

2-12-2016

Advocating for the Adoption of West Virginia's Substantial Burden Standard Across the Mining States

Kathryn Scherpf

Boston College Law School, kathryn.scherpf@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>

 Part of the [Environmental Law Commons](#), [Property Law and Real Estate Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Kathryn Scherpf, *Advocating for the Adoption of West Virginia's Substantial Burden Standard Across the Mining States*, 43 B.C. Env'tl. Aff. L. Rev. 181 (2016), <http://lawdigitalcommons.bc.edu/ealr/vol43/iss1/7>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

ADVOCATING FOR THE ADOPTION OF WEST VIRGINIA'S SUBSTANTIAL BURDEN STANDARD ACROSS THE MINING STATES

KATHRYN SCHERPF*

Abstract: Horizontal severance deeds separate property above and below the surface of land. In such deeds, typically the property rights below belong to mineral owners while property rights above belong to farmers. In most states, common law trespass utilizes what is generally known as the *reasonable necessity* doctrine to account for the rights that each owner has to enjoy in connection with his respective property. This doctrine has evolved over time and establishes the degree of surface damage that mineral owners can cause in accessing minerals below without becoming liable to the surface owner for damages. Recently, West Virginia made its standard more rigorous by prohibiting mineral owners from substantially burdening the surface estate. If other mining states like Texas and Pennsylvania were to incorporate West Virginia's heightened standard into their respective doctrines, then the farming industry may receive greater national protection. And, since farming is currently thriving, heightened protection may even lead to greater national economic growth.

INTRODUCTION

In mining country, property is often split in horizontal severance deeds, whereby two separate estates are created: an estate in the surface of the property and a separate estate in the mineral rights underground.¹ Disputes typically arise when mining and drilling companies damage the surface land while accessing the minerals below.² Although different states apply different standards in determining the rights of mineral owners, often, states will ultimately recognize some right to destroy surface land.³

* Senior Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2015–2016.

¹ Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH L. REV. 33, 33–34 (2009).

² See BLAKELY E. WHILDEN, MINERAL RIGHTS IN CENTRAL APPALACHIA: A BRIEF HISTORY OF THE BROAD FORM DEED IN KENTUCKY AND TENNESSEE 2 (n.d.), http://studentorgs.law.unc.edu/documents/elp/2012/whilden_final.pdf [<http://perma.cc/H3WL-NHYQ>].

³ See, e.g., *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 394 (4th Cir. 2013) (condoning mineral owner's drilling activities); *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 252 (Tex. 2013) (holding in favor of a mineral owner that surface destruction was reasonable); *Pa. Game Comm'n v. Seneca Res. Corp.*, 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014) (determining that subsurface fracking activities destroying the surface were acceptable).

In *Merriman v. XTO Energy, Inc.*, the Supreme Court of Texas granted such destruction right to the mineral owner, albeit to the detriment of the surface owner.⁴ In Limestone County, Texas, plaintiff Homer Merriman filed an injunction against defendant XTO Energy, Inc. (“XTO”), a mining company.⁵ Merriman, a cattle herder, had purchased forty acres of surface land on which to live and run a cattle ranching operation.⁶ On the same plot of land, XTO possessed rights to the minerals located below the surface.⁷ In accessing the minerals, XTO devastated Merriman’s property by destroying the cattle business that he spent over a decade building.⁸ XTO drilled a well on the same forty-acre tract of land on which Merriman configured permanent corrals and catch-pens for his cattle operation.⁹ After failed attempts to re-configure his corrals and catch-pens, Merriman was out of options.¹⁰ Indeed, he could not just simply lease land somewhere else to run his business.¹¹ It was crucial for Merriman to have the base of the cattle operation literally in his backyard so that he could conduct the cattle roundup in the evenings.¹² He did not hire anyone else to help him run this undertaking, and he worked another job that required him to be gone for long hours, six days a week.¹³ Although Merriman did lease other land for his cattle to graze, it would have been a significant investment of capital and time to relocate the roundup; further, the roundup operation required a permanent fence, which Merriman was very hesitant to build on leased property.¹⁴

Despite the fact that XTO’s actions devastated the surface so as to end Merriman’s cattle business, the Supreme Court of Texas found that this damage was acceptable and that Merriman failed to demonstrate that there were no reasonable alternative means for him to maintain his use of the sur-

⁴ 407 S.W.3d at 252.

⁵ *Id.* at 246.

⁶ *Id.* at 247. Merriman’s home and barn were on the same forty-acre tract of land where he installed a permanent fence and corrals to use in a cattle operation. *Id.*

⁷ *Id.*

⁸ Petitioner’s Brief on the Merits, *Merriman*, 407 S.W.3d 244 (No. 11-0494), 2012 WL 6044205, at *5.

⁹ *Id.* at *32–33.

¹⁰ *See id.* (“I have attempted to devise a way to re-configure my corrals and catch-pens so as to conduct my cattle operation on my property with the well present. My efforts were unsuccessful.”).

¹¹ *See id.* at *5–6. Because Merriman’s operation required a permanent fence, he was only comfortable building the corral operation on the land he owned. *Id.* Further, Merriman worked another job elsewhere and thus was limited to conducting his operation at certain times. *Id.* As a result, it was not feasible for Merriman to look into leasing another tract of land to set up his operation. *See id.* at *6.

¹² *Id.* at *5–6.

¹³ *See id.* at *6. Homer Merriman worked as a pharmacist during the day. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 247 (Tex. 2013).

¹⁴ Petitioner’s Brief on the Merits, *supra* note 8, at *5.

face property.¹⁵ If this case was decided by a court in West Virginia applying the *substantial burden* test, it is likely that Merriman would have prevailed because such a substantial burden to Merriman was a violation of his property rights, even if such damage was reasonably necessary for XTO to access the minerals below.¹⁶

In Part I, this Note compares how different mining states balance the property rights of surface estate and mineral owners.¹⁷ Part II then argues that West Virginia's *reasonable necessity* doctrine is superior to that of states with similar mining and drilling operations, particularly Texas and Pennsylvania.¹⁸ This is because unlike the other states, West Virginia incorporates a *substantial burden* requirement whereby the mineral owner can do what is reasonably necessary to access minerals below but cannot substantially burden the surface land without an explicit deed provision granting permission to do so.¹⁹

This heightened standard offers greater potential for surface owner protection than the standards currently applied in other similarly situated states.²⁰ Further, if other states incorporate the heightened standard into their respective doctrines, the national economy could benefit, as well.²¹ A mine typically produces its highest returns in the first few years of operation but then production gradually drops to zero over time.²² In contrast, a farm produces a stable output indefinitely into the future.²³ By prohibiting substantial (and at times, irreparable) harm to the surface—even if reasonably necessary to access minerals below—West Virginia's demonstrates a heightened concern for

¹⁵ See *Merriman*, 407 S.W.3d at 252. Merriman argued that he was essentially forced to end his operation because he did not own other lands to build a permanent fence and was not comfortable doing so on lands he leased. Petitioner's Brief on the Merits, *supra* note 8, at *27.

¹⁶ See *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980) (holding that the mineral owner's surface activities must not only be reasonably necessary to access minerals below but must also be exercised without substantially burdening the surface owner).

¹⁷ See *infra* notes 26–141 and accompanying text.

¹⁸ See *infra* notes 142–250 and accompanying text.

¹⁹ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26.

²⁰ *Compare id.* (incorporating the requirement that mineral owners not burden surface land even if reasonable necessary to access minerals below, if such action will substantially burden the surface estate and the deed provision does not explicitly grant the mineral owner the right to cause such harm), with *Merriman*, 407 S.W.3d at 252 (applying a less rigorous version of the *reasonable necessity* doctrine such that mineral owners may harm surface land as much as reasonably necessary even if the harm is substantial).

²¹ See *infra* notes 22–25 and accompanying text. *Compare Buffalo Mining Co.*, 267 S.E.2d at 725–26 (establishing high *substantial burden* standard protecting farmers from surface harm), with *Merriman*, 407 S.W.3d at 252 (requiring a less burdensome standard).

²² William J. Bernstein, *Of Mines, Forests, and Impatience*, EFFICIENT FRONTIER (2001), <http://www.efficientfrontier.com/ef/401/fisher.htm> [<http://perma.cc/A957-UPL4>].

²³ See *id.*

each industry's value to our national economy.²⁴ As such, West Virginia's doctrine provides a more conducive environment for farming.²⁵

I. COMPARISON OF COMMON LAW DOCTRINES REGARDING PROPERTY RIGHTS AND HORIZONTAL SEVERANCE DEEDS

When activities of the mineral estate owner amount to common law trespass, surface owners are entitled to injunctive relief.²⁶ Common law trespass typically occurs when a mineral owner's activities exceed the scope of what is granted—either implicitly or explicitly—in the severance deed.²⁷ When property rights are granted through a horizontal severance deed, mineral owners are normally authorized implicitly to conduct operations along the surface as reasonably necessary to obtain the minerals below.²⁸ There are doctrinal differences amongst states with heavy mining and drilling operations in terms of how much of a surface burden mineral owners are entitled to create in the obtainment of minerals and enjoyment of property rights below.²⁹

Like other similarly situated states, West Virginia common law grants the mineral estate owner the use of the surface land as long as such usage is reasonably necessary for the enjoyment of the minerals below.³⁰ Unlike many other states with heavy mining and drilling operations, however, West Virginia also requires that the mineral owner's use of the surface land not substantially burden the surface property.³¹ This Note calls for other states with heavy mining operations to incorporate the *substantial burden* requirement from West Virginia into their own common law doctrines that currently employ a *reasonable necessity* standard.³²

²⁴ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (holding that the mineral owner's surface activities must not only be reasonably necessary to access minerals below but must also be exercised without substantially burdening the surface owner).

²⁵ See *id.*

²⁶ Rachel Heron et al., Commentary, *The Interpretation of Surface Easements in Severance Deeds as a Limit on Hydraulic Fracturing Practices*, 19 BUFF. ENVTL. L.J. 73, 74–75 (2011–2012).

²⁷ See *id.*

²⁸ See *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 390 (4th Cir. 2013) (describing how horizontal severance deeds grant rights to mineral owners below and rights to surface owners above the surface).

²⁹ Compare *id.* (applying standard which prohibits mining operators from substantially burdening surface land), with *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013) (illustrating how Texas does not require the stringent standard used by other courts), and *Pa. Game Comm'n v. Seneca Res. Corp.*, 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014) (making no mention of any limitations on the substantiality of the surface burden that an owner should be expected to tolerate from activity by a subsurface mineral right owner).

³⁰ See *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725 (W. Va. 1980).

³¹ See *id.* at 725–26.

³² See *infra* notes 178–250 and accompanying text.

Other states, like Texas and Pennsylvania, also consider the surface owner's use of the land as a factor in determining parties' rights.³³ Yet they do not display a concern for surface owners that is equivalent to West Virginia's *substantial burden* requirement.³⁴ For instance, in Texas, Homer Merriman, a surface owner, built a permanent fence with a corral on his tract of land for use in his cattle operation.³⁵ That court held that despite the surface owner's substantial hardship, he was not entitled to an injunction to prevent the mineral owner's damaging well operation.³⁶ If this case had been heard in West Virginia as opposed to Texas, the outcome may have been more favorable for the surface owner because West Virginia courts recognize substantial harm to the surface as sufficient grounds to grant an injunction.³⁷

A. The Reasonable Necessity Doctrine

Trespass is "entry on another man's ground *without lawful authority*, and doing some damage, however inconsiderable, to his real property."³⁸ Continuing trespass occurs if one leaves on the land of another, with a duty to remove it, any "structure, chattel, or other thing."³⁹ The law of trespass applies when one enters the land of another—or as relevant to the case here, leaves something upon the land of another—without "lawful authority" to do so.⁴⁰

A license is a typical method of obtaining lawful authority to enter or leave something on another's land.⁴¹ With a license, a licensee is permitted, upon agreement with the licensor, to commit some act upon the land of the licensor that would otherwise be unlawful.⁴² Over the years, however, various states' common law trespass doctrines established a precedent that granted a mineral estate owner authority to enter upon the land of a surface estate owner—without express authority, license, or otherwise—to extract

³³ See *Merriman*, 407 S.W.3d at 249; *Seneca Res. Corp.*, 84 A.3d at 1106 (allowing the mineral owner to use so much of the surface as is reasonably necessary).

³⁴ Compare *Seneca Res. Corp.*, 84 A.3d at 1106 (requiring a less burdensome standard), and *Merriman*, 407 S.W.3d at 249 (mentioning no requirement as to the degree to surface harm permitted), with *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (establishing a heightened standard prohibiting mineral owners from substantially burdening surface estates).

³⁵ *Merriman*, 407 S.W.3d at 247.

³⁶ *Id.* at 251–52.

³⁷ Compare *Merriman*, 407 S.W.3d at 249 (requiring a less burdensome standard whereby substantial surface harm is permitted), with *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (establishing a heightened standard protecting farmers from substantial surface harm).

³⁸ *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 386 (4th Cir. 2013) (citing *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 352 (W. Va. 1945)).

³⁹ RESTATEMENT (SECOND) OF TORTS § 160 (AM. LAW INST. 1965).

⁴⁰ *Whiteman*, 729 F.3d at 386 (internal citation omitted).

⁴¹ *Id.* at 387.

⁴² *License*, BLACK'S LAW DICTIONARY (10th ed. 2014).

minerals when reasonably necessary to do so.⁴³ This concept of *reasonable necessity* established the notion that a mineral estate owner enters the surface estate owner's land *without* lawful authority "only if doing so 'exceed[s] [the mineral estate owner's] rights . . . thereby invading the rights' of the surface estate owner."⁴⁴

In 1874 in *Marvin v. Brewster Iron Mining Co.*, the New York Court of Appeals initially established the *reasonable necessity* doctrine.⁴⁵ There, a surface owner sought to uphold an injunction granted against a mineral owner from mining below and leaving "ore and rubbish" on the surface.⁴⁶ The surface estate owner had claimed that the mineral estate owner deposited "ore and rubbish" from the mines along the surface.⁴⁷ The lower court found that while the mineral estate owner had a right to enter the surface estate owner's land to mine, no right existed "to deposit or keep upon [the surface estate owner's] lands any . . . refuse stuff or rubbish."⁴⁸ That court then ordered the mineral estate owner to remove the "ore and rubbish" deposited on the surface and enjoined the mineral estate owner from future waste disposal on such land.⁴⁹

The New York Court of Appeals reversed the lower court, because the lower court did not consider if it was "necessary [to deposit mine waste] for the reasonably profitable enjoyment" of the mineral estate owner's property in the minerals.⁵⁰ The court explained that a grant of minerals beneath a tract of land carries with it a right to use the surface as fairly necessary to recover the mineral holder's "reasonably profitable enjoyment" of the mineral.⁵¹ This has come to be called the *reasonable necessity* standard.⁵² The *Marvin* court further explained that it is rarely acceptable to leave such waste on the land, but that *necessary* is a fluid concept: "The facts of each case" must determine what is necessary.⁵³

⁴³ *Whiteman*, 729 F.3d at 387 (citing *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538, 538 (1874)); *Friedline v. Hoffman*, 115 A. 845, 846 (Pa. 1922) (citing to *Marvin*, 55 N.Y. at 538).

⁴⁴ *Whiteman*, 729 F.3d at 387 (quoting *Adkins v. United Fuel Gas Co.*, 61 S.E.2d 633, 635 (W. Va. 1950)) (emphasis added).

⁴⁵ 55 N.Y. at 565.

⁴⁶ *Id.* at 543.

⁴⁷ *Id.* at 540–41.

⁴⁸ *Id.* at 543.

⁴⁹ *Id.*

⁵⁰ *Id.* at 565.

⁵¹ *Id.*

⁵² See *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 387 (4th Cir. 2013) (explaining that *Marvin* was the seminal case that introduced "the concept of what has come to be known as reasonable necessity and its application to severance deed construction").

⁵³ *Marvin*, 55 N.Y. at 553.

After the *Marvin* decision, the *reasonable necessity* standard was incorporated into various states' common law trespass doctrines.⁵⁴ Thereafter, the *Marvin* decision was seen as officially laying out the principle that mineral estate ownership *implies* a "right to use the surface in such manner and with such means as fairly necessary for the enjoyment" of the mineral estate.⁵⁵ *Porter v. Mack Manufacturing Co.* and *Squires v. Lafferty* were seminal West Virginia cases that, although not trespass cases, embodied the *reasonable necessity* standard's adoption and evolution.⁵⁶

In *Porter*, the mineral estate owner sought to mine minerals and carry them off using a tram road that he intended to build on the surface estate owner's property.⁵⁷ When the surface estate owner blocked the operation, the mineral estate owner sought an injunction against causing such obstruction to the mining operation.⁵⁸ Similarly, in *Squires*, the mineral estate owner sought to drill test holes and transport machinery and men over the surface estate owner's property, but the surface owner locked the access gate to the land and even assaulted the mineral estate owner's employees for forcing passage.⁵⁹

The Supreme Court of Appeals of West Virginia ruled alike in both cases, holding that the building of a tram road across the surface estate owner's property, drilling of test holes, and transport of machinery and men across the surface were activities "fairly necessary" to the enjoyment of the mineral estate.⁶⁰ Thus, although both *Porter* and *Squires* were not actions grounded in trespass, the resulting standard is still the same: A mineral es-

⁵⁴ See, e.g., *Whiteman*, 729 F.3d at 388 (following *Marvin*, a line of precedent was established in West Virginia informing a mineral estate owner's authority to enter upon the land of a surface estate owner without express license or otherwise); *Buck Creek R.R. Co. v. Haws*, 69 S.W.2d 333, 336 (Ky. 1934) (availability of damages for trespass "outside the reasonably necessary right of way"); *Meixner v. Buecksler*, 13 N.W.2d 754, 756 (Minn. 1944) (saying that the "general rule to do a particular act carries with it authority and the right by implication to do all that is necessary to effect the principal object and to avail the licensee of his rights under license"); *Jones v. Erie & Wyo. Valley R.R. Co.*, 32 A. 535, 537 (Pa. 1895) (that powers are given "in plain words, or by necessary implication"); *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967) ("[R]ight to use as much of the premises . . . as was reasonably necessary to comply with the terms of the lease and to effectuate its purposes.").

⁵⁵ *Whiteman*, 729 F.3d at 388 (citing *Porter v. Mack Mfg. Co.*, 64 S.E. 853, 854 (W. Va. 1909)); see also *Squires v. Lafferty*, 121 S.E. 90, 91 (W. Va. 1924) (concluding that the right to use the surface "in a manner and with such means as would be fairly necessary" to enjoy the mineral estate is incident to mineral estate ownership). The West Virginia Supreme Court of Appeals uses the two phrases—"fairly necessary" and "reasonably necessary"—interchangeably. *Whiteman*, 729 F.3d at 388 n.11.

⁵⁶ See *Squires*, 121 S.E. at 91; *Porter*, 64 S.E. at 854.

⁵⁷ 64 S.E. at 853.

⁵⁸ *Id.*

⁵⁹ 121 S.E. at 90.

⁶⁰ See *id.* at 91; *Porter*, 64 S.E. at 854.

tate owner has the right to use the surface “in such a manner and with such means as would be fairly necessary” to enjoy the mineral estate.⁶¹

In the wake of *Porter* and *Squires*, the Supreme Court of Appeals of West Virginia held in *Adkins v. United Fuel Gas* that a mineral owner’s drilling operations were not unreasonable or unnecessary.⁶² In *Adkins*, a surface owner brought a trespass claim against a mineral owner for drilling a gas well near the center of the surface owner’s fifty-acre tract on which he grew alfalfa, corn, and vegetables.⁶³ Further, the mineral estate owner constructed, through the area used to grow crops, a road and pipelines to access the well and two ditches.⁶⁴ One ditch was designed to carry water and refuse from the gas well, and the other was created to lay a gas pipe necessary to operate the gas well.⁶⁵ The surface estate owner was unable to produce crops as a result of the mineral estate owner’s activities.⁶⁶ Once the drilling operation finished, the *Adkins* mineral estate owner removed one of the gas pipes, drained the ditches, and covered them, but left a permanent gas pipe underground.⁶⁷

Here, the *Adkins* court applied the *reasonable necessity* standard as laid out in *Porter* and *Squires* and held that none of defendant’s activities were unnecessary or unreasonable.⁶⁸ Defendant needed to construct the road to bring in machinery to drill the well; similarly, installing the pipeline along the surface was not found to be unnecessary.⁶⁹ The court reasoned that defendant’s construction of the open ditch for draining sand, water, and other refuse from drilling operations appeared to be an effort by the defendant to keep the refuse from spreading to the plaintiff’s neighboring surface land, and, therefore, was an attempt by the defendant to minimize surface harm.⁷⁰

While many states utilize the *reasonable necessity* standard in horizontal severance deed issues, each state applies the standard differently.⁷¹ West

⁶¹ See *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 388 (4th Cir. 2013).

⁶² *Adkins v. United Fuel Gas Co.*, 61 S.E.2d 633, 636 (W. Va. 1950).

⁶³ *Id.* at 634.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* Considerable amounts of water, oil, and refuse were deposited on plaintiff’s garden that was located close to defendant’s well. *Id.* Plaintiff showed further that roughly three-tenths of an acre of the alfalfa was destroyed, another seven-tenths of an acre could not be cut and so was useless to plaintiff, and finally, that the corn field was not plowable because of defendant’s activities on the surface. *Id.*

⁶⁷ *Id.*

⁶⁸ See *id.* at 636.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Compare *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980) (establishing West Virginia’s heightened standard protecting surface owners from substantial harm), with *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013) (demonstrating Texas’ present

Virginia courts traditionally applied the *reasonable necessity* doctrine in line with the *Marvin* holding; but then, thirty-five years ago, the state's highest court added a gloss to the doctrine and in turn heightened the standard whereby mineral owners could not be found liable for trespass.⁷² States with heavy drilling operations such as Texas and Pennsylvania should adopt West Virginia's heightened standard into their respective common law doctrines to better protect surface owners.⁷³

B. West Virginia Strengthens the Reasonable Necessity Doctrine

Following *Adkins*, the Supreme Court of Appeals of West Virginia in *Buffalo Mining* scrutinized the doctrine of *reasonable necessity*.⁷⁴ There, as in *Porter* and *Squires*, a mineral estate owner sought to enjoin the surface owner from obstructing mining operations.⁷⁵ The surface owner primarily interfered with Buffalo Mining attempt to build a powerline needed to ventilate a coal mine positioned below the surface estate.⁷⁶ The *Buffalo Mining* court, however, rather than simply applying the previously laid out *reasonable necessity* standard, applied the following gloss:

[W]here implied as opposed to express rights are sought, the test of what is reasonable and necessary becomes more exacting, since the mineral estate owner is seeking a right that he claims not by virtue of any express language in the mineral severance deed, but by necessary implication as a correlative to those rights expressed in the deed. In order for such a claim to be successful, *it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner.*⁷⁷

Accordingly, following *Buffalo Mining* the *reasonable necessity* doctrine became a two-prong test in West Virginia: (1) the proposed activity must be *reasonably necessary*; and (2) it must not cause a *substantial burden* to the surface owner.⁷⁸

reasonable necessity doctrine that does not protect surface owners from substantial harm), and Pa. Game Comm'n v. Seneca Res. Corp., 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014) (demonstrating Pennsylvania's *reasonable necessity* doctrine that permits substantial surface harm).

⁷² *Buffalo Mining Co.*, 267 S.E.2d at 725–26.

⁷³ See *infra* notes 74–250 and accompanying text.

⁷⁴ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26.

⁷⁵ *Id.* at 722.

⁷⁶ See *id.*

⁷⁷ *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 390 (4th Cir. 2013) (quoting *Buffalo Mining Co.*, 267 S.E.2d at 725–26).

⁷⁸ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26; see also *Whiteman*, 729 F.3d at 390 (explaining that the court in *Buffalo Mining* did not simply apply the “fairly necessary” doctrine as

The *Buffalo Mining* holding made the state's *reasonable necessity* doctrine uniform in its application to two differing activities: (1) "[W]here the mineral estate owner engages in activity that disturbs, perhaps permanently and negatively, the surface"; and (2) "where the mineral estate owner engages in activity that 'virtually destroy[s]' the surface or is otherwise 'totally incompatible with the rights of the surface owner.'" ⁷⁹ *Buffalo Mining* essentially permits the first type of activity because such surface use is reasonably necessary to access the minerals below and the surface does not tend to incur a substantial burden. ⁸⁰ Yet *Buffalo Mining* does not permit the second activity type to be implicit in a mineral estate, because damage to the surface tends to be substantial. ⁸¹ Accordingly, if surface damage is substantial, a mineral estate owner will typically need an explicit deed provision before causing such destruction. ⁸²

A recently decided trespass case further entrenched the *Buffalo Mining* holding into West Virginia common law. ⁸³ In *Whiteman v. Chesapeake Appalachia, L.L.C.*, the United States Court of Appeals for the Fourth Circuit upheld the finding of the United States District Court for the Northern District of West Virginia (applying West Virginia law) that the plaintiff-surface owners failed to present sufficient evidence to show that defendant-mining corporation's drill waste pits imposed a *substantial burden* on the surface. ⁸⁴ The only support that the surface owners produced to support an argument for a substantial burden to the land was their subjective fear that they would one day be held liable if another was injured on their property. ⁸⁵ Additionally, the surface owners acknowledged that they experienced minimal pecuniary loss due to the drill waste pits and that potential damage to the land was limited to ten acres. ⁸⁶

Moreover, the *Whiteman* court upheld the earlier finding that the surface owners failed to show that the pits were not *reasonably necessary*, as

laid out in *Porter, Squires, Adkins*, and others; instead, the *Buffalo Mining* court incorporated the *substantial burden* gloss to that doctrine).

⁷⁹ *Whiteman*, 729 F.3d at 390 (quoting *Buffalo Mining Co.*, 267 S.E.2d at 725–26).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.* at 382, 394.

⁸⁴ *Id.* at 384, 392. The Fourth Circuit upheld the district court's holding. *Whiteman v. Chesapeake Appalachia, LLC*, 873 F. Supp. 2d 767, 777 (N.D.W. Va. 2012) *aff'd sub nom.* *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381 (4th Cir. 2013). This case was removed to federal court due to diversity jurisdiction: The Whitemans are domiciled in West Virginia, the state of the family's residency, while Chesapeake is incorporated in and holds its primary place of business in Oklahoma. *Id.* at 384; *see* 28 U.S.C. § 1332(a) (2012).

⁸⁵ *See Whiteman*, 729 F.3d at 384, 392.

⁸⁶ *Id.* at 383, 384.

well.⁸⁷ The court found that the open pit system employed on the surface owners' property between 2007 and 2009 was the common method employed in the state at the time.⁸⁸ An alternative disposal method known as the closed-loop system required the removal of drill waste from the well site; the waste was then placed in off-site landfills.⁸⁹ Although the defendant-mining corporation used the closed-loop system in Texas and Oklahoma in 2004 and 2005, it did not employ it in West Virginia until December 2009.⁹⁰ Thus, at the time the open pits were drilled on the surface property, the open pit system was the "common and ordinary method of disposal in West Virginia," and it was "consistent with permitting requirements in the state and approved by the [West Virginia Department of Environmental Protection]."⁹¹ The surface owners argued that comparing the drill waste disposal methods in Texas and Oklahoma with those in West Virginia "ought to inform whether [defendant's] drill waste disposal used on the Whitemans' surface was 'reasonably necessary.'"⁹² The court found that such a comparison is "false equivalency."⁹³ The court went on to say that to compare drill waste disposal methods within all of West Virginia would not even likely conform to what a *reasonable necessity* inquiry requires because *Marvin* established that the determination is fact-intensive.⁹⁴ Therefore, each case should be evaluated in light of the fact that what is *necessary* is a fluid concept.⁹⁵

Buffalo Mining's requirement that there not be a substantial burden on the surface is unique to West Virginia, and has been incorporated into the state's common law for over thirty years.⁹⁶ This constraint to not substantially burden the surface owner has not been incorporated into other mining states' common law trespass doctrines.⁹⁷ Indeed, West Virginia courts' raising the standard by which mineral estate owners are allowed to use the surface land possessed by another demonstrates a strong commitment to pro-

⁸⁷ *Id.* at 392.

⁸⁸ *Id.* at 384, 392.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 393.

⁹² *Id.* (internal citation omitted).

⁹³ *Id.*

⁹⁴ *Id.*; see *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538, 553 (1874).

⁹⁵ *Whiteman*, 729 F.3d at 393; see *Marvin*, 55 N.Y. at 553 (holding that determinations of what is necessary must be based on the facts of each case).

⁹⁶ See *Whiteman*, 729 F.3d at 392 (applying the rationale earlier established in *Buffalo Mining*).

⁹⁷ See, e.g., *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013); *Pa. Game Comm'n v. Seneca Res. Corp.*, 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014).

tect surface estate owners' rights.⁹⁸ It further benefits the national economy as it offers greater protection to the farming industry, which provides a stable output indefinitely into the future.⁹⁹ Interestingly, no other state has added this heightened requirement to its respective *reasonable necessity* standard.¹⁰⁰

C. Texas' Take on the Reasonable Necessity Doctrine

Like West Virginia, Texas law also applies a version of the *reasonable necessity* doctrine, but unlike West Virginia, Texas also applies the *accommodation* doctrine, which differs considerably from the *substantial burden* requirement in West Virginia.¹⁰¹

The *accommodation* doctrine was first laid out in *Getty Oil Co. v. Jones*, and requires the surface owner to establish that the mineral owner's use at least substantially impairs the surface owner's existing use and to show that there is no reasonable alternative means *for the surface owner to use the land as intended*.¹⁰² This standard, while still focusing on the reasonableness of alternative methods to access the minerals, requires that there be no reasonable alternative to the desired activity of *the surface owner*.¹⁰³

Texas's *reasonable necessity* doctrine, like West Virginia, places the burden of proof on the surface owner bringing a claim for common law trespass.¹⁰⁴ Under Texas law, a mineral owner has the right to go onto the surface to extract minerals and an incidental right to use as much of the surface as *reasonably necessary* to extract and produce the minerals.¹⁰⁵ If there are other reasonable alternatives available for accessing the underground minerals that would permit the surface owner to continue to use the surface

⁹⁸ See *Whiteman*, 729 F.3d at 391–92 (applying the *Buffalo Mining* court's more exacting test).

⁹⁹ See Bernstein, *supra* note 22.

¹⁰⁰ See *Merriman*, 407 S.W.3d at 249; *Seneca Res. Corp.*, 84 A.3d at 1106.

¹⁰¹ Compare *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980) (incorporating the *substantial burden* requirement into West Virginia's *reasonable necessity* doctrine), with *Merriman*, 407 S.W.3d at 248–49 (demonstrating Texas' version of the *reasonable necessity* doctrine's lack of concern for substantial surface harm and explaining the *accommodation* doctrine's requirement that surface owners establish mineral owners's use at least substantially impair surface use and that there are no alternative uses for the surface).

¹⁰² *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 623 (Tex. 1971).

¹⁰³ *Id.* (holding that alternatives available to the surface owner are to be impractical and unreasonable under all the circumstances).

¹⁰⁴ See *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 392 (4th Cir. 2013) (explaining that when surface owner-plaintiffs file a complaint for trespass they carry the burden of making a prima facie trespass claim); *Merriman*, 407 S.W.3d at 249 (holding that to obtain relief on a claim that the mineral lessee failed to accommodate the existing use, the surface owner carries the burden of proof).

¹⁰⁵ *Merriman*, 407 S.W.3d at 248–49; Tarrant Cty. Water Control & Improvement Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993); *Getty Oil Co.*, 470 S.W.2d at 621.

as intended, however, the mineral owner must pursue such alternative methods.¹⁰⁶ Accordingly, to obtain relief the surface owner must prove that, given the particular circumstances, there are “alternative, reasonable, customary, and industry-accepted [mineral retrieval] methods available” that permit the surface owner to continuing the existing use.¹⁰⁷ Further, the Supreme Court of Texas has held that “if the mineral owner or lessee has only one method for developing and producing the minerals, that method may be used *regardless of whether it precludes or substantially impairs an existing use of the servient surface estate.*”¹⁰⁸ In contrast to West Virginia, Texas not only does not require that there be a lack of substantial burden to the surface, it also allows such a burden if the only method of mineral retrieval available is that currently employed.¹⁰⁹

In *Merriman*, the Supreme Court of Texas clarified that the *accommodation* doctrine does not require the surface owner to produce evidence that there were no reasonable alternatives for general agricultural uses, but only whether there were no reasonable alternatives for the surface owner to conduct the activity *intended*.¹¹⁰ The Court found that the surface owner had failed to demonstrate that he had no reasonable alternative means of maintaining his surface use.¹¹¹ Thus, as long as there were other alternative means for Merriman to conduct his cattle operation, those alternative methods must be pursued with no consideration of the burden that such a requirement would place on the surface owner.¹¹² Further, the Texas court held that in determining the surface owner’s intended use, both parties and their respective interests must be considered and each one’s respective rights must be balanced.¹¹³

In *Merriman*, the surface owner argued that the defendant mineral owner’s well location interfered with his cattle operation.¹¹⁴ The court held that in balancing each party’s considerations, the plaintiff surface owner failed to establish why such corrals could not be constructed and used somewhere else, and thus failed to show that his intended use was preclud-

¹⁰⁶ *Merriman*, 407 S.W.3d at 249; *Haupt, Inc.*, 854 S.W.2d at 911–12.

¹⁰⁷ *Merriman*, 407 S.W.3d. at 248–49.

¹⁰⁸ *Id.* at 249 (emphasis added).

¹⁰⁹ *See id.*

¹¹⁰ *See id.* at 250–51 (explaining that courts need not consider whether the surface owner can still conduct broadly any activity that can be characterized as “agricultural” but only whether there is a reasonable alternative means available by which the surface owner can still continue the particular subset agricultural activity intended).

¹¹¹ *Id.* at 252.

¹¹² *See id.*

¹¹³ *Id.* at 250 (explaining that the issue is one of fairness to both parties).

¹¹⁴ *Id.* at 251.

ed.¹¹⁵ The court went on to state that the evidence presented by the plaintiff surface owner showed only that the defendant mineral owner's well operation *substantially impaired* the surface owner's use of his existing corrals.¹¹⁶ Although this substantial impairment would result in an additional expense and reduce the surface owner's ability to make a profit because he must build new corrals, this burden was not sufficient to meet the *accommodation* doctrine's standard that there be no reasonable alternative method to maintain the existing use.¹¹⁷ Indeed, in reaching such conclusion, the *Merriman* court failed to consider: first, that the surface owner used other areas on the same forty-acre tract of land for his home and a barn; second, that he installed a *permanent* fence for use in conjunction with the temporary corrals; and finally, that he could not simply build a new operation on his other leased property.¹¹⁸

The *Merriman* court did acknowledge, however, that building a permanent fence—which was then rendered useless as a result of the mining operation's surface destruction—*substantially impaired* the surface owner's use of his land.¹¹⁹ The court's reasoning displays a greater lack of concern for surface damage as compared to West Virginia's heightened standard.¹²⁰ It is likely that if the facts from *Merriman*—wherein the surface owner was substantially harmed—were instead set in West Virginia, then an injunction would more likely have been granted due to the surface owner's *substantial impairment*.¹²¹

D. Pennsylvania's Take on the Reasonable Necessity Doctrine

Pennsylvania, another state known for its mining operations, also applies a doctrine similar to West Virginia's *reasonable necessity* doctrine.¹²² Like Texas, however, Pennsylvania courts also do not prohibit substantial harm to the surface.¹²³ The Pennsylvania Supreme Court has held that as a general rule of law when property rights are granted, in the absence of express language to the contrary, all incidental powers are also granted to al-

¹¹⁵ See *id.* at 251–52. However, *Merriman* did not have the funds to build another fence nor did he own other lands besides the plot at issue to build a permanent fence. See Petitioner's Brief on the Merits, *supra* note 8, at *5–6.

¹¹⁶ *Merriman*, 407 S.W.3d at 252.

¹¹⁷ *Id.*

¹¹⁸ See *id.* at 247 (emphasis added); see Petitioner's Brief on the Merits, *supra* note 8, at *5–6.

¹¹⁹ *Merriman*, 407 S.W.3d at 251–52.

¹²⁰ *Id.* at 249; *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980).

¹²¹ See *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 390, 392 (4th Cir. 2013) (applying rationale laid out in *Buffalo Mining*); *Merriman*, 407 S.W.3d at 251–52.

¹²² See *Pa. Game Comm'n v. Seneca Res. Corp.*, 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014).

¹²³ See *Merriman*, 407 S.W.3d at 249; *Seneca Res. Corp.*, 84 A.3d at 1106.

low full and necessary enjoyment of what was granted.¹²⁴ As such, the mineral estate owner has the right to use so much of the surface as is *reasonably necessary*.¹²⁵ Pennsylvania courts, however, do not mention a requirement that there not be a substantial burden brought to the surface owner.¹²⁶ To the contrary, as stated in *Commonwealth of Pennsylvania v. Seneca Resources Corporation*: “The mine owner has the right to enter and take . . . possession even as against the owner of the soil, and to use the surface so far as may be necessary to carry on the work of mining, *even to the exclusion of the owner of the soil.*”¹²⁷ Indeed, in that case, the Commonwealth Court of Pennsylvania cited to *Chartiers Block Coal Company v. Mellon* as “the seminal case setting forth a subsurface owner’s rights with respect to the surface owner’s rights” in the state of Pennsylvania.¹²⁸

In *Seneca Resources Corporation*, the surface owner complained that the subsurface oil and gas owner did not have a right to use horizontal and hydraulic fracturing methods to obtain the oil and gas below, because such methods were not in contemplation at the time the deed was drawn.¹²⁹ Notably, Pennsylvania’s rule permitting the severance of the mineral estate for coal and other solid minerals applies “with equal force” to subsurface rights to oil and gas.¹³⁰ Thus, just the same as a mineral estate owner may convey property rights, owners to subsurface oil and gas property can similarly convey such rights through horizontal severance deeds.¹³¹ And, because Pennsylvania common law regarding the severance of mineral estates applies “with equal force” to oil and gas, the implicit rights contained in such horizontal severance deeds apply the same way.¹³² Thus, whether the focus of the particular case is on subsurface rights to minerals, oil, or gas, the implicit and explicit rights to subsurface estate owners is one and the same.¹³³

¹²⁴ *Seneca Res. Corp.*, 84 A.3d at 1106 (citing to *Oberly v. H.C. Frick Coke Co.*, 104 A. 864 (Pa. 1918)).

¹²⁵ *Id.*

¹²⁶ *Compare* *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980) (prohibiting substantial harm), with *Seneca Res. Corp.*, 84 A.3d at 1106 (mentioning no prohibition against causing substantial harm).

¹²⁷ *Seneca Res. Corp.*, 84 A.3d at 1106 (emphasis added).

¹²⁸ *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893) (“As against the owner of the surface . . . [subsurface] purchasers would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or drift, or well, to his underlying estate, and to occupy so much of the surface, beyond the limits of his shaft, drift, or well, as may be necessary to operate his estate, and to remove the product thereof.”); *Seneca Res. Corp.*, 84 A.3d at 1106.

¹²⁹ 84 A.3d at 1105–06.

¹³⁰ *Hetrick v. Apollo Gas. Co.*, 608 A.2d 1074, 1077–78 (Pa. Super. Ct. 1992).

¹³¹ See *Seneca Res. Corp.*, 84 A.3d at 1105.

¹³² See *Hetrick*, 608 A.2d at 1077–78.

¹³³ See *id.*

The *Seneca Resources Corporation* court denied the surface owner's complaint and held that the subsurface owner's fracking activities and resultant surface destruction were permissible.¹³⁴ The court held that when property rights are granted, all the means of attaining such property are also granted as incidental so long as no limitations to the contrary are expressed in words.¹³⁵ Particularly, the Pennsylvania court made no mention of any limitations on the substantiality of the surface burden that an owner should be expected to tolerate in consideration of a subsurface owner's rights below.¹³⁶

Evidently, like Texas, Pennsylvania courts do not take into account what harm is brought to the surface estate when mining operations are granted rights to the property located beneath.¹³⁷ By accounting for the burden to surface owners, West Virginia shows a greater concern for surface estate rights than is customary in other similarly situated states.¹³⁸ Moreover, the concern that West Virginia shows for the potential burden to the surface portrays not only a greater concern for the surface owner's rights, but also for the implications that unmonitored mining operations can have on the environment and national economy.¹³⁹ The *Buffalo Mining* court's heightened awareness of the need to account for surface property damage has been incorporated into West Virginia common law for over thirty years.¹⁴⁰ This commitment demonstrates a critical concern for the rights of

¹³⁴ *Seneca Res. Corp.*, 84 A.3d at 1106.

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ Compare *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980) (requiring no substantial harm caused to surface), with *Seneca Res. Corp.*, 84 A.3d at 1106 (mentioning no prohibition against substantial surface harm), and *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013) (permitting substantial surface harm).

¹³⁸ Compare *Seneca Res. Corp.*, 84 A.3d at 1106 (mentioning no prohibition against substantial surface harm), and *Merriman*, 407 S.W.3d at 249 (permitting substantial surface harm), with *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (requiring no substantial harm caused to surface without an explicit deed provision stating otherwise).

¹³⁹ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26; see also Paige Anderson, Note, *Reasonable Accommodation: Split Estates, Conversation Easements and Drilling in the Marcellus Shale*, 31 VA. ENVTL. L.J. 136, 162 (2013) (discussing how drilling and other extraction activities create potential for major environmental problems and harm to surface activities); Bernstein, *supra* note 22 (explaining that mines produce their highest outputs in the first few years of operation before dropping to zero while farms produce stable outputs indefinitely into the future; accordingly, the implications that mining operations can have on farming must be given a heightened concern).

¹⁴⁰ See 267 S.E.2d at 725–26; see also *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 391–92 (4th Cir. 2013) (applying the *Buffalo Mining* court's more exacting test 33 years later); Heron et al., *supra* note 26, at 94 ("Later cases have interpreted *Buffalo Mining* as creating a two-part test that a surface use must meet in order to fall within the scope of an ambiguous express easement . . ."); Joseph V. Schaeffer, *Oil & Gas Lessees Retain Important Rights in W.Va.*, SPILLMAN THOMAS & BATTLE (Sept. 26, 2013), <https://www.spilmanlaw.com/resources/attorney-authored-articles/marcellus---utica-shales/oil---gas-lessees-retain-important-rights-in-w-va> [http://perma.cc/4TNM-5LCM].

both surface and mineral owners alike, as well as the importance of surface land for agricultural activities like farming and cattle herding.¹⁴¹

II. WHY STATES SHOULD ADOPT WEST VIRGINIA'S MORE EXACTING SUBSTANTIAL BURDEN TEST

West Virginia courts have developed a doctrine that provides a more balanced approach to evaluating surface and mineral rights in severance deeds, and thus should be incorporated into other states' respective common law doctrines.¹⁴² West Virginia common law allows subsurface owners to cause destruction that is reasonably necessary to access the minerals below.¹⁴³ Such subsurface owners, however, are not permitted to cause a substantial burden to the surface.¹⁴⁴ This second component—the *substantial burden* prohibition—demonstrates a greater concern for property rights than seen in other similarly situated states.¹⁴⁵ For instance, while Texas and Pennsylvania employ similar doctrines to West Virginia's *reasonable necessity* doctrine, neither incorporate a requirement that prevents a substantial burden from being placed on the surface estate.¹⁴⁶ Accordingly, West Virginia's heightened standard may provide surface owners with a fairer chance—compared to other states with similar mining activities—to receive a remedy if surface damage reaches a point of substantial harm.¹⁴⁷

Texas common law does not prevent subsurface owners from causing destruction to the surface if such destruction is reasonably necessary to access the minerals below.¹⁴⁸ Further, as the *Merriman* court explicitly explained, such destruction is permitted even if it *substantially impairs* the surface land.¹⁴⁹ Accordingly, Texas courts have incorporated a doctrine that ex-

¹⁴¹ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (“Any use of the surface by virtue of rights granted by a mining deed must be exercised reasonably so as not to unduly burden the surface owner’s use.”); *supra* note 140 and accompanying text.

¹⁴² See *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (adding the *substantial burden* gloss to West Virginia’s common law *reasonable necessity* doctrine); *infra* notes 178–250 and accompanying text.

¹⁴³ *Buffalo Mining Co.*, 267 S.E.2d at 725.

¹⁴⁴ See *id.* at 725–26.

¹⁴⁵ See *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 252 (Tex. 2013); *Buffalo Mining Co.*, 267 S.E.2d at 725–26; *Pa. Game Comm’n v. Seneca Res. Corp.*, 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014).

¹⁴⁶ Compare *Seneca Res. Corp.*, 84 A.3d at 1106 (demonstrating no concern for substantial surface harm), and *Merriman*, 407 S.W.3d at 249 (explicitly not considering the substantial surface harm as a factor), with *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (establishing the requirement that there be no substantial burden to surface land without an explicit deed provision permitting otherwise).

¹⁴⁷ See *Merriman*, 407 S.W.3d at 249; *Buffalo Mining Co.*, 267 S.E.2d at 725–26; *Seneca Res. Corp.*, 84 A.3d at 1106.

¹⁴⁸ *Merriman*, 407 S.W.3d at 249.

¹⁴⁹ See *id.* at 251–52.

PLICITLY permits destruction that results in a substantial burden to the surface owner, which is significantly different from the heightened standard in West Virginia.¹⁵⁰

In *Merriman*, the surface estate owner Homer Merriman built a permanent fence for a corral on his tract of land to use in his cattle operation.¹⁵¹ Despite the court's acknowledgement that to rebuild a new cattle operation on another tract of land that he did not own constituted a substantial impairment, the court nevertheless held that Merriman was not entitled to an injunction.¹⁵² If Merriman's case had taken place in West Virginia as opposed to Texas, the outcome would arguably have been more favorable for the surface owner due to the Texas court's explicit finding of substantial impairment.¹⁵³

Though the United States Court of Appeals for the Fourth Circuit in *Whiteman v. Chesapeake Appalachia, L.L.C.* (applying West Virginia law) did not spell out what would constitute a substantial burden, it reasoned that damage to merely ten percent of the surface with no financial loss to the surface owner was not enough.¹⁵⁴ On the other hand, Homer Merriman suffered the loss of his entire forty-acre tract of land and suffered financially due to the cost of building the permanent fence in the first place.¹⁵⁵ Although Merriman leased other land for his cattle to graze, it would have been a significant investment of capital and time to relocate the roundup.¹⁵⁶ Additionally, continuing his current operation on his forty acres was no longer an option because XTO's construction permanently damaged the land he needed to conduct his roundup business.¹⁵⁷ Accordingly, if West Virginia's doctrine applied in Texas, Merriman would have had a chance to recover because he would have met the *Whiteman* court's surface and financial harm concerns: Merriman's entire property was rendered useless compared to the mere ten percent damaged in *Whiteman*, and Merriman suffered financially by losing his entire business.¹⁵⁸ Thus, if the facts from the *Merriman* case

¹⁵⁰ See *id.* at 249, 251–52; *Buffalo Mining Co.*, 267 S.E.2d at 725–26.

¹⁵¹ 407 S.W.3d at 247.

¹⁵² *Id.* at 251–52.

¹⁵³ Compare *id.* (holding that though surface owner suffered substantial surface harm, such harm was acceptable as it was reasonably necessary to access mineral rights below), with *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (establishing that the *reasonable necessity* doctrine would not permit mineral owners to substantially burden surface land as implicit in their mining rights).

¹⁵⁴ See 729 F.3d 381, 392 (4th Cir. 2013).

¹⁵⁵ Petitioner's Brief on the Merits, *supra* note 8, at *5.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Compare *Whiteman*, 729 F.3d at 392 (explaining that in West Virginia, if there is substantial surface harm, then such harm is not acceptable as reasonably necessary to access mineral rights below, but finding that for harm to be substantial, more than 10% of the surface must be harmed), with *Merriman*, 729 F.3d at 251–52 (holding that surface owner was not entitled to re-

were set in West Virginia as opposed to Texas, then the substantial impairment that Merriman endured may have satisfied the *substantial burden* test so that the court would grant injunctive relief.¹⁵⁹

Similarly, the lack of any language in Pennsylvania's common law limiting the amount of permissible destruction to the surface puts surface owners at grave risk of destruction to their property.¹⁶⁰ Indeed, in Pennsylvania, farming is a common means of livelihood that may potentially be wiped out if limitations regarding the degree of destruction permitted are not considered.¹⁶¹

A. Potential Arguments Against Adopting the Substantial Burden Requirement

Some may argue that encouraging states to incorporate West Virginia's heightened standard has its disadvantages.¹⁶² For instance, reasonable buyers enter into these deeds knowing that severance provisions are included separating mineral rights below, and thus, know that the owners of the subsurface estates must have access to these minerals.¹⁶³ Horizontal severance deeds result in the creation of two separate and distinct estates: an estate in the surface and an estate in the minerals.¹⁶⁴ Because mineral estate owners must be able to access the minerals to which they have rights below, the surface owner's right to use his or her land is subject to the subsurface owner's access rights.¹⁶⁵ As Section 2.15 of the Restatement Third of Property states: "[R]ights necessary to the enjoyment of property may include rights

covery as substantial surface impairment was reasonably necessary and thus, acceptable), and Petitioner's Brief on the Merits, *supra* note 8, at *5–6, 27 (arguing that Merriman did suffer damage to his entire forty-acre tract of land; further arguing that Merriman suffered financially and should not be obligated to take on the expense and the risk to set up a completely new operation on property he does not own, especially when XTO can simply drill elsewhere).

¹⁵⁹ Compare *Merriman*, 407 S.W.3d at 251–52 (acknowledging that surface owner suffered substantial surface harm but finding that such harm was nonetheless reasonably necessary), with *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980) (establishing that under the *reasonable necessity* doctrine, mineral owners cannot implicitly substantially burden the surface estate).

¹⁶⁰ See *Pa. Game Comm'n v. Seneca Res. Corp.*, 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014).

¹⁶¹ See *id.*; Bernstein, *supra* note 22 (explaining the value of farming over mining and the harm that mining can bring to farming operations).

¹⁶² See Rebecca Mott, *Who Owns the Mineral Rights on My Property?*, OIL & GAS L. REP. (Feb. 7, 2013), <http://www.oilandgaslawreport.com/2013/02/07/who-owns-the-mineral-rights-on-my-property/> [<http://perma.cc/9GJS-KLQL>].

¹⁶³ See *id.* (explaining that to determine if land has been previously severed, potential buyers can confirm this information by checking the chain of title).

¹⁶⁴ *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971).

¹⁶⁵ See *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538, 565 (1874) (the seminal case establishing that mineral owners could harm the surface estate above if such harm was reasonably necessary to access mineral rights below).

in addition to access, particularly when the property is severed into horizontal estates.”¹⁶⁶ Thus, for the subsurface owners to enjoy a profit, they must be able to “extract and remove the subject of the profit.”¹⁶⁷ Such secondary rights necessary to the enjoyment of profits are accordingly implied when these deeds are created.¹⁶⁸

Marvin v. Brewster Iron Mining Co., the seminal 1874 case introducing the *reasonable necessity* doctrine, explained that when severance deeds are applied, any surface activity not expressly granted to the mineral owner is impliedly lawful so long as such actions are reasonably necessary to access the rights below.¹⁶⁹ Parties thus are aware of the potential surface repercussions because, by their nature, horizontal severance deeds inherently allow harm to the surface if reasonably necessary to exercise subsurface rights.¹⁷⁰ This understanding has been incorporated into various state common law doctrines on horizontal severance deeds for almost 150 years.¹⁷¹

It is fair to argue then that surface owners enter into horizontal severance deeds knowing separate rights implicitly belong below, allowing subsurface owners to conduct surface activities reasonably necessary to enjoy their rights.¹⁷² The court in *Buffalo Mining Co. v. Martin*, however, scrutinized the standard in West Virginia allowing only such surface activities that were “reasonably necessary . . . without any substantial burden to the surface owner.”¹⁷³ Those activities that did result in a substantial burden were only permissible when an explicit provision was included in the deed allowing such destructive activities to occur.¹⁷⁴ Thus, while property owners enter into horizontal severance deeds knowing that their land may be harmed to access rights below, such destruction should only be implicitly permitted if it does not substantially burden the surface.¹⁷⁵ But, if such a substantial impairment to the surface land is required to access subsurface property, then an explicit provision allowing such actions must be included.¹⁷⁶ In this way, the *substantial burden* requirement strikes a fair balance between the rights above and below the surface.¹⁷⁷

¹⁶⁶ RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 (AM. LAW. INST. 2000).

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Marvin*, 55 N.Y. at 565.

¹⁷⁰ *See id.*

¹⁷¹ *See, e.g., Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 387 (4th Cir. 2013) (citing to *Marvin* as the “seminal 1874 case” that established the *reasonable necessity* doctrine).

¹⁷² *See id.* at 388.

¹⁷³ 267 S.E.2d 721, 725–26 (W. Va. 1980) (emphasis added).

¹⁷⁴ *Whiteman*, 729 F.3d at 390.

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ *See Buffalo Mining Co.*, 267 S.E.2d at 725–26.

B. Adopting the More Exacting Substantial Burden Requirement

States like Texas and Pennsylvania should adopt West Virginia's *substantial burden* requirement.¹⁷⁸ This adjustment may prevent harm to surface owners and the population that relies on the maintenance of such surface land usage.¹⁷⁹ One may argue that to encourage states like Texas and Pennsylvania to adopt the common law doctrine established by the courts in West Virginia would require those states to disregard their own settled common law doctrines.¹⁸⁰ Indeed, both Texas and Pennsylvania appear to have settled law on the *reasonable necessity* standard applied therein.¹⁸¹ If there is indeed settled law, then to argue that these states should adopt West Virginia common law in place of their own may require those states to disregard the legal principal of *stare decisis*.¹⁸²

1. Amending Common Law Rules

Occasionally, parties have presented arguments directly challenging an established common law rule, and courts will consider the limits on their power to overrule an established precedent.¹⁸³ Often times, courts are self-restricting when dealing with such issues, and offer great deference to common law precedent.¹⁸⁴ This is particularly true when the precedent is from the United States Supreme Court or the highest court of the state having jurisdiction.¹⁸⁵

Stare decisis channels the law, but it does not require an “unyielding rigidity which nothing later can change.”¹⁸⁶ As the Supreme Court of Pennsylvania stated in *Flagiello v. Pennsylvania Hospital*, “If, after thorough examination and deep thought a prior judicial decision seems wrong in

¹⁷⁸ See *infra* notes 194–250 and accompanying text.

¹⁷⁹ See COUNCIL OF ECON. ADVISORS, HIGHLIGHTS OF RECENT FARM SECTOR AND RURAL ECONOMY PERFORMANCE 1 (n.d.), http://www.whitehouse.gov/sites/default/files/docs/ceastatsheet_ruraleconomy.pdf [<http://perma.cc/8B6B-7P6W>] (explaining that rural America contributes to the entire nation's economic growth); *infra* notes 209–250 and accompanying text.

¹⁸⁰ See C. Christopher Brown, *A Search for Clarity and Consistency in Judicial Process: The Maryland Court of Appeals Decides Whether to Change Common-Law Rules*, 62 MD. L. REV. 599, 628–29 (2003).

¹⁸¹ See, e.g., *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013); *Pa. Game Comm'n v. Seneca Res. Corp.*, 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014).

¹⁸² See Brown, *supra* note 180, at 628–29.

¹⁸³ See *id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964) (“After a principle, rule or proposition of law has been squarely decided by the Supreme Court, or the highest court of the State having jurisdiction of the particular case, the decision is accepted as a binding precedent by the same court or other courts of lower rank when the very point is again presented in a subsequent suit between different parties.”).

¹⁸⁶ *Flagiello v. Pa. Hosp.*, 208 A.2d 193, 205 (Pa. 1965).

principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlling precedent.”¹⁸⁷

In both Texas and Pennsylvania, the law on horizontal severance deeds and surface versus subsurface rights is well established.¹⁸⁸ Thus, in line with the latter view described above—that *stare decisis* should be disregarded only if the common law precedent is unsound in light of modern circumstances—these states perhaps should stick with their respective *reasonable necessity* standards for trespass and not look to West Virginia.¹⁸⁹ And, though each in comparison to West Virginia does not appear to protect surface owners to the same extent, each does provide some protection to surface owners, because subsurface property rights cannot be accessed by means that are not reasonably necessary to do so.¹⁹⁰

In the seminal Texas case on this standard, however, *Getty Oil Co. v. Jones*, the Supreme Court of Texas demonstrated concern for surface owners in stating that the rights implied to mineral estate owners are to be exercised *with due regard for the rights of the surface owner*.¹⁹¹ Notably, in *Buffalo Mining*, the West Virginia court cited to *Getty Oil* for support of its principle that mineral owners can do what is reasonably necessary as long as they can do so *without substantially burdening the surface*.¹⁹² Further, no court decision in either Texas or Pennsylvania has ever explicitly rejected the *substantial burden* gloss incorporated by the *Buffalo Mining* court into West Virginia common law doctrine.¹⁹³

2. Adopting a More Rigorous Standard

In adding this *substantial burden* gloss, *Buffalo Mining* not only cited to the Texas case, *Getty Oil*, but it did not reference any West Virginia court decisions explicitly stating that such a *substantial burden* gloss should be incorporated.¹⁹⁴ In doing so, the *Buffalo Mining* court did not disregard *stare decisis*; instead, it considered the revised doctrine to be simply a more

¹⁸⁷ *Id.* (internal citation omitted).

¹⁸⁸ See, e.g., *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013); *Pa. Game Comm'n v. Seneca Res. Corp.*, 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014).

¹⁸⁹ See *Harrison v. Montgomery Cty. Bd. of Educ.*, 456 A.2d 894, 903 (Md. 1983) (explaining that courts often decline to change well-settled precepts established by earlier decisions of the same court and prefer instead to leave such changes to the state legislature).

¹⁹⁰ See, e.g., *Merriman*, 407 S.W.3d at 249; *Seneca Res. Corp.*, 84 A.3d at 1106.

¹⁹¹ 470 S.W.2d 618, 621–22 (Tex. 1971) (emphasis added).

¹⁹² *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (citing *Getty Oil Co.*, 470 S.W.2d at 621).

¹⁹³ See *id.*

¹⁹⁴ *Id.*

“exacting” test than “what is reasonable and necessary,” the standard it had previously applied in West Virginia cases.¹⁹⁵

The *Buffalo Mining* court, in citing to other states’ interpretations of the *reasonable necessity* doctrine, demonstrates that support for West Virginia’s *substantial burden* requirement comes from concerns that a surface owner be given the “greatest possible use of his property consistent therewith.”¹⁹⁶ Thus, although Texas courts have traditionally restricted mineral owners from substantially impairing the surface, that state’s highest court has perhaps implicitly recognized further concern regarding surface owners.¹⁹⁷

Moreover, *Buffalo Mining*’s adjustment of the doctrine demonstrates that states can make the *reasonable necessity* test more “exacting” and in turn account for greater concern for surface owners.¹⁹⁸ And because adding the *substantial burden* requirement can be viewed simply as a gloss making the *reasonable necessity* test more rigorous, it does not run counter to *stare decisis* to make such an adjustment to each state’s doctrine.¹⁹⁹ Instead, it can be seen as simply heightening an already existing standard by adjusting to changing times; as subsurface activities like hydraulic fracturing and drilling for oil and gas continue to prosper in the modern era, more protection must be given to surface owners whose land could be all but destroyed if protection is not granted to prevent such harm.²⁰⁰ Indeed, the potential harm that could result if surface land is substantially impaired—and perhaps even destroyed altogether—presents a concern for not only present agricultural operations but such future activities, as well.²⁰¹

¹⁹⁵ See *id.* (citing only to *Porter v. Mack Mfg. Co.*, 64 S.E. 853, 854 (W. Va. 1909) for support that the *reasonable necessity* doctrine has existed within the state’s common law doctrine).

¹⁹⁶ See *id.*; see also *Getty Oil Co.*, 470 S.W.2d at 621–22 (acknowledging the right of the lessee to extract oil notwithstanding surface damage; yet, also acknowledging that as long as there is a reasonable and practical alternative available to the mineral owner, then such alternative should be pursued); *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976) (explaining that the general rule approved by all jurisdictions that have considered the matter is that mineral ownership rights dominate over those of the surface owner to the extent reasonably necessary to extract minerals below but this dominance must be consistent with allowing the surface owner the greatest possible use of his property).

¹⁹⁷ See *Getty Oil Co.*, 470 S.W.2d at 621–22.

¹⁹⁸ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26.

¹⁹⁹ See *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 390 (4th Cir. 2013) (explaining that *Buffalo Mining*’s holding “harmonized the reasonable necessity standard”).

²⁰⁰ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26; Anderson, *supra* note 139, at 162 (discussing how drilling and other extraction activities create potential for major environmental problems and harm to surface activities); *U.S. Oil & Gas Production on the Rise Thanks to Fracking*, INST. FOR ENERGY RESEARCH (Sept. 19, 2014), <http://instituteeforenergyresearch.org/analysis/u-s-oil-gas-production-continues-increase-due-hydraulic-fracturing/> [<http://perma.cc/GHZ5-4XSK>].

²⁰¹ See Anderson, *supra* note 139, at 162; *infra* notes 202–208 and accompanying text.

Efforts to ensure the future success of the agricultural industry is not one to scoff at, as recent statistics show that farming activity is currently on the rise.²⁰² Further, farming provides a more stable output of productivity than mining operations traditionally have; the White House Council of Economic Advisors has even stated: “[S]tatistics show that mine production initially peaks and then gradually falls to zero while farming produces a relatively stable output indefinitely.”²⁰³

States then should not disregard *stare decisis*, but instead, as in *Buffalo Mining*, should make their respective *reasonable necessity* standards more exacting.²⁰⁴ In the modern era, farming activity is increasingly playing a crucial role in the national economy while subsurface activities like fracking and drilling for oil and gas bring destructive impacts to surface land.²⁰⁵ Since 2005, fracking alone had directly damaged more than 360,000 acres of land across the country.²⁰⁶ Fracking activities are taking place in twenty-five states, with the most fracking occurring in Texas, Colorado, Pennsylvania, and North Dakota.²⁰⁷ Even if this more exacting standard may result in some damage to drilling activities due to limits on the surface harm permitted in accessing land below, it would benefit surface owners as well as the agricultural industry.²⁰⁸

3. Potential Benefits to the Farming Industry and National Economy by Adopting the Substantial Burden Gloss

When surface owners suffer substantial damage to their property, their rights are unfairly harmed.²⁰⁹ It is true that when agreeing to a severance deed, surface owners are aware that a separate party owns the rights below the surface and may implicitly conduct surface activities reasonably neces-

²⁰² See COUNCIL OF ECON. ADVISORS, *supra* note 179, at 1.

²⁰³ See *id.* (explaining that farming productivity is currently the highest it has been since 1973); Bernstein, *supra* note 22.

²⁰⁴ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26.

²⁰⁵ See ELIZABETH RIDLINGTON & JOHN RUMPLER, ENV’T AM. RESEARCH & POL’Y CTR., FRACKING BY THE NUMBERS: KEY IMPACTS OF DIRTY DRILLING AT THE STATE AND NATIONAL LEVEL 25 (2013), http://www.environmentamerica.org/sites/environment/files/reports/EA_FrackingNumbers_scrn.pdf [<http://perma.cc/YH4M-7MN6>]; Bernstein, *supra* note 22.

²⁰⁶ RIDLINGTON & RUMPLER, *supra* note 205, at 25; Craig Welch, *Fracking Pollutes Some Water, but Harm Is Not Widespread, EPA Says*, NAT’L GEOGRAPHIC (June 4, 2015), <http://news.nationalgeographic.com/2015/06/150604-fracking-EPA-water-wells-oil-gas-hydrology-poison-toxic-drinking/> [<http://perma.cc/96RW-J692>].

²⁰⁷ See Welch, *supra* note 206.

²⁰⁸ See, e.g., *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 251–52 (Tex. 2013); COUNCIL OF ECON. ADVISORS, *supra* note 179, at 1 (explaining the value that farming contributes to our national economy).

²⁰⁹ See *Merriman*, 407 S.W.3d at 251–52; Petitioner’s Brief on the Merits, *supra* note 8, at *5.

sary to reach the minerals below.²¹⁰ But, while this has become a common understanding underlying such deeds, one would likely be significantly more hesitant to agree to buy surface rights if the mineral owner was also impliedly authorized to completely destroy the surface.²¹¹ West Virginia's *substantial burden* requirement establishes a baseline whereby implicit and explicit surface usage can be drawn.²¹² Texas and Pennsylvania common law do not establish such a baseline.²¹³ West Virginia's common law baseline would be beneficial to provide clarity in other similarly situated states like Texas and Pennsylvania to determine how much destruction is too much, and thus, when an explicit deed provision should be included.²¹⁴

West Virginia common law would offer clarity as to how much damage surface owners should reasonably expect to endure.²¹⁵ Indeed, if the severance provision explicitly allows for substantial impairment of the surface, then surface owners should not be entitled to injunctions or any remedies at law because they are fully on notice that such destruction is permissible.²¹⁶ But, if such substantial damage occurs in the absence of any explicit deed provision, then surface owners should be entitled to some remedy.²¹⁷ Without such protection, as oil and gas drilling operations continue to grow, surface owners may hesitate to purchase and use the surface land.²¹⁸ In turn, this hesitation to purchase surface property would harm not only surface owners but the national economy that relies on the agricultural industry in these areas to thrive.²¹⁹

By accounting for the degree of burden to the surface estate, West Virginia common law currently demonstrates a more holistic approach to resolving ownership rights than other similarly situated states.²²⁰ As stated by

²¹⁰ See *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 390 (4th Cir. 2013); Mott, *supra* note 162.

²¹¹ See *Whiteman*, 729 F.3d at 390.

²¹² See *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980).

²¹³ See, e.g., *Merriman*, 407 S.W.3d at 246; Pa. Game Comm'n v. Seneca Res. Corp., 84 A.3d 1098, 1101 (Pa. Commw. Ct. 2014).

²¹⁴ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26.

²¹⁵ See *id.*

²¹⁶ See *Whiteman*, 729 F.3d at 390.

²¹⁷ See *id.*; Rachel Heron et al., *supra* note 26, at 90 (explaining that West Virginia courts limit the rights of mineral owners when provisions are ambiguous or implicit, and that as a result of the ambiguity “surface owners are in a stronger position”).

²¹⁸ See, e.g., *Whiteman*, 729 F.3d at 390–91 (“Before ‘*Buffalo Mining*,’ the reasonable necessity doctrine simply did not discern between a case where a mineral estate owner drilled a hole into the surface and a case where a mineral estate owner all but removed the surface.”); see also *U.S. Oil & Gas Production on the Rise Thanks to Fracking*, *supra* note 200 (explaining that oil and gas production continues to grow through the use of hydraulic fracturing).

²¹⁹ See COUNCIL OF ECON. ADVISORS, *supra* note 179, at 1.

²²⁰ Compare Pa. Game Comm'n v. Seneca Res. Corp., 84 A.3d 1098, 1106 (Pa. Commw. Ct. 2014) (not considering the degree of harm to the surface), and *Merriman*, 407 S.W.3d at 249 (al-

the White House Council of Economic Advisors, our nation's "[a]griculture put[s] food on the table of American families at affordable prices . . . [and] supports one out of every twelve jobs in the economy."²²¹ Further, the Council has stated that "[t]he hard work done on the farm is felt throughout our economy, particularly when agriculture is thriving."²²² Thus, farming is essential to the economy of the United States.²²³ It is important that courts consider, as the West Virginia courts do, the burden that mining and drilling operations can have on farming and other surface uses when deciding respective rights for surface and mineral owners.²²⁴ Consequently, West Virginia's two-part requirement strikes a proper balance that Texas and Pennsylvania should emulate.²²⁵

The period from 2009 to 2013 was the strongest five-year period for agricultural exports in our nation's history.²²⁶ Thus, if the substantial burden that mining imposes upon a surface estate is not considered, then mining operations would have an adverse impact not only on the surface owner, but on our nation's economy as a whole.²²⁷ Rural America contributes to the entire nation's economic growth, strengthening the middle class, and building our country's ability to compete with other strong farming countries in the future.²²⁸

For instance, local Pennsylvania farmers currently supply the produce and meat that occupy the shelves in many grocery stores in the northeastern United States.²²⁹ A source recently revealed that those living in the areas where such local ingredients come from opt to not buy these products out of concern that the products have been compromised by local fracking activities to a point where they could present a serious health hazard.²³⁰ Specifically, one local Pennsylvania farmer recently revealed that she and her husband sold their organic farm that they had been operating for twenty years

lowing substantial surface harm), with *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (forbidding substantial surface harm as an implicit mineral ownership right).

²²¹ COUNCIL OF ECON. ADVISORS, *supra* note 179, at 1.

²²² *Id.*

²²³ See *supra* notes 221–222 and accompanying text.

²²⁴ See, e.g., *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 390 (4th Cir. 2013); Anderson, *supra* note 139, at 162 (drilling and other extraction activities create potential for major environmental problems including "water contamination, interference with agricultural operations, disruption of wildlife habitats, and destruction of unspoiled landscapes").

²²⁵ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26.

²²⁶ See COUNCIL OF ECON. ADVISORS, *supra* note 179, at 6.

²²⁷ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26; COUNCIL OF ECON. ADVISORS, *supra* note 179, at 1.

²²⁸ COUNCIL OF ECON. ADVISORS, *supra* note 179, at 1.

²²⁹ See Maria Rodale, *How Fracking Affects Your Farmer's Market*, HUFFPOST GREEN: THE BLOG (Sept. 16, 2013, 5:12 AM), http://www.huffingtonpost.com/maria-rodale/how-fracking-affects-your_b_3613373.html [<http://perma.cc/XQ72-33PD>].

²³⁰ *Id.*

because, as a result of local fracking, “[They] can’t in good conscience say [their] food is organic.”²³¹ Such damage to the surface that could lead to such health hazards, if litigated, would likely be considered a substantial harm.²³² Thus, if the Pennsylvania court hearing such a case applied West Virginia’s *substantial burden* standard, the drilling activity leading to such substantial harm would very likely constitute an unreasonable burden on the surface owner’s estate, and accordingly, be forbidden under state common law.²³³

Moreover, although mining is valuable to the national economy, farming has proven to offer an arguably more economically favorable use of the land in terms of its longevity.²³⁴ A mine produces its highest returns typically in the first few years of operation, but production gradually drops to zero over time.²³⁵ By contrast, a farm “produces a relatively stable output indefinitely into the future.”²³⁶ Accordingly, the potentially infinite value of farming should be weighed against the terminal value of mining that destroys farmland beyond repair.²³⁷ By prohibiting the creation of an irreparable burden to the surface estate, even if it is reasonably necessary to access the minerals below, West Virginia courts have implied a heightened concern for each industry’s value to the economy of the United States, creating a more conducive environment for farming.²³⁸

In West Virginia, although the *Whiteman* court did not hold that the surface owner experienced a sufficiently substantial burden to be entitled to a remedy, that court applied the two-part standard from *Buffalo Mining*.²³⁹ The *Whiteman* court weighed the implicit rights of the mineral owner against the burden to the surface owner.²⁴⁰ Chesapeake’s mining damaged only ten of the one hundred and one acres the Whitmans used for farming, and the family was unable to demonstrate any financial harm as a result of

²³¹ *Id.*

²³² *See id.*; *see also Buffalo Mining Co.*, 267 S.E.2d at 725–26 (defining the *substantial burden* standard); Rodale, *supra* note 229 (pointing to studies that show fracking compromises our food sources and in turn, presents a “significant health hazard”) (emphasis added).

²³³ *See Buffalo Mining Co.*, 267 S.E.2d at 725–26; *see also* Rodale, *supra* note 229.

²³⁴ *See* Bernstein, *supra* note 22.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *See id.*

²³⁸ *See Buffalo Mining Co.*, 267 S.E.2d at 725–26 (evaluating mineral estate owner’s rights in light of those of the surface owner); *see also* Bernstein, *supra* note 22 (“A mine produces ore for a relatively brief period of time, with the highest returns in the first years, gradually falling to zero as it is played out. A farm, on the other hand, produces a relatively stable output indefinitely into the future.”). *See generally* *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381 (4th Cir. 2013) (applying the *substantial burden* test to determine whether the mineral estate owner’s use infringed upon the surface owner’s rights).

²³⁹ *See Whiteman*, 729 F.3d at 394; *Buffalo Mining Co.*, 267 S.E.2d at 725–26.

²⁴⁰ *See Whiteman*, 729 F.3d at 392, 394.

Chesapeake's construction of waste pits.²⁴¹ Given the limited property damage and relative lack of financial harm, the court properly found that Chesapeake's mining operations did not cause a substantial burden to the Whitemans' surface rights.²⁴²

By factoring in the degree of damage to the surface land in terms of use and financial harm, the West Virginia court provided the surface owners with a fair chance at receiving a remedy.²⁴³ If the same doctrine applied in *Merriman*, then the Texas surface owner may have received a remedy as his surface harm would likely have met the *substantial burden* requirement.²⁴⁴

TTO Energy's construction of a well on Merriman's land, though reasonably necessary to access and enjoy its mineral rights, rendered Merriman's property useless for his ranching operation.²⁴⁵ The Supreme Court of Texas acknowledged that forcing Merriman to relocate his corral operation constituted a substantial impairment, but despite this degree of harm, it held that Merriman was not entitled to an injunction because the activity at issue was "reasonably necessary" to ensure the mineral owner's property enjoyment.²⁴⁶ If the Texas court incorporated the more exacting test from West Virginia, then given the *substantial* nature of the cattle herder's harm, the mineral owner would not have been implicitly permitted to cause such damage.²⁴⁷ Accordingly, if the West Virginia *substantial burden* requirement were incorporated into the standard that the Texas court applied, the plaintiff in *Merriman* would have had a greater likelihood of receiving a remedy in court.²⁴⁸

In the modern era, with farming on the rise and growing concerns with property destruction from activities like drilling, it is reasonable and necessary to argue for states to make their common law doctrines more protective of surface rights.²⁴⁹ The two-pronged test applied in West Virginia helps

²⁴¹ *Id.* at 392.

²⁴² *Id.* at 392, 394.

²⁴³ See *id.* at 392 (concluding that minimal financial harm and damage limited to ten acres was insufficient to find a substantial burden to the surface estate).

²⁴⁴ Compare *id.* (forbidding mineral owners from substantially burdening surface estates as an implicit right), with *Merriman*, 407 S.W.3d at 251–52 (acknowledging that the mineral owner substantially harmed the surface estate but holding that such harm was reasonably necessary).

²⁴⁵ *Merriman*, 407 S.W.3d at 251–52.

²⁴⁶ *Id.*

²⁴⁷ Compare *id.* (acknowledging that the surface harm was substantial but refusing to find for plaintiff), with *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980) (refusing to allow mineral owners to substantially burden surface estates as an implicit right).

²⁴⁸ Compare *Merriman*, 407 S.W.3d at 251–52 (noting that plaintiff's harm was substantial but refusing to hold in plaintiff's favor), with *Buffalo Mining Co.*, 267 S.E.2d at 725–26 (establishing the precedent in West Virginia that mineral estate owners may not implicitly substantially burden surface estates under the *reasonable necessity* doctrine).

²⁴⁹ See COUNCIL OF ECON. ADVISORS, *supra* note 179, at 1.

protect the farming industry by highlighting the importance of balancing the rights of both mining operators and agriculturists alike.²⁵⁰

CONCLUSION

Severance deeds often lead to conflicts between property rights above and below the surface. West Virginia courts have demonstrated a more balanced concern for both mineral and surface rights by prohibiting the imposition of a substantial burden upon surface property by a subsurface owner. This heightened *reasonable necessity* doctrine is a holistic approach that is more beneficial not only to individual farmers themselves, but also to the modern farming industry in general. Given the steady and indefinite economic value that the farming industry offers our national economy compared to mining's short-lived value, our country must consider granting greater protection to farmers' property rights. Accordingly, other states such as Texas and Pennsylvania—that, like West Virginia, have both heavy mining and farming activities—should incorporate the *substantial burden* requirement into their respective common law doctrines. In this way, we can offer greater protection to our national farming industry.

²⁵⁰ See *Buffalo Mining Co.*, 267 S.E.2d at 725–26; COUNCIL OF ECON. ADVISORS, *supra* note 179, at 1.

