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The Balance of Power in Accommodation Doctrine Disputes After *Merriman v. XTO*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CODES:

OTHER:

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The accommodation doctrine has been around for decades and dozens of articles have covered its contours. Last year, however, the Texas Supreme Court issued the *Merriman* opinion – its first accommodation doctrine case since 2011 – and arguably settled some of the interpretation and application disputes that had developed since the doctrine's inception.

In an effort to be complete, this article will briefly cover the landscape surrounding the doctrine and its origination; discuss the *Merriman* opinion itself; address some of the outstanding issues; and then provide some possible solutions for those in the industry.

I. The legal landscape surrounding the accommodation doctrine and the mineral owner's ability to use the surface

The accommodation doctrine arose as one of several mechanisms imposing limits on the mineral estate's ability to use a surface.

A. General rule: the owner of the mineral estate can use the surface

The mineral estate carries with it the right to use as much of the surface as reasonably necessary to explore for and develop the minerals. *E.g.*, *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013). This right over the surface estate has been described by the Texas Supreme Court as an "appurtenance" and a "mineral easement" over the surface of the land. *E.g., Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943). The easement is automatically implied and attaches even if the surface owner does not expressly grant it. *Empire Gas & Fuel Co. v. Texas*, 47 S.W.2d 265, 268 (Tex. 1932). The Texas Supreme Court has stated the reason for this "easement":

> This common law right was created "because a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved."

Tarrant County Water Control & Improvement Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993) (citing *Harris*, 176 S.W.2d at 305). *See also Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 103 (Tex. 1984) ("This is an imperative rule of mineral law; a mineral owner's estate would be worthless without the right to reach the minerals."); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810-11 (Tex. 1972); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621-23, 627-28 (Tex. 1971); *Brown v. Lundell*, 344 S.W.2d 863, 866 (Tex. 1961).

This deference to mineral estate owners – also known as the "dominant estate rule" – is often found in the language of mineral leases themselves, such as:

> Lessor . . . does hereby grant, lease and let unto Lessee for the purposes of exploring, prospecting, drilling and mining for and producing oil and gas and all other hydrocarbons, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees, and without additional consideration, does hereby authorize Lessee to enter upon the land covered hereby to accomplish said purposes.

A.A.P.L. Form 675, Oil and Gas Lease.

Thus, a variety of cases have permitted mineral owners to construct not just drill sites but roads, buildings, facilities, pipelines, and other structures on the surface. The mineral owner may also enter and exit the tract, conduct seismographic tests, and use surface assets such as caliche and water. *See, e.g.*, *Merriman*, 407 S.W.3d at 249 ("A party possessing the dominant mineral estate has the right to go onto the surface of the land to extract the minerals, as well as those incidental rights reasonably necessary for the extraction. The incidental rights include the right to use as much of the surface as is reasonably necessary to extract and produce the minerals.").

Not only does the mineral estate owner have the right to use the surface as reasonably necessary, but because the mineral estate is dominant, the mineral owner need not maintain or restore the surface in the absence of a statute or lease provision requiring such restoration. *See Warren Petrol. Corp. v. Monzingo*, 304 S.W.2d 362 (Tex. 1957). Similarly, barring an agreement to do so or violation of one of the doctrines discussed below, the mineral owner has no duty to compensate for its surface use. *See Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967) ("A person who seeks to recover from the lessee for damages to the surface has the burden of alleging and proving either specific acts of negligence or that more of the land was used by the lessee than was reasonably necessary."); *General Crude Oil v. Aiken Co.*, 344 S.W.2d 668, 670-71 (Tex. 1961); *see also Moser*, 676 S.W.2d at 103 (acknowledging general rule of non-compensation, but creating exception for production of substances not specifically described in a conveyance, but whose production requires broad-scale surface destruction).

Moser was an unusual case but illustrates the reasoning that led to the general rule of no compensation for surface use: the grantor of specifically identified minerals is presumed to know how those minerals are produced and thus must have intended to also grant the ability to produce the minerals. The *Moser* case, however, dealt with minerals *not* specifically identified. In *Moser*, the conveyance was for "all of the oil, gas, *and other minerals*." *Moser*, 676 S.W.2d at 100 (emphasis added). The mineral owner wanted to extract uranium ore, which is found just 200 feet below the surface, as one of its "other minerals." *Id.* at 100-01. Such extraction would necessarily destroy the surface and so the surface owner objected. *Id.* At 103. The Texas Supreme Court, consistent with prior mineral cases, held that the uranium owner would not be precluded from its necessary use of the surface. *Id.* However, unlike prior mineral cases, the Court found that the grantor probably did not anticipate destruction of the surface since uranium was not specifically contemplated by the deed. *Id.* In such circumstances, the Court held, the mineral owner must compensate the surface owner for the destruction. *Id.*

If the conveyance in *Moser* had been for "all of the oil, gas, *uranium ore*, and other minerals," the Court held that the mineral owner would not have had to compensate the surface owner for the destruction, because "[i]t is reasonable to assume a grantor who expressly conveys a mineral which may or must be removed by destroying a portion of the surface estate anticipates his surface estate will be diminished when the mineral is removed." *Id.* "It is also probable the grantor has calculated the value of the diminution of his surface in the compensation received for the conveyance." *Id.* But, "[t]his reasoning is not compelling when a grantor conveys a mineral which may destroy the surface in a conveyance of 'other minerals.'" *Id.*

B. General rule of surface use is limited by "reasonableness"

The reasonable use doctrine, unlike the accommodation doctrine, applies regardless of whether the surface owner is actually using the