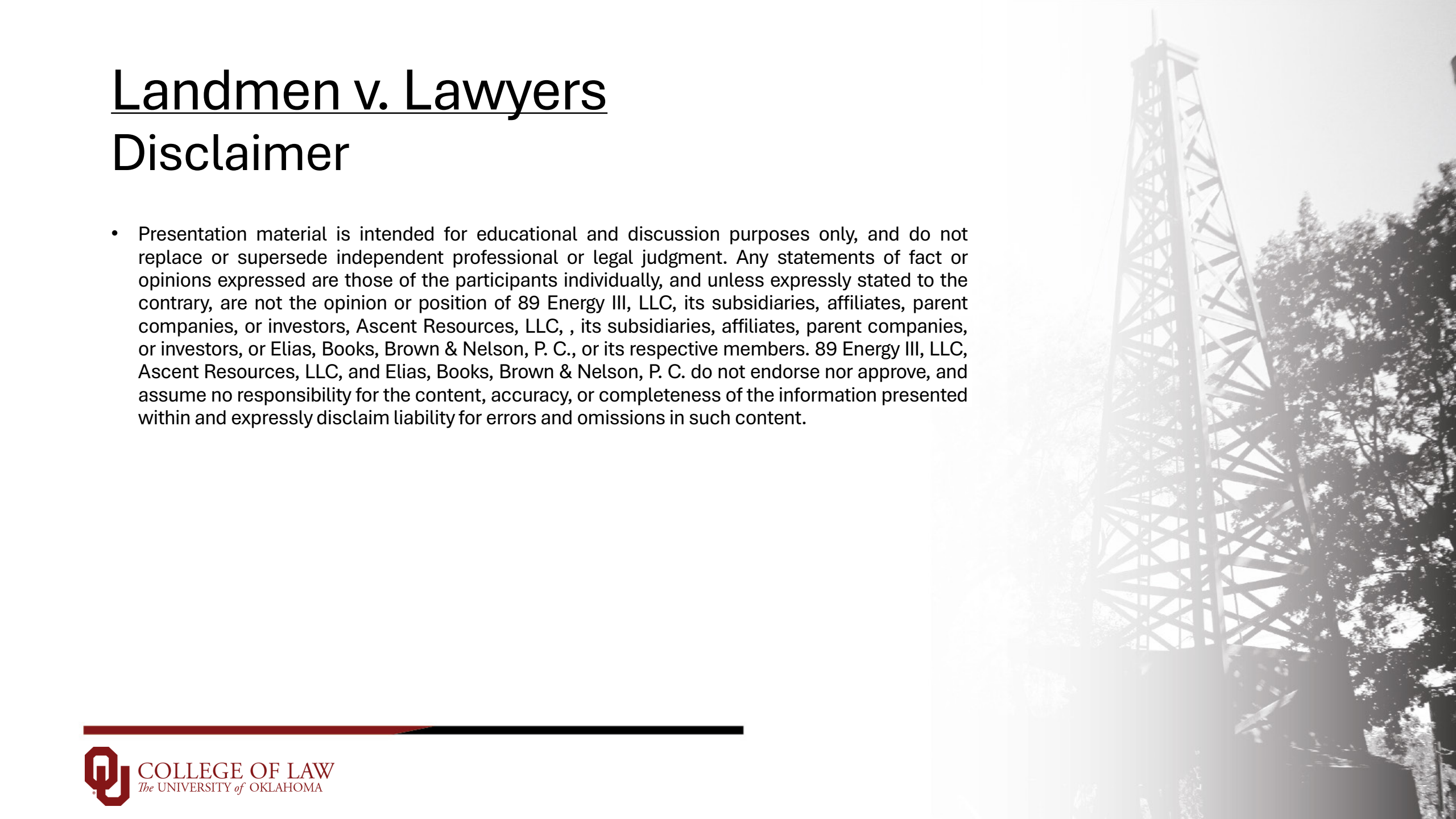


Landmen v. Lawyers
Business Risk v. Legal Risk

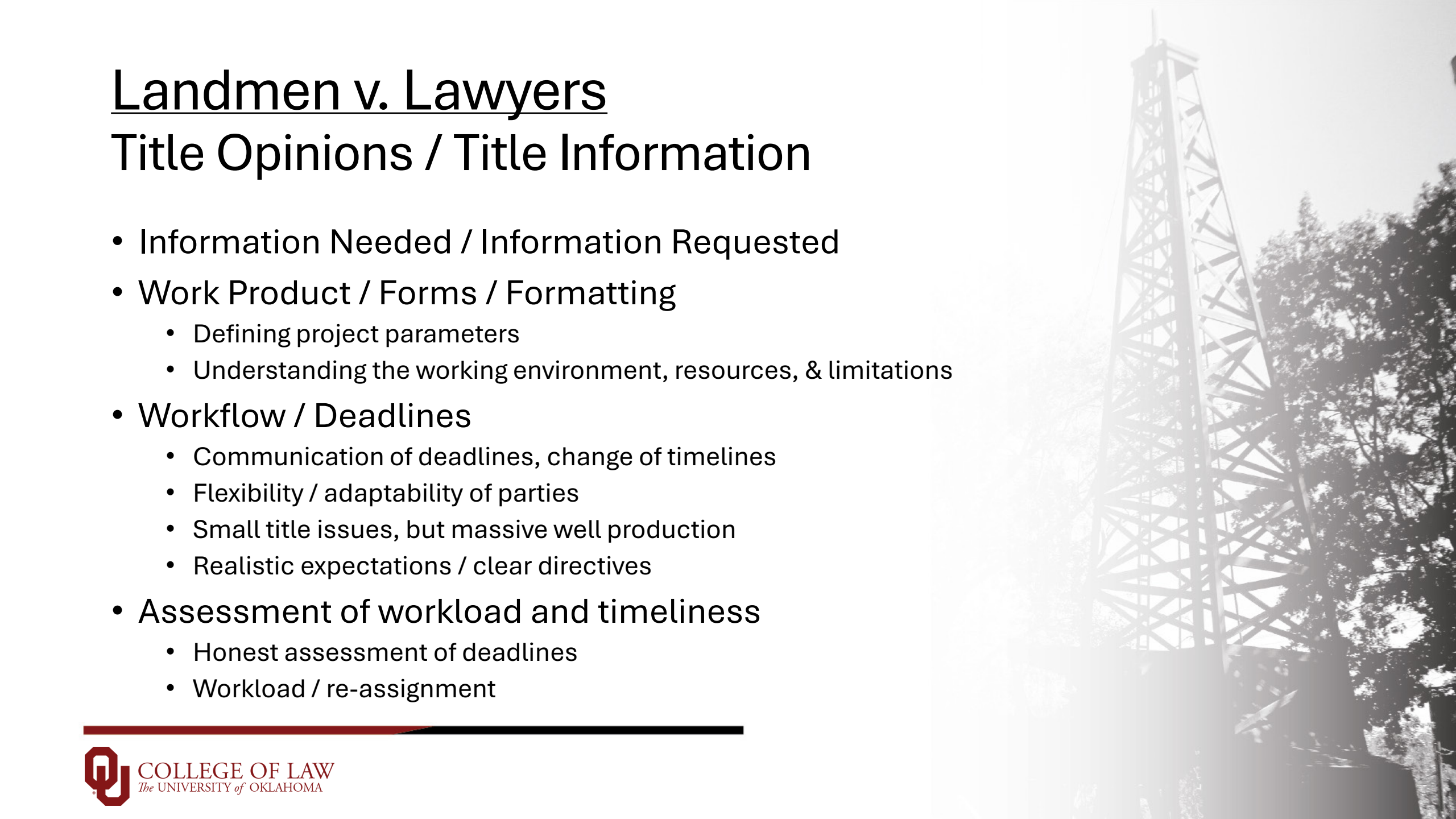
- Commercial Considerations
  - Largest concerns from Land / A&D Departments
    - Necessity of asset acquisitions and closing transactions
    - Incorporating the asset and implementing plans
  - Business risk assessment (& thresholds)
    - Type of risk / defect
    - Value v. exposure
  - Alternative methods / approaches
    - Deal specific methodology
    - Multiple interpretations for analysis

Landmen v. Lawyers
Business Risk v. Legal Risk

- Legal Considerations
  - Largest concerns from Legal Departments / Law Firms
    - Protecting Company / Client from legal risk and exposure
    - Disclosures (smoking guns, land mines, & big-ticket items)
  - Legal risk assessment (& thresholds)
    - Potential damages and liabilities
    - Value v. exposure
    - Small title issues, but massive well production
  - Alternative methods / approaches
    - Deal specific methodology
    - Multiple interpretations for analysis

Landmen v. Lawyers
Title Opinions / Title Information

- Information Needed / Information Requested
- Work Product / Forms / Formatting
  - Defining project parameters
  - Understanding the working environment, resources, & limitations
- Workflow / Deadlines
  - Communication of deadlines, change of timelines
  - Flexibility / adaptability of parties
  - Small title issues, but massive well production
  - Realistic expectations / clear directives
- Assessment of workload and timeliness
  - Honest assessment of deadlines
  - Workload / re-assignment



Landmen v. Lawyers
Title Opinions / Title Information

- Substantive Comments (Objections, Requirements, Defects)
  - Project specific parameters
    - DTO, DOTO, Due Diligence, & Lease Review
  - State / Basin specificity
    - Keep up to date on case law, statutory or regulatory changes
    - Avoid making non-relevant objections (TAFT)
    - Clear application of title standards and curative statutes
  - Provide applicable curative methodology
    - Multi-level curative to resolve portions of an objection
    - Avoiding blanket stipulation / QTA requirements
    - Superfluous or CYA objections that can be covered elsewhere
    - Understanding potential liability / necessary requirements
    - Clear, concise, and direct defects, objections, and requirements

Landmen v. Lawyers
Litigation / Claims

- Client / Attorney or Landman / Lawyer (or layman)
- Assistance
- Considerations
  - Consistent methodology
  - Bigger picture impacts
  - Active role v. passive participant

Landmen v. Lawyers
Communication

- Client / Attorney or Landman / Lawyer (or layman)
- Necessity
- Consistency
  - Following up / Updates
  - Assignment / Project changes
  - Revisions / Supplements (whose responsibility?)

Landmen v. Lawyers
Miscellaneous Items

- Confidentiality
  - Projects / Topics
  - Document / Data Sharing
  - Access to Internal Applications
- Invoicing
  - Parameters
  - Revisions / Supplements (whose responsibility?)
  - Firm v. Solo Practitioner
  - Transparency
  - Optics (work product before billing)

Landmen v. Lawyers

Questions, Comments, or Pitchforks?

Landmen v. Lawyers
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Thank You

Unauthorized Practice: A Guide for Lawyers and Landmen

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University of Oklahoma College of Law

Michael Brady
Elias Books, Brown, & Nelson, P.C.

COLLEGE OF LAW
The UNIVERSITY of OKLAHOMA

Scenario 1: House Rules?

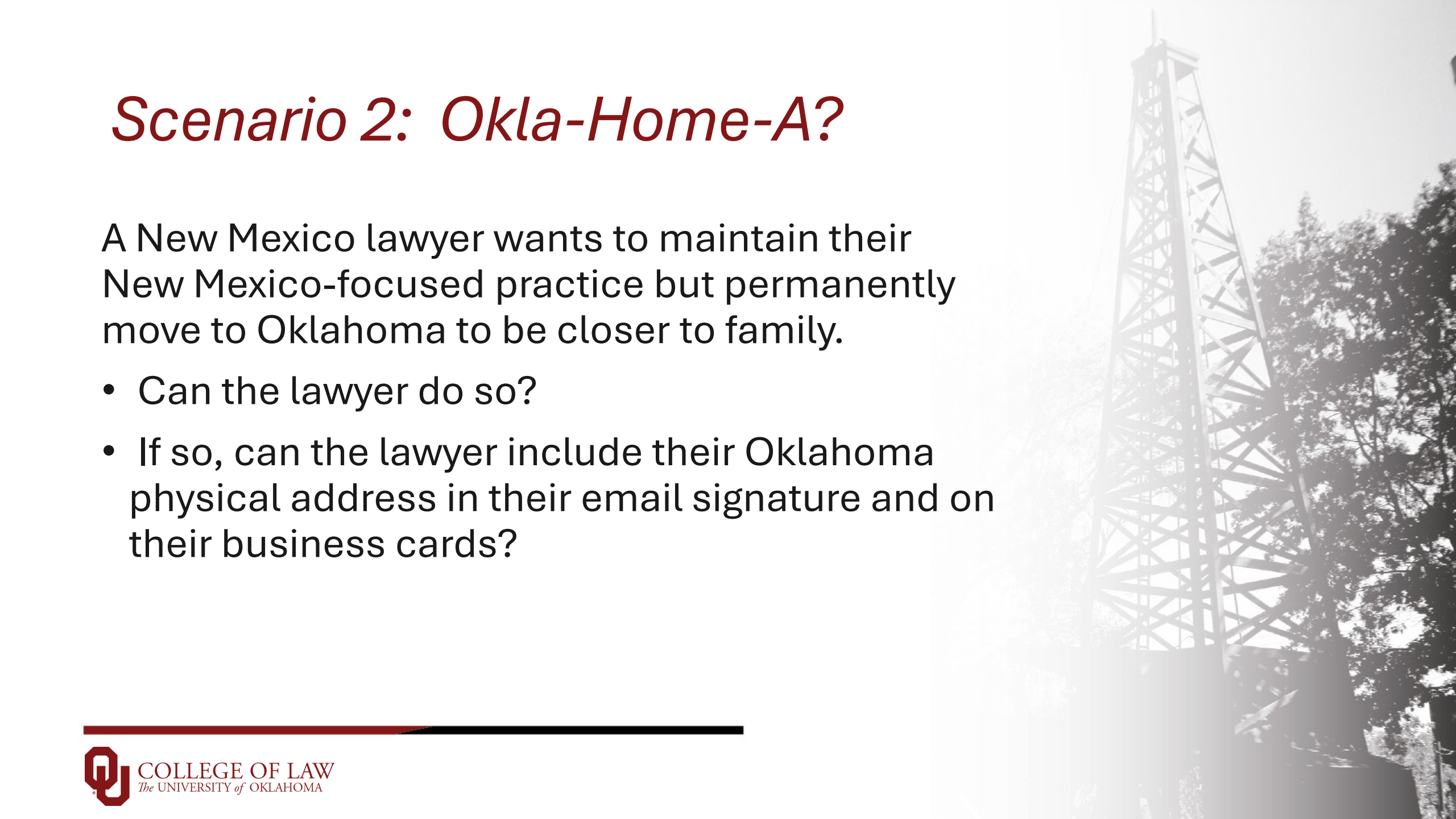
An Oklahoma lawyer receives an attractive offer to be in-house counsel for a health care company headquartered in Kansas.

- If the lawyer accepts and moves to Kansas, does the lawyer also need to become licensed there?
- If not, what are the limits on the lawyer's ability to practice in Kansas?

Scenario 2: Okla-Home-A?

A New Mexico lawyer wants to maintain their New Mexico-focused practice but permanently move to Oklahoma to be closer to family.

- Can the lawyer do so?
- If so, can the lawyer include their Oklahoma physical address in their email signature and on their business cards?



Scenario 3: Multi-State Transaction?

An Oklahoma lawyer is outside counsel for a regional grocery store chain. The client asks the lawyer to represent it in negotiating a sale of several buildings in Kansas and Texas to another company. The client asked the lawyer to negotiate the sale because of the lawyer's particular expertise in that type of transaction. The other company is headquartered in Texas.

- May the lawyer communicate by letter, phone, and e-mail with the other company's counsel in negotiating the transaction?
- May the lawyer draw up the relevant agreements involving buildings in Kansas and Texas?

Multi-Jurisdictional Practice: Two Limits

Ethics Rules in Home Jurisdiction

Ethics Rules in Target Jurisdiction

ABA MR 5.5: What *Can't* You Do?

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

- (1) except as authorized by these Rules or other law, **establish an office or other systematic and continuous presence** in this jurisdiction for the practice of law; or
- (2) **hold out to the public or otherwise represent** that the lawyer is admitted to practice law in this jurisdiction.

Practice of Law: "The definition of the practice of law is established by law and varies from one jurisdiction to another. . . ." Rule 5.5, Cmt. [2].

Remote Practice (ABA Formal Op. 495)

- “Lawyers may remotely practice . . . if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office [there], and do not provide or offer to provide legal services [there].”
- “If the lawyer’s website, letterhead, business cards, advertising, and the like clearly indicate the lawyer’s jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not ‘held out’ as prohibited by [Rule 5.5(b)].”

ABA MR 5.5: Temporary Practice

(c) A lawyer admitted in another United States jurisdiction . . . may provide legal services on a **temporary basis in this jurisdiction** that:

- (1) are undertaken **in association** with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is **authorized by law or order to appear in such proceeding** or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or **potential arbitration, mediation, or other alternative resolution proceeding** in this or another jurisdiction, if the services arise out of or are **reasonably related to the lawyer's practice** in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
- (4) are not within paragraphs (c) (2) or (c)(3) and **arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice**.

ABA Temporary Practice Details

- **Rule is Nonexclusive:** "Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. . . ." Rule 5.5, Cmt. [5].

- **What's "Temporary":** "There is no single test . . . . Services may be 'temporary' even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation." Rule 5.5, Cmt. [6].

- **What's "Reasonably Related":** "A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. . . . The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. . . ." Rule 5.5, Cmt. [14].

ABA MR 5.5: Systematic and Continuous Presence

(d) A lawyer admitted in another United States jurisdiction [or a foreign jurisdiction]. . . may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

- (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; [with additional requirements for foreign lawyers]; or
- (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

What About Oklahoma?

- The Oklahoma Bar Association is charged with investigating and prosecuting UPL.
- Oklahoma Rules of Prof'l Conduct virtually mimic ABA MRPC:
  - In-house counsel must be admitted in a state having reciprocity with Oklahoma and must comply with Rule 2, Section 5 of the Rules Governing Admission.
  - Note: Oklahoma has disbarred an attorney that participated in the UPL in another state (State ex rel. Oklahoma Bar Ass'n v. Auer, 2016 OK 75 (2016)).

- Practice of Law:
  - "[T]he rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent" (R.J. Edwards v. Hert, 1972 OK 151 (1972). This is a highly fact-specific inquiry.
  - "One who, in the exercise of a commission to draw a conveyance, selects language designed to create a certain effect is practicing law." (Edwards v. Hert, 1972 OK 151 (1972).

Thinking About Kansas?

- Kansas statutorily regulates UPL through its consumer protection article.
- Kansas Rules of Prof'l Conduct virtually mimic ABA MRPC"
  - In-house counsel must seek a restricted license to provide legal services only to their employer and must keep up with CLEs (Rule 721)

- Practice of Law:
  - "[I]t must be determined on a case-by-case basis. . . . But [the Court] has 'repeatedly recognized the actions of counseling and advising clients on their legal rights and rendering services requiring knowledge of legal principles to be included within the definition.'" *McCormick v. City of Lawrence*, 253 F. Supp. 2d 1156 (D. Kan. 2003).
  - "[I]ncludes . . .preparation of legal instruments and contracts by which legal rights are secured." *State Ex Rel. Boynton v. Perkins*, 28 P.2d 765 (Kan. 1934).

Return to Scenario 1: House Rules?

An Oklahoma lawyer receives an attractive offer to be in-house counsel for a health care company headquartered in Kansas.

- If the lawyer accepts and moves to Kansas, does the lawyer also need to become licensed there?
- If not, what are the limits on the lawyer's ability to practice in Kansas?

Thinking about New Mexico?

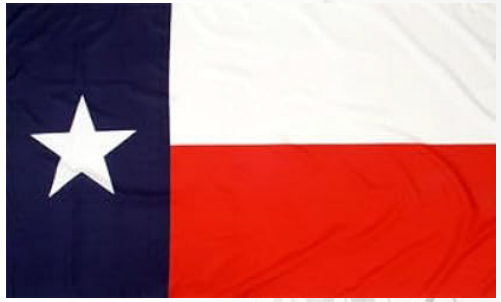
- Unauthorized practice of law, if willful, is a misdemeanor.
- Many NM Rules of Prof'l Conduct UPL provisions are similar to ABA MRPC:
  - In-house counsel must apply for a limited license to practice.
  - If lawyer is providing legal services reasonably related to jurisdiction in which lawyer is admitted: "In transactions involving issues specific to NM law, the lawyer shall associate with [NM] counsel . . . ." NMRPC 16-505(F)(2).
  - When conducting discovery (where proceedings arise out of another state), attorneys licensed elsewhere don't need to associate unless required by court.
- Practice of Law:
  - The Supreme Court ""ha[s] declined to define what constitutes the practice of law because of the infinite number of fact situations which may be presented, each of which must be judged according to its own circumstances." State ex rel. Norvell v. Credit Bur. of Albuquerque, Inc., 85 N.M. 521(1973).
- Virtual Practice: New Mexico has suggested that lawyers practicing elsewhere should maintain a physical address in NM and forward their mail from there.

Return to Scenario 2: Okla-Home-A?

A New Mexico lawyer wants to maintain their New Mexico-focused practice but permanently move to Oklahoma to be closer to family.

- Can the lawyer do so?
- If so, can the lawyer include their Oklahoma physical address in their email signature and on business cards?

Thinking About Texas? Careful!



- There is no provision akin to ABA MPRC 5.5(c), i.e. no provision permitting a non-Texas lawyer to provide legal services on a temporary basis.
- But….Texas does permit a lawyer licensed elsewhere to "provide legal services solely to the lawyer's employer or its organizational affiliates." (TRDPC Rule 5.05(c))
- Texas permits a lawyer licensed elsewhere to "practice law from a temporary or permanent residence" in TX provided that they (1) don't advertise or hold themselves out as a TX lawyer or as having an office in TX, (2) do not solicit or accept TX clients on issues of TX law unless TX or federal law permit it, and (3) make efforts to correct others' misunderstandings about their license status. (TRDPC Rule 5.05(d))

What is the Practice of Law in Texas?

Texas R. Disc. Prof'l Conduct:

- Rule 5.05 . . . leaves the definition to judicial development.

Texas Government Code § 81.101:

- (a) [T]he "practice of law" means the **preparation of a pleading or other document incident to an action** . . . on behalf of a client before a judge in court as well as a service rendered out of court, **including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined**.
- (b) The definition . . . is not exclusive and does not deprive the judicial branch of the power and authority . . . to determine [what] may constitute the practice of law.
- (c) In this chapter, the "practice of law" does not include the design, creation, publication, distribution, display, or sale, . . . by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney . . . .

Texas UPL Committee

- UPL Committee: A standing committee of the State Bar of Texas
- Through its subcommittees, the UPL Committee "investigates complaints and, if warranted, files suit to enjoin the unauthorized practice of law."

http://www.txuplc.org/Home/about

Return to Scenario 3: Multi-State Transaction?

An Oklahoma lawyer is outside counsel for a regional grocery store chain. The client asks the lawyer to represent it in negotiating a sale of several buildings in Kansas and Texas to another company. The client asked the lawyer to negotiate the sale because of the lawyer's particular expertise in that type of transaction. The other company is headquartered in Texas.

- May the lawyer communicate by letter, phone, and e-mail with the other company's counsel in negotiating the transaction?
- May the lawyer draw up the relevant agreements involving buildings in Kansas and Texas?

Unauthorized Practice by Landmen?

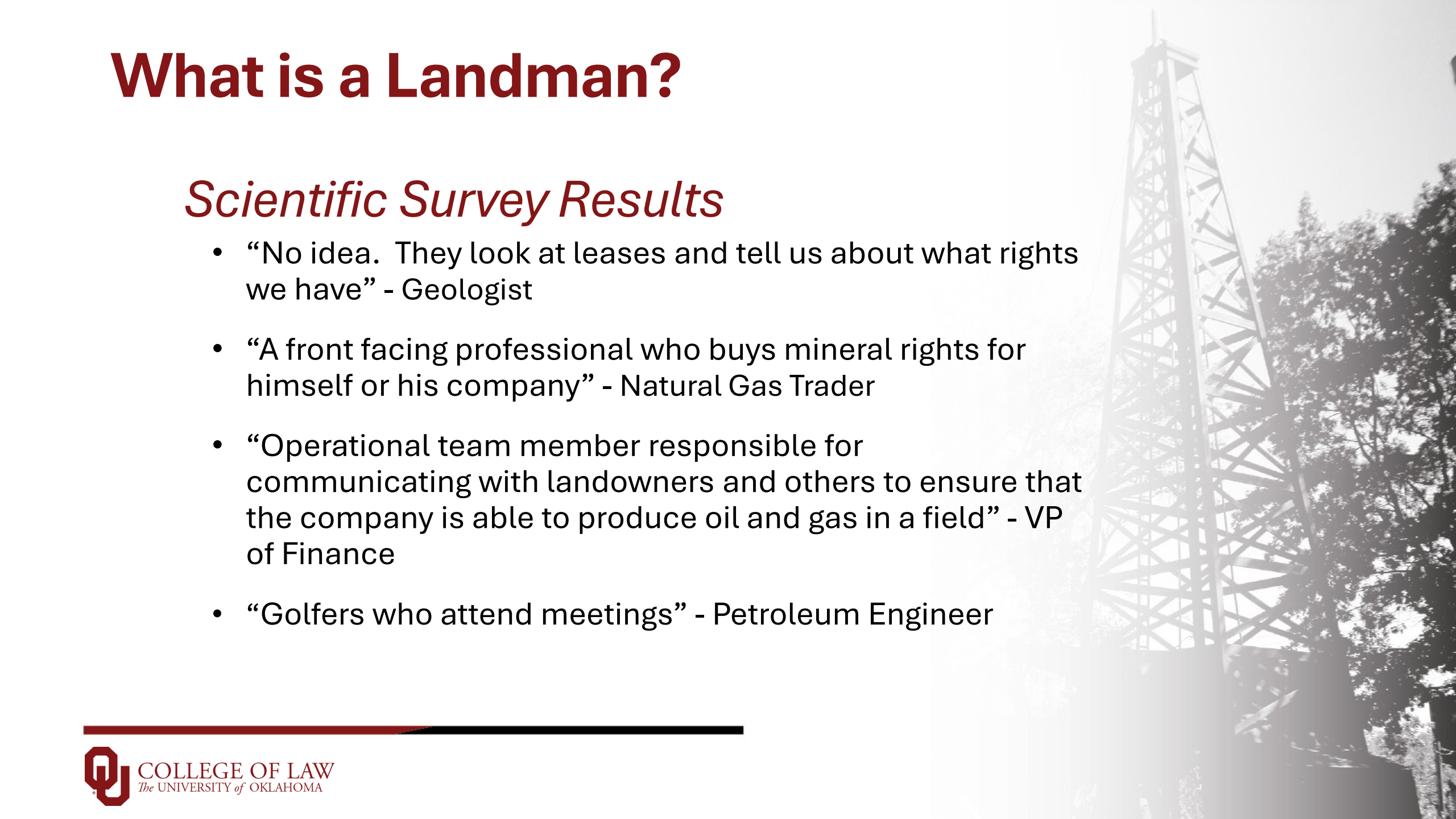
Agenda

- Introduction
- Are Landmen Practicing Law?
- Where Things Stand
- Advising Clients

What is a Landman?

Scientific Survey Results

- “No idea. They look at leases and tell us about what rights we have” - Geologist
- “A front facing professional who buys mineral rights for himself or his company” - Natural Gas Trader
- “Operational team member responsible for communicating with landowners and others to ensure that the company is able to produce oil and gas in a field” - VP of Finance
- “Golfers who attend meetings” - Petroleum Engineer



What is a Landman?

A generic, gender-neutral term that is used to describe a multitude of different job responsibilities.

Field Landman

In-House Landman

What is a Landman?

A generic, gender-neutral term that is used to describe a multitude of different job responsibilities.

Field Landman

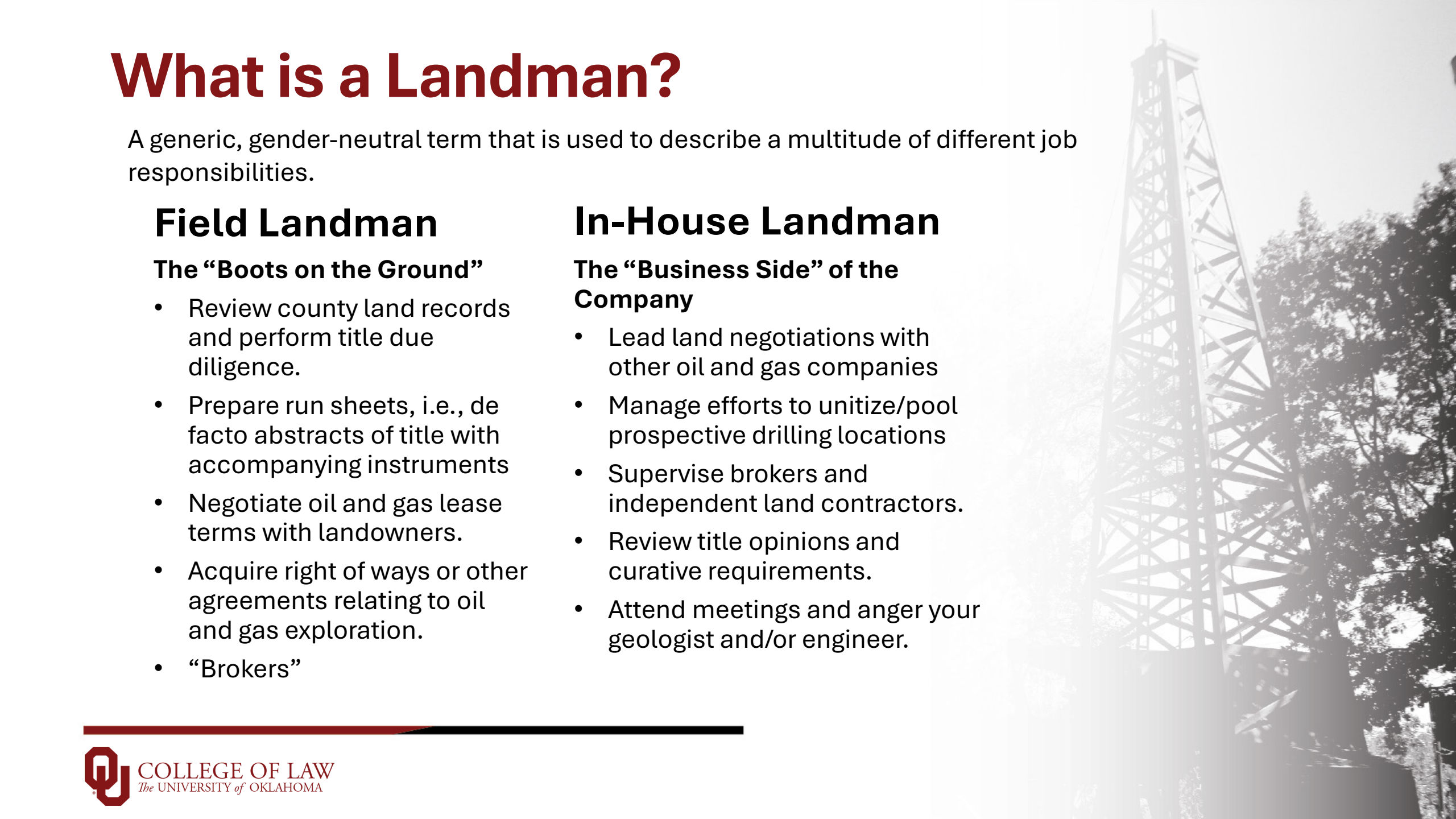
The "Boots on the Ground"

- Review county land records and perform title due diligence.
- Prepare run sheets, i.e., de facto abstracts of title with accompanying instruments
- Negotiate oil and gas lease terms with landowners.
- Acquire right of ways or other agreements relating to oil and gas exploration.
- "Brokers"

In-House Landman

The "Business Side" of the Company

- Lead land negotiations with other oil and gas companies
- Manage efforts to unitize/pool prospective drilling locations
- Supervise brokers and independent land contractors.
- Review title opinions and curative requirements.
- Attend meetings and anger your geologist and/or engineer.



Regulation and Training

Association of Professional Landmen (AAPL)

Art. XVI, Section I of the AAPL Bylaws:

- "A land professional shall provide a level of competent service in keeping with the standards of practice in those filed in which a landman customarily engages. The land professional shall not represent themselves to be skilled in nor shall he engage in professional areas in which such land professional is not qualified such as *the practice of law,* geology, engineering or other disciplines." (emphasis added).

Art. XVI, Section III (The Code of Ethics):

- The Land Professional shall represent others only in the areas of expertise and shall not represent himself to be skilled in professional areas in which he is not professionally qualified.

Regulation and Training

Association of Professional Landmen (AAPL)

AAPL Ethics Committee

- Can form investigative committees to examine allegations concerning unethical conduct.
- Formal complaints are filed if the investigating committee finds there is probable cause to necessitate a hearing.
- Hearings – accused member may appear through counsel, present witnesses, etc. Can also waive the right and submit a written statement.
- Disciplinary actions may include (a) censure, (b) suspension, (c) allowed resignation, (d) expulsion, and/or (e) revocation of certification.
- Appeals – accused member can appeal to the AAPL's Executive Committee.

Are Landmen Practicing Law?

Association of Professional Landmen (AAPL)

Assume a Non-Lawyer was:

- Interpreting documents found in a title search;
- Offering advice to Landowners regarding mineral rights or the meaning of contractual language
- Drafting complex contracts with little or no assistance from an attorney; or
- Preparing deeds, leases, easements, and affidavits for third parties and recording them in the real property records.

Perhaps the better question is "Can landmen do their jobs without practicing law?"

Are Landmen Practicing Law?

Potential Consequences:

Personal Liability – chances are the landman will not have malpractice insurance or be covered under the company's policies for legal malpractice.

- *St. Paul Fire & Marine Insurance v. Nicholson*, 567 S.W.2d 107 (1978).

Agreements Declared Invalid – contract cancelled because it was the product of an illegal act..

- *Collins v. Godchaux*, 86 S.o.3d 831 (2012)

Restraining Order – prohibiting the landman from practicing law and effectively eliminating his or her ability to make a living.

- WY R UNAUTH PRAC Rule 5

Where Things Stand

Texas: Statutory Exemption for "Land Services"

- V.T.C.A., Government Code § 81.101
  - The "practice of law" includes "the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined."
- V.T.C.A, Occupations Code § 954.002
  - The "practice of law" does not include engaging in land services if:

    (1) the acts are performed by a person who does not hold the person out as an attorney licensed to practice law in this state; and

    (2) the person is not a licensed attorney.

Where Things Stand

Texas: Statutory Exemption for "Land Services"

- V.T.C.A, Occupations Code § 954.002
  - "Land Services"
    - Buying and selling mineral rights
    - Negotiating agreements to develop minerals
    - Researching title
    - Curing title defects
    - Pooling mineral interests
  - Not "Land Services"
    - Examining or determining title in connection with (1) surface transactions unassociated with mineral rights or (2) the mortgage of real property for residential purposes.

Where Things Stand

Wyoming: Judicial Rule Exemption

WY R BAR AUTH PRAC. RULE 7(c):

- Whether or not they constitute the practice of law, the following are not prohibited:
  - (2) Acts historically performed by landmen relating to the lease, purchase, sale, or transfer of an oil, gas, mineral or mining interest or other interest incident to an oil, gas, mineral or mining interest in real property if:

    (A) the acts are performed by a landman who does not hold himself or herself out as an attorney licensed to practice law in Wyoming or another jurisdiction;

    (B) the acts are in conformance with best industry practice; and

    (C) the landman is not a member of the Wyoming State Bar.

Where Things Stand

Wyoming: Judicial Rule Exemption

- 40-DEC Wyo. Law. 12, Office of the Bar Counsel, Should Landmen be Regulated.
  - "The Committee struggled with how landmen should be treated."
  - "Clearly, many of the activities of landmen touch upon the practice of law." Yet no state requires they be licensed and the "AAPL's standards are aspirational and have not been codified into law in any jurisdiction"
  - However, the oil and gas industry "could not operate efficiently without landmen" and this pragmatic reality "drives a rule which allows landmen to perform 'acts historically performed by landmen.'

Where Things Stand

Louisiana: Case Law Exemption for "Historic Activities"

- *Collins v. Godchaux*, 86 So.3d 831 (La.App. 3 Cir. 2012.
  - CPL Landman secured better lease terms for Heirs to a legacy oil and gas field in exchange for an ORRI. Heirs refused to honor the ORRI and argued the agreement with the Landman was invalid.
  - Landman's activities included: (1) advising Heirs as to their legal rights; (2) negotiating damage claims releases with the operator; (3) asserting the Heirs legal rights; (4) negotiating settlements for the Heirs on a contingency basis; and (5) hiring attorneys.
  - Summary Judgment in favor of the Heirs overturned because all the Landman's activities were the sort of services historically performed by landmen.
  - *See also*, *Placid Oil Co. v. Taylor*, 306 So.2d 664 (La.1975); *Crawford v. Deshotels*, 359 So.2d 118 (La. 1978)

Where Things Stand

Oklahoma: Exemption??

Judicial Ethics Advisory Panel, 2009 OK JUD ETH 1

- Question: May a judge, at night and on non-working days, be employed in checking land records for persons engaged in oil and gas leasing operations?
  - Compilation of ownership does not constitute "the practice of law."
  - However, rendering an opinion as to ownership is "practice of law" and is prohibited

Cox v. Freeman, 1951 OK 16, 227 P.2d 670

- No unauthorized practice of law where Landman contracted to employ attorneys to clear title.

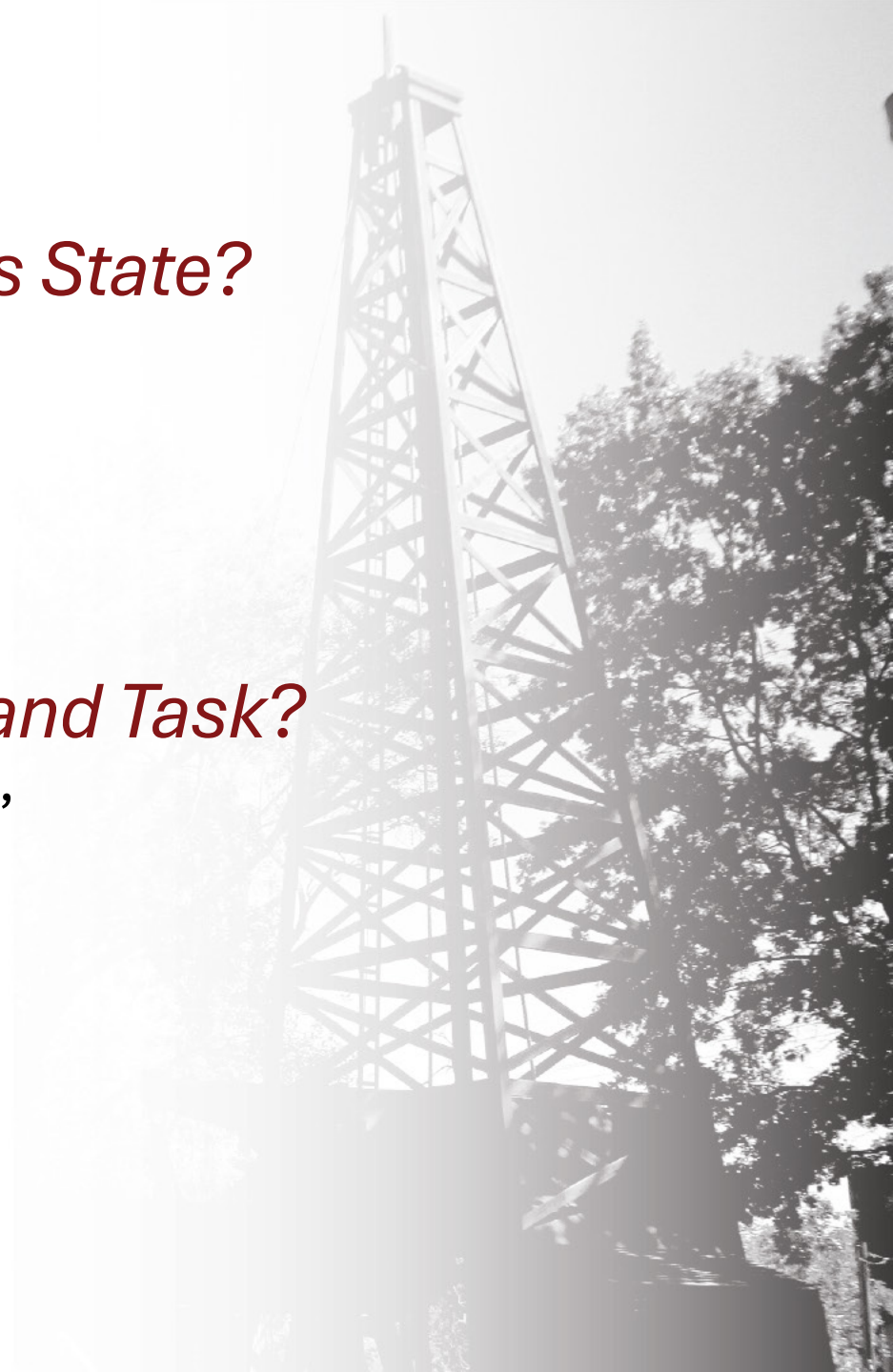
Advising Clients

Is the Landman in a Traditional Oil and Gas State?

- Oklahoma, Texas, etc.
- Pennsylvania? Ohio? North Carolina?

Is the Landman Engaged in a Traditional Land Task?

- Oil and Gas related activities are likely “traditional”
- Renewables?



Advising Clients

How have Courts Handled Analogous Scenarios?

- Title Companies
- Real Estate licensing.

Help the Landman "Find the Line"

- Land Advice vs. Legal Advice.

Thank You

Surface & Subsurface Accommodation

Matt Hill

Mahaffey & Gore, P.C.

Outline of Presentation

History of Reasonable Use Doctrine in Oklahoma

Legislative Actions and Impact on the Reasonable Use Doctrine

Interplay between Mineral Estate and Surface Development in context of wind and solar

Common Law Incidents of Mineral Estate

1. Right to Develop
2. Right of Ingress and Egress
3. Right to Alienate

Right of Ingress and Egress

Reasonable Use Doctrine (Oklahoma)

- Ownership of an oil and gas interest carries with it the right to enjoy that interest by entering and making reasonable use of the surface to explore and extract mineral deposits – *Turley v. Flag-Redfern Oil Co.*, 1989 OK 144, 782 P.2d 130

Accommodation Doctrine (Texas)

- If the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended … and one of which would preclude that use by the surface owner, the mineral owner *must* use the alternative that allows continued use of the surface by the surface owner. – *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013)

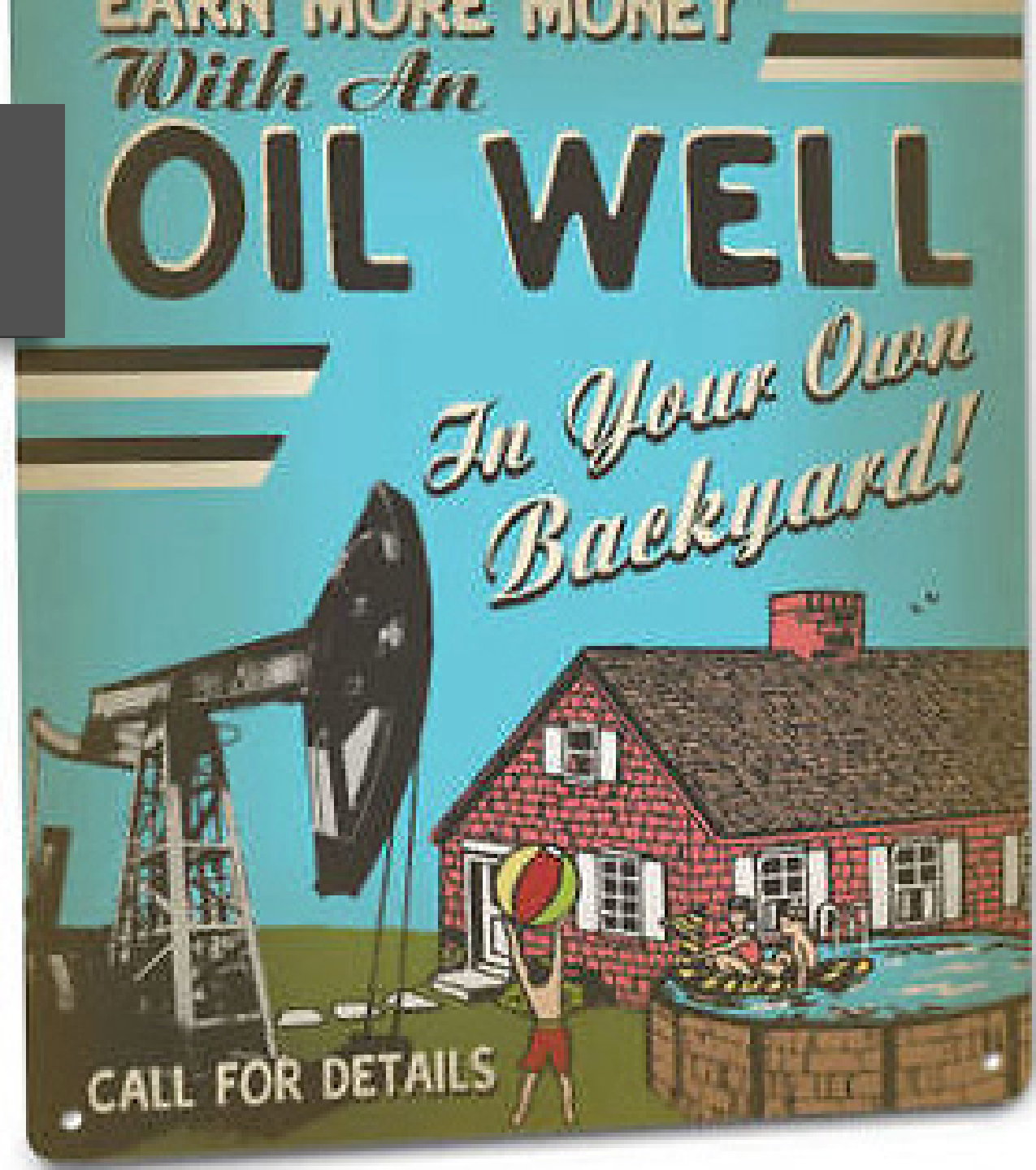
Origin of Reasonable Use Doctrine

HARRIS *v.* RYDING. Exch. of Pleas. 1839.—A., being seised in fee of certain lands, granted the land to P., his heirs and assigns, reserving to himself, his heirs and assigns, "all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals, and metals which then were, or at any time, and from time to time thereafter, should be discovered in or upon the said premises, &c., with free liberty of ingress, egress, and regress, to come into and upon the premises, to dig, delve, search for, and get &c. the said mines and every part thereof, and to sell and dispose of, take, and convey away the same, at their free will and pleasure; and also to sink shafts, &c., for the raising up works, carrying away and disposing of the same or any part thereof, making a fair compensation to P. for the damage to be done to the surface of the premises, and the pasture and crops growing thereon":—Held, that, under this reservation, A. was not entitled to take all the mines, but only so much as he could get leaving a reasonable support to the surface.

- *Harris v. Ryding*, 5 M.W. 59 (Exch. of Pleas. 1839)

Origin of Reasonable Use Doctrine

- United States
  - *Jones v. Wagner*, 66 Pa. 429, 5 Am. Rep. 385 (Pa. 1870)
- Oklahoma
  - *Gulf Pipe Line Co. v. Pawnee-Tulsa Petro. Co.*, 1912 OK 630, 127 P. 252
- Statutory?
  - 60 O.S. § 54



Statehood to 1982

- *Pulaski* (1916) to *Hinds* (1979)
- Protect the Surface
- Reasonable damages to surface considered *damnum absque injuria*
  - No recovery available
  - Operator not liable for reasonable damages

Early Conflicts between Interests (and Cases)

Agriculture vs. Oil and Gas

- *Pure Oil Co. v. Gear*, 1938 OK 511, 83 P.2d 389
- *Mid-Continent Petro. Corp. v. Rhodes*, 1951 OK 240, 240 P.2d 95
- *Hamon v. Gardner*, 1957 OK 161, 315 P.2d 669

Oklahoma's Surface Damages Act

- 52 O.S. § 318.2 *et seq.*
- Balancing competing interests and industry
- Drastically altered the common law view on damages

Constitutional Attacks

- *Davis Oil Co. v. Cloud*, 1986 OK 73, 766 P.2d 1347
- State Police Powers
- No Vested Right in the Common Law

Abolition of the Defense but not the Right

- SDA did not abrogate the Reasonable Use Doctrine
- Clearly under Oklahoma law, the lessee or mineral owner is entitled to use so much of the surface as is reasonably necessary for the exploration and development of the mineral estate
  - *Roye Realty & Developing, Inc. v. Watson*, 1990 OK CIV APP 21, 791 P.2d 821
- Lessee's "Duty" to protect the surface as to areas where an implied incidental necessity does not exist
  - *Thompson v. Andover Oil Co.*, 1984 OK CIV APP 51, 691 P.2d 77

Dominance and Right Established Post-SDA

- Surface Estate "subject to" outstanding rights held by Mineral Estate
  - *Turley v. Flag-Redfern Oil Co.*, 1989 OK 144, 782 P.2d 130

- Surface Activity that could impair mineral development
  - *DuLaney v. Okla. State Dept. of Health*, 1993 OK 113, 868 P.2d 676

Wind and Solar Development Statutes

- Exploration Rights Act of 2011
  - 52 O.S. § 801 *et seq.*
- Oklahoma Energy Security Act
  - 17 O.S. § 801.1 *et seq.*
- Airspace Severance Restriction Act
  - 60 O.S. § 820.1
- Oklahoma Wind Energy Development Act
  - 17 O.S. § 160.11 *et seq.*

Airspace Severance Restriction Act

- Prohibition on severing airspace for purposes of developing wind or solar energy

- Severance for other reasons acceptable?
  - 60 O.S. § 803

Wind Energy Development Act

- Notice to Commission
  - Within 60 days of the initial filing with the FAA
  - Form of Notice prescribed by OCC, but at least the same as FAA requirements
- Notice to Oil & Gas Operators and Lessees
  - 60 days notice prior to entering the surface estate
  - Within 6 months of initial notice to OCC, must provide same to oil and gas operators and lessees
- Operators and Lessees entitled to Notice
  - Any operator conducting operations upon all or any part of the surface estate that the developer intends construction
  - Any operator of an unspaced unit or unit created by OCC where the unit or a portion of the unit is within the geographical boundaries of the surface the developer intends to use
  - Tracts of land not described above, all lessees of oil and gas leases covering the mineral estate underlying the surface the developer intends to use

Exploration Rights Act of 2011

- Confirms historical right of Mineral Estate to make reasonable use of the surface
- The lessee of a wind or solar energy agreement or the wind energy developer shall not *unreasonably* interfere with the mineral owner's right to make reasonable use of the surface estate
- Permits Mineral Estate (or Lessee) to file a District Court action to enforce historical rights

Conflict Between Mineral Estate and Wind Development

- *Newfield Exploration Mid-Continent Inc. v. Apex Clean Energy Management, LLC, et al.*, Case No. CJ-2015-14, Kingfisher County, Oklahoma

- Osage Nation Wind Cases
  - *Osage Nation ex rel. Osage Minerals Council v. Wind Capital Grp., LLC*, 2011 WL 6371384 (N.D. Okla. Dec. 20, 2011)
  - *United States v. Osage Wind, LLC*, 710 F.Supp.3d 1018 (N.D. Okla. 2023)

Considerations in light of Existing Law

Mineral Estate remains dominant estate with right to reasonably use the surface

Wind and Solar Development should be considered servient estate

History, both early and recent, has favored Mineral Estate's access rights

Horizontal Development lessens potential conflict

Mineral Estate will likely be required to give reasonable consideration to already existing surface use

Thank you

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