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# Oil & Gas Alert

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## Here's What's New!!

Merriman v. XTO Energy, Inc.

By Christopher L. Halgren

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The Supreme Court of Texas has clarified the proof required for a surface owner to take advantage of the "accommodation doctrine," by which a mineral lessee *may* be compelled to use alternative means to produce oil or gas to those preferred by the lessee if the surface owner can show:

"(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."

However, if the lessee has no reasonable alternative to produce the minerals, then the surface owner's existing use must yield, *without regard to the harm to the existing surface use* because in Texas the mineral estate is the dominant estate.

The Supreme Court held Merriman's evidence was insufficient as a matter of law, finding that Merriman failed to establish why he could not conduct his cattle operations elsewhere on his tract. Although Merriman testified that his current method was his preferred method and it was "easier" than alternatives, the court concluded that "[e]vidence that the mineral lessee's operations result in inconvenience and some unquantified amount of additional expense to the surface owner does not rise to the level of evidence that the surface owner has no reasonable alternative method to maintain the existing use."

Merriman was a pharmacist and owned his own business where he worked six days a week. In addition, Merriman operated a cattle ranch where he owned a 40-acre tract and leased 15 other tracts for grazing. The tract owned by Merriman was the center of his once-a-year "roundup" where he would sort and work his cattle. Merriman's preferred method to carry out these activities was to construct temporary corrals and catch-pens in conjunction with permanent fencing and structures. In September 2007, over Merriman's objection, XTO Energy, Inc. ("XTO") drilled a producing gas well on the 40-acre tract which interfered with the manner in which Merriman carried out his cattle operations. Merriman sought a permanent injunction requiring XTO to remove its producing well, alleging XTO failed to accommodate for his existing cattle operations.

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## Merriman v. XTO Energy, Inc., cont.

The parties filed cross-motions for summary judgment. The trial court entered judgment for XTO which was affirmed by the Tenth District Court of Appeals in Waco, which held Merriman had failed to establish that the surface could not be used for *any* agricultural purpose and Merriman had failed to establish he did not have reasonable alternatives available on lands Merriman held by short term leases. *See Merriman v. XTO Energy, Inc.*, 2011 WL 1901987, \*4 (Tex. App.—Waco, 2011) (memo. op.).

Though affirming the appellate court's holding, the Supreme Court made clear it did "not completely agree with its analysis," stating first that "[r]equiring a surface owner to show that it could not alternatively conduct its existing use on land held by short term leases would too greatly alter the balance between those who possess and have established a use of the surface estate and those who possess the mineral estate." Second, the court stated when inquiring into alternative uses of the surface, the "issue is one of fairness to both parties in light of the *particular existing use* by the surface owner and the principle underlying the accommodation doctrine: balancing the rights of surface and mineral owners to use their respective estates while recognizing and respecting the dominant nature of the mineral estate." (emphasis added). For Merriman, the particular existing use was his cattle operations and the proper judicial inquiry should be whether he had reasonable alternatives for conducting his operations on his property.

[Click here for the full opinion](#)

*Chris Halgren focuses his practice in general civil litigation. He represents clients in a variety of practice areas with a primary focus on oil and gas leasing, title and operational disputes. Chris has represented clients or assisted in the representation of clients in Texas state court, federal court and arbitration — including an international dispute decided before the London Court of International Arbitration. His experience includes defending and prosecuting business disputes arising in contract and tort.*



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