

# **EFFECT OF DIVORCE ON OIL, GAS, WATER, WIND & SOLAR RIGHTS**

**RICHARD R. ORSINGER**

**Orsinger, Nelson, Downing & Anderson, LLP**

**310 S. St. Mary's Street, 26<sup>th</sup> Floor**

**San Antonio, Texas 78205**

**[richard@ondafamilylaw.com](mailto:richard@ondafamilylaw.com)**

**[www.orsinger.com](http://www.orsinger.com)**

**STATE BAR OF TEXAS**

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# Fee Simple: A Bundle of Sticks

- Fee simple ownership of land is divided between the surface estate and the mineral estate (which is dominant)
- Fee simple ownership is like a bundle of sticks
- Sticks can be unbundled and transferred or retained
- For example, the owner can convey some or all of the water rights or mineral rights and retain everything else
- Or the owner can convey the fee simple interest but retain some or all of the water rights or mineral rights

# Easement

- An easement is a property interest that gives a party the right to use another's property for a certain purpose.
- The easement is not ownership of the land. It is instead a right to use the land for a particular purpose.
- The land over which the easement lies is the “servient estate”; the land the easement benefits is the “dominant estate.”
- Easements can be express or implied.
- An express easement is written, conveyed, or reserved in a deed or will or agreement.
- An implied easement arises by operation of law.

# Profit a Prendre

- A “profit a prendre,” or “profit,” is a right to take a part of the soil or produce from the land of another person. *Evans v. Ropte*, 96 S.W.2d 973 (Tex. 1936).
- The right to take timber or coal from land or the right to fish or hunt on property of another are examples of profits a prendre. *Digby v. Hatley*, 574 S.W.2d 186, 190 (Tex. Civ. App.--San Antonio 1978, no writ) (hunting lease characterized as profit a prendre).
- A profit a prendre is considered to be an interest in land and as such must be evidenced by a writing.

# Lease

- A (rental) lease is a contractual right to use another's property for a specified purpose for a specified period of time.
- A (rental) lease is not a conveyance of real property. It creates a contractual right for both landlord and tenant.
- Under a (rental) lease, the tenant pays rent to the landlord, usually monthly, sometimes with annual adjustments.

# Separate Property

- **Tex. Const. art. XVI, § 15**, Separate and Community Property of Spouses

All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse....

- **TFC § 3.001**. Separate Property. A spouse's separate property consists of:

Inception of title

- (1) the property owned or claimed by the spouse before marriage;
  - (2) the property acquired by the spouse during marriage by gift, devise, or descent ....
- Mutation and tracing

# Marital Property: Buying an Easement

Acquiring an easement is acquiring the **right** to use another's land

- “Owned or claimed before marriage”
- If during marriage, CP presumption applies
- Mutation and tracing apply
- CP easement should be divisible on divorce
- Some easements run with the dominant estate

# Marital Property: Selling an Easement

The marital property character of proceeds from selling a SP easement during marriage has not been determined in Texas case law.

- The purchase price is usually paid up front; looks like a sale and not a rental.
- The term is usually unlimited, absent abandonment; looks like a sale.
- The easement is not a conveyance of an ownership interest in land: doesn't look like a sale.



# Marital Property: Profit A Prendre

- A Profit a Prendre is like an easement but it is different from a right to **use**; it is a right enter and to **take away**
- Profit A Prendre can apply to near-surface coal and gravel (part of the surface estate); severed timber, harvested crops and animals (not part of surface estate)
- SP or CP character of proceeds from granting a Profit A Prendre to SP land during marriage may depend on what can be removed under the Profit A Prendre

# Marital Property: Rental Lease

- A rental lease owned or claimed prior to marriage is SP
- What if SP land is leased during marriage? The lease is SP but the lease income is CP.
- Lease income (i.e., rental income) earned during marriage on a premarital lease is CP; after divorce, back to SP
- If SP land is leased during marriage, is the lease itself SP? Can post-divorce rental income be awarded to the non-owning spouse?

# Timber, Crops, and Bricks

- Timber produced from trees grown on SP land is CP -- *White v. Lynch & Co.*, 26 Tex. 195 (1862); *McElwee v. McElwee*, 911 S.W.2d 182 (Tex. App.–Houston [1st Dist.] 1995, writ ref'd).
- Crops grown on SP land are CP -- *DeBlane v. Hugh Lynch & Co.*, 23 Tex. 25 (1859); *Coggin v. Coggin*, 204 S.W.2d 47, 52 (Tex. Civ. App.–Amarillo 1947, no writ); *McGarrangh v. McGarrangh*, 177 S.W.2d 296, 300 (Tex. Civ. App.–Amarillo 1944, writ dism'd).
- Bricks manufactured from SP land using SP labor are CP -- *Craxton, Wood & Co. v. Ryan*, 3 Willson 439 (Tex. Ct. App. 1888).

# MINERAL RIGHTS

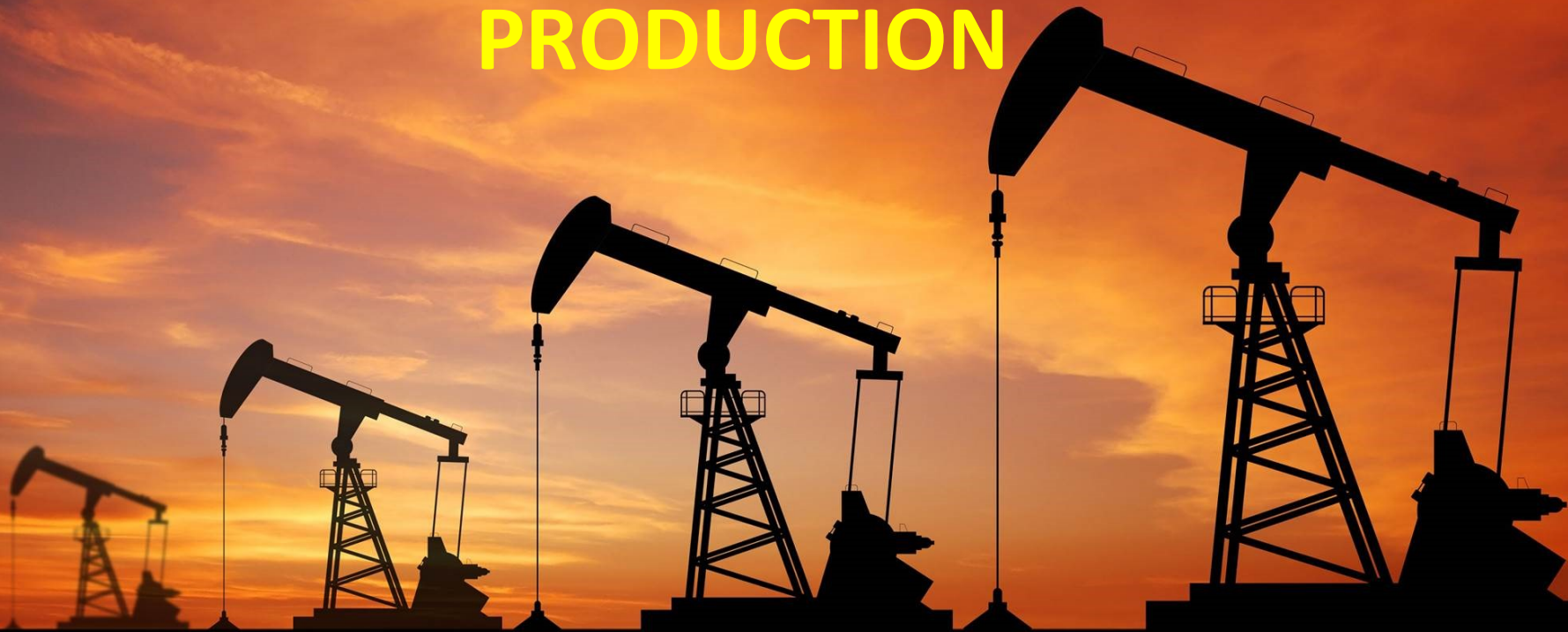
# Ownership of Minerals

- Mineral rights are part of the fee simple bundle of sticks
- Mineral rights can be severed from the rest of the fee
- The owner can convey the fee while retaining minerals
- The owner can convey minerals while keeping the fee
- The mineral estate is the dominant estate, with the right to use as much of the surface as is reasonably necessary to explore for and produce the minerals. This includes the right to access and use ground water.

# Ownership of Minerals

- The term “minerals” includes oil, gas, and uranium.
- Minerals do not include: sand; gravel; limestone; caliche; surface shale; building stone; near-surface coal, lignite and iron ore; or water.

# OWNERSHIP OF OIL AND GAS PRODUCTION



# Mineral Lease

- The owner of the minerals can lease the mineral estate
- A mineral lease conveys an ownership interest in the minerals (a fee simple determinable)
- Lessor's side vs. Lessee's side
- Lessor ordinarily retains a royalty interest and reversionary right
- Lessee has right to explore and develop, or reconvey



## Lessor

- Royalty Interest
- Non-Participating Royalty Interest
- Reversionary Right

## Lessee

- Working Interest
- Overriding Royalty Interest
- Assignment of Lease
- Farmout Agreement

## Pooling & Unitization

# Marital Property Character of Mineral Interest & Income

- Royalty income from separate property minerals is separate property -- *Norris v. Vaughan*, 260 S.W.2d 676, 679 (Tex. 1953) (because a royalty payment is for the extraction or waste of the separate estate, as opposed to income from the separate estate); *Welder v. Welder*, 794 S.W.2d 420, 425 (Tex. App.--Corpus Christi 1990, no writ).
- Bonus for leasing on SP minerals is SP -- *Lessing v. Russek*, 234 S.W.2d 891, 894 (Tex. Civ. App.--Austin 1950, writ ref'd n.r.e.).
- Delay rentals on SP minerals are CP -- *McGarraugh v. McGarraugh*, 177 S.W.2d 296, 300-301 (Tex. Civ. App.--Amarillo 1943, writ dism'd).

# Transmutation of SP to CP

- *Craxton v. Ryan*, 3 Willson 439 (Tex. 1888): bricks made from W's SP land using W's SP labor are CP
- *Norris v. Vaughan*, 278 S.W. 2d 582 (Tex. 1955): H's effort in acquiring the right to drill oil wells impressed CP character on the wells
- *Weed v. Frost Bank*, 565 S.W.3d 397 (Tex. App.—San Antonio, pet. denied): H's effort in acquiring mineral interests using SP impressed CP character on the minerals

# Marital Property Issues

1. Acquiring Minerals -- inception of title; tracing; transmutation due to CP efforts
2. Bonus – same character as the mineral interest
3. Royalty – same character as the mineral interest
4. Shut-in Royalties – should be same character as royalties
5. Delay Rentals – community property
6. Working Interest – inception of title, mutation vs. transmutation
7. Overriding Royalty Interest – inception of title, tracing
8. Farm Out Agreements – inception of title, mutation vs. transmutation
9. Pooling – inception of title, mutation



**RIVERS, STREAMS & LAKES**  
**SURFACE WATER**  
**GROUND WATER**

# Rivers, Streams, & Lakes

1. Rivers and lakes belong to the State of Texas which holds them in trust for the Texas people.
2. Navigable streams belong to the State.
3. A stream is “navigable by statute” if the stream bed retains an average width of 30 feet from the mouth up.
4. A stream is “navigable in fact” when its waters in their natural state are useful to the public for a considerable portion of the year (boating, logging, fishing, hunting, etc.).

# Surface Water

- Surface water includes all of the “water under ordinary flow, underflow and tides of every flowing river, natural stream, lake, bay, arm of the Gulf of Mexico, and stormwater, floodwater or rain water of every river, natural stream, canyon, ravine, depression, and watershed in the state.” **Tex. Water Code § 11.021.**
- However, “**diffused surface water**” is not owned by the State; instead it is owned by the owner of the land over which it flows.
- Diffused surface water is water on the surface that has not yet entered a “watercourse.”

# Surface Water Right

- A person can use the State's "surface water" upon receiving a permit and obtaining a "water right" from the Texas Commission on Environmental Quality. **Tex. Water Code § 11.022.**
- A "water right" is defined as "a right acquired under the laws of Texas to impound, divert or use state water." **Tex. Water Code § 11.002(5).**
- A "water right" is a non-ownership right to use (a "usufruct"), not an ownership right. The water belongs to the State.
- However, the holder of a water right has a property interest in the right to use the water. This right can be assigned, with or without ownership of particular land (except an irrigation right that relates to specific land).



# Ground Water

- Groundwater is water percolating below the surface of the earth. **Tex. Water Code §36.001(5)**
- “[A] landowner owns the groundwater below the surface of the landowner’s land as real property.” **Tex. Water Code §36.002(a)**
- The groundwater ownership and rights described by **§36.002** entitle the landowner, and his lessees, heirs, or assigns, to drill and produce, w/o causing waste or malicious drainage or negligently causing subsidence. **§36.002(b)**

# Ground Water Rights

- Ground Water rights can be severed from the rest of the bundle of sticks making up the fee simple estate
- Ground Water rights are part of the surface estate
- The surface owner can convey some or all of the fee simple estate while retaining the ground water rights
- The owner can convey the ground water rights while retaining the rest of the surface estate
- A severed groundwater estate is dominant over the surface estate. A severed mineral estate is dominant over both.

# Ground Water Leases

1. O&G leases convey an ownership interest, a fee simple determinable, with a possibility of reverter
2. We don't know whether a Ground Water lease is a conveyance of an ownership interest like an O&G lease
3. Ground Water leases provide for a royalty percentage of the water taken, usually paid in cash

# Produced Water

1. “Produced water” is water produced as a by-product of oil or gas production.
2. Traditionally considered a waste product, so surface owner often retained no royalty interest in produced water.
3. Now a market is developing for produced water.
4. **Tex. Nat. Res. Code § 122.002** says that, when “fluid oil and gas waste” is produced and used by or transferred to a person who takes possession of that waste for the purpose of recycling, the using/receiving person becomes the owner of that fluid waste until ownership is transferred to another person.

# Marital Property Issues: Surface Water

1. Diffused surface water is part of the surface estate. If the surface estate is SP:
  - The sale of diffused surface water is a sale of property, suggesting a mutation of SP.
  - Diffused surface water is renewable, akin to timber and crops, suggesting CP.
  - Is the sale of the diffused surface water **right** different from the sale of the **water** itself? Is the right SP and the water CP?
2. TCEQ water right Permit is a property right that can be SP or CP.

# Marital Property Issues: Ground Water

3. Ground water is part of the surface estate. If the surface estate is SP:
  - The sale of ground water is the sale of property, suggesting a mutation of SP.
  - Ground water can be renewable, akin to timber and crops, suggesting CP.
  - Is the sale of ground water **rights** different from the sale of ground **water**?

# Marital Property Issues: Produced Water

## 4. Produced water is ground water

- The mineral lease can but may not give the lessor a right to share in proceeds from sale of produced water.
- When produced water is transferred to a recycler, ownership transfers. Are the proceeds SP or CP?
- If the surface estate is SP and the owner receives a % of proceeds from sale of produced water, are the proceeds SP or CP?

# Wells

1. Oil and Gas Wells
2. Pooling
3. Injection Wells
4. Disposal Wells
5. Water Wells
6. Marital Property Issues



# Pipelines

1. Condemnation: SP land mutates into SP cash
2. Easements: Unclear whether SP land mutates into SP cash
3. Privately-owned:
  - If embedded in the soil, may be a fixture that becomes part of the land
  - If constructed using CP money and embedded on SP land, likely reimbursement, not ownership
  - If not embedded but constructed across SP land using CP money, is it CP ownership or reimbursement?

# WIND RIGHTS



Roscoe Wind Farm

# Wind “Rights”

1. The landowner owns the land, including the airspace above the land, which is part of the surface estate.
2. Does the landowner have a “right” to utilize the wind that blows across the land?
3. Does the landowner have a right to wind that s/he has “captured”?
4. Is the wind really captured, since the wind blows through and beyond the wind turbines?
5. Should we focus on the easement or lease, instead of the wind itself?
6. The Ground Water rights and Mineral estate are dominant.

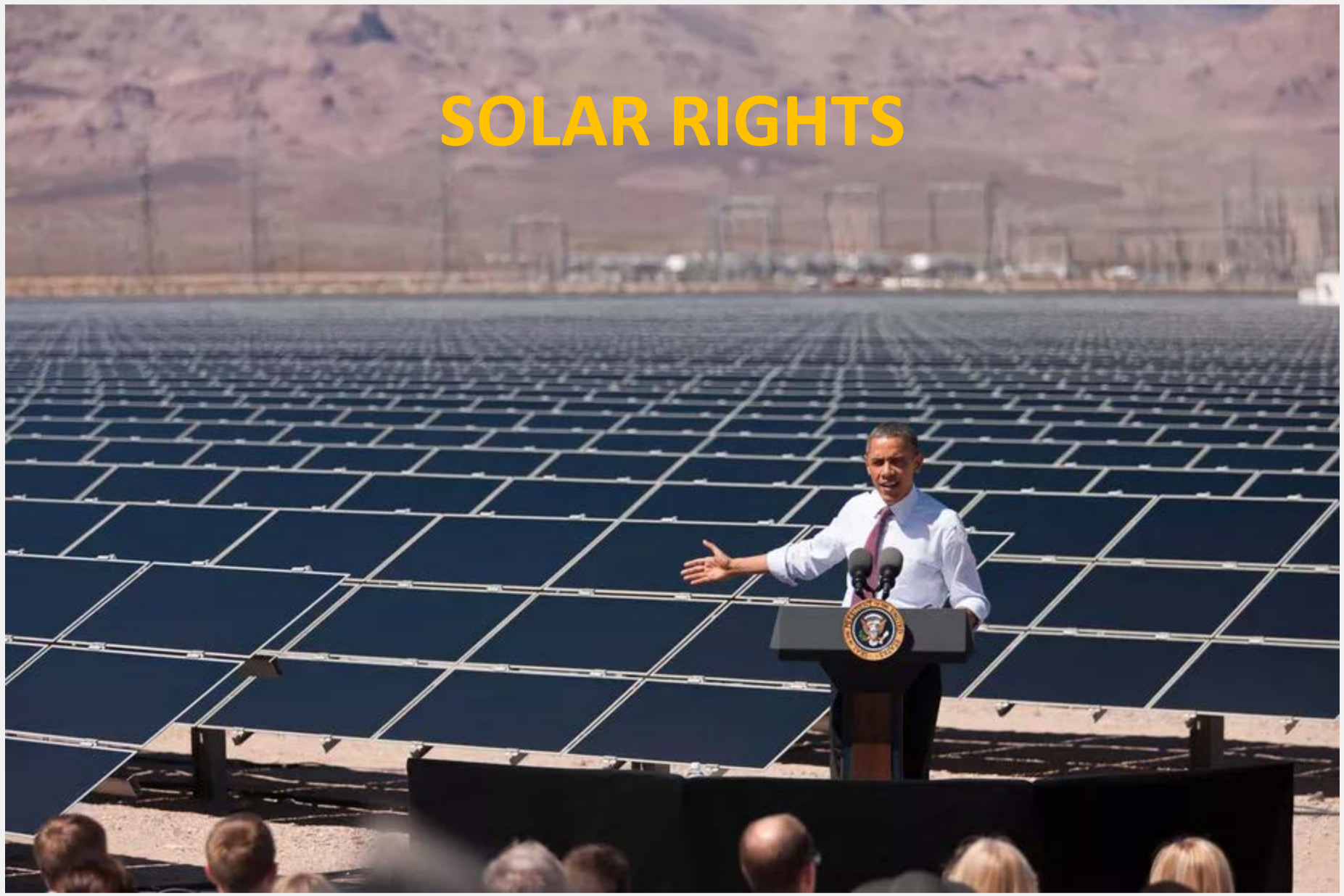
# General Features of a Wind Lease

1. The Lease Term
2. Rents vs. Royalties
3. Easements vs. Lease
4. The Mineral Estate is dominant
5. Property Taxes
6. Surface Damages
7. Removal Bond

# Marital Property Issues: Wind

1. Nobody owns the wind. The right to erect windmills and wind turbines belongs to the surface estate. That right can be assigned.
2. Is the right to give access to the wind different from revenues generated from the wind?
3. Does Easement vs. Lease matter?
4. A wind lease signed before marriage is SP; if signed during marriage, then presumptively CP unless a mutation of a SP ownership right
5. Is the income from a pre-marital wind lease CP during marriage and SP after divorce?
6. Can the divorce court divide the income from a CP wind lease independent from awarding the land?

# SOLAR RIGHTS



# General Features of a Solar Lease

1. The Lease Term
2. Rents vs. Royalties
3. Easement vs. Lease
4. The water rights and Mineral Estate are dominant
5. Property Taxes
6. Surface Damages
7. Exclusion From Occupied Area
8. Removal Bond

# Marital Property Issues: Solar

1. No one owns sunlight, so no mutation of a separate property origin
2. If “right” to utilize sunlight arises upon capture, then rights arise when sunlight hits the solar cell
3. Recurrent payments are royalties, not rent. Does that matter?
4. Does it matter if the agreement is an easement and not a lease?
5. A solar energy lease signed before marriage is SP; if signed during marriage, is it CP or belong to the surface estate?
6. Is the income from a pre-marital solar lease CP during marriage and SP after divorce?
7. Should we focus on the land and equipment and not photons and electrons?



# Marital Property Issues: Solar

7. Lease term 30 to 50 years
8. Signing Bonus – is it like minerals, the same character as the surface estate?
9. Royalty Income – more like mineral royalties or more like rent?
10. Removal Bond – should run with the land
11. Injury to the land; Reduction in the value of the land
12. Can the royalties from a solar lease on SP land signed during marriage be divided upon divorce?

The End