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Make Peace, Not War: Negotiating and Drafting Accommodation Agreements in the Oil and Gas Industry with Wind and Solar Companies.

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"There's battle lines being drawn, Nobody's right if everybody's wrong"[1]

"You will hear of wars and rumors of war" Philip Caputo, Rumors of War (1977)[2]

[1] "Buffalo Springfield – For What It's Worth." *Genius*, 5 Dec. 1966, genius.com/Buffalo-springfield-for-what-its worth-lyrics (last visited, February 22, 2021).
[2] *Matthew* 24:6 (NIV), as quoted in, Caputo, Philip, and Kevin Powers. *A Rumor of War: the Classic Vietnam Memoir*. St Martins Press, 2017.

1. INTRODUCTION: THE CLOUDS OF WAR

Man's endless pursuit of energy, starting with invention of fire, through the modern solar panel brings a crushing drive to improve and maximize the production of energy as well as endless competition for the use of surface of land in energy rich areas.

Beginning with the discovery of Spindletop in 1901, the oil industry quickly surpassed coal as the king of energy production not only in Texas but in the United States.[3] After a reign of nearly 100 years beginning in the late 1990's, the oil industry began to share the limelight with new sources of energy, euphemistically called "green energy," which was once thought of as the stuff of Hollywood and science fiction novels.[4] It was not long before tensions began to rise between the old king of energy and the wind and solar newcomers arriving from places like California and foreign countries, such as Germany, Spain and Scandinavia.[5] So it was that by 2009, thousands of wind leases had been executed by landowners in West Texas, with three of the world's largest wind farms located near the small town of Sweetwater where the authors maintain their main office. Early during that year, author Rod Wetsel received a call from the editors of the Rocky Mountain Mineral Law Foundation about writing a paper regarding the looming clash between oil and gas and wind developers. For this task, they also selected Professor K.K. DuVivier of the University of Denver law school. The result was the publication of an article in the 55th Annual Institute of the Rocky Mountain Mineral Law Foundation entitled "Jousting at Windmills: When Wind Power Development Collides with Oil, Gas and Mineral Development."[6] The gist of the article focused in detail on the upcoming energy Armageddon and predicted inevitable conflict, but suggested possible solutions.[7] Thankfully, in the years that followed, the conflicts between wind developers and mineral lessee were few and isolated. Today, these industries are typically able to accommodate one another and their concurrent use of surface use agreements commonly called accommodation agreements. As many of large wind companies have now shifted into solar development, many accommodation practices used for wind are now implemented in solar leases, with various degrees of success. The heightened tension between solar surface use and mineral accommodation will be illustrated by the most extensive solar accommodation requirements, and the recent litigation regarding solar surface use and mineral development.

The paper is a guide to successfully maximize the surface use of a landowner's property, allowing the landowner to have several revenue streams from the surface and mineral estate, enable wind and solar developers and oil companies to jointly develop the property for energy production, all while protecting the landowner from exposure to liability. It will also assist the practicing attorney in mastering the art of negotiating and drafting accommodation agreements for use not only in Texas, but elsewhere.

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[3] *See Oil Production in Texas*, Texas State Impact, *available at* https://stateimpact.npr.org/texas/tag/oil-production-in-texas/ (last visited February 22, 2021).

[4] *See* Katherine Blunt, *Solar Power Booms in Texas*, Wall Street Journal, *available at* https://www.wsj.com/articles/solar-power-booms-in-texas-11606579200#:~:text=Texas%20is%20the%20leader%20in,of%20wind%20and%20solar%20generation (last visited February 22, 2021).

[5] *See* Matthew Johnston, *10 Biggest Renewable Energy Companies in the World*, Investopedia, *available at* https://www.investopedia.com/investing/top-alternative-energy-companies/ (last visited February 22, 2021).

[6] *See* K.K. DuVivier & Roderick E. Wetsel, "Jousting at Windmills: When Wind Power Development Collides with Oil, Gas, and Mineral Development," 55 Rocky Mt. Min. L. Inst. 9-1 (2009).

[7] *Id.*

2. THE GREAT DIVIDE – SPLIT MINERAL ESTATES AND THE ACCOMMODATION DOCTRINE

It is now well established that the surface estate and the mineral estate can be severed, creating two estates from the fee simple interest of land.[8] The divide began almost 80 years ago, when the Texas Supreme Court issued a landmark opinion in *Harris v. Currie*, holding that "a grant or reservation of minerals would be wholly worthless if the [mineral owner] could not enter upon the land to explore for and extract the minerals granted or served."[9] Texas law established the dominant estate doctrine—that the mineral estate is "dominant" to the surface estate—allowing the mineral owner to continue use of the surface for the extraction of the minerals.[10] This doctrine embodies the above stated logic that the severed mineral rights would be of no use to the mineral owner if the mineral owner could not enter onto the surface in order to explore or extract the mineral.[11]

Texas jurisprudence on the dominant estate doctrine, written to protect the state's newest form of revenue, became the benchmark for many other state courts, ruling in favor of the mineral estate owner, resulting often in harsh outcomes for the surface owner.[12] By today's standards, these draconian results seem quite shocking. For example, in the 1919 case of *Grimes v. Goodman Drilling Co*., the Grimes family moved to the oil boom town of Burkburnett, Texas, purchasing a lot and house subject to an existing oil and gas lease.[13] The Grimes family moved into their home only to have Goodman Drilling erect a derrick on their lot and begin drilling operations beside the Grimes's home.[14] The derrick slush pit was routed by the Grimes house, throwing grease and slush over the home's exterior.[15] The Grimes family sued Goodman over the slush pit and the constant noise of the derrick, but both the trial court and appellate court ruled in favor of Goodman Drilling, noting the Grimes family had purchased the lot subject to an oil and gas lease, and had no grounds to complain about the drilling of the well.[16]

Similar cases occurred frequently during the early days of the Texas oil industry so that by 1954, the Texas Supreme Court held that an oil company "was under no duty to fence the well to prevent [the landowner's] cattle from entering upon the land near the well and drinking oil on the ground" from which the cattle died.[17] In 1957, the Texas Supreme Court even went so far as to hold that an oil company had no obligation to restore the surface of the land to its prior condition after drilling operations if there was no express provision in the oil and gas lease requiring it to do so.[18] Incredible as it seems, these cases are still good law in Texas; however through the years, Texas courts have softened the harsh edge of the dominant estate doctrine.[19]

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[8] *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 60 (Tex. 2016).
[9] *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943).
[10] *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244, 248-49 (Tex. 2013).
[11] *See* Harris*, supra* note 10.
[12] *See* David E. Jackson, *Surface Use: The Dominant Estate, Reasonable Use and Due Regard* 2, State Bar of Texas 24th Annual Advanced Oil, Gas and Energy Resources Law Course 2006.
[13] *Grimes v. Goodman Drilling Co*., 216 S.W. 202 (Tex. Civ. App. Fort Worth 1919, writ dism'd).
[14] *Id.* at 204.
[15] *Id.*
[16] *Id.*
[17] *Warren Pet. Corp. v. Martin*, 271 S.W.2d 410, 412 (Tex. 1954).
[18] *Warren Pet. Corp. v. Monzingo*, 304 S.W.2d 362, 363 (Tex. 1957).
[19] *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017).

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