

COMMITTEE REPORTS

LEGAL REPORT

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During the second quarter of 2019, a PBPA member requested we consider providing support of a motion for rehearing submitted in *Virtex Operating Co., Inc. and Virtex Producing Company, L.P. v. Robert Leon Bauerle and Cynthia Bauerle*. The Petitioner (Virtex) was requesting that the Texas Supreme Court review the decision of the Fourth Court of Appeals at San Antonio. The case does not concern property in the Permian Basin, nor does it concern members of the PBPA.

Shortly, the case challenges tenants of the accommodation doctrine, which as a whole provides that the mineral estate is dominant to the surface estate. Under the accommodation doctrine, mineral lessees have “the right to go onto the surface of the land to extract [] minerals, as well as those incidental rights reasonably necessary for [] extraction.” *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248-49 (Tex. 2013). As provided in *Merriman*, the dominance of the mineral estate is moderated only by a modest duty to accommodate productive, preexisting uses of the surface when it would be unnecessary to disrupt them. In the case at hand, we argued that the Fourth Court allowed the Respondents (the Bauerles, who are the surface owners) to prevail on their accommodation claim by merely presenting evidence that a mineral lessee’s proposed power lines (an incidental right reasonably necessary for extraction) would inconvenience one method of carrying out inessential aspects of the surface owners’ business, as opposed to disrupting the use of the surface.

The request for engagement was provided to the members of the PBPA Legal Committee for review. With no opposing vote, it was determined that outside counsel would be contracted with the financial support of those in favor. *Vinson & Elkins LLP* was contracted to draft and submit an amicus curiae brief in favor of the motion for rehearing. Such brief was submitted on May 21, 2019.

The Supreme Court has not yet ruled on the motion for rehearing. On June 21, 2019, the Supreme Court requested a response to the motion. This is a good first step. Often, the Court will simply deny a motion for rehearing without requesting any response. When the Court requests a response, it indicates some level of interest at the Court. That said, it is also common for the Court to request a response to a motion for rehearing and then deny the motion, so at this time we can’t read too much into the fact that the Court requested a response.

On June 27, 2019, the Respondents filed a motion for an extension of time to file their response to the motion for rehearing, and the Court granted that motion for extension of time. The response to the motion for rehearing is currently due on July 22, 2019. No action will be taken by the Court until the response is filed by Respondents, and from there it could take a few weeks for the Court to rule on the motion for Rehearing.