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## Substantial Burden and the Reasonable Necessity Doctrine in Severance Deed Ownership: *Whiteman v. Chesapeake Appalachia*

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# SUBSTANTIAL BURDEN AND THE REASONABLE NECESSITY DOCTRINE IN SEVERANCE DEED OWNERSHIP: *WHITEMAN v. CHESAPEAKE APPALACHIA*

KATHRYN SCHERPF\*

**Abstract:** Horizontal severance deeds separate property rights above and below the surface. Sub-surface rights have typically belonged to mineral estate owners, whereas surface rights above have typically belonged to farmers. In West Virginia, courts have traditionally applied a common law trespass doctrine known as reasonable necessity to account for times when these bifurcated rights clash. The reasonable necessity doctrine in West Virginia has evolved over time as state courts have made it more rigorous by requiring that, in exercising their rights, sub-surface mineral estate owners not substantially burden the surface. The U.S. Court of Appeals for the Fourth Circuit’s decision in *Whiteman v. Chesapeake Appalachia, L.L.C.* applies the current standard to resolve disputes between the rights of surface and mineral estate owners in horizontal severance deed disputes. This Comment argues that the Fourth Circuit properly applied the heightened reasonable necessity doctrine that has developed in West Virginia common law over the past thirty years, and that in so doing, the court properly balanced the values that both mining and farming bring to the national economy.

## INTRODUCTION

Landowners typically have a right to exclude others from their property.<sup>1</sup> When, however, one entity—a mineral estate owner—holds title to the underground minerals of a property, and another holds title to the surface under which the minerals are located, the mineral estate owner faces a real challenge in accessing his property.<sup>2</sup> Further, the surface owner’s right to exclude is also in jeopardy.<sup>3</sup> Martin and Lisa Whiteman, who owned surface rights to 101 acres of land in West Virginia, learned this the hard way.<sup>4</sup>

West Virginia common law typically grants use of the surface land to mineral estate owners as long as such usage is reasonably necessary to the

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<sup>1</sup> See Michelle Andrea Wenzel, *The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 AM. U. L. REV. 607, 609 (1993).

<sup>2</sup> *Id.* at 609–10.

<sup>3</sup> *See id.*

<sup>4</sup> *See Whiteman v. Chesapeake Appalachia, L.L.C. (Whiteman II)*, 729 F.3d 381, 382, 394 (4th Cir. 2013).

enjoyment of the minerals below and does not cause a substantial burden to the surface land.<sup>5</sup> This Comment focuses on the method employed by the West Virginia Supreme Court of Appeals to address the entitlements a mineral estate owner implicitly retains with respect to the surface land when mineral ownership is obtained through a horizontal severance deed.<sup>6</sup> It argues that in *Whiteman v. Chesapeake Appalachia, L.L.C.*, although the Whitemans did not receive a favorable outcome, the U.S. Court of Appeals for the Fourth Circuit properly applied the West Virginia common law requirement that the mineral estate owner's use not only be reasonably necessary to its enjoyment of its rights, but also that there not be a substantial burden to the surface owner.<sup>7</sup> This heightened concern that mining operations not substantially burden the surface property has developed in West Virginia jurisprudence over the past thirty years, and supports the inherent policy of balancing the value of sub-surface mining with that of farming productivity, which is currently on the rise.<sup>8</sup>

## I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Martin and Lisa Whiteman (the “Whitemans”) own surface rights to approximately 101 acres of land in Wetzel County, West Virginia.<sup>9</sup> They purchased this land pursuant to a general warranty deed dated March 2, 1992.<sup>10</sup> Defendant Chesapeake Appalachia, L.L.C. (“Chesapeake”), a subsidiary of Chesapeake Energy—the nation’s second largest natural gas producer—is the mineral estate owner beneath plaintiff’s property.<sup>11</sup> Each party’s property rights originated from two severance deeds that split the surface and mineral estates of the relevant 101 acres.<sup>12</sup> Both severance deeds allowed severance by granting the respective surface estate to the grantee while “reserving and excepting” the mineral estate to the grantor.<sup>13</sup>

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<sup>5</sup> *Id.* at 390.

<sup>6</sup> See *infra* notes 40–80 and accompanying text.

<sup>7</sup> See *infra* notes 81–127 and accompanying text.

<sup>8</sup> See *Whiteman II*, 729 F.3d at 390; WHITE HOUSE COUNCIL OF ECON. ADVISORS, HIGHLIGHTS OF RECENT FARM SECTOR AND RURAL ECONOMY PERFORMANCE 2 (2014), available at <http://www.whitehouse.gov/sites/default/files/docs/ceastatsheetruraleconomy.pdf>, archived at <http://perma.cc/8B6B-7P6W> (demonstrating that farming productivity is currently the highest it has been since 1973).

<sup>9</sup> *Whiteman v. Chesapeake Appalachia, L.L.C. (Whiteman I)*, 873 F. Supp. 2d 767, 770 (D. W. Va. 2012), *aff'd*, 729 F.3d 381 (4th Cir. 2013).

<sup>10</sup> *Whiteman II*, 729 F.3d at 382–83.

<sup>11</sup> Meaning Chesapeake owns lease rights to minerals beneath plaintiffs’ surface property. See *Whiteman I*, 873 F. Supp. 2d at 770.

<sup>12</sup> *Id.*

<sup>13</sup> *Whiteman II*, 729 F.3d at 383. Both deeds explicitly stated, “[t]here is reserved and accepted unto the said Ellis O. Miller, the grantor, all of his interest in and to the oil and gas within and underlying the above-described parcels as well as all of the coal not heretofore conveyed, and all other

The severance deeds neither reserved any specific surface rights for Chesapeake, nor mentioned permitting permanent waste disposal from mineral extraction.<sup>14</sup> The Whitemans owned the entire 101 acres of surface land, on which they lived, raised sheep, and performed other farming activities.<sup>15</sup> Notably, they grew hay on the same ten acres under which Chesapeake obtained proper permission from the West Virginia Department of Environmental Protection (“WVDEP”) to conduct its well operations and dispose of pit waste, which included drill water, frac blow back, and various formation cuttings.<sup>16</sup> To obtain WVDEP permission, Chesapeake followed the WVDEP permit process by first notifying the Whitemans of its intent to dispose of drill-waste in pits on the property and providing them a copy of its WVDEP application.<sup>17</sup> On the application, Chesapeake included a list of the substances it anticipated the pit waste would contain, including drill water, frac blow-back, and drill cuttings.<sup>18</sup> Once the pit began operating, the Whitemans were no longer able to produce hay because Chesapeake’s well operations and drill waste disposal destroyed the land.<sup>19</sup>

Chesapeake drilled using “mud,” a water-based drilling fluid that removes excess drill cuttings.<sup>20</sup> It disposed of the drill cuttings in accordance with the intended land application method by depositing them in open pits near the wellheads on the Whitemans’ property.<sup>21</sup> This pit method is considered an “open” system, which was common in West Virginia in 2007, despite the existence and use of other, less hazardous methods for drill waste disposal in other parts of the country.<sup>22</sup> One alternative method in particular—the “closed-loop” system—entails removing drill cuttings and other waste from the well site and placing it in off-site landfills.<sup>23</sup> Closed-loop systems create a smaller drilling operation footprint, help preserve pricey mud for future drilling operations, and eliminate concerns of on-site disposal pit failure.<sup>24</sup> Closed-loop systems, however, can cost approximately \$100,000 more than open systems, depending on the well location.<sup>25</sup> Although Chesapeake started

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minerals within and underlying the above described property, with the necessary rights and privileges appertaining thereto.” *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Whiteman I*, 873 F. Supp. 2d at 770.

<sup>16</sup> *Id.*

<sup>17</sup> *Whiteman II*, 729 F.3d at 383.

<sup>18</sup> *Id.* Drill cuttings consist of earth, rock, and other debris released when drilling the wells. *Id.* at 383 n.2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 383; *Whiteman I*, 873 F. Supp. 2d at 771.

<sup>21</sup> *Whiteman II*, 729 F.3d at 384.

<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

using closed-loop systems in several locations in Oklahoma and Texas as early as 2004 and 2005, it did not do so in West Virginia until December 2009,<sup>26</sup> approximately two years after it began using waste pits on the Whitemans' land.<sup>27</sup>

On February 23, 2011, the Whitemans brought a lawsuit alleging common law trespass against Chesapeake in the State Circuit Court of Wetzel County, West Virginia.<sup>28</sup> Upon filing, they admitted that their monetary damages were "trivial" and, "not real significant."<sup>29</sup> In fact, expert testimony revealed no diminution in value to the Whitemans' property as a result of the drilling operations.<sup>30</sup> Nevertheless, they sought to exclude Chesapeake and others from their property and argued that Chesapeake was required to remove the waste pits to eliminate the possibility that they themselves could be held accountable for liability in the future due to them.<sup>31</sup>

Chesapeake removed the case to the U.S. District Court for the Northern District of West Virginia on the basis of diversity of citizenship.<sup>32</sup> Thereafter, the parties filed cross motions for summary judgment.<sup>33</sup> In an order dated June 11, 2012, the district court denied the Whitemans' motion and granted Chesapeake's motion with respect to the trespass claim.<sup>34</sup> The Whitemans appealed to the U.S. Court of Appeals for the Fourth Circuit.<sup>35</sup>

In *Whiteman v. Chesapeake Appalachia, L.L.C.*, the Fourth Circuit reviewed the district court's decision to grant Chesapeake's motion for summary judgment on the basis of the district court's determination that Chesapeake

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<sup>26</sup> *Id.*

<sup>27</sup> *See id.*; *Whiteman I*, 873 F. Supp. 2d 767, 775 (D. W. Va. 2012), *aff'd*, 729 F.3d 381 (4th Cir. 2013).

<sup>28</sup> *Whiteman I*, 873 F. Supp. 2d at 769.

<sup>29</sup> *Whiteman II*, 729 F.3d at 384.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Whiteman II*, 729 F.3d at 384; *see* 28 U.S.C. § 1332(a) (2012) (codifying the federal court rules for diversity jurisdiction based on citizenship). The Whitemans are domiciled in West Virginia, the state of the family's residency, whereas Chesapeake is incorporated in, and holds its primary place of business in, Oklahoma. *Whiteman II*, 729 F.3d at 384. Thus, there was sufficient diversity of citizenship to trigger federal diversity jurisdiction. *See* 28 U.S.C. § 1332(a). The district court found the amount in controversy requirement met because the cost of the injunction to Chesapeake exceeded \$75,000. *Whiteman II*, 729 F.3d at 384. The monetary value of an injunction is determined by either looking to its worth to the plaintiff or its cost to the defendant. *Id.* at 384 n.6. Here, the Whitemans did not provide the court with evidence of the injunction's financial worth to them; accordingly, the court looked to the detrimental value of the injunction to Chesapeake, which was over \$100,000. *See id.*

<sup>33</sup> *Whiteman II*, 729 F.3d at 385. In deciding this case, the district court referred to the following areas of West Virginia state common law: trespass, nuisance, strict liability, negligence recklessness or gross negligence, and infliction of emotional distress. *Id.*; *see Whiteman I*, 873 F. Supp. 2d at 769.

<sup>34</sup> *Whiteman II*, 729 F.3d at 385.

<sup>35</sup> *Id.*

peake's permanent disposal of drill waste on the Whiteman's surface property was "reasonably necessary" for the extraction of minerals beneath.<sup>36</sup> On review, the West Virginia common law of trespass was the only relevant substantive law for the Fourth Circuit to consider.<sup>37</sup> Further, the court was required to conduct this limited review in a light most favorable to the Whitemans, the non-moving party for the underlying summary judgment motion.<sup>38</sup> On September 4, 2014, the Fourth Circuit upheld the district court's finding that Chesapeake's activity was reasonably necessary, according to West Virginia law, and that there was no substantial burden caused to the Whiteman's surface property.<sup>39</sup>

## II. LEGAL BACKGROUND

In West Virginia, trespass is "entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property."<sup>40</sup> Continuing trespass occurs if one leaves on the land of another, with a duty to remove it, "a structure, chattel, or other thing."<sup>41</sup> "Mere trespass to real estate [is] not enjoined when the injury . . . is susceptible of complete pecuniary compensation and for which the injured person has an adequate legal remedy."<sup>42</sup> Regardless, West Virginia state law allows a court, acting in equity, to enjoin a party from continuing trespass.<sup>43</sup> The state requires that, to find that the law of trespass applies, one must enter the land of another, or—as is relevant in *Whiteman v. Chesapeake Appalachian, L.L.C.*—leave something upon the land of another without "lawful authority" to do so.<sup>44</sup>

A license is the typical method of obtaining lawful authority to enter or leave something on another's land.<sup>45</sup> Upon agreement with the licensor, a licensee is permitted to commit some act upon the land of the licensor that would otherwise be unlawful trespass.<sup>46</sup> West Virginia's common law of trespass, however, grants a mineral estate owner authority to enter upon the land of a surface estate owner to extract minerals, without express authority, li-

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<sup>36</sup> *Id.* at 386.

<sup>37</sup> *See id.*

<sup>38</sup> *Id.* at 385.

<sup>39</sup> *Id.* at 394.

<sup>40</sup> *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 352 (W. Va. 1945).

<sup>41</sup> RESTATEMENT (SECOND) OF TORTS § 160 (1965).

<sup>42</sup> *Wiles v. Wiles*, 58 S.E.2d 601, 606 (W. Va. 1950).

<sup>43</sup> *Tate v. United Fuel Gas Co.*, 71 S.E.2d 65, 69–70 (W. Va. 1952).

<sup>44</sup> *Hark*, 34 S.E.2d at 352; *see Whiteman v. Chesapeake Appalachian, L.L.C.*, 729 F.3d 381, 386 (4th Cir. 2013).

<sup>45</sup> BLACK'S LAW DICTIONARY 1059 (10th ed. 2014) (defining "license").

<sup>46</sup> *Id.*

cense, or other permission, when it is *reasonably necessary* to do so.<sup>47</sup> The concept of *reasonable necessity* has been interpreted by the West Virginia courts to mean 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."<sup>48</sup>

A New York case heavily influenced the development of this law in West Virginia.<sup>49</sup> In 1874, in *Marvin v. Brewster Iron Mining Co.*, a surface estate owner in New York sought to enjoin a mineral estate owner from mining below the land.<sup>50</sup> The surface estate owner argued that the mineral estate owner deposited "ore and rubbish" from mines along the surface land.<sup>51</sup> The lower court found that although 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."<sup>52</sup> The lower 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 the surface land.<sup>53</sup> The New York Court of Appeals reversed the ruling, explaining that the lower court failed to consider if it were "necessary [to deposit mine waste] for the reasonably profitable enjoyment" of the mineral estate owner's property in the minerals.<sup>54</sup> The court's holding—now called the *reasonable necessity* standard<sup>55</sup>—explained that a grant of minerals beneath a tract of land carries with it a right to use as much of the surface as is *fairly necessary* to recover the mineral estate holder's "reasonably profitable enjoyment" of the minerals.<sup>56</sup> The *Marvin* court further explained that it is rarely acceptable to leave such waste on the land, but that "necessary" is a fluid concept because "the facts of each case" must determine what is necessary.<sup>57</sup>

The West Virginia Supreme Court of Appeals, in *Porter v. Mack Manufacturing Co.* and *Squires v. Lafferty*, citing *Marvin*, adopted the principle that mineral estate ownership implies a "right to use the surface in such manner and with such means as [is] fairly necessary for the enjoyment" of the mineral

<sup>47</sup> *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538, 539–40 (1874).

<sup>48</sup> See generally *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725 (W. Va. 1980) (setting out the doctrine of reasonable necessity in severance deed conflicts for West Virginia common law).

<sup>49</sup> See *Whiteman II*, 729 F.3d 381, 387 (4th Cir. 2013); *Marvin*, 55 N.Y. at 565.

<sup>50</sup> 55 N.Y. at 539.

<sup>51</sup> *Id.* at 540–41.

<sup>52</sup> *Id.* at 542–43.

<sup>53</sup> *Id.* at 543–44.

<sup>54</sup> *Id.* at 565.

<sup>55</sup> *Whiteman II*, 729 F.3d at 388 n.11.

<sup>56</sup> See *Marvin*, 55 N.Y. at 565 (emphasis added).

<sup>57</sup> *Id.* at 553.

estate.<sup>58</sup> In *Porter*, the mineral estate owner, Porter, sought to mine minerals and carry them off using a tram road that he intended to build on the surface estate owner's property.<sup>59</sup> When the surface estate owner, Mack Manufacturing, blocked the operation, Porter sought an injunction.<sup>60</sup> Similarly, in *Squires*, the mineral estate owner sought to drill test holes and transport machinery and personnel over the surface estate owner's property.<sup>61</sup> In response, the surface estate owner locked the access gate to the land and even assaulted the mineral estate owner's employee for forcing passage.<sup>62</sup>

In both *Porter* and *Squires*, the West Virginia Supreme Court of Appeals ruled that the mineral estate owners' respective activities were "fairly necessary" to the reasonable enjoyment of the mineral estate.<sup>63</sup> Both decisions endorse the concept that, although fact sensitive, a West Virginia mineral estate owner has the right to use the surface "in such manner and with such means as would be fairly necessary" to enjoy the mineral estate.<sup>64</sup>

Several West Virginia cases more factually akin to *Whiteman* have followed *Squires* and *Porter*.<sup>65</sup> In 1950, in *Adkins v. United Fuel Gas Co.*, a surface estate owner brought a trespass claim against a mineral estate owner for drilling operations that damaged the surface owner's land.<sup>66</sup> The mineral estate owner drilled a gas well near the center of a fifty-acre tract on the surface estate owner's property where the surface owner grew alfalfa, corn, and vegetables.<sup>67</sup> In addition, the mineral estate owner constructed a road and pipelines to access the well and dug two ditches through this farming area: one to carry water and refuse from the gas well and the other to lay a gas pipe to operate the gas well.<sup>68</sup> The surface estate owner was unable to produce crops as a result of the mineral estate owner's various activities.<sup>69</sup> Once the drilling operation finished, the mineral estate owner removed one of the gas pipes and drained and covered the ditches, but left one gas pipe permanently below the

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<sup>58</sup> *Squires v. Lafferty*, 121 S.E. 90, 91 (W. Va. 1924); *Porter v. Mack Mfg. Co.*, 64 S.E. 853, 854 (W. Va. 1909). In both *Porter* and *Squires*, West Virginia's highest court endorsed the finding in *Marvin*, though neither case dealt with trespass specifically. See *Squires*, 121 S.E. at 91; *Porter*, 64 S.E. at 854; *Marvin*, 55 N.Y. at 565. West Virginia courts use the two phrases, "fairly necessary" and "reasonably necessary" interchangeably. *Whiteman II*, 729 F.3d at 388 n.11.

<sup>59</sup> 64 S.E. at 853.

<sup>60</sup> *Id.*

<sup>61</sup> 121 S.E. at 90.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 90–91; *Porter*, 64 S.E. at 854.

<sup>64</sup> See *Squires*, 121 S.E. at 91; *Porter*, 64 S.E. 854.

<sup>65</sup> See *Whiteman II*, 729 F.3d 381, 388–89 (4th Cir. 2013); *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 722 (W. Va. 1980); *Adkins v. United Fuel Gas Co.*, 61 S.E.2d 633, 634 (W. Va. 1950).

<sup>66</sup> 61 S.E.2d at 634

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *id.*

surface.<sup>70</sup> The *Adkins* court applied the aforementioned reasonable necessity standard, and held that the defendant's acts—constructing a road to bring machinery to drill, laying a pipe over the surface, and constructing a ditch for draining refuse to prevent it from spreading to the plaintiff's adjacent surface land—were neither unnecessary nor unreasonable.<sup>71</sup>

In 1980 in *Buffalo Mining Co. v. Martin*, the West Virginia Supreme Court of Appeals scrutinized the reasonable necessity doctrine.<sup>72</sup> In this case, like in *Squires* and *Porter*, a mineral estate owner sought an injunction against the surface owner for interfering with the mineral estate owner's mining operations.<sup>73</sup> The mineral estate owner wanted to construct a power line, which was necessary to ventilate a coalmine under the surface estate owner's land.<sup>74</sup> The *Buffalo Mining* court applied a more exacting test than the established "reasonable necessity" standard, requiring the sub-surface mineral estate owner seeking to exercise a right implicit in its deed to demonstrate that "the right can be exercised without any substantial burden to the surface owner."<sup>75</sup> Accordingly, following *Buffalo Mining*, the reasonable necessity doctrine in West Virginia became a two-prong test: first, the proposed activity must be *reasonably necessary* pursuant to *Squires* and *Porter*, and second, it must not cause a *substantial burden* to the surface owner.<sup>76</sup>

*Buffalo Mining* made the reasonable necessity standard uniform in its application to two different activities.<sup>77</sup> First, "where the mineral estate owner engages in activity that disturbs, perhaps permanently and negatively, the surface," and second, "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.'"<sup>78</sup> The first type of activity is typically allowed if such use of the surface is reasonably necessary, as "implicit to a grant of a mineral estate because the surface generally incurs no substantial burden."<sup>79</sup> The second type of activity, however, is typically disallowed because the surface land burden is so substantial, unless an explicit deed provision authorized it.<sup>80</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 636.

<sup>72</sup> *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 722 (W. Va. 1980).

<sup>73</sup> *See id.*; *Squires v. Lafferty*, 121 S.E. 90, 91 (W. Va. 1924); *Porter v. Mack Mfg. Co.*, 64 S.E. 853, 854 (W. Va. 1909).

<sup>74</sup> *See Buffalo Mining*, 267 S.E.2d at 722.

<sup>75</sup> *Id.* at 725–26.

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

<sup>78</sup> *Id.* at 725.

<sup>79</sup> *Id.*; *see Whiteman II*, 729 F.3d 381, 390 (4th Cir. 2013).

<sup>80</sup> *Buffalo Mining*, 267 S.E.2d at 725–26; *see Whiteman II*, 729 F.3d at 390.

## III. ANALYSIS

The U.S. Court of Appeals for the Fourth Circuit, in *Whiteman v. Chesapeake Appalachia, L.L.C.*, upheld the district court's finding—according to the test set out in *Buffalo Mining Co. v. Martin*—that Chesapeake Appalachia's ("Chesapeake" or "defendant") activity was reasonably necessary and that there was no substantial burden caused to the Whiteman's surface property.<sup>81</sup> The Fourth Circuit's holding properly balanced each party's rights, and in so doing, provided increased protection for the farming industry.<sup>82</sup>

The court first determined that the Whitemans failed to establish that Chesapeake's activity was not *reasonably necessary*, because the open pit system Chesapeake used was common practice in West Virginia.<sup>83</sup> The Whitemans argued that Chesapeake's drill waste disposal was not reasonably necessary to operate its wells because an alternative method to disposal, the closed-loop system, was available and significantly less intrusive to surface owners.<sup>84</sup> The court disagreed with the Whitemans' argument "that *reasonable necessity* amounts to *necessity*," because otherwise, the court held, "the modifier *reasonable* would be meaningless."<sup>85</sup> The court found that during the time the open pit system was employed on the Whitemans' property between 2007 and 2009, the alternative closed-loop system was not yet employed anywhere in West Virginia.<sup>86</sup> Thus, at the time the pits were drilled on the Whitemans' property, the open pit system was the "common and ordinary method of disposal in West Virginia."<sup>87</sup>

The Whitemans argued that the use of the less-intrusive closed-loop drill waste disposal method in Texas and Oklahoma "ought to inform whether Chesapeake's drill waste disposal used [in West Virginia] was reasonably necessary."<sup>88</sup> The court, however, found that comparing technology in different states was "false equivalency."<sup>89</sup> Accordingly, the court concluded that defining what is reasonably necessary relies on the facts of each case and is not

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<sup>81</sup> *Whiteman v. Chesapeake Appalachia, L.L.C. (Whiteman II)*, 729 F.3d 381, 393–94 (4th Cir. 2013); *Whiteman v. Chesapeake Appalachia, L.L.C. (Whiteman I)*, 873 F. Supp. 2d 767, 770 (D. W. Va. 2012), *aff'd*, 729 F.3d 381 (4th Cir. 2013); *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980).

<sup>82</sup> See *Whiteman II*, 729 F.3d at 393–94; WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 8, at 1 ("Rural America contributes to economic growth, a strengthening Middle Class[,] and building America's competitiveness for the future.").

<sup>83</sup> See *Whiteman II*, 729 F.3d at 392–93; *supra* notes 21–22 and accompanying text.

<sup>84</sup> *Whiteman II*, 729 F.3d at 392; see *supra* notes 23–24 and accompanying text.

<sup>85</sup> *Whiteman II*, 729 F.3d at 392 (emphasis added) (internal quotation marks omitted).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 392–93.

<sup>88</sup> *Id.* at 393 (citations and internal quotation marks omitted); see Brief of Appellants at 24, *Whiteman II*, 729 F.3d 381 (No. 12-1790) (citing Chesapeake's use of the closed-loop disposal system in Texas as evidence that the company had access to the newer technology).

<sup>89</sup> See *Whiteman II*, 729 F.3d at 393.

dependent on technologies used elsewhere in the country or even necessarily in the same state.<sup>90</sup>

The Fourth Circuit next concluded that Chesapeake's drill waste pits did not impose a substantial burden on the surface.<sup>91</sup> The Whitemans offered no evidence to rebut Chesapeake's expert testimony that the drill waste pits did not affect the Whitemans' property value.<sup>92</sup> The only evidence they produced to support their argument of a substantial burden to the land was Lisa Whiteman's fear that drill waste pits would cause the family future liability.<sup>93</sup> The Whitemans admitted that the drill waste pits caused only minimal pecuniary loss and the potential damage to the land was limited to ten of their 101 acres.<sup>94</sup> Without anything more, the court found that there was no substantial burden.<sup>95</sup> Thus, because Chesapeake's actions were reasonably necessary and did not create a substantial burden, pursuant to *Buffalo Mining*, Chesapeake obtained an implicit right to use the Whiteman's surface land to access its sub-surface mineral rights.<sup>96</sup>

The heightened requirement from *Buffalo Mining*—that the mineral estate owner not substantially burden the surface owner—has been incorporated into West Virginia common law for over thirty years.<sup>97</sup> This increased concern for surface rights demonstrates the state's awareness of the need for proper balance between farming and mining.<sup>98</sup> The reasonable necessity doctrine was first established by a New York state court in 1874.<sup>99</sup> Since then, the doctrine has served as the foundation for the development of West Virginia's analogous law.<sup>100</sup> The West Virginia Supreme Court of Appeals first endorsed the standard in 1909, in *Porter v. Mack Manufacturing Co.*, and again in 1924, in *Squires v. Lafferty*.<sup>101</sup> Then, in 1950, in *Adkins v. United Fuel Gas Co.*, the court demonstrated the doctrine's application when a surface owner, like the Whitemans, brings a cause of action for trespass.<sup>102</sup> As the doctrine

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<sup>90</sup> See *id.*

<sup>91</sup> *Id.* at 392.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See *id.* at 394; *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980).

<sup>97</sup> See *Whiteman II*, 729 F.3d at 389; *Buffalo Mining*, 267 S.E.2d at 725–26.

<sup>98</sup> See *Whiteman II*, 729 F.3d at 394; *Buffalo Mining*, 267 S.E.2d at 725–26; William J. Bernstein, *Of Mines, Forests, and Impatience*, EFFICIENT FRONTIER, <http://www.efficientfrontier.com/ef/401/fisher.htm> (last visited Mar. 21, 2015), archived at <http://perma.cc/A957-UPL4> (presenting statistics showing that mine production initially peaks and then gradually falls to zero, whereas farming produces a relatively stable output indefinitely).

<sup>99</sup> See *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538, 565 (1874).

<sup>100</sup> See *Whiteman II*, 729 F.3d at 387.

<sup>101</sup> See *Squires v. Lafferty*, 121 S.E. 90, 91 (W. Va. 1924); *Porter v. Mack Mfg. Co.*, 64 S.E. 853, 854 (W. Va. 1909); *Marvin*, 55 N.Y. at 565.

<sup>102</sup> 61 S.E.2d 633, 634, 636 (W. Va. 1950); see *Whiteman II*, 729 F.3d at 385.

has evolved in the state, it has permitted mineral estate owners to enter and use surface estates as is reasonably necessary to access and enjoy their mineral rights below.<sup>103</sup>

It was not until 1980 in *Buffalo Mining*, however, that the West Virginia Supreme Court of Appeals laid out an explicit limitation on just what burden a surface owner could be expected to endure.<sup>104</sup> The *Buffalo Mining* court incorporated this concern by requiring that there not be a substantial burden to the land.<sup>105</sup> The two-pronged *Buffalo Mining* doctrine requiring reasonable necessity and prohibiting any substantial burden on the surface estate owner has, as seen in *Whiteman*, forced courts to more fairly weigh the rights of both surface and sub-surface mineral estate.<sup>106</sup> 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 it did before *Buffalo Mining*.<sup>107</sup>

Farming is essential to the economy of the United States.<sup>108</sup> It is important that courts consider—as the *Whiteman* court did and as the *Buffalo Mining* doctrine requires—the burden that mining operations can have on farming and other surface uses when deciding respective rights for surface estate and sub-surface mineral estate owners.<sup>109</sup> West Virginia’s two-part requirement, as applied in *Whiteman*, portrays such a balance.<sup>110</sup>

The importance of considering surface damage is further supported by looking at current national farming statistics.<sup>111</sup> Farming activity is currently on the rise.<sup>112</sup> It is thus all the more important to protect farmers against substantial burdens to their surface rights when allowing the implicit right to access mining operations below.<sup>113</sup> If the substantial burden that mining brings to the surface is not considered and controlled, then mining operations would

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<sup>103</sup> See *Whiteman II*, 729 F.3d at 388–89 (demonstrating that the “[reasonably] necessary” standard has remained intact in West Virginia property law and been applied to a “multitude of factual scenarios”); *supra* notes 65–71 and accompanying text.

<sup>104</sup> See *Whiteman II*, 729 F.3d at 388–89; *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980).

<sup>105</sup> 267 S.E.2d at 725–26.

<sup>106</sup> See *Whiteman II*, 729 F.3d at 390; *Buffalo Mining*, 267 S.E.2d at 725–26.

<sup>107</sup> See *Whiteman II*, 729 F.3d at 390; *Buffalo Mining*, 267 S.E.2d at 725–26.

<sup>108</sup> Our nation’s “[a]griculture put[s] food on the table of American families at affordable prices . . . [and,] it also supports one out of every twelve jobs in the economy. The hard work done on the farm is felt throughout our economy, particularly when agriculture is thriving.” See WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 8, at 1.

<sup>109</sup> See *Whiteman II*, 729 F.3d at 392.

<sup>110</sup> See *id.*; *Buffalo Mining*, 267 S.E.2d at 725–26.

<sup>111</sup> See WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 8, at 1–2.

<sup>112</sup> The period from 2009 to 2013 was the strongest five-year period for agricultural exports in our nation’s history. *Id.*

<sup>113</sup> See *Whiteman II*, 729 F.3d at 392; WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 8, at 1.

have an adverse impact not only on the surface estate owner, but the national economy.<sup>114</sup>

Moreover, although mining is valuable to the national economy, farming has arguably proven to offer a more economically favorable use of land in terms of longevity.<sup>115</sup> A mine typically produces its highest returns in the first few years of operation.<sup>116</sup> Production, however, gradually drops to zero over time.<sup>117</sup> By contrast, a farm “produces a relatively stable output indefinitely into the future.”<sup>118</sup> Accordingly, the potentially indefinite sustainability of the value of farming should be weighed against the terminal value of mining and the processes’ byproduct irreparable destruction of potentially valuable farmland that it causes.<sup>119</sup> By prohibiting irreparable burdens on surface rights, even if such burdens are reasonably necessary to access the mines below, West Virginia courts have demonstrated a heightened concern for the value of a diverse economy, and have thus created a more conducive environment for farming.<sup>120</sup>

The *Whiteman* court properly weighed the implicit rights of the mineral estate owner against the burden to the surface owner.<sup>121</sup> Chesapeake’s mining operations damaged only ten of the 101 acres of surface land used by the Whitemans to conduct farming operations.<sup>122</sup> The family was also unable to demonstrate any pecuniary damage as a result of Chesapeake’s implicit right to construct waste pits.<sup>123</sup> Given the limited surface land damage and relative lack of pecuniary loss, the court properly found that Chesapeake’s mining operations did not cause a substantial burden to the Whitemans’ surface rights.<sup>124</sup> By factoring in the degree of damage to the surface land in terms of use and financial loss, the West Virginia court provided the Whitemans a fair chance at receiving a remedy.<sup>125</sup> The two-pronged test applied in *Whiteman* helps protect the farming industry, an essential component of both the state’s

<sup>114</sup> See *Whiteman II*, 729 F.3d at 392; WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 8, at 1 (“Rural America contributes to economic growth, a strengthening Middle Class and building America’s competitiveness for the future.”).

<sup>115</sup> See Bernstein, *supra* note 98.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See id.*

<sup>120</sup> See *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725–26 (W. Va. 1980); Bernstein, *supra* note 98.

<sup>121</sup> See *Whiteman II*, 729 F.3d 381, 392, 394 (4th Cir. 2013).

<sup>122</sup> *Id.* at 392.

<sup>123</sup> *Id.*

<sup>124</sup> *Buffalo Mining*, 267 S.E.2d at 725–26; see *Whiteman II*, 729 F.3d at 392.

<sup>125</sup> See *Whiteman II*, 729 F.3d at 392 (concluding that minimal pecuniary loss and damage limited to ten acres was an insufficient burden); *Buffalo Mining*, 267 S.E.2d at 725–26.

and the nation's economy.<sup>126</sup> The *Whiteman* court's reasoning highlights the importance of balancing the rights of both mineral estate owners and farmers.<sup>127</sup>

#### CONCLUSION

Severance deeds, which grant bifurcated land rights to owners of the surface and of the subterranean minerals, often lead to conflicts due to the sub-surface mineral estate holder's attempts to access and enjoy its rights. West Virginia courts, and federal courts applying West Virginia law, have traditionally resolved such disputes according to the *reasonable necessity* doctrine. By adding as a condition to the reasonable necessity doctrine that there not be a substantial burden to the surface, West Virginia courts have demonstrated a more balanced concern for both mineral and surface rights, and thus for mining and farming.

This balanced approach was seen in *Whiteman v. Chesapeake Appalachia, L.L.C.*, where surface estate holders attempted to prevent a mineral rights estate holder from digging drilling waste pits on their land. Although the Whitemans—the surface estate holder—did not receive a favorable outcome, the U.S. Court of Appeals for the Fourth Circuit properly applied the heightened West Virginia *Buffalo Mining* standard, which has now stood for over thirty years. This holistic approach to the resolution of severance deed property rights is more beneficial to modern farming and allows a properly balanced consideration of the values that both mining and farming each bring to the national economy.

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<sup>126</sup> See *Whiteman II*, 729 F.3d at 392; WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 8, at 1.

<sup>127</sup> See *Whiteman II*, 729 F.3d at 392; WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 8, at 1; Bernstein, *supra* note 98.