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Disturbing Surface Rights: What Does Reasonably Necessary Mean in West Virginia

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DISTURBING SURFACE RIGHTS: WHAT DOES “REASONABLY NECESSARY” MEAN IN WEST VIRGINIA?

I. INTRODUCTION

When land is mentioned, one usually thinks only of that part of an estate which can be seen. This part of the land is called the surface. Legally, however, land includes not only the surface but also everything underneath, theoretically to the center of the earth. Included in “everything underneath” are the various ores and raw materials that industrial nations have always needed. As these valuable minerals have become more and more scarce, that “need” has turned to a compulsion, resulting in increasing frictions between the owners of the surface estate and the owners of the mineral estate.

The West Virginia law governing the interaction between the rights of the surface owner and the rights of the mineral owner is currently unclear. In 1980, the West Virginia Supreme Court of Appeals decided two cases highlighting this confusion. The first was Buffalo Mining Company v. Martin and the second was Lowe v. Guyan Eagle Coals, Inc. These cases focus on two recurring problems in situations where the ownership of the surface and mineral interest are severed: deciding, in the first instance, whether the surface can be disturbed to extract the mineral resources and determining, in the second instance, how much surface disturbance is permissible where extraction is contractually allowed.

The fact that confusion pervades this area of law is of more than passing academic interest. As the search for domestic energy intensifies, more and more surface owners and mineral owners are going to come into conflict. Given Americans’ intense feelings about their land, these conflicts can easily grow into violent self-help. More importantly, the legal tangle which can result from these conflicts may significantly impede exploitation of much needed mineral resources.

In the pages that follow, this Note will discuss West Virginia’s approach to resolving the inherent tension between surface owners and mineral owners. Necessarily, the attempt to tear away the mask of confusion from this area of law will involve some critical commentary of the court’s efforts. This criticism is not offered indictively; rather it is offered to highlight the colliding and perhaps irreconcilable policy issues the court confronts in attempting to clarify each party’s property rights.

II. BACKGROUND

The first case in West Virginia which extensively discussed the severed

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1 267 S.E.2d 721 (W. Va. 1980).
2 273 S.E.2d 91 (W. Va. 1980).
ownership issue was Porter v. Mack Manufacturing. In that case, Porter owned the minerals in a tract of land in which Mack Manufacturing owned the surface. Porter wanted to mine the fire clay and build a tram road to carry the clay to its plant on an adjoining property. Mack Manufacturing opposed the use of its surface and the controversy ended up in court. In resolving the dispute, the trial court issued an order that said Porter had a right to the minerals but added a condition: The court allowed Porter to build a road and open a pit “with the provision in the decree that Porter should so operate the mine and so construct and operate the tramway with due regard for the rights of the Mack Manufacturing Company in the surface.” Upon appeal, the West Virginia Supreme Court of Appeals essentially agreed with the burden placed on the owner’s estate, saying that, even if the deed in question had not granted an explicit right to mine and remove the minerals, “there would have been an implied right to use the surface in such manner, and with such means as would be fairly necessary for the enjoyment of their estates in the minerals.” However, the court added that “[t]his is a right to be exercised with due regard to the owner of the surface and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary.” Therefore, as of 1909, the law in West Virginia was that the mineral owner had the right to use as much of the surface as fairly necessary to extract the minerals with due regard for the rights of the surface owner.

Fifteen years after Porter, in Squires v. Lafferty, the court upheld Squires’ “right to use the ‘surface’ of the land in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.” The opinion cited Porter for support of its statements regarding the fairly necessary rule; but it offered no discussion of due regard for the rights of the surface owner language. The next case in the evolution of the reasonably necessary rule in West Virginia was Adkins v. United Fuel Gas Co. Adkins owned the surface of fifty acres, and United Fuel owned the minerals. Adkins alleged that when United Fuel drilled a well, it destroyed three-quarters of an acre of alfalfa and prevented the planting of part of a corn crop. In reaching the merits, the court cited Porter and Squires in saying that “the owner of the mineral underlying land possesses as incident to this ownership, the right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.” In light of earlier case law, the Adkins court’s resolution was predictable. But the court went further than earlier decisions when it elaborated:

It may be said at this point that we do not think that whether the plaintiff’s rights have been invaded or whether the defendant has exceeded its

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65 W. Va. 636, 64 S.E. 853 (1909).
4 Id.
5 Id. at 638, 64 S.E. at 854.
6 Id. at 639, 64 S.E. at 854.
7 95 W. Va. 307, 121 S.E. 90 (1924).
8 Id. at 309, 121 S.E. at 91.
10 Id. at 723, 61 S.E.2d at 636.
rights are questions of fact for determination of the jury. In a case where there is a dispute of fact, the jury should find the facts, and from such finding of facts by the jury it is the duty of the court to determine whether the use of the surface by the owner of the minerals has exceeded the fairly necessary use thereof, and whether the owner of the minerals has invaded the rights of the surface owner, and thus exceeded the rights possessed by the owner of such minerals.¹¹

There was no other discussion of why the court felt that it was necessary that the judge decide this question. Also, there are no cases cited in support of taking the question from the jury. A reason for the lack of support may have been the court's recognition that the rule directly conflicted with State v. Cooper,¹² where the court had said:

If the question depends on the weight of the testimony, or inferences and deductions from the facts proved, the jury and not the court are exclusively and uncontrollably the judges. This conclusion is based upon the well established rule, that the jury are the sole judges of the evidence, the credibility of all admissible testimony and inferences from the facts and circumstances proved.¹³

Whatever the case, the court's intrusion into the province of the jury only further confused an already ambiguous legal standard.

In the case of Justice v. Pennzoil,¹⁴ the Fourth Circuit Court of Appeals attempted to explain the foundation for Adkins in this manner:

[T]he rule articulated in Adkins v. United Fuel Gas, supra, is one of state property law. Unreasonable use of land by a mineral owner is not measured by the tort standard of the ordinary reasonable man; rather it is measured by concrete legal standards rooted in the common law. See Adkins v. United Fuel Gas Co., 61 S.E.2d at 635-36 and cases discussed therein. It is not a matter readily susceptible of jury determination. The rule of Adkins is not only bound up with but assures the continuity of those substantive rights and obligations of the parties which were defined generations ago.¹⁵

The difficulty with the Fourth Circuit's explanation of the Adkins case is that there are no cases cited in support of its proposition; nor are there any "concrete legal standards" announced to guide a judge in deciding the extent to which the surface owner must allow his estate to be disturbed by the mineral holder. All the decision did, in practical terms, was to repeat Adkins' curious conclusion that the "fairly necessary" standard presents a question of law for the judge.

¹¹ Id. at 724, 61 S.E.2d at 636.
¹² 26 W. Va. 338 (1885).
¹³ Id. at 340.
¹⁴ 598 F.2d 1339 (4th Cir. 1979).
¹⁵ Id. at 1343.
III. CURRENT LAW: Buffalo Mining AND Guyan Eagle

A. Buffalo Mining Criticized

_**Buffalo Mining Company v. Martin**_ is one of the West Virginia Supreme Court of Appeals' most recent statements on the "fairly necessary" standard. In that case, Martin owned the surface and Buffalo Mining had the mineral rights. Buffalo Mining wanted to construct an electric transmission line across Martin's surface and was forced to obtain an injunction to prevent Martin from interfering with the construction.

1. Confused Due Regard with Undue Burden

In the opinion, the West Virginia Supreme Court refused to answer Martin's argument that the building of the power line constituted an unreasonable use of the surface. "Initially, we do not address the first contentions raised by the Martins, simply because the record reveals that the Martins did not advance these issues, which are factual in nature, in the trial court." And later, "[a]s we earlier noted, the factual issues of undue burden and reasonable necessity were not raised by the Martins in the trial court, and are not before us now." Whether the court's reference to factual issues represents a retreat from _Adkins_' "question of law" ruling is unclear. Conceivably, the reference could be to the underlying facts the judge will use to determine the reasonableness of the contemplated surface use. Unfortunately, there is no further discussion that would clarify the question, even though the _Adkins_ case is cited twice later in the opinion. The court first refers to _Adkins v. United Fuel Gas Co._, in support of its statement: "It is generally recognized that where there has been a severance of the mineral estate and the deed gives the grantee the right to utilize the surface, such surface use must be for purposes reasonably necessary to the extraction of the minerals." This reference is simply a restatement of the well-settled "fairly necessary" standard and offers no clarification on the issue of who is to decide whether the surface use is reasonable.

The court's second reference to _Adkins_ is equally unenlightening. The court states "[o]ur past cases have demonstrated that 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." The confusion arises because the court cites _Adkins_ and _Porter_ in support of this statement. Yet, _Adkins_ contains no discussion of surface use which would cause an undue burden to the surface owner and _Porter_ refers only to due regard for the surface owner's rights. The uncertainty is compounded by the _Buffalo Mining_ court's apparent interpretation of what constitutes an undue burden. The court stated, in dis-

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17 Id. at 723 (emphasis added).
18 Id. at 726 (emphasis added).
20 267 S.E.2d at 723.
21 Id. at 725.
tistinguishing West Virginia-Pittsburgh Coal Co. v. Strong\textsuperscript{22}: "Moreover, we believe that Strong was correctly decided on the more fundamental principle that a right to surface use will not be implied where it is totally incompatible with the rights of the surface owner."\textsuperscript{23}

The Buffalo Mining court has apparently concluded that due regard for the surface owner's rights and undue burden to the surface owner are interchangeable standards. But that is not the case, as the following hypothetical demonstrates. Suppose there is only one method for a mineral owner to remove his minerals and this one method will destroy the surface owner's use of his estate. Under the due regard standard, which recognizes that the mineral estate is dominant, the mineral owner would prevail in a later suit contesting the use because no amount of regard for the surface owner would both protect the surface owner's use and allow the mineral owner access to his property. These are essentially the facts and holding of Kenny v. Texas Gulf Company.\textsuperscript{24} In contrast, under the West Virginia's undue burden standard, as announced in Buffalo Mining, the mineral owner could not use this method of exploitation because it would be totally incompatible with the rights of the surface owner. The effect of the West Virginia approach is to make the surface the dominant estate.

Not only was the court inaccurate in saying that the law always favored surface owners, but it also somewhat distorted the reasoning applied in other jurisdictions when dealing with the same problem. For example, in defining the burden of a plaintiff seeking an implied right to disturb the surface, the Buffalo Mining court said:

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. Porter v. Mack Manufacturing Co., supra. This concept has been most clearly articulated in oil and gas cases. See, e.g., Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah, 1976) (surface easement "consistent with allowing the fee owner the greatest possible use of his property"), Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971). . . .\textsuperscript{25}

The court's reference to Rust and Jones is more than a little misleading. Rust and Jones are the leading cases in the reasonably necessary with due regard area of mineral law and espouse what is generally referred to as the "Southwestern Rule." Rust, in which Utah adopted the Jones rule from Texas, arose when the Flying Diamond Corporation built a road to its well site from the east. Rust had requested the road come from the north so as to not interfere with irrigation. Rust alleged that by building the road from the east, Flying Diamond had acted without due regard for his surface rights, but did not claim that the building of the road was unreasonable or that more land than was necessary was used. The Rust court stated:

\textsuperscript{22} 129 W. Va. 832, 42 S.E.2d 46 (1947).
\textsuperscript{23} 267 S.E.2d at 725.
\textsuperscript{24} 351 S.W.2d 612 (Tex. Civ. App. 1961).
\textsuperscript{25} 267 S.E.2d at 725-26.
The general rule which is approved by all jurisdictions that have considered the matter is that the ownership (or rights of a lessee) of mineral rights in land is dominant over the rights of the owner of the fee to the extent reasonably necessary to extract the minerals therefrom. [citation omitted]. This dominance is limited in that the mineral owner may exercise that right only as reasonably necessary for that purpose and consistent therewith. Such a conflict of interest was dealt with in the case of Getty Oil Company v. Jones, 470 S.W.2d 618, 53 ALR 1 (Tex. 1971); cases therein; Diamond Shamrock Corp. v. Philipp, 256 Ark. 886, 511 S.W.2d 160 (1974). Therein the Court acknowledged the rights of the lessee to extract oil notwithstanding surface damage, but also pointed out that where there is a reasonable and practical alternative which could be pursued to minimize damages to the fee holder, that should be done.28

This fuller explanation of the reasonably necessary with due regard rule demonstrates what is proposed in the hypothetical above, namely, that the reasonably necessary with due regard rule and the undue burden of the surface owner rule are different. Under the Southwestern rule, the mineral owner will dominate in all circumstances except where there is a reasonable alternative. What is a reasonable alternative? The Jones court explained:

The reasonableness of the method and manner of using the dominant mineral estate may be measured by what are usual, customary and reasonable processes in the industry under like circumstances of time, place and servient estate uses. What may be a reasonable use of the surface by the mineral lessee on a bald prairie used only for grazing by the servient surface owner could be unreasonable within an existing residential area of the City of Houston or on the campus of the University of Texas, or in the middle of an irrigated farm. What we have said is that in determining the issue of whether a particular manner of use in the dominant estate is reasonable or unreasonable, we cannot ignore the condition of the surface itself and the uses then being made by the servient surface owner. . . . [If the manner of use selected by the dominant mineral lessee is the only reasonable, usual and customary method that is available for developing and producing the minerals on the particular land then the owner of the servient estate must yield. However, if there are other usual, customary and reasonable methods practiced in the industry on similar lands put to similar uses which would not interfere with the existing uses being made by the servient surface owner, it could be unreasonable for the lessee to employ an interfering method or manner of use. These conditions involve questions to be resolved by the trier of the facts.27

The last sentence quoted above demonstrates an additional difference between West Virginia's Buffalo Mining opinion and the Southwestern rule. Whether the amount of surface used by the mineral owner is reasonable is a question of fact in Texas; in West Virginia the reasonableness is a question of law. Therefore, not only is the test announced in Jones and Rust different than that declared in Buffalo Mining, but who applies the test is also different.

In its defense, the West Virginia Supreme Court of Appeals is the first jurisdiction to attempt to apply the due regard standard to coal rather than oil

27 470 S.W.2d 618, 627-28 (Tex. 1971).
and gas. Predictably, one would expect some adjustment to be necessary when one applies a standard to a new area of the law. Because it is a novel application, it is not surprising that the court failed to get everything perfect the first time. Thus when the court next approaches this problem, the reasoning of Hunt Oil Company v. Kerbaugh\textsuperscript{28} may be helpful in sorting out the various rules. The Kerbaugh court said:

> It is important to note that the Texas Supreme Court in Getty concluded the accommodation doctrine is not a balancing type test weighing the harm or inconvenience to the owner of one type of interest against the benefit to the other. Rather the court said the test is the availability of alternative non-conflicting uses of the two types of owner. Inconvenience to the surface owner is not the controlling element where no reasonable alternatives are available to the mineral owner or lessee. The surface owner must show that under circumstances, the use of the surface under attack is not reasonably necessary. Getty Oil Co. v. Jones, supra at 623.

> We agree a pure balancing test is not involved under the accommodation doctrine where no reasonable alternatives are available. Where alternatives do exist, however, the concepts of due regard and reasonable necessity do require a weighing of the different alternatives against the inconveniences to the surface owner. Therefore, once alternatives are shown to exist a balancing of the mineral and surface owner's interest does occur.\textsuperscript{29}

\textbf{2. Limited to Technology at Time Rights Severed}

Another matter of concern in the Buffalo Mining opinion is footnote four.\textsuperscript{30} In footnote four, the court stated "[w]e do not, nor do other Courts, make a distinction between the extent of the right to surface use under coal severance deeds and oil and gas or other mineral severances. . . ." citing Adkins, Rust and Jones. For the most part, this statement is accurate; but there is one rule that has never been applied to modern drilling of oil and gas wells, even though it has been applied to coal exploitation. This rule is the Strong rule, which says that if the technology to be employed in exploiting the mineral reserves was not in the contemplation of the parties at the time the rights were granted, the severing deed did not give the grantee the right to use that technology.

West Virginia-Pittsburgh Coal Co. v. Strong,\textsuperscript{31} arose under the following facts. West Virginia-Pittsburgh Coal owned the minerals under the surface owned by Strong. The deed that severed the minerals from the surface included an option to pay the grantor one hundred dollars per acre for all surface occupied or used by the grantee. West Virginia-Pittsburgh asked for a declaratory judgment stating its rights under the deed and an order compelling Strong to convey the acreage that the coal company wanted to strip mine. Applying the Rock House Fork Land Co. v. Raleigh Brick & Tile Co.,\textsuperscript{32} test of "the con-

\begin{footnotesize}
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  \item[28] 283 N.W.2d 131 (N.D. 1979).
  \item[29] Id. at 137.
  \item[30] 267 S.E.2d at 726.
  \item[31] 129 W. Va. 832, 42 S.E.2d 46 (1947).
  \item[32] 83 W. Va. 20, 97 S.E. 684 (1919).
\end{itemize}
\end{footnotesize}
templation of the parties" the court ruled:

We are of the opinion, arrived at by reading the instrument as a whole, that it was the manifest intention of the parties to preserve intact the surface of the entire tract, subject to the use of the owner of the coal "at convenient point or points" in order "to mine, dig, excavate and remove all of said coal" by the usual method at that time known and accepted as common practice in Brooke County. We do not believe that this included the practice known as strip mining.33

Thus the court limited the coal companies to the technology in common use at the time of the severance. Since at the time of the severance, there was no way to move the surface of the land as can be done today with a bulldozer, the court concluded that the grantees did not receive the right to do so.

At the first part of the century—which is the time most mineral estates were severed from the surface estate—the most common method of drilling was the cable tool method. The cable tool method involved a bit mounted on a post which was raised by a cable and then dropped, breaking the rock at the bottom of the hole by the impact. This method was limited to three or four thousand feet into the earth. In contrast, today's modern rotary drilling can go to depths of thirty thousand feet. In addition, the modern drill site must have a level area for devices that were not involved in cable tool drilling such as generators, fuel tanks, engines, water tanks, extensive pipe racks and reserve pits. The solution in West Virginia, where level ground is at a premium, has been to use bulldozers to clear and level sites, and build roads to accomodate these new technologies.34

In United States v. Polino,35 the district court, discussing the destruction of the surface by strip mining, said "by the latter (strip mining), the vein of coal is exposed by the removal of the earth and the growth above it. Thus the surface affected is completely disturbed and is either destroyed or moved to a place other than that of its original location." This description is equally applicable to modern oil and gas drilling, though admittedly, the surface disturbance is on a much smaller scale. Despite these similarities in surface disturbance, the Strong rule has never been applied to oil and gas operations. Contrary to the court's statement in Buffalo Mining, then, there is at least one difference in how West Virginia has treated surface interests in coal deeds and oil and gas deeds.

B. Lowe v. Guyan Eagle Coals

Decided eight months after Buffalo Mining, Lowe v. Guyan Eagle Coals, Inc.,37 does not answer very many of the questions raised by Buffalo Mining.

33 129 W. Va. at 836, 42 S.E.2d at 49.
34 See Energy Consulting Association, Introduction to Oil and Gas Technology and Supplementary Text (1979).
36 Id. at 776 (emphasis added).
37 273 S.E.2d 91 (W. Va. 1980).
The mineral and surface estates of the Lowe property were severed in 1902 when Joseph Lowe conveyed in fee to C. W. Campbell who reconveyed the property to Joseph Lowe, reserving mineral and mining rights to himself. The plaintiff Lowe, a successor to Joseph, acquired the surface rights to the nineteen acres. After the Lowe property had been deep-mined for several years, Guyan Eagle purchased the mineral rights to the Lowe property and the right to strip-mine an adjacent, unrelated property. Guyan Eagle then began to use the right-of-way created by the previous operator of the Lowe property to transport men and material to the strip-mine off the property. Lowe sued to enjoin the trespass and the issue reached the West Virginia Supreme Court of Appeals. In resolving the dispute the court ruled that the language in the reconveyance from Campbell to Joseph expressly reserved "the right to use the surface for transporting coal from other property." The court continued:

We are not faced with problems of implied easements or reservations as in Buffalo Mining Co. v. Martin. Instead, these facts are akin to those in West Virginia-Pittsburgh Coal Co. v. Strong wherein the first syllabus point is:

In order for a usage or custom to affect the meaning of a contract in writing because within the contemplation of the parties thereto, it must be shown that the usage or custom was one generally followed at the time and place of the contract's execution.

At Footnote 3 in Buffalo Mining Co. v. Martin, we interpreted the West Virginia-Pittsburgh Coal Co. v. Strong, supra decision to be based on the compatibility of a mineral owner's uses of and burdens on a surface owner's estate with the intention of the parties to the deed, a genuine question of material fact that must be resolved at trial. Footnote 3 of Buffalo Mining reads in pertinent part:

In West Virginia-Pittsburgh Coal Co. v. Strong, and its progeny, we indicated that from a technological standpoint the parties could not contemplate strip and auger mining, and therefore the technological advance would not be allowed. The fundamental basis for all of the decisions is whether the easement sought is substantially compatible with the surface rights granted to the mineral owner and whether it substantially burdens the surface owner's estate.

One wonders if the court might have overstated the basis for the Strong and Brown v. Crozer Coal & Land Co. decisions. Extending the court's logic to the extreme, every year a truck manufacturer delivers a new model truck a trial would have to be held because a technological advance is introduced. The same would be true for every piece of equipment used in mineral extraction, such as drill bits, heavier bulldozers and so forth. To argue, as the court does, that a full-blown jury trial is required to determine that the current model dump truck is no more burdening on the surface owner than last year's model is absurd. But once the "technological advance" theory is accepted there is no meaningful distinction between the different equipment used for mineral ex-

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38 Id. at 93.
39 Id. (citations omitted).
40 267 S.E.2d at 724 (citations omitted).
traction in the first year after severance or one hundred years after severance.

What is suggested by extending the court's logic is that Strong and Brown might have been better distinguished on the basis of the damage to the surface rather than technological advance. This distinction was used in Buffalo Mining where the court said:

These decisions were each based on two grounds. First, at the time of the original severance deed neither strip or auger mining was known and therefore could not have been in the contemplation of the parties. Second, and of even more importance, was the fact that these mining methods virtually destroyed the surface for its normal use, as stated in Strong:

"Certainly if the owner of the surface has a proprietary right to subjacent support he has at least an equal right to hold intact the thing to be supported, i.e. the surface, in the absence of a clearly expressed intention to the contrary."

We do not believe that these three decisions [including Oresta v. Romano Bros., Inc.] are controlling in the present case. The issue presented involves no claim of any widespread destruction of the surface....

Under the standard proposed here, all questions of implied rights not involving widespread destruction of the surface would be decided under the pre-Buffalo Mining standard of whether the right is reasonably necessary for the extraction of the minerals. Questions of implied rights that do involve widespread destruction of the surface would be decided on the basis of whether the surface disturbance is reasonably necessary for the extraction of the minerals and was in the contemplation of the parties to the deed, demonstrated by the language of the deed and the usages or customs generally followed at the time and place of the contract's execution.

IV. Conclusion

Need West Virginia law be as complicated and confused as Buffalo Mining and Lowe make it? The answer is "no." The confusion arises because the term reasonably necessary refers to two distinct concepts, yet is used interchangeably by the court. The first concept controls the amount of surface an operator may use to extract minerals; the second governs the methods that can be used by the operator to extract the minerals. Since the confusion is traceable to the use of legal "shorthand," it is now necessary for courts to use the full descriptive phrase of the test being applied, at least initially in an opinion, and to take care to keep the underlying concepts separate and distinct. When dealing with the methods to be used by an operator to exploit mineral resources,

42 129 W. Va. 832, 42 S.E.2d 46 (1947).
45 267 S.E.2d at 724 (emphasis added and citations omitted) (quoting Strong).
the courts must apply the *reasonably necessary to extract the minerals standard*.\(^{50}\) When discussing the amount of surface an operator may use, the courts must apply the *reasonably necessary to extract the minerals with due regard for the rights of the surface owner standard*.\(^{51}\)

Granted, this is awkward. But if an opinion stated clearly in the beginning which "reasonably necessary" standard it was using and the court was careful to keep the underlying logic in the forefront, much of the current confusion would be alleviated. With less confusion and a dedicated application of the "accommodation doctrine" referred to in *Kerbaugh*, all landowners, surface and mineral, could be assured of a "fair shake" and hence there would be considerably less temptation to resort to self-help. In addition, a clear standard would make the legal profession better able to give accurate advice, draft better leases and deeds and better narrow the issues for trial. In short, a clear standard would help trial judges apply the law in an even-handed fashion and facilitate appellate court review.

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\(^{50}\) See *supra* text accompanying notes 42-47.

\(^{51}\) See *Buffalo Mining*, 267 S.E.2d at 721; *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Flying Diamond Corp. v. Rust*, 551 P.2d 509 (Utah 1976).