COMMENT

THE ACCOMMODATION DOCTRINE REVISITED: IMPLICATIONS IN LAW AND IN POLICY

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I. INTRODUCTION

Recently, oil and gas production in Texas has increased at an unprecedented rate due to the Shale Boom.[1] While this surge in production has resulted in an economic windfall for landowners,[2] it has also prompted new litigation over old problems.[3] One such problem is the extent of the right of the mineral owner, usually the oil company, to interfere with a surface owner's pre-existing uses.[4]

In *Merriman v. XTO Energy, Inc.*,[5] the Supreme Court of Texas required a surface owner to show he did not have a reasonable alternative to conduct his operations as part of his burden in arguing a successful claim under the accommodation doctrine, *before* examining whether *the mineral owner* had a reasonable alternative to conduct operations.[6] As suggested in the amicus brief by the Texas Farm Bureau, this requirement could have subtly, yet substantively changed the elements of the accommodation doctrine for the first time in twenty years.[7] The court's application of the accommodation doctrine may have overlooked long-standing precedent.[8] Despite this "new" outlook, the *Merriman* opinion does not mention or discuss departure from the historical analysis, which begs the question: Did the court even change the doctrine, and if so, was the change purposeful, or

1. *See Eagle Ford Shale Information*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/oil-gas/major-oil-gas-formations/eagle-ford-shale/ (last updated Sept. 29, 2014) ("There were 2,418 producing gas well[s] on schedule in 2013; 875 producing gas well[s] on schedule in 2012; 550 producing gas wells in 2011; 158 producing gas wells in 2010; and 67 producing gas wells in 2009.").

2. *See* Riley W. Vanham, Comment, *A Shift in Power: Why Increased Urban Drilling Necessitates a Change in Regulatory Authority*, 43 ST. MARY'S L.J. 229, 247 (2011) ("Many residents wish to allow drilling because of the resulting economic benefits.").

3. *See* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 248–50 (Tex. 2013) (reviewing the applicability of the Texas accommodation doctrine).

4. *See id.* at 246 ("This case involves the question of whether a mineral lessee failed to accommodate an existing use of the surface when the lessee drilled a gas well.").

5. Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013).

6. *See id.* at 250–51 (ignoring the historical application of the accommodation doctrine).

7. *See* Brief of Amicus Curiae of Texas Farm Bureau on Motion for Rehearing at 12, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2012 WL 6044204, at *12 ("Thus, it is to this new analytical framework of the Accommodation Doctrine in the Waco Court Opinion in *Merriman* that the Texas Farm Bureau objects. It is not consistent with *Getty,* and with the amount of oil and gas activity in Texas, this Court should intervene."); *see also Merriman*, 407 S.W.3d at 250 (transforming the accommodation doctrine into a balancing test); Tex. H.B. 3600, 83d Leg., R.S. (2013) (proposing legislation that would address similar issues in a different manner).

8. *See* Tarrant Cnty. Water Control & Improv. Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993) (reiterating the elements of the accommodation doctrine); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810–11 (Tex. 1972) (providing limitations to the accommodation doctrine); Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (forging the path of the accommodation doctrine in Texas).

did the court overlook the alteration of the doctrine because of a pro-development policy?[9] This opinion may have a much greater impact on surface owners of a severed estate than anticipated,[10] such as the economic effects of ousting existing agricultural operations from Texas lands,[11] but could potentially be rectified with the enactment of adequate surface protection legislation in Texas.[12]

This Comment will address various issues concerning the relationship between surface estate owners and their respective mineral estate owners, their correlative rights, and the effects of the *Merriman* holding on this relationship. Part I summarizes the *Merriman* case and acts as a guideline for the discussion. Part II provides information pertinent to the foundational principles of oil and gas law used in *Merriman*, as well as the case's factual background. The history and basic underpinnings of the accommodation doctrine are discussed in Part III, wherein a few Texas cases that have made the largest impact on the accommodation doctrine in Texas will be briefly analyzed. Part IV analyzes whether the holding in *Merriman* is divergent from the precedential law of the accommodation doctrine. Part V follows with a discussion of the limited statutory

9. *Compare Merriman*, 407 S.W.3d at 249 ("To obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued."), *with Sun Oil*, 483 S.W.2d at 812 (applying the traditional accommodation doctrine but holding that the mineral owner may make use of the salt water on the surface owner's property solely because there were no other alternative water sources available for the waterflood project on the leased premises), *and Getty Oil*, 470 S.W.2d at 622 ("[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.").

10. *See* Brief of Amicus Curiae of Texas Farm Bureau on Motion for Rehearing at 12, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2012 WL 6044204, at *12 (stating the court's interpretation of the doctrine may "become a source of substantial leverage" against rural landowners); *see also Merriman*, 407 S.W.3d at 249 (switching the reasonable alternative test to first require inspection of whether the surface owner has available alternatives rather than whether the mineral owner has available alternatives); Transcript of Oral Argument at 7, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *7 (bringing the idea of "conditional submission" to the forefront of the argument to determine which party should accommodate first).

11. *See* Harper Estes & Douglas Prieto, *Contracts As Fences: Representing the Agricultural Producer in an Oil and Gas Environment*, 73 TEX. B.J. 378, 378 (2010) (understanding the prevalent competing interests of the agricultural sector and the energy sector).

12. *See generally* Andrew M. Miller, Comment, *A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas Is Ready to Take the Next Step with a Surface Damage Act*, 40 HOUS. L. REV. 461 (2003) (postulating how the creation of statutory protections could benefit surface owners).

protections offered to surface estate owners in Texas and how those protections drastically vary from those of other highly productive oil and gas states, such as North Dakota and Oklahoma. Additionally, Part V briefly explores the political influences surrounding the development of oil and gas laws and regulations. Part VI illustrates the status of the law after *Merriman* and how its holding could potentially impact the oil and gas industry, lessors, and owners of severed surface estates. Finally, Part VII reconciles the abovementioned sections and provides a general overview of the current state of the law.

II. FACTUAL BACKGROUND AND LEGAL UNDERPINNING OF *MERRIMAN*

While property owners often own their land "from Heaven to Hell" in fee simple absolute, it is common for the mineral interests to be severed from the surface estate.[13] These severances occur in deeds or when the owner executes an oil and gas lease.[14] In Texas, the oil and gas "lease" is actually a conveyance by the owner, who then becomes the lessor,[15] of a fee simple determinable to a lessee.[16] Through the conveyance, the mineral owner, or lessee, acquires the right to use the surface, the right to develop, the right to alienate, and the right to retain benefits from the lease.[17] The mineral owner gains the dominant estate with an implied

13. *See* Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 60 (1898) (establishing the common law principle that the subsurface minerals may be severed from the estate without the surface owner having to relinquish title); Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598 (Pa. 1893) ("[I]t often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or *stratum*, while he retains the surface for settlement and cultivation, precisely as he held it before."); Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 942 (1935) ("No time need be spent in restating the general common-law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them." (quoting Ohio Oil Co. v. Indiana, 177 U.S. 190, 202 (1900))); Christopher M. Alspach, *Surface Use by the Mineral Owner: How Much Accommodation Is Required Under Current Oil and Gas Law?*, 55 OKLA. L. REV. 89, 91–92 (2002) (providing foundational information necessary to understand the severance of estates); *see also* White v. Brown, 559 S.W.2d 938, 939–41 (Tenn. 1977) (deciding whether the deceased intended to convey a life estate or a fee interest).

14. *See* Christopher S. Kulander, *Common Law Aspects of Shale Oil and Gas Development*, 49 IDAHO L. REV. 367, 369–70 (2013) (discussing the severance of an estate and the potential problems).

15. *See* Douglas R. Hafer et al., *A Practical Guide to the Operator/Surface-Owner Disputes and the Current State of the Accommodation Doctrine*, 17 TEX. WESLEYAN L. REV. 47, 51–52 (2010) (commenting on the roles, responsibilities, and duties of the parties to an oil and gas lease).

16. *See* Alspach, *supra* note 13, at 91 (characterizing the "implied right of the mineral owner to use the surface . . . as an easement"); Hafer et al., *supra* note 15, at 49–51 (describing the rights of a mineral owner privy to an oil and gas lease).

17. *See* Sundance Minerals, LP v. Moore, 354 S.W.3d 507, 511 (Tex. App.—Fort Worth 2011, pet. denied) (recognizing five interests of which the mineral estate is composed).

easement, which allows the mineral owner to employ the surface in any manner that may be reasonably necessary to conduct operations and obtain minerals.[18] To determine if a surface use is within the scope of what is considered to be "reasonably necessary," the accommodation doctrine is applied.[19]

> [W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.[20]

These basic oil and gas law principles set the stage for the facts in *Merriman*.

Merriman, the surface owner and lessor in this case, was a full-time pharmacist[21] but spent much of his time engaging in cattle operations throughout various times of the year on his forty-acre tract, which was subject to an oil and gas lease.[22] Merriman used both temporary and permanent cattle pens and corrals in his annual activities of sorting and working the cattle on the tract.[23] The controversy began when XTO

18. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971) (stating reasonable limitations exist when the lessee makes use of the surface); Tex. Genco, LP v. Valence Operating Co., 187 S.W.3d 118, 121–22 (Tex. App.—Waco 2006, pet. denied) ("The dominant mineral estate has the right to reasonable use of the surface estate to produce minerals, but this right is to be exercised with due regard for the rights of the surface estate's owner.").

19. *See Getty Oil*, 470 S.W.2d at 622 (applying the accommodation doctrine).

20. *Id.*

21. During oral arguments to the Supreme Court of Texas, XTO Energy downplayed the importance of Merriman's agriculture operation by equating it to a hobby. *See* Transcript of Oral Argument at 8, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *8 ("Mr. Merriman likes to draw [out his operations] because he likes to do it himself. I don't blame him. I have a hobby of flying. I like to do it myself. I don't like to turn the airplane over to somebody else . . . .").

22. *See* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 247 (Tex. 2013) (describing the property in controversy); *see also* Amicus Brief of Texas Oil & Gas Ass'n in Support of Respondent XTO Energy Inc. at 1–3, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2012 WL 6044207, at *1–3 (condemning Merriman's stance and condescendingly describing Merriman as a "recreational rancher" and his cattle operations as a "pharmacist's hobby").

23. *See Merriman*, 407 S.W.3d at 247 (detailing the process of Merriman's operations); *see also* Ernest E. Smith, *The Growing Demand for Oil and Gas and the Potential Impact upon Rural Land*, 4 TEX. J. OIL GAS & ENERGY L. 1, 3 (2008) ("A major issue for the landowner who is either using or leasing his or her land for farming or grazing is the potential [mineral extraction] operations have to interfere with agricultural operations and thereby either directly or indirectly reduce the agricultural income produced from the land."); James S. Lloyd, *Scratching the Surface: Understanding the Potential Impact of Minerals Rights on Your Texas Loan*, PILLSBURY L. PERSPECTIVES ON REAL EST. (Spring 2012), http://www.pillsburylaw.com/publications/scratching-the-surface-understanding-the-potential-impact-of-minerals-rights-on-your-texas-loan (warning landowners of the possible impacts and

Energy, Inc. (XTO), the lessee and mineral owner, approached Merriman in September of 2007 in hopes of locating a gas well on the tract.[24] Merriman opposed XTO's plan, reasoning that the gas well would greatly hinder his cattle operations.[25] Despite this opposition, XTO began the process of placing the gas well on the tract.[26] Merriman sought an injunction, arguing XTO had failed to accommodate his operations and therefore committed a trespass.[27] Subsequently, both parties filed motions for summary judgment.[28] The trial court granted XTO's motion.[29]

Ruling in favor of XTO, the Tenth Court of Appeals based its judgment on Merriman's failure to bring forth evidence showing he did not have any reasonable alternatives for conducting his cattle operations and that he had leased several other tracts of land which could properly support his operations.[30] The Supreme Court of Texas affirmed the holding.[31] However, the court then shifted its focus to the evidentiary issue of "whether Merriman produced legally sufficient evidence that he did not have any reasonable alternatives for conducting his cattle operations on the tract, not whether he produced evidence that he had no reasonable alternatives for general agricultural uses" and based its decision in large part on related findings.[32] This evidentiary issue raises this question: Prior to *Merriman*, did the accommodation doctrine, as fashioned by Texas courts, require the surface owner to prove he or she did not have reasonable alternatives before inquiring into the reasonable alternatives of the mineral owner?[33]

restrictions an oil and gas lease can impose).

24. *Merriman*, 407 S.W.3d at 247.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* Merriman v. XTO Energy, Inc., No. 10-09-00276-CV, 2011 WL 1901987, at *1 (Tex. App.—Waco, May 11, 2011) (mem. op., not designated for publication) (noting the procedural history at the trial court level), *aff'd*, 407 S.W.3d 244 (Tex. 2013).

29. *Id.*

30. *See id.* at *4 (declaring that Merriman's lack of evidence was a hindrance to his case).

31. *Merriman*, 407 S.W.3d at 252.

32. *See id.* at 250–51 (considering Merriman's burden of proof).

33. *See* Brief of Amicus Curiae of Texas Farm Bureau on Motion for Rehearing at 7, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2012 WL 6044204, at *7 (scrutinizing the approach of the Tenth Court of Appeals and noting the decision "all but extinguishes the correlative rights of the surface owner").

III. A BRIEF HISTORY AND OVERVIEW OF THE ACCOMMODATION DOCTRINE IN TEXAS

The accommodation doctrine is a common law doctrine used in Texas to restrict a mineral owner's right to use the surface in a severed estate.[34] It is triggered when a mineral owner's interference with a pre-existing surface use is substantial and significantly impairs the use.[35] Unfortunately, as revealed in the discussion below, the protections offered to surface owners by this doctrine have proven to be somewhat illusory.[36]

It has long been settled that rights to minerals beneath the ground may be separated from the rights of the surface.[37] When an estate is severed, the surface becomes the servient estate,[38] and the mineral estate becomes the dominant estate.[39] The mineral estate acquires an implied easement[40]

34. *See* Hafer et al., *supra* note 15, at 58 (identifying the accommodation doctrine as the most significant way to restrict surface uses in Texas).

35. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 621–22 (Tex. 1971) (invoking the accommodation doctrine where a mineral owner's installation of pumping jacks substantially interfered with the surface owner's pre-existing irrigation system, and other reasonable alternatives, common to the industry, would allow the mineral owner to reach the minerals).

36. *See Merriman*, 407 S.W.3d at 249 (holding against Merriman based on his failure to provide evidence that XTO's placement of the well site caused more than an inconvenience to his cattle operations); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 812 (Tex. 1972) (allowing the mineral owner to use large amounts of water, which is considered to be part of the surface estate, for a waterflood project simply because there was no other source of water on the leased premises); *see also* Paige Anderson, Note, *Reasonable Accommodation: Split Estates, Conservation Easements, and Drilling in the Marcellus Shale*, 31 VA. ENVTL. L.J. 136, 146 (2013) ("If a dispute arises, the lessee almost always wins." (quoting John S. Lowe, *The Easement of the Mineral Estate for Surface Use: An Analysis of Its Rationale, Status, and Prospects*, 39 ROCKY MTN. MIN. L. INST. 4-1, 4-3 (1993))); GASLAND (Docurama 2010) (demonstrating how little protection and deference is often afforded to landowners whose properties are subject to oil and gas leases); Mindy Riffle, *Over and Under: Landowners Have Legal Rights*, COUNTRY WORLD NEWS (Jan. 25, 2011, 3:55 PM), http://www.countryworldnews.com/news/headlines/797-over-and-under-landowners-have-legal-rights.html (on file with the *St. Mary's Law Journal*) (quoting Dr. Judon Fambrough of Texas A&M University who stated, "if an oil company gets an oil and gas lease from me, the mineral owner, they have, by the virtue of that lease, they have a right to exercise a right to enter and explore all that surface without asking permission, without paying surface damages and without having to restore it when they are through.").

37. *See* Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598 (Pa. 1893) ("[T]he surface of the land may be separated from the different *strata* underneath it, and there may be as many different owners as there are *strata*.").

38. The servient estate—or the surface estate in these situations—is the estate that has an implied easement imposed on it and must yield to the dominant estate. *See* Smith, *supra* note 23, at 10 ("[I]n the event of conflicts between the oil company and the surface owner or lessee of surface uses, the oil and gas company has the paramount legal right.").

39. The dominant estate—or mineral estate in these situations—is the estate which burdens the servient estate with an easement. *See* Matthew T. Milam, *Texas Surface Damage Litigation*, 61 THE ADVOC. (TEX.), Winter 2012, at 40, 40 ("It has long been established that the right to the minerals beneath the land carries with it the right to enter and extract those minerals[,] . . . [a]s the Texas Supreme Court articulated, ' . . . a grant or reservation of minerals would be wholly worthless if the

to use the surface for purposes related to mineral extraction.[41]

As stated in *Hunt Oil Co. v. Kerbaugh*,[42] "In the absence of other rights expressly granted or reserved, the rights of the owner of the mineral estate are limited to so much of the surface and such use thereof as are *reasonably necessary* to explore, develop, and transport the minerals."[43] In exercising

grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.'" (quoting Harris v. Currie, 176 S.W.2d 302, 305 (Tex. 1943))). Usually this is an affirmative easement and allows the owner of the dominant estate to affirmatively act on the property. *See* Smith, *supra* note 23, at 8–14 (introducing various situations in which the dominant estate has a significant impact and explaining the power gained with the ascertainment of the dominant estate). *But see* Miller, *supra* note 12, at 468–70 (describing the duties and liabilities the holder of the dominant estate may owe to the servient estate).

40. An easement is a non-possessory property interest that gives its holder a way to make use of property without actually owning it. *See* Alspach, *supra* note 13, at 91 (explaining how the concept of an implied easement is actually applied in a severed estate). In this case, a mineral owner acquires an easement to use the surface to gain access to the minerals. *See* Milam, *supra* note 39, at 40 (expressing the long-established principle that without the ability to extract the subsurface minerals, ownership of the easement over the surface estate would be rendered useless). This easement is implied but has become commonplace through custom and practice. *See* Miller, *supra* note 12, at 467–68 (providing a more in depth explanation of the role of an implied easement in a severed estate).

41. *See* Slaaten v. Cliff's Drilling Co., 748 F.2d 1275, 1277 (8th Cir. 1984) (describing the relationship and responsibilities of the parties in a severed estate); Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979) (affirming the dominance of the mineral estate implied in all oil and gas leases unless expressly stated otherwise); Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 867–68 (Tex. 1973) (noting the mineral estate owners possessed an implied easement to use the salt water on the property "to the extent reasonably necessary to develop and produce the minerals" from the leased tract, but could not advantageously use the salt water for other tracts); Gen. Crude Oil Co. v. Aiken, 162 Tex. 104, 344 S.W.2d 668, 669 (1961) (commenting on the relationship between surface owner and mineral owner in a severed estate where "appellant owed the duty to appellee as owner of the surface estate not to negligently injure such estate"); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410, 413 (1954) (emphasizing the respective rights of the parties); Gulf Prod. Co. v. Cont'l Oil Co., 139 Tex. 183, 132 S.W.2d 553, 562 (1939) (adhering to the concept of the severed estate and the duties of the owners therein), *superseded by* 139 Tex. 183, 164 S.W.2d 488 (1942); Grissom v. Anderson, 125 Tex. 26, 79 S.W.2d 619, 621 (1935) (announcing "well-established principles of law"); Gregg v. Caldwell-Guadalupe Pick-Up Stations, 286 S.W. 1083, 1084 (Tex. Comm'n App. 1926, holding approved) ("The right to produce oil would be worth little, without the further right to do those other things necessary to the complete enjoyment of the major right. But . . . the right . . . extends no further than to the production of oil or gas upon the leased premises and the doing of those things expressly authorized or necessarily implied in the lease as a necessary incident to the business of producing oil or gas."); Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296, 299 (1923) (referring to the idea of the mineral estate separating from the surface as "elementary"); *see also* Bodcaw Lumber Co. v. Goode, 254 S.W. 345, 348 (Ark. 1923) (affirming that mineral rights may be reserved separately from surface rights); Tex. Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, 722 (1915) (advancing the idea that "the conveyance of such minerals in place . . . creates a freehold interest in the land itself").

42. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979).

43. *Id.* at 135; *see also* Milam, *supra* note 39, at 40–41 (giving an example of how broadly the standard of "reasonably necessary" has been construed through case law). *But see* Smith, *supra* note

these reasonable uses and rights to the surface, the owners of mineral estates are expected to use due regard in their consideration for the surface owners' rights.[44]

A. *Getty Oil Co. v. Jones*

The accommodation doctrine was first articulated and adopted in the Texas case, *Getty Oil Co. v. Jones*,[45] which involved a lessee, Getty, who wanted to install beam-type pumping units that prevented the use of a pre-existing irrigation system used by Jones, the surface owner.[46] Arguing it had acted in a reasonable manner in installing the beam-type units, Getty Oil reasoned it had the absolute right to use the surface to effectuate the purpose of the lease because of the dominance of the mineral estate.[47] Jones argued that the pre-existing irrigation system was the most advantageous way for him to accomplish his agricultural purposes and that Getty had two ways to achieve its purposes of obtaining the minerals beneath the land: (1) the current system and (2) a system of pumping units which could be installed beneath the surface of the land in a cellar.[48] The availability of evidence showing that "Getty's use of an alternative method of producing its wells would serve the public policy of developing [the] mineral resources while, at the same time, permitting the utilization of the surface for productive agricultural uses" was an important underlying factor in the court's decision in favor of the surface owner.[49] The court also examined "established practices in the industry" to determine that Getty did have reasonable alternatives available to recover the underlying minerals.[50]

23, at 5 ("The viewpoint of [the] parties on reasonableness is quite different. Sadly for the surface owner, Texas law, which governs in the present case, implies that a mineral lease gives a large measure of deference to the lessee's view of reasonableness." (quoting Vest v. Exxon Corp., 752 F.2d 959, 960 (5th Cir. 1985))).

44. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971) (placing responsibility on the lessee to maintain some level of equity between the parties in an oil and gas lease).

45. Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971).

46. *See id.* at 619–20 (stating background information relevant to the cause of action); *see also* Smith, *supra* note 23, at 19–20 (providing a succinct summary of the important facts in *Getty Oil*).

47. *Getty Oil*, 470 S.W.2d at 621.

48. *Id.* at 622.

49. *See id.* at 622–23 (balancing the rights of the parties while attempting to find a favorable compromise that allows each party to continue with their use of the land).

50. *See id.* at 622 (relying on evidence showing that other oil companies had installed pumps in concrete cellars to avoid interfering with irrigation systems). *But see id.* at 624–26 (McGee, J., dissenting) (utilizing document interpretation of the lease to conclude that because Getty owns the dominant estate, it should not have to yield to the surface owners. "This Court should not rewrite the oil and gas lease . . . [and read] into the lease an implied covenant requiring Getty to alter its

Although not explicitly stated in the rule of the accommodation doctrine, the *Getty* opinion mentions the idea of "conditional submission," meaning that a jury must find the surface owner has proved he or she lacks reasonable alternatives for the pre-existing surface use before inquiring into whether the mineral owner has reasonable alternatives.[51] This idea was further articulated in the motion for rehearing:

> [A] proper [*initial*] inquiry would be whether Jones had reasonable means of developing his land for agricultural purposes other than by use of the sprinkler system in question. If this is found to be the case, Jones must yield to the surface use adopted by *Getty* since it is not contended that the beam-type pumps installed by Getty are otherwise unreasonable.[52]

Essentially, the idea of conditional submission changes the accommodation doctrine from the traditional three-element test to a four-element test.

During oral arguments before the Supreme Court of Texas in *Merriman*, counsel for XTO Energy relied on this idea of conditional submission in arguing Merriman's cattle operations should not have to be accommodated.[53] Ultimately, the *Merriman* court held the mineral owner did not have to accommodate the surface owner because the surface owner did not show any lack of reasonable alternatives for its operations, which speaks to conditional submission.[54] Through this reasoning, it seems as though *Merriman* is in line with *Getty*; however, other Texas

operations at its expense to accommodate Jones . . . [which] is contrary to, rather than in accord with, the intention of the original parties to the agreement.").

51. *See id.* at 623 (majority opinion) (stating that one consideration to be made when determining if the dominant estate should yield to the surface estate is whether the "alternatives available to [the surface owner] would be impractical and unreasonable under all the conditions"); *see also* Transcript of Oral Argument at 7, Merriman v. XTO Energy, 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *7 (explaining conditional submission to the court).

52. *See Getty Oil*, 470 S.W.2d at 628 (conditioning whether the dominant estate must modify or cease its activities on if the surface owner can first find a way to curtail its operations so the two estates may coexist); *see also* Transcript of Oral Argument at 7, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *7 (addressing the concept of conditional submission and arguing that, when the parties of a severed estate become involved in a surface dispute, the surface owner must accommodate the mineral owner first, if at all possible).

53. *See* Transcript of Oral Argument at 7, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *7 ("[T]he landowner must accommodate first. Otherwise, he's the dominant estate. If he can't accommodate . . . the dominant estate's use, then and only then do you get to the . . . second question [does the mineral owner have a reasonable alternative available], Jones must yield.").

54. *See* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 249–50 (Tex. 2013) (focusing on whether Merriman provided sufficient evidence to show that there were no other reasonable alternatives by which to conduct his operations).

cases[55] and treatises[56] have not traditionally incorporated this element requiring the surface owner show the lack of alternatives into the definition of the accommodation doctrine.

B. *Sun Oil Co. v. Whitaker*

The year following the *Getty* decision, the Supreme Court of Texas decided *Sun Oil Co. v. Whitaker*,[57] which commentators have interpreted as a step backward for the landowner.[58] The dispute involved the use of groundwater by the lessee in a secondary recovery waterflood project.[59] The court held Sun Oil, the lessee, was allowed to use potable

55. *See* Tarrant Cnty. Water Control & Improv. Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 912 (Tex. 1993) ("The accommodation doctrine mandates that the mineral owner's exercise of its right to use of the surface cannot unreasonably infringe on the surface owner's right of surface use if reasonable alternative surface uses are available to the mineral owner."); Tex. Genco, LP v. Valence Operating Co., 187 S.W.3d 118, 121–23 (Tex. App.—Waco 2006, pet. denied) (reestablishing the traditional elements of the accommodation doctrine); Ottis v. Haas, 569 S.W.2d 508, 514 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (agreeing the burden on the surface estate is to prove the mineral estate is not using the surface in a way that is reasonably necessary); *see also* Alspach, *supra* note 13, at 94 (interpreting *Getty* to require a preexisting use, an interference with that use, and reasonable alternatives available to the lessee for the accommodation doctrine); Richard J. Garcia & Paula K. Manis, *"Across the Great Divide": Surface Owners v Severed Mineral Owners—What Is "Reasonable Use"?,* 78 MICH. B.J., Feb. 1999, at 140, 140 (listing the traditional common law elements of the accommodation doctrine); Hafer et al., *supra* note 15, at 59 ("[T]he surface owner may show that the mineral owner's surface use is not reasonably necessary because the operator can employ other non-interfering and reasonable ways and mean of producing the minerals, the use of which will permit the surface owner to continue the existing surface use."); Anderson, *supra* note 36, at 147 ("The reasonableness inquiry established by *Getty* is different from that of the common law because it takes into consideration the surface owner's uses."); Vanham, *supra* note 2, at 240 (acknowledging the traditional elements of the accommodation doctrine and noting the doctrine has proven to be greatly ineffective in protecting surface rights).

56. *See* 4 NANCY SAINT-PAUL, SUMMERS OIL AND GAS § 40.2 (3d ed. 2013) ("Where there is an existing or planned use by the surface owner which would otherwise be precluded or impaired and where under established practices in the industry there are alternatives available to the lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the *lessee*.") (emphasis added); *see also* JEFFERSON JAMES DAVIS ET AL., 32 TEX. JUR. 3D EMINENT DOMAIN § 496 (2014) (affirming that when the existing or planned use by the surface owner would be impaired and when there are other industry practices available to the lessee, the lessee may be required to adopt an alternative method); BETH BATES HOLLIDAY, 51 TEX. JUR. 3D MINES AND MINERALS § 49 (2013) ("[W]here a surface owner's existing use would otherwise be precluded or impaired, and established industry practices provide alternatives which are available to the lessee to recover minerals, the rules of reasonable usage of the surface may require the *lessee's* adoption of an alternative method . . . .") (emphasis added).

57. Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972).

58. *See id.* at 812 (allowing more freedoms for the mineral owners to use on-site resources as they please).

59. *See id.* at 809 (seeking a permanent injunction to prevent the mineral owners from using a large amount of fresh water every day for its secondary recovery waterflood operation).

groundwater from the leased premises in its waterflood operations instead of traveling off the leased premises to acquire its own water, reasoning the use of water was "reasonably necessary to carry out the essential purpose of the lease."[60] Thus, Sun Oil was able to use large amounts of water, a surface substance, without permission from the surface owners and without having to provide compensation for any damage it might have caused.[61] The unavailability of any other water—which would force the lessee to travel off the premises to obtain water that was essential in the collection of the minerals, thereby degrading the dominant mineral estate—was a persuasive factor in the court's decision.[62]

C. *Texas Genco, LP v. Valence Operating Co.*

A more recent accommodation doctrine case, *Texas Genco, LP v. Valence Operating Co.*,[63] made further refinements to the accommodation doctrine, but this time in the surface owner's favor.[64] The surface owner, Genco, had set aside land and received permits for an industrial landfill to dispose of discarded material from its coal burning operations.[65] The landfill was divided into cells, and certain cells of the landfill had not yet been utilized.[66] The mineral owners wished to drill a straight-hole well on part of the cells that did not contain any waste.[67] The surface owners argued that the contemplated landfill constituted a pre-existing use with which the mineral owner's drilling would interfere.[68] The mineral owners argued that there was no actual pre-existing use because the cells were not in use

60. *See id.* at 812 (reasoning that the holding in *Getty Oil* was not applicable and "limited to situations in which there are reasonable alternative methods that may be employed by the lessee *[o]n the leased premises* to accomplish the purposes of this lease" (emphasis added)).

61. *See id.* at 810 (requiring nothing from the lessee in the way of damages to the lessor).

62. *See id.* at 812 ("To hold that Sun can be required to purchase water from other sources or owners of other tracts in the area, would be in derogation of the dominant estate."). *But see id.* at 819 (Daniel, J., dissenting) ("[I]t is particularly regrettable that today this Court becomes the first to say that the dominant estate is once again so sovereign that it has the implied right to take, consume and destroy the fresh water supply of a surface owner for a secondary water flooding project without compensation.").

63. Tex. Genco, LP v. Valence Operating Co., 187 S.W.3d 118 (Tex. App.—Waco 2006, pet. denied).

64. *See id.* at 124–25 (allowing the planned use of a landfill that was not yet actually operating to qualify as a pre-existing use).

65. *Id.* at 120.

66. *Id.* at 120–21.

67. *Id.* at 121.

68. *See id.* (explaining the substantial impairment of the landfill's processes if the straight-hole drilling was allowed).

as a landfill at the time of the proposed drilling.[69] Ultimately, the Tenth Court of Appeals held that the *planned* use of the landfill did qualify as a pre-existing use.[70]

In addition to clarifying that a planned use qualifies as a pre-existing use, *Genco* reaffirmed the third element of the traditional accommodation doctrine—the surface owner must show that the mineral owner has other reasonable alternatives available to conduct its operations—by stating "[the surface owner] had the burden of introducing evidence and obtaining findings necessary to establish that the plaintiffs [the mineral owners] had alternative means of access and that their use of the surface was not reasonably necessary because an alternative means of access was reasonable."[71] However, the opinion fails to mention the disputed element at issue in *Merriman*: whether a surface owner must first show that he has no reasonable alternatives before showing the mineral owner does have other reasonable alternatives.[72]

Because few cases had discussed the accommodation doctrine, the role of this disputed element remained unclear.[73] Most of the cases following *Sun Oil Co. v. Whitaker* refined and intended to clarify the application of the accommodation doctrine.[74] The lack of available precedent is likely one

69. *See id.* at 124–25 (arguing unsuccessfully that there was no evidence for the jury to determine Genco had a pre-existing use of the surface).

70. *Id.* at 123–24.

71. *See id.* at 123 (reestablishing that the surface owner has the burden of proving that the mineral owner has reasonable alternatives, regardless of whether the surface owner has reasonable alternatives).

72. *See* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 251 (Tex. 2013) ("Thus, we look to see whether he met his burden to produce evidence that he did not have any reasonable alternatives for continuing his cattle operation, including those essential aspects, on the tract.").

73. *See* Hafer et al., *supra* note 15, at 58–67 (alluding to confusion and a lack of consensus when analyzing and applying the individual elements of the accommodation doctrine).

74. *See* Vest v. Exxon Corp., 752 F.2d 959, 959 (5th Cir. 1985) (holding a mineral lease gives much deference to a "lessee's view of reasonableness of interference with surface use"); Tarrant Cnty. Water Control & Improv. Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 913 (Tex. 1993) (including economic reasonableness as a factor to consider in determining whether an alternative is reasonable); Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (recognizing that the grant "of minerals by fee owner effects a horizontal severance and the creation of two separate and distinct estates: an estate in the surface and an estate in the minerals"); Tex. Genco, LP v. Valence Operating Co., 187 S.W.3d 118, 120–23 (Tex. App.—Waco 2006, pet. denied) (applying, for the first time, the accommodation doctrine to facts not analogous with those in previous cases); Ottis v. Haas, 569 S.W.2d 508, 514 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (requiring more than mere inconvenience be shown to raise the accommodation doctrine); *see also* Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 933 (Colo. 1997) (accepting a modified version of the Texas accommodation doctrine in which the burden of proving the reasonableness of surface use lies with the mineral owner rather than on the surface owner); Key Operating & Equip., Inc. v. Hegar, 403 S.W.3d 318, 336 (Tex. App.—Houston [1st Dist.] 2013) (blending the accommodation doctrine and easement law

cause of the confusion in the doctrine's application and the tensions between parties to a severed estate.[75] While Texas case law has created confusion, other states balance the rights of mineral and surface owners with statutes that bolster equilibrium in the landowners' and mineral owners' relationships.[76]

IV. THE ACCOMMODATION DOCTRINE BEFORE *MERRIMAN*: HAS THE SURFACE OWNER'S BURDEN CHANGED?

Under the traditional three-element model of the accommodation doctrine, a mineral owner (or lessee) must accommodate surface uses of a landowner if the landowner shows that three elements have been satisfied: (1) there is a pre-existing use of the surface;[77] (2) the mineral owner is interfering with this use;[78] and (3) the mineral owner has other reasonable alternatives available to conduct its operations.[79] If we apply these elements to *Merriman*, Merriman's cattle operations would debatably

in holding that a mineral estate can use roads cutting through an adjacent, pooled tract that is not producing), *rev'd*, 435 S.W.3d 794 (Tex. 2014).

75. *See* Vanham, *supra* note 2, at 232–33 (discussing the "long history of tension between owners of the surface estate and owners of the mineral estate" in Texas); s*ee also* Alspach, *supra* note 13, at 90–111 (examining interaction between the surface protection statutes of various states and the right of the dominant mineral estate); Estes & Prieto, *supra* note 11, at 378–80 (recognizing the strife between the agriculture and energy sectors); Garcia & Manis, *supra* note 55, at 140–42 (addressing the disparity between what a surface owner and what a mineral estate holder considers to be reasonable use); John S. Lowe, *The Easement of the Mineral Estate for Surface Use: An Analysis of Its Rationale, Status, and Prospects*, 39 ROCKY MTN. MIN. L. INST. 4-1, 4-3 (1993) (speaking to the scope of the implied easement relied on by mineral owners).

76. *See infra* Section V (comparing surface owner protection laws in North Dakota and Oklahoma with the limited protections provided by Texas statutes); *see also* Tex. H.B. 3600, 83d Leg., R.S. (2013) (proposing greater protections for surface owners such as required surface agreements that regulate when drilling for minerals can occur, the number of roads that can be built, and what the lessee is responsible for in the way of cleaning up after the well is no longer productive).

77. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 619–20 (Tex. 1971) (addressing the preclusion of Jones's use of a pre-existing irrigation system by Getty Oil's installation of pumping jacks); Tex. Genco, LP v. Valence Operating Co., 187 S.W.3d 118, 120–21 (Tex. App.—Waco 2006, pet. denied) (expanding on the definition of "pre-existing use" and treating the planned use of land for waste storage as an existing use even though no waste had been stored).

78. *See Getty Oil*, 470 S.W.2d at 620 (noting that the height of the pump jacks was impeding the pivot points of the irrigation system); *Tex. Genco*, 187 S.W.3d at 120–21 ("[S]traight-hole drilling . . . would drastically impact the entire landfill's remaining life.").

79. *See Tex. Genco*, 187 S.W.3d at 124 (requesting adherence by the oil company to other common industry practices used to extract subsurface minerals); *see also* Tarrant Cnty. Water Control & Improv. Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 912–13 (Tex. 1993) ("[I]f reasonable alternative drilling methods exist . . . then an accommodation by the mineral owners would be required."); *Getty Oil*, 470 S.W.2d at 622 (using the testimony of a petroleum engineer to prove that there were other reasonable, and perhaps more efficient, methods available to Getty Oil to install the pumping system).

qualify as a pre-existing use.[80] If it is determined that Merriman's operations do qualify as a pre-existing use,[81] then XTO's placement of a well on the tract reserved for cattle operations certainly would constitute a substantial interference, and the availability of space on the opposite side of Merriman's tract of land would likely meet the requirements of a reasonable alternative for the mineral owner.[82] However, the court did not examine whether XTO had reasonable alternatives for its placement of the well, but rather, whether Merriman did not have reasonable alternatives for *his* cattle operations.[83] This analysis creates further imbalance in the relationship between surface owners and mineral owners, thereby negating the original purpose of the accommodation doctrine—to level the playing field between the parties to a severed estate.[84]

80. *See Getty Oil*, 470 S.W.2d at 622 (determining that in circumstances where an existing use of the surface estate is being prevented and reasonable alternatives are available to recover the minerals, the lessee may be required to utilize one of these alternatives). In *Merriman*, the placement of the cattle pens on the tract would constitute the pre-existing use; however, it could be argued that, because the pens are removable, are removed annually, and could be placed elsewhere, this is not a pre-existing use. *See* Brief of Amicus Curiae of Texas Farm Bureau on Motion for Rehearing at 9–10, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2012 WL 6044204, at *9–10 ("Despite *Getty,* under the *Merriman* Opinion, the mineral owner apparently *automatically* wins with a conceptual right to simply extinguish the existing use of the land and redirect the inquiry to whether or not there are *any* other uses of the land available to the surface owner."). *But see* Amicus Brief of Texas Oil & Gas Ass'n in Support of Respondent XTO Energy Inc. at 4–5, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2012 WL 6044207, at *4–5 (twisting the language in *Getty* to encompass only pre-existing uses that are "critical" to maintain the surface owner's overarching purpose for using the land).

81. *See* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 247 (Tex. 2013) (noting Merriman's opposition to the drill site due to his ongoing cattle operations on the tract).

82. *See* Transcript of Oral Argument at 5, Merriman v. XTO Energy, Inc. 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *5 (arguing that XTO did have a reasonable alternative on the leased premises by placing the well site on the opposite corner of the tract so cattle operations could have continued, the parties could have co-existed without resorting to a lawsuit, and XTO declined to utilize that option).

83. *See Merriman*, 407 S.W.3d at 251 (declining to apply the accommodation doctrine through the usual method and instead focusing on whether Merriman had other alternatives available for his cattle round-up).

84. *See Haupt*, 854 S.W.2d at 911 (citing *Getty Oil*, 470 S.W.2d at 621) (using the discussion of due regard in *Getty* as the foundation for the court's decision); *Getty Oil*, 470 S.W.2d at 621 (emphasizing the need of mineral owners to conduct their operations with reverence to the concept of due regard for the rights of the surface owner); *see also Merriman*, 407 S.W.3d at 250 (stating, hypothetically, "[t]he issue is one of fairness to both parties . . . [and] balancing the rights of surface and mineral owners to use their respective estates while recognizing and respecting the dominant nature of the mineral estate"). *But see* Tiffany Dowell, *A Cattle Rancher v. An Oil Company—The Accommodation Doctrine*, TEX. AGRIC. L. BLOG (July 8, 2013), http://agrilife.org/texasaglaw/2013/07/08/a-cattle-rancher-v-an-oil-company-the-accomodation-doctrine/ (repeating the basic facts of *Merriman*, but questionably analyzing these facts in a way that seems to benefit the landowner with regard to their burden of proof, while disregarding the reformulation of the elements of the

V. SURFACE PROTECTION STATUTES

Other states with significant oil and gas production have enacted statutes to give guidance to landowners and mineral owners alike, which can help level bargaining power.[85] Legislation in Texas that provides protection for surface estate owners is very limited.[86] Solutions to the lack of protection in Texas are also limited;[87] typically, the theories of nuisance or negligence have governed the standard of liability for surface damages.[88] Texas should take the next proactive step (as several other states have), move away from reliance on common law recovery, and pass surface protection legislation.[89]

accommodation doctrine); *Texas Supreme Court Refines Application of the Accommodation Doctrine in Texas*, BURLESON LLP ATT'YS & ADVISORS (June 26, 2013), http://www.burlesonllp.com/?t=40&an=22700&format=xml (noting that the Supreme Court of Texas based its holding on precedent, which shows no intention to substantively change the law in Texas). *See generally* SPLIT ESTATE (Red Rock Pictures 2009) (showing a dramatic portrayal of how extreme the inequity between parties can be).

85. *See* LA. REV. STAT. ANN. § 31:11 (2011) (clarifying the correlative rights of the parties); N.M. STAT. ANN. § 70-12-5 (West Supp. 2014) (requiring mineral owners to give landowner notice of when they intend to conduct operations, how they propose to use the surface, and agree, in writing, how much compensation will be given for surface damages); *see also* Miller, *supra* note 12, at 471–84 (outlining the surface damage statutes of other major oil and gas producing states and placing large emphasis on the act in North Dakota, which is considered to be a foundational act used by the states that followed suit).

86. *See* TEX. NAT. RES. CODE. ANN. § 92.005 (West 2014) (giving guidance to the "owner of a possessory mineral interest within a qualified subdivision [to] use only the surface contained in designated operations sites for exploration, development, and production of minerals and the designated easements only as necessary to adequately use the operations sites"); *see also* Milam, *supra* note 39, at 42 ("The landowner seeking compensation for damages to his land faces quite the uphill battle."); Miller, *supra* note 12, at 485 ("The accommodation doctrine is a common law stepping stone to the legislative enactment of surface damage acts.").

87. *See* Michael C. Sanders & David Livingston, *Surface Rights vs. Mineral Rights Conflicts are Bound to Increase*, HOUS. BUS. J. (Sept. 9, 2007, 11:00 PM), http://www.bizjournals.com/houston/stories/2007/09/10/focus4.html?page=all (proposing surface waivers and forced agreements as possible solutions); *Surface Owner Protection Legislation*, EARTHWORKS, http://www.earthworksaction.org/issues/detail/suface_owner_protection_legislation#.UlKyRRco5jo (last visited Nov. 11, 2014) (distinguishing remedies available to surface owners throughout the United States); Hannah Wittmeyer, *Property Rights & Surface Protection*, FRACKWIRE (June 18, 2013), http://frackwire.com/property-rights-surface-protection/ (discussing surface damage acts generally and referencing states that have already taken steps to enact such statutes).

88. *See* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134–35 (Tex. 1967) (speaking to tort liability in the oil patch); Miller, *supra* note 12, at 469–70 (exploring Texas's adherence to these common law doctrines); *see also* Michael J. Mazzone, *Changing Times Bring Conflict with Surface Owners*, AM. OIL & GAS REP. (Dec. 2011), http://www.aogr.com/index.php/web-features/exclusive-story/changing-times-bring-conflict-with-surface-owners (listing examples of possible negligent acts by oil and gas operators that could potentially lead to litigation).

89. *See* Miller, *supra* note 12, at 471–84 (surveying statutes enacted in North Dakota, Oklahoma, Illinois, Tennessee, West Virginia, Kentucky, Montana, and South Dakota); EARTHWORKS, *supra* note 87 ("[A]t least ten states in the [United States] have thriving oil and gas programs and have

A. *North Dakota*

North Dakota's Oil and Gas Production Damage Compensation Act (the North Dakota Act) was one of the first surface protection acts passed in the country.[90] The North Dakota Act is used as a model for other states creating their own surface protection acts.[91] The original legislative intent of the North Dakota Act was to protect the public welfare and the public's reliance on agricultural activities by establishing the rights and duties of each party to a severed estate.[92] However, one criticism of this act is that it could be interpreted as misplacing the traditional dominance of the mineral estate with the surface estate.[93] For example, "[t]he provisions of [the surface protection act] shall be interpreted to benefit surface owners, regardless of how the mineral estate was separated from the surface estate and regardless of who executed the document which gave the mineral developer the right to conduct mining operations on the land."[94] Perhaps one of the most important protections that the North Dakota Act implements is the requirement of surface compensation "equal to the amount of damages sustained by the surface owner and the surface owner's tenant, if any, for loss of agricultural production and income, lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations."[95] With the recent increase in fracking activity, another important provision effected by the North Dakota Act is protection of surface and ground water.[96]

> If . . . the water supply . . . [near] an oil or gas well site has been disrupted, or diminished in quality or quantity by the drilling operations and a certified water quality and quantity test has been performed . . . within one year

already implemented surface owner protection or damage compensation laws.").

90. *See* N.D. CENT. CODE ANN. §§ 38-11.1-.01–.05 (West 2014) (protecting the lesser servient estate from the dominance of the mineral estate).

91. *See* Miller, *supra* note 12, at 464 (commenting on the influence the North Dakota Act has had on other large, producing oil and gas states).

92. *See* N.D. CENT. CODE § 38-11.1-01 (articulating the underlying purpose of this surface protection act).

93. *See id.* § 38-18-03 (allocating power to the surface owner by favorably interpreting the statute on their behalf).

94. *See id.* (disregarding a basic principle of mineral law—the mineral estate is the dominant estate).

95. *See id.* § 38-11.1-04 (specifying that damages should be calculated through a mutually agreed upon method, as long as the time period in which the disruption occurred is taken into consideration).

96. *See id.* § 38-11.1-06 (providing remedy to the surface owner or other nearby surface owners whose water supply the geophysical or seismic operations affected); *see also* GASLAND (Docurama Dec. 14, 2010) (filming the effects of unknown substances in fracking fluids on the water supply in rural communities).

> preceding the commencement of drilling operations, the person who owns an interest in real property is entitled to recover the cost of making such repairs . . . that will ensure the delivery to the surface owner of that quality and quantity of water available to the surface owner prior to the commencement of drilling operations.[97]

B. *Oklahoma*

Texas's neighboring state, Oklahoma, endorsed securities of its own in the Oklahoma Surface Damage Act (the Oklahoma Act) to nurture an amicable relationship between surface owners and mineral developers.[98] Like the North Dakota Act, the Oklahoma Act calls for a mutually agreeable method of calculating surface damage payments.[99] However, the Oklahoma Act also includes a unique provision that entails the petitioning for appointment of appraisers if an initial agreement by the estate holders has not been reached.[100] "The operator shall select one appraiser, the surface owner shall select one appraiser, and the two selected appraisers shall select a third appraiser for appointment by the court . . . ."[101] The appraisers then perform examinations of the property and make reports based on surface damage already sustained and possible future surface damages.[102] The court subsequently reviews the appraisers' report and decides whether to confirm, reject, modify, or order a new appraisal.[103] The Oklahoma Act also provides for damages for failure to follow the appraisal provision or any other provision of the statute.[104]

97. *See* N.D. CENT. CODE § 38-11.1-06 (allowing recovery for loss of quality or quantity of a water supply through damages with "prima facie evidence of injury").

98. *See* OKLA. STAT. ANN. tit. 52, §§ 318.1–.9 (West 2013) (offering practical solutions to surface owners and mineral developers who face controversy); *see also* Miller, *supra* note 12, at 477–81 (discussing the development of the Oklahoma Act, specific provisions within the act, the constitutionality of the statute, the statute's applicability, and the relief allowed before its enactment).

99. *See* N.D. CENT. CODE § 38-11.1-04 (benefitting both the surface and mineral owner by requiring agreement); OKLA. STAT. § 318.5 (suggesting an agreement between the surface owner and mineral developer for surface damages before taking any further action).

100. *See* OKLA. STAT. § 318.5(a) ("If agreement is not reached, or if the operator is not able to contact all parties, the operator shall petition the district court in the county in which the drilling site is located for appointment of appraisers to make recommendations to the parties and to the court concerning the amount of damages, if any.").

101. *Id.* § 318.5(c) (mandating the appointment of such appraisers "within twenty days of service of the notice of the petition to appoint appraisers").

102. *See id.* (entrusting the value, boundaries, and damages of the property to the appointed appraisers who take an oath to insure their duties are carried out impartially and "to the best of their [abilities]").

103. *See id.* § 318.5(f) ("After the hearing the court shall enter the appropriate order either by confirmation, rejection, modification, or order of a new appraisal for good cause shown.").

104. *See id.* § 318.9 ("Any operator who willfully and knowingly fails to keep posted the

C. *Texas*

Texas has not been completely blind to the need to invoke surface protections.[105] However, for a state with highly productive shale plays, such as the Barnett Shale[106] and the Eagle Ford Shale,[107] Texas lacks meaningful statutory measures.[108] Texas has enacted a narrow notice statute, known as the Common Courtesy Act,[109] which "requires an oil company to give notice to the surface owner within fifteen days after the company has obtained a drilling permit."[110] There is also a Texas statute intended to allow for the most effective utilization of mineral resources in conjunction with the development of land resources,[111] known as the

required bond or who fails to notify the surface owner, prior to entering, or fails to come to an agreement and does not ask the court for appraisers, shall pay, at the direction of the court, treble damages to the surface owner.").

105. *See* Tex. H.B. 3600, 83d Leg., R.S. (2013) (proposing protections for surface owners by imposing restrictions on the mineral owner regarding notice, the right to enter on the land, damages, surface use agreements, and penalties).

106. The Barnett Shale is a geological formation underlying the city of Fort Worth, Texas. *See Barnett Shale Information*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/oil-gas/major-oil-gas-formations/barnett-shale-information/ (last updated July 29, 2014) (educating readers of the formations, statistics, and history of the Barnett Shale); Terry W. Roberson, *Environmental Concerns of Hydraulically Fracturing a Natural Gas Well*, 32 UTAH ENVTL. L. REV. 67, 70 (2012) (providing specific details relating to the geology and production of the Barnett Shale).

107. *See Eagle Ford Shale Information*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/oil-gas/major-oil-gas-formations/eagle-ford-shale/ (last updated Sept. 29, 2014) (describing notable features and providing responses to frequently asked questions related to the Eagle Ford Shale formation); *see also* David Blackmon, *Texas's Amazing Shale Oil and Gas Abundance*, FORBES (July 5, 2013, 11:32 AM), http://www.forbes.com/sites/davidblackmon/2013/07/05/texass-amazing-shale-oil-and-gas-abundance/ (reporting as of the end of June 2013, "there were 843 oil and natural gas drilling rigs operating in Texas, representing an amazing 48% of all the rigs operating in the United States . . . [which] represents 26% of all the drilling rigs operating anywhere on the face of the earth!").

108. *See* Smith, *supra* note 23, at 6 ("Texas [landowners] are likely to find themselves in [an unfavorable position] if their rights in the land are limited to the surface only, if the land is subject to an oil and gas lease that makes no express provisions for surface damages, or if the express lease provisions are not comprehensive enough to cover the situation."); Miller, *supra* note 12, at 471–84 (summarizing surface damage acts of other states and explaining why a surface damage act in Texas would be the next logical step). *But see* TEX. NAT. RES. CODE ANN. § 52.297 (West 2014) (requiring compensation for "school land . . . for damages from the use of the surface in prospecting for, exploring, developing, or producing the leased minerals"); *Id.* § 92.005 (limiting the use of the surface by the "owner of a possessory mineral interest").

109. *See* NAT. RES. § 91.701 (giving the surface owner the advantage of receiving notice that the mineral developer has procured a drilling permit or permission to re-enter an existing well); *see also* Smith, *supra* note 23, at 4 (discussing the few Texas acts that have succeeded in becoming law).

110. Smith, *supra* note 23, at 4; *see* NAT. RES. § 91.753 (allowing only minimal opportunity for surface owners to react to the potential use and destruction of their property).

111. *See* NAT. RES. § 92.001 (explaining the legislative intent of the statute).

Qualified Subdivision Statute.[112] "The surface owners of a parcel of land may create a qualified subdivision on the land if a plat of the subdivision has been approved by the railroad commission and filed with the clerk of the county in which the subdivision is to be located."[113] However, the Qualified Subdivision Statute has a limited effect due to its narrow scope, which tightens constraints regarding what tracts of land constitute a "qualified subdivision."[114]

In 2013, Representative Lon Burnam[115] introduced legislation in the Eighty-Third Legislative Session that provides surface owners with greater protections; unfortunately, it was left pending in committee.[116] The bill suggested conservative protections for surface estate owners such as requirements for developers to: (1) "give each surface owner written notice [of] plans to begin constructing improvements or conducting oil and gas operations on the property," (2) furnish "a proposed surface use agreement," and (3) "restore the surface to a condition that is substantially the same as existed before the developer began operations" after the cessation of production.[117] It is unclear why this simple act was not made into law, but perhaps there is a greater force working to keep bills like this from being enacted.[118]

112. *See id.* §§ 92.001–.007 (allowing for the subdivision of property for the purposes of effectuating an oil and gas lease with the approval of the Railroad Commission); *see also* Miller, *supra* note 12, at 486–87 (exploring the development and effects of the Qualified Subdivision Statute).

113. *See* NAT. RES. § 92.003 (creating allowances for the subdivision of land to achieve the greatest results and fully exploit the minerals).

114. *See id.* § 92.002(3) (providing limitations for acreage, population, and other relevant factors).

115. Lon Burnam serves on the Energy Committee and has authored and co-authored several pieces of potential legislation related to oil and gas issues and other various environmental issues. *See Texas House Member*, TEX. HOUSE OF REPS., http://www.house.state.tx.us/members/member-page/?district=90 (last visited Nov. 11, 2014) (providing background and history of Burnam's activities in politics).

116. *See* Tex. H.B. 3600, 83d Leg., R.S. (2013) (imposing administrative penalties on mineral estate owners who overstep their boundaries).

117. *See id.* (suggesting commonsensical provisions that would provide guidance for the mechanics of the relationship between the surface and mineral owner).

118. *See* Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 AM. POL. SCI. REV. 1026, 1028 (1977) (explaining that "the American political system . . . raises the paradoxical possibility of translating disproportionate economic power into disproportionate political influence in a way that can frustrate broad public control"); *Influence & Lobbying: Oil & Gas*, OPENSECRETS: CENTER FOR RESPONSIVE POLITICS (Sept. 22, 2014), http://www.opensecrets.org/lobby/indusclient.php?id=E01&year=2013 (displaying a list of the top contributors from the oil and gas industry and their donations to various politicians in the 2013–2014 fiscal year—the largest donation of $589,900 being from Koch Industries). *See generally* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (exploring theories of legislative conduct and how these theories have influenced

D. *Political Influence on Surface Damage Legislation*

Various industries exercise political muscle by lobbying, contributing to political campaigns, and using tactics to sway the media in hopes of spreading their influence.[119] But how expansive is this influence?[120]

In order for Texas to pass a surface protection act, representatives must have an incentive to support such an act.[121] Unfortunately, it has proved difficult for elected officials to take a vested interest in a piece of legislation when financial backing for a campaign is at stake.[122] Large oil companies fund many political campaigns and make it difficult for smaller surface owners to have their voices heard.[123] The surface owners' lack of political power furthers the imbalance between the typical parties of a severed estate;[124] however, attempts to limit corporate contributions to

legal scholarship).

119. *See generally* OPENSECRETS: CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/ (last visited Nov. 11, 2014) (listing companies and contributions from a multitude of different industries to individual political campaigns and programs).

120. In 2011, uproar erupted after an environmental activist for Earthworks, Sharon Wilson, secretly recorded and then blogged audio statements of oil company executives at an industry PR conference, describing their use of "PSYOPS," or psychological-operations expertise—a military technique used to favorably influence the opinions and emotions of others, which is illegal to use on United States citizens—against members of the media, environmentalists, and community opponents of fracking. *See* Sharon Wilson, *PSYOPS: Gasholes Caught with their Fracking Pants Down*, BLUEDAZE (Nov. 9, 2011), http://www.texassharon.com/2011/11/09/psyops-gasholes-caught-with-their-fracking-pants-down/ (click on wmv or mpg for audio recording) (recording the statement of Matt Pitzarella who admits there are "several former PSYOPs folks that work . . . at Range [Resources] because they're very comfortable in dealing with localized issues and local governments"); *id.* (reporting the statement of Matt Carmichael and his recommendation that PR executives in the oil and gas industry "[d]ownload the U.S. Army/Marine Corps Counterinsurgency Manual [audience gasps], because [they] are dealing with an *insurgency*" and recommending they take a course offered by M.I.T. entitled "Dealing with an Angry Public" because it gives PR executives "the media tools on how to deal with a lot of the controversy that [they] as an industry are dealing with") (emphasis added); *see also* Eamon Javers, *Oil Executive: Military-Style 'Psy Ops' Experience Applied*, CNBC (Nov. 8, 2011, 1:35 PM), http://www.cnbc.com/id/45208498 (reporting the statements of Matt Pitzarella, communications director at Range Resources, and Matt Carmichael, manager of external affairs for Anadarko Petroleum).

121. *See* Lindsay Renick Mayer, *Big Oil, Big Influence*, PBS (Aug. 8, 2008), http://www.pbs.org/now/shows/347/oil-politics.html (discussing how public interests often get pushed to the wayside when large oil companies distract politicians).

122. *See id.* (reporting the amount of contributions the industry spent lobbying the federal government during the first month of the Bush/Cheney administration and the results of those contributions).

123. *But see* GASLAND (Docurama 2010) (giving a voice to landowners directly affected by fracking and other explorative processes on their properties); SPLIT ESTATE (Red Rock Pictures 2009) (documenting the opinions and experiences of surface owners whose mineral rights are owned by big oil and gas companies). *See generally* OPENSECRETS, *supra* note 118 (posting contributions from various oil companies to lobbyists throughout the years).

124. *See* James V. Hammett, Jr. & Deborah Essig Taylor, *Oil, Gas and Mineral Law*, 47 SMU L.

political campaigns have proven futile even on a federal level.[125]

VI. THE STATUS AND EFFECT OF THE ACCOMMODATION DOCTRINE AFTER *MERRIMAN*

The Supreme Court of Texas granted review of *Merriman* to clear up confusion about the elements and application of the accommodation doctrine.[126] As described in this section, however, the ruling in *Merriman* may result in more problems than remedies for Texas landowners.

The accommodation doctrine was intended to provide protections to surface owners from lessees who clearly have the upper hand in the relationship due to the dominant nature of the mineral estate.[127] Mineral owners may not be constrained by the terms in an oil and gas lease due to the broad scope of the implied surface easement.[128] While large landowners may have the clout to negotiate separate surface-protection agreements, most are at the mercy of lessees' decisions regarding the use of their surface estates.[129] Balancing the interests of the two parties will almost always result in a triumph for the lessee, as the operations lessees

REV. 1439, 1442–46 (1994) (summarizing case law that depicts the typical relationship between a surface owner and a mineral owner).

125. *See* Citizens United v. FEC, 558 U.S. 310, 312–15 (2010) (rejecting limitations on corporate contributions by broadly interpreting and applying the First Amendment right to free speech). *But see id.* at 394 (Stevens, J., dissenting) (criticizing the majority's opinion as "misguided" and noting that corporate "interests may conflict in fundamental respects with the interests of eligible voters[;] [t]he financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process"); President Barack Obama, *Statement from the President on Today's Supreme Court Decision*, THE WHITE HOUSE (Jan. 21, 2010), http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0 (calling the Court's holding a "victory for big oil" and worrying "[t]his ruling gives the special interests and their lobbyists even more power in Washington . . . while undermining the influence of average Americans who make small contributions to support their preferred candidates").

126. *See* Transcript of Oral Argument at 6–7, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *6–7 (recognizing the accommodation doctrine has become convoluted throughout the years and is in need of a firm court decision as to how it should be applied).

127. *See* Smith, *supra* note 23, at 10 ("It is well established, however, that the mineral estate is the dominant estate, and in the event of conflicts between the oil company and the surface owner or lessee of surface uses, the oil and gas company has the paramount legal right."); *see also* Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971) (explaining the well-established principle of due regard, where a mineral owner must heed when exercising the use of the implied easement across the surface estate (citing Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133 (Tex. 1967) and Gen. Crude Oil Co. v. Aiken, 162 Tex. 104, 344 S.W.2d 668 (Tex. 1961))).

128. *See* Miller, *supra* note 12, at 467–68 (explaining the scope of the implied easement acquired by mineral owners).

129. *See* GASLAND (Docurama 2010) (depicting the effects of the lessee's decisions in extreme conditions).

conduct will generally be more costly and time consuming than those of a surface owner, and therefore valued higher.[130] However, in *Merriman,* surface owners did achieve a small victory, as the Supreme Court of Texas noted that the court of appeals had improperly considered Merriman's use of his other leased tracts when "determining whether he produced evidence that he had no reasonable alternatives to continue his cattle operation," and thereby disallowing XTO to push his operations off his tract completely.[131]

A major concern stemming from the court's holding is the potential extent to which the lessee will be allowed to use the surface and how much deference they will be required to give the landowner.[132] This concern is especially pertinent with the recent rise in hydraulic fracturing operations, otherwise known as "fracking."[133] Because fracking requires extremely large tracts of land,[134] involves the use of millions of gallons of water (a surface substance),[135] and is a very effective process for mineral removal,

130. During oral arguments discussing the reasonable alternative prong of the accommodation doctrine, attorney for XTO Energy, Charles Watson, compared the cost of what he considered to be a reasonable alternative for Merriman and the cost of drilling a well on different area of the tract. Although this comparison may be persuasive, cost to each party is not the proper test to determine whether the third prong is satisfied. *See* Transcript of Oral Argument at 8–9, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *8–9 ("What we are saying is this, Merriman admitted, even if you accept that he proved, which we say he didn't, that his operation won't work, I mean all he has to do is buy a portable chute, $4000, $2.3 million well. It should be an easy call there. Buy the portable chute.").

131. *See* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 250 (Tex. 2013) (reasoning that the availability of leased tracts should not have been considered when determining whether Merriman had reasonable alternatives).

132. *But see* Mazzone, *supra* note 88 (addressing concerns of oil companies and their counsel related to impeded ability to drill due to surface owner complaints and litigation regarding trespass, nuisance, gross negligence, and even assault).

133. *See* Susanne Posel, *Obama Green Lights More Fracking to Increase Natural Gas Exporting*, OCCUPY CORPORATISM (Sept. 14, 2013), http://www.occupycorporatism.com/obama-green-lights-more-fracking-to-increase-natural-gas-exporting/ (exploring the Dept. of Energy's new initiative, that they say is in accordance with public policy, to begin exporting more natural gas from American soil); *see also* Blackmon, *supra* note 107 (depicting fracking and other oil and gas exploration techniques in Texas's prominent shale formations); *What Is Fracking*, FRACKING FOR GAS: INFORMATION ON FRACKING IN THE UK, http://www.frackingforgas.co.uk/ (last visited Nov. 11, 2014) (communicating basic information about fracking, its processes, and its development).

134. *See What Is Fracking*, FRACKING FOR GAS: INFORMATION ON FRACKING IN THE UK, http://www.frackingforgas.co.uk/ (last visited Nov. 11, 2014) ("A typical test well pad is approximately 7,000 sqm in size and provides enough space for the drilling rig equipment, piping and storage, and other site facilities such as mobile portacabins for offices and worker restrooms.").

135. *See* Jesse Jenkins, *Energy Facts: How Much Water Does Fracking for Shale Gas Consume?*, THE ENERGY COLLECTIVE (Apr. 6, 2013), http://theenergycollective.com/jessejenkins/205481/friday-energy-facts-how-much-water-does-fracking-shale-gas-consume (reporting that billions of gallons of water are used for fracking each year).

the level of accommodation that lessees will be required to give their surface owners may be slim.[136]

As in *Merriman*, some surface owners may be forced to transport or reconfigure their agricultural operations.[137] This may prove to be true even if it means sacrificing their livelihood.[138] The *Merriman* case has already shown how easy it is for activities of oil and gas companies to become a higher priority than pre-existing agricultural operations.[139] By forcing agricultural uses to yield to drilling activity or by impeding agricultural production, the courts are allowing oil and gas companies to incapacitate another massive contributor to Texas's economy.[140]

It seems the accommodation provided to the mineral owner from the surface owner is only a few steps away from actual encroachment on a surface owner's homestead.[141] For example, if a mineral owner is engaged in fracking, can a surface owner be required to move if that is in the best interest of a mineral owner, simply because the surface owner does not own the mineral rights?[142] Will surface owners be forced to relocate if the operations render their property unlivable?[143] If the only

136. *See* GASLAND (Docurama 2010) (showing adversely effected landowners living with fracking operations essentially in their backyards, rendering their homes virtually unlivable).

137. *See* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 252 (Tex. 2013) (concluding Merriman's cattle operations must yield to the drilling operations of XTO Energy).

138. *See* Smith, *supra* note 23, at 3 ("The potential for long-term permanent damage to the land is also a cause of concern for all landowners, regardless of how they use their land. Such concerns are not necessarily ill-founded. An oil or gas company's operations typically include [vast amounts of] activities, all of which may have a negative impact on ranching and farming operations and wildlife habitat.").

139. *See Merriman*, 407 S.W.3d at 249–52 (holding the surface owner must accommodate first and that Merriman did not produce any significant evidence to show that there were no reasonable alternatives in which to conduct his cattle round-up); Transcript of Oral Argument at 6–7, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *6–7 (discussing Merriman's attempt and failure to find a reasonable alternative for his cattle round-up); *see also* Smith, *supra* note 23, at 9 (warning surface owners of the dominant mineral estate's right to use valuable surface materials, such as water, that might be essential to surface operations).

140. *See* Estes & Prieto, *supra* note 11, at 378 ("Agriculture and energy are prominent sectors in the Texas economy. However, these industries are often in conflict because both require surface access for production."); Miller, *supra* note 12, at 463 (noting that Texas has the second highest producing agriculture industry in the nation).

141. *See* Brian Sullivan of McElroy, Sullivan, Miller, Weber & Olmstead LLP, Meeting of St. Mary's University School of Law's Oil, Gas and Energy Resources Law Society (Nov. 12, 2013) (opining that oil and gas companies have the "absolute right" to be on the surface owner's property in order to accomplish their drilling goals for the "greater good").

142. *Cf.* Smith, *supra* note 23, at 2–3 (worrying that the "insatiable appetite for energy" will have potentially adverse effects on surface owners who do not own and have no control over the mineral beneath the surface respectively (citing Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 15 (Tex. 2008))).

143. *See* GASLAND (Docurama 2010) (showing surface owners that were forced to abandon

way to conduct fracking operations is to build a roadway through their homes, can oil companies demolish their homesteads to build one?[144] Apart from the protection of the accommodation doctrine, landowners have the option to bring tort lawsuits, such as nuisance;[145] however, those cases often prove difficult for landowners to win.[146]

Turning back to the accommodation doctrine in situations like those mentioned above, the surface owners would argue they are clearly entitled to a pre-existing use which is substantially interfered with by the mineral owner.[147] Because *Merriman* has confirmed the fourth element of the accommodation doctrine, surface owners must now prove they have no reasonable alternatives to carry out their pre-existing use and then that the mineral owner has a reasonable alternative to conduct its operations.[148]

their family homes because of unlivable conditions thought to be caused by drilling); Mazzone, *supra* note 88 (reporting various lawsuits and conflicts surface and mineral owners have recently faced); *see also* SPLIT ESTATE (Red Rock Pictures 2011) (reliving the experiences of surface owners whose properties underwent major changes during the large oil and gas boom over the past few years).

144. *See* Vest v. Exxon Corp., 752 F.2d 959, 960–61 (5th Cir. 1985) (comparing the differing views of reasonableness and how they will potentially affect the surface estate); *see also* Smith, *supra* note 23, at 2–6 (expressing concern for the rural landowner who may be subject to large scale oil and gas operations on their property); Mazzone, *supra* note 88 (exploring the implications of leasing to oil and gas companies on rural and suburban communities).

145. *See* Miller, *supra* note 12, at 469–70 (defining nuisance and commenting on the prevalence of such claims in Texas courts).

146. *But see* Jason Morris, *Texas Family Plagued with Ailments Gets $3M in 1st-of-its-kind Fracking Judgment*, CNN (Apr. 26, 2014, 8:14 AM), http://www.cnn.com/2014/04/25/justice/texas-family-wins-fracking-lawsuit/ (reporting the story of a Texas family successfully asserting a claim of private nuisance against an oil company conducting drilling operations near their ranch).

147. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 619–20 (Tex. 1971) (deciding that the use of the landowner's pumping jacks, which were fully installed and functioning before the well was created, satisfied the requirement of a pre-existing use under the accommodation doctrine); Tex. Genco, LP v. Valence Operating Co., 187 S.W.3d 118, 120–21 (Tex. App.—Waco 2006, pet. denied) (accepting a very broad definition of pre-existing use, which included the planned use of waste storage); *see also* Hafer et al., *supra* note 15, at 58–61 (clarifying the "current state of the accommodation doctrine" and delving into what exactly constitutes a pre-existing surface use); Hammett & Taylor, *supra* note 124, at 1445–46 (describing the historical application of the elements of the accommodation doctrine).

148. *See* Tarrant Cnty. Water Control & Improv. Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 912–13 (Tex. 1993) (asserting that if the surface owner can prove there are reasonable alternatives in which the mineral owner can conduct their operations, the mineral owner must utilize such alternatives); *Tex. Genco, LP*, 187 S.W.3d at 124 (suggesting custom and practice dictated adherence to other effective methods of operation); *see also* Miller, *supra* note 12, at 484–85 (explaining that the holding in *Getty Oil* was based on the conclusion that the implied easement that had been acquired by the lessee was not reasonably necessary to achieve the ultimate goal of accessing the subsurface minerals). *But see* Hafer et al., *supra* note 15, at 61–62 ("Another issue that arises commonly is that surface owners frequently overlook the following element: the surface owner must show that any alternative uses of the surface, other than the existing use, are impracticable and unreasonable under all the circumstances.").

However, if the fracking operation takes up the entirety of the tract, the surface owner will be forced to yield to the mineral owner, which will leave them with very few options.[149] Even if situations like these do occur, it does not mean the current accommodation doctrine will change.[150] There is a high possibility that surface owners would choose to avoid risky litigation and its uncertain results by entering into settlements with mineral owners. Thus, leaving the accommodation doctrine, which was constructed to protect surface owners, swayed in favor of the mineral owner.[151]

VII. CONCLUSION

The Supreme Court of Texas granted review of the *Merriman* case to clarify the law of the accommodation doctrine.[152] The *Merriman* holding clarifies that the accommodation doctrine affords less protection to surface owners in Texas than those afforded to landowners in other states who have the protection of broad surface-protection statutes.[153] This lack of protection may be potentially damaging to surface owners until the court hears another accommodation doctrine case, which may not be for another twenty years.[154]

The history of the accommodation doctrine has done little to clarify the

149. For surface owners who do not own the mineral rights and have fracking operations conducted on their property, it will prove difficult to move as the fracking will ward off any potential buyers and very few surface owners will be able to pay two mortgages. *See* GASLAND (Docurama 2010) (interviewing surface owners who are trapped in the middle of fracking sites).

150. For a substantial change to occur, Texas needs to enact surface protection statutes. *See* Miller, *supra* note 12, at 471–97 (conducting an in-depth analysis of surface protection statutes around the United States, the protections afforded to surface owners in Texas, and why it would be prudent of Texas to enact a similar surface protection statute).

151. *See* GASLAND (Docurama 2010) (interviewing residents of rural land affected by fracking operations who claim that fellow residents have attempted to participate in litigation resulting from surface damages and contamination of natural resources, but this litigation has proven to be unsuccessful in making a change due to settlements reached with the oil and gas companies).

152. *See* Transcript of Oral Argument at 6, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *6 ("I know you granted to clarify the accommodation doctrine after 40 years of having it lose meaning in translation and being shortened and shortened and shortened to where now it's a shadow of itself in some thumbnail types of recitations . . . .").

153. *See generally* LA. REV. STAT. ANN. § 31:11 (2011) (codifying correlative rights of the surface owner and mineral owner); N.M. STAT. ANN. § 70-12-5 (West Supp. 2014) (requiring mineral owners to give landowners notice of their intent to conduct operations).

154. *Cf. Texas Supreme Court Refines Application of the Accommodation Doctrine in Texas*, BURLESON LLP ATTY'S & ADVISORS (June 26, 2013), http://www.burlesonllp.com/?t=40&an=22700&format=xml (acknowledging that *Merriman* was the first case concerning the accommodation doctrine the Supreme Court of Texas agreed to hear in the last twenty years).

law.[155] While the accommodation doctrine has been refined, there still seems to be divergence regarding the actual elements of the doctrine.[156] The traditional elements of the accommodation doctrine required the surface owner to prove that: (1) there is a pre-existing use of the surface; (2) the pre-existing use is being substantially interfered with by the mineral owner; and (3) the mineral owner has reasonable alternatives in which to conduct its operations.[157] *Merriman*, in essence, emphasizes a four-element model of the accommodation doctrine by incorporating the concept of conditional submission[158]—the lessee need only resort to a reasonable alternative if the surface owner does not have a reasonable alternative for its operations.[159] Although *Merriman* has attempted to give Texas a clear view of the accommodation doctrine, the application of the law has become more complicated and the relationship between surface owners and minerals will potentially become more strained.[160]

155. *See* Transcript of Oral Argument at 6, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *6 (observing that the true meaning of the accommodation doctrine has become muddled through the case law over the years and is in desperate need of reformation).

156. *Compare* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 248–49 (Tex. 2013) (explaining the elements of the accommodation doctrine to require the inclusion of evidence from the surface owner that the mineral owner's activities substantially impair the surface owner's activities and that the surface owner does not have any other way to accomplish their activities), *and* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (introducing the concept of conditional submission and requiring the surface owner to first prove that there are no accessible, reasonable alternatives available before proving that there are reasonable alternatives available to the mineral owner), *with* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 812 (Tex. 1972) (holding that the mineral owner was able to utilize the water on the surface owner's property while adhering to the traditional accommodation doctrine elements), *and* Tex. Genco, LP v. Valence Operating Co., 187 S.W.3d 118, 123–24 (Tex. App.—Waco 2006, pet. denied) (solidifying the idea that the surface owner's burden is to prove that the mineral owner has reasonable alternatives, without any deference as to whether the surface owner has reasonable alternatives).

157. *See Getty Oil*, 470 S.W.2d at 622 ("[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.").

158. *See Merriman*, 407 S.W.3d at 249 (affirming that the mineral owner must exercise due regard for the existing surface uses when making use of the surface that is reasonably necessary to obtain the minerals, but contradictorily asserting that the surface owner must yield to the mineral owner first, if at all possible, when the parties become engaged in a dispute); *see also* Transcript of Oral Argument at 7, Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013) (No. 11-0494), 2013 WL 530472, at *7 (suggesting that conditional submission has always been a part of the accommodation doctrine but has been overlooked in many cases).

159. *See Merriman*, 407 S.W.3d at 249 (criticizing the surface owner's argument that his cattle operation should be accommodated by suggesting that moving his operations would only be inconvenient and cause a greater financial burden to him).

160. *See id.* (attempting to reconcile past cases and provide a clear statement of law).

With the rapidly growing oil and gas industry[161] and the legal relationship between surface owners and mineral owners in a state of flux,[162] Texas needs to enact surface protection statutes to help balance the bargaining power between the mineral owner and the surface owner.[163] Texas should look to other highly productive oil and gas states for guidance.[164] Although surface protections are in the best interest of Texas and its agricultural industry, a legislative solution may prove difficult to make these changes due to the massive amount of political influence that oil and gas companies exert on potential legislation.[165]

With the state of the accommodation doctrine now favoring the mineral estate, surface owners face more uncertainty than ever. With no indication of how they will fare and fracking on the rise,[166] prudent surface owners should be concerned about the future of their pre-existing surface uses.[167]

161. *Cf.* Smith, *supra* note 23, at 1 ("Concerns over the escalating price of oil and gas, the rising demand for oil from countries such as China and India, dwindling proven reserves of crude oil, and national security have led to renewed proposals to increase domestic production of both oil and natural gas."); Blackmon, *supra* note 107 (reporting that Eagle Ford shale production increased by 77% between 2012 and 2013); Susanne Posel, *Obama Green Lights More Fracking to Increase Natural Gas Exporting*, OCCUPY CORPORATISM (Sept. 14, 2013), http://www.occupycorporatism.com/obama-green-lights-more-fracking-to-increase-natural-gas-exporting/ ("To increase natural gas exports, the Obama administration approved the permits for 'a Lake Charles, LA project, as well as the Freeport LNG project on Quintana Island, Texas, and, in 2011, Houston-based Cheniere Energy's Sabine Pass facility in southwest Louisiana' to sell 6.37 billion cubic feet of liquefied natural gas to non-free-trade nations.").

162. *See* James Carter, *Amid Shale Boom, Law Is Evolving*, SAN ANTONIO EXPRESS-NEWS, Mar. 31, 2014, at B1 (discussing the rapidly evolving "legal relationship between [land owners] and the oil companies").

163. *See* Miller, *supra* note 12, at 496–97 (stating that a surface protection act in Texas would not only be beneficial with regards to protecting surface rights, but also in fostering more efficient exploration methods; but to achieve successful negotiations, parties on both sides of the argument must make a collaborative effort, rather than competing).

164. *See* EARTHWORKS, *supra* note 87 (summarizing various statutes enacted by productive oil and gas states geared toward the protection of surface owners and the balancing of power between the mineral and surface estate).

165. *See* OPENSECRETS, *supra* note 118 (revealing the astonishing amount of money that is spent by large oil companies in support of political campaigns); Mayer, *supra* note 121 (casting light on the perks that large oil companies and politicians received from working closely with one another).

166. *See* Blackmon, *supra* note 107 (bringing focus to the ever-expanding oil and gas industry in Texas and the many resources that Texas is able to utilize); *see also* Mazzone, *supra* note 88 (discussing not only the change in landscape that urban drilling has brought, but also the rise in litigation and potential litigation).

167. *See* Smith, *supra* note 23, at 2–3 (expressing concern regarding what the effect the increase in drilling will have on rural landowners and their properties, especially with respect to "farming, ranching, or recreational purposes" of the land); *see also* James Carter, *Amid Shale Boom, Law Is Evolving*, SAN ANTONIO EXPRESS-NEWS, Mar. 31, 2014, at B1 ("Texas landowners, especially over oil productive areas, should keep in mind the continuing changes to their property rights. As it is

There has long been an imbalance of power between mineral owners and surface owners.[168] With advancements in technology and the growing need for natural gas and other subsurface minerals, this imbalance has

designed to do, the law will continue to evolve with the times.").

168. *See* Vest v. Exxon Corp., 752 F.2d 959, 961 (5th Cir. 1985) ("[T]he Texas courts imply a dominant estate and right of a mineral lessee . . . to use as much of the surface estate [as needed]. The Texas courts do speak of a restriction upon the lessee to that use of the surface as is 'reasonably necessary,' but that is simply a limit on the manner in which the mineral operation is done, and it does not limit the right of the lessee to develop and extract minerals in accordance with the lease."); Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 248–49 (Tex. 2013) (stating the rights of the dominant estate); Tarrant Cnty. Water Control & Improv. Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 912 (Tex. 1993) (agreeing that the dominant estate may use the surface for whatever purpose is deemed necessary to extract the minerals as long as the mineral owner is using the surface estate in a reasonable manner); Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 867 (Tex. 1973) (referring to the dominance of the mineral estate as an implied easement but continuing to uphold the dominance standard); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810–11 (Tex. 1972) (implying that the mineral estate's dominance stands absent any provision in the lease to the contrary); Getty Oil Co. v. Jones, 470 S.W.2d 618, 627–28 (Tex. 1971) (providing a lenient measurement to determine the reasonableness of the acts of the dominant estate); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) ("The oil and gas lease gave Humble a dominant estate. The lessee had the right to use as much of the premises, and in such a manner, as was reasonably necessary to comply with the terms of the lease and to effectuate its purposes."); Gen. Crude Oil Co. v. Aiken, 162 Tex. 104, 34 S.W.2d 668, 670 (1961) (protecting the dominant estate from liability for damages to the surface unless caused by carelessness or negligence); *see also* Alspach, *supra* note 13, at 91–92 (recognizing the imbalance of the parties to a severed estate); Estes & Prieto, *supra* note 11, at 379 ("The general rule has been long and often stated that the owner of the mineral lease has the right to use so much of the surface as is reasonably necessary to comply with the terms of the lease and effectuate its purposes. Texas law recognizes the oil and gas estate as dominant and also generally recognizes that the mineral lessee may select any portion of the surface estate covered by the lease for placement of its well."); Garcia & Manis, *supra* note 55, at 141 (commenting on the unavailability of relief for a surface owner that seeks limited use of the surface for the mineral owner); Hafer et al., *supra* note 15, at 50 (revering the dominant estate theory as "one of the most solidly established tenets of Texas property law"); Kulander, *supra* note 14, at 370–71 (commenting on the typical relationship between surface and mineral owners and the various views of the accommodation doctrine that are present among the states); Smith, *supra* note 23, at 10 ("An oil company's exercise of its implied rights frequently disrupts existing or potential surface uses. It is well established, however, that the mineral estate is the dominant estate, and in the event of conflicts between the oil company and the surface owner or lessee of surface uses, the oil and gas company has the paramount legal right."); Anderson, *supra* note 36, at 164–66 (reviewing the history of the dominance of the mineral estate through various case law); Miller, *supra* note 12, at 465–70 (drawing a clear picture of the development of the dominant mineral estate and servient surface estate and the interplay between the two); Vanham, *supra* note 2, at 269–70 (noting that, generally, the dominance of the mineral estate has been favored, even in surface protection legislation); Lloyd, *supra* note 23, at 6 (explaining the limited rights afforded to surface owners); Sanders & Livingston, *supra* note 87 (identifying the common struggle between the estates as the "basic battle").

become exacerbated.[169] It is time for Texas to correct the inequality of bargaining power and promote fairness to each party of a severed estate.

169. *See* GASLAND (Docurama 2010) (exemplifying the discrepancy between the estates); SPLIT ESTATE (Red Rock Pictures 2011) (documenting the everyday problems that plague rural landowners with property subject to an oil and gas lease).