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Case Note

MINING LAW—Ownership of Coalbed Methane—A Judicial Step Toward Efficient CBM and Coal Development. *Southern Ute Tribe v. Amoco Production Company*, 119 F.3d 816 (10th Cir. 1997).

INTRODUCTION

Coalbed Methane (CBM) is a gas produced during the coalification¹ process which historically had little value as an energy resource.² Recent technological advances, however enable economically feasible extraction of CBM, increasing its value tremendously.³ Conflicting opinions from the Solicitor of the Department of the Interior and some state courts on whether CBM is or is not part of the coal in which it is found, have raised ownership questions potentially involving billions of dollars of income from CBM production. Estimates vary, but roughly 90 trillion cubic feet of recoverable CBM lay imbedded in the nation's coal reserves.⁴ Thus, what was once seen as a nuisance and a safety hazard is now a valuable energy resource.⁵ In *Southern Ute Tribe v. Amoco Production Co.*, the Court of Appeals for the Tenth Circuit announced that coal reserved by the United States also includes CBM found in the coal.⁶

Historical Overview

In 1864, the Southern Ute tribe, the Uncompahgre Utes, and the White River Utes formed the confederated band of Utes and exchanged aboriginal land in Utah, New Mexico, and Colorado for approximately 15.7 million acres in Southern Colorado.⁷ Ten years later, the Tribe ceded 3.7 million

1. Ownership of and Right to Extract Coal Bed Gas in Federal Coal Deposits, 88 Int. Dec. 538, 539 (1981) (citing E. Craig and M. Myers, *Ownership of Methane Gas in Coalbeds*, 24 ROCKY MTN. MIN. L. INST. 767-68 (1978)). Coalification is the process by which buried plant materials are transformed into coal. *Id.*

2. Jeff J. Lewin, et al., *Unlocking the Fire: A Proposal for Judicial or Legislative Determination of the Ownership of Coalbed Methane*, 94 W. VA. L. REV. 563, 566-67 (1992); *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 823 (10th Cir. 1997).

3. Lewin, et al., *supra* note 2, at 576. Vertical wells are drilled to extract CBM and can also be used to degasify the coal for mining. Combinations of vertical and horizontal boreholes allow CBM mining in cooperation with coal mining. *Id.* at 577-78.

4. *Id.* at 574.

5. CBM has always existed in coal. Its combustible nature has led to the loss of many lives and inspired federal regulations on methane levels in coal mines. 30 C.F.R. §§ 57.22001-22608 (1997); 30 C.F.R. 77.200-217 (1997); *see also* 30 U.S.C. §§ 801, 861, 863 (1994).

6. *Southern Ute*, 119 F.3d at 836.

7. *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159, 162 (1971).

acres of the reservation to the United States upon discovery of mineral resources.⁸ The Southern Utes retained the southern strip of land 15 miles wide and 110 miles long.⁹ A Ute uprising in 1879 in which several non-Indians were killed led to further tribal ownership restrictions.¹⁰ In the Act of 1880,¹¹ Congress terminated tribal ownership in the reservation lands and allotted land parcels to individual tribal members.¹² The Act provided that the United States would hold the non-allotted lands available for sale and allow the Utes to share in the proceeds from such sales. The Act required the United States to hold the proceeds in trust for the Tribe.¹³ By 1882 only the Southern Utes remained on the reservation. The Uncompahgre Utes left for Utah, and the statute banished the White River Utes from Colorado.¹⁴

The United States opened the non-allotted lands to homesteading and mineral exploration under a number of federal statutes.¹⁵ Because the United States Geological Survey had insufficient resources to evaluate the mineral character of all land parcels, the land was most often classified by the patent applicant,¹⁶ resulting in both fraudulent and unintentional misclassification of lands.¹⁷ In response, in 1906 President Theodore Roosevelt withdrew from entry 64 million acres of land considered valuable for coal resources including the non-allotted Southern Ute Reservation land.¹⁸ Withdrawal was necessary to halt reliance on the patent applicants' classifications of land and to ensure that valuable resources could be developed and would not become unavailable because of conflicting homesteading claims.¹⁹

The 1909 Coal Lands Act²⁰ served to appease homesteaders who had

8. Brunot Cession, ch. 136, 18 Stat. 673 (1864). The Southern Utes negotiated with Congress to exchange their land for land further west once minerals were discovered. At Congress's urging, the Southern Utes agreed to the Cession. *Id.*

9. *Id.*

10. *Id.* For additional insight on the uprising known as the Meeker Massacre, see S. EXEC. DOC. NO. 31, 46th Cong. (1880). See also J. DUNN, MASSACRES OF THE MOUNTAINS (1958).

11. Act of 1880, ch. 223, 21 Stat. 200 (1880).

12. 10 CONG. REC. 1059, 2066 (1880). Congressional records indicate that the purpose of the act was to destroy the tribal structure and to convert the Utes from a pastoral to an agricultural society. *Id.*

13. Act of 1880, ch. 223, 21 Stat. 203-204. In part, the 1880 Act stated: [T]he land not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States. *Id.*

14. *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159, 162 (1971); Act of 1880, ch. 223, 21 Stat. 200.

15. See the Homestead Act of 1862, 43 U.S.C. §§ 161-64 (repealed 1976), the Coal Lands Act of 1873, ch. 279, 17 Stat. 607 (1873), and the Mining Law of 1872, 30 U.S.C. § 22 (1872).

16. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 47 (1983). Classification of land as mineral or non-mineral was necessary to determine the price of the land. *Id.*

17. *Id.* at 48 n.9. *Watt* explains that with land classified as non-mineral, the patentee received title to the entire land and the government was left with no recourse. *Id.*

18. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1149 (Colo. 1995) [*Amoco*].

19. *Id.* at 1149-50

20. 30 U.S.C. § 81 (1995).

entered in good faith upon land subsequently classified as coal lands. The Act gave homesteaders a patent in the land subject to a reservation of all coal in the United States.²¹ In order to encourage new agricultural development of the withdrawn lands, Congress enacted the 1910 Coal Lands Act, which allowed for future land patents while also leaving a reservation of coal in the United States.²² Homesteading and mineral exploration continued under these statutes over the next several decades. Prospective miners patented more than 16 million acres subject to the coal reservation.²³

In 1934, in an effort to restore tribal cultures, Congress passed the Indian Reorganization Act (IRA)²⁴ which returned to tribal ownership the remaining surplus lands of any Indian reservation that had been open to homesteading.²⁵ In 1938, Congress conveyed the coal previously reserved to the United States on those lands, to the Southern Ute Tribe.²⁶

In 1991, the Southern Ute Tribe sued Amoco Production Company, other oil companies, and individual oil and gas lessees and lessors over ownership of coalbed methane contained in coal that the Tribe acquired through the IRA.²⁷ The litigation arose when the defendant companies, through leases with surface owners, began drilling in tribally-owned coal in preparation for development of CBM.²⁸ In *Southern Ute*, Amoco and other

21. *Id.* The act provided in part:

Any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction . . .

Id.

22. Act of June 22, 1910, ch. 318, § 1, 36 Stat. 583 (codified at 30 U.S.C. § 83 (1994)). This act provided in part:

[U]pon satisfactory proof of full compliance with the provisions of the laws under which entry is made . . . the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same.

Id.

23. *Amoco*, 874 F. Supp. at 1151.

24. Indian Reorganization Act of 1934 (IRA), 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1994)). This act marked a change in U.S. Indian policy from an assimilationist policy to one which favored the revival of tribal culture. *Amoco*, 874 F. Supp. at 1151.

25. 25 U.S.C. § 463 (1995).

26. *Amoco*, 874 F. Supp. at 1151.

27. *Id.* at 1146.

28. Brief for Appellant at 16, *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816 (10th Cir. 1997) (No. 94-1579) (on file with the *Land & Water Law Review*). Brief for Appellee at 64, *Southern Ute*, 119 F.3d 816 (No. 94-1579). The parties' briefs discuss the events prior to filing of the suit including the

defendants claimed the right to develop approximately \$200,000,000 worth of CBM contained within the reserved coal.²⁹ The Southern Utes argued that the CBM was necessarily included in the reservation of coal to the United States in the 1909 and 1910 acts, and thus to the Tribe through the IRA.

The United States District Court for the District of Colorado held that the reservation in coal did not include the CBM.³⁰ The court found that Congress had no intent to reserve CBM along with coal at the time Congress passed the Acts.³¹ The Tenth Circuit reversed, holding that "the ownership of CBM, an integral component of coal inseverable at the time of the 1909 and 1910 enactments, is vested in the Tribe as owners of the coal resource."³² A petition for rehearing *en banc* was granted in December of 1997.³³

This note provides a history and background of the lands in dispute and provides a summary of the applicable law. It also examines the Tenth Circuit's analysis of Congressional intent in the 1909 and 1910 acts and considers the effect this decision may have on past and future coal and gas interests.

BACKGROUND

Coalbed Methane

Similar in chemical composition to other hydrogen based gases,³⁴ CBM is used as an energy source for industrial and domestic purposes. Unlike many gases, which have a more migratory nature, CBM has a tendency to remain adsorbed³⁵ to the surface of coal. CBM is released only when the

CBM development that had begun. Additionally, Amoco's answer brief on appeal from the district court states that Amoco drilled wells and made millions of dollars worth of preparations for mining with the consent and understanding of the tribe that the gas owner owned the coalbed methane. Brief for appellees at 9, *Amoco*, 874 F. Supp 1142.

29. *Amoco*, 874 F. Supp. at 1147.

30. *Id.* at 1146.

31. *Id.* at 1154.

32. *Southern Ute*, 119 F.3d at 836.

33. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816 (10th Cir. 1997) (order granting rehearing *en banc*). The court granted rehearing on the issue of whether "coal" as used in the Coal Lands Acts unambiguously excludes or includes CBM.

34. R. MCBANE, A CRITICAL LOOK AT THE STATUS OF COALBED METHANE, COALBED METHANE TECHNOLOGY, AND THE FUTURE OF COALBED METHANE (1992); Lewin et al., *supra* note 2, at 572-73. CBM contains over 80 percent methane, making it similar to other gases. However, CBM contains no propane, butane, pentane, carbon monoxide or sulfur compounds as does natural gas. The amount of methane in a coal deposit depends upon factors such as coal rank, pressure, temperature, permeability and porosity of coal. *Id.*

35. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 16 (10th ed. 1993). Adsorption is "adhesion in an extremely thin layer of molecules . . . to the surfaces of solid bodies or liquids." *Id.*

coalbed is depressurized by faulting or drilling, for example.³⁶ This characteristic complicates classification of CBM since it is inevitably interrelated to the coal in which it is found.

CBM has not always been considered a valuable resource. Commercial mining for CBM in the United States did not begin until the 1980s.³⁷ Prior to that, CBM was considered a hazard and a nuisance due to its explosive nature.³⁸ In order to protect mine workers, mining companies found ways to release the gas before mining thereby reducing the danger. Thus, the right to ownership of coal, necessarily included the responsibility of safely handling CBM. The hazard created by methane in coal beds eventually led to federal regulations governing the level of methane in mines.³⁹

When Congress passed the 1909 and 1910 acts, extracting CBM required removing or destroying the coal.⁴⁰ Today, a number of means are used to capture the gas which leave most of the coal undisturbed.⁴¹ A popular method is hydrofracturing, a process by which a liquid is forced into the coal bed to fracture the coal and release the trapped gas.⁴² Although CBM mining is currently technologically feasible, there is valid concern that extraction of the gas inevitably interferes with coal mining and can affect the value of the coal.⁴³ Some of the current extraction technologies can damage mining equipment and coal seams and prevent mining of coal.⁴⁴

CBM Ownership

Few cases have addressed the issue of CBM ownership⁴⁵ and state legislatures are only beginning to consider the question.⁴⁶ In *Vines v. McKenzie*

36. *Vines v. McKenzie Methane Corp.*, 610 So. 2d 1305, 1307 (Ala. 1993). See *Southern Ute*, 119 F. 3d at 823.

37. *Vines*, 610 So. 2d at 1307.

38. Lewin et al., *supra* note 2, at 556. As recently as 1992, explosions in coal mines due to CBM have killed miners. Jeff L. Lewin, *Coalbed Methane: Recent Court Decisions Leave Ownership Up in the Air, But New Federal and State Legislation Should Facilitate Production*, 96 W. VA. L. REV. 631, 684 n.1 (1994).

39. See 30 U.S.C. §§ 801, 861, 863 (1994); 30 C.F.R. §§ 57.22001-22608 (1997), 30 C.F.R. §§ 77.200-217 (1997).

40. *Southern Ute*, 119 F.3d at 823.

41. See Lewin et al., *supra* note 2, at 576, 593-97. See also *NCNB Texas Nat. Bank, N.A. v. West*, 631 So. 2d 212, 215 (Ala. 1993). These methods include: gob wells, vertical wells and horizontal boreholes.

42. *Id.*

43. Lewin et al., *supra* note 2, at 593-98.

44. *Id.*

45. *Carbon County v. Union Reserve Coal Co., Inc.*, 898 P. 2d 680 (Mont. 1995); *Rayburn v. USX Corp.*, Civ. No. 88-G-2661-W (N.D. Ala. 1987), *aff'd*, 844 F.2d 796 (11th Cir. 1988); *Pinnacle Petroleum Co. v. Jim Walter Resources, Inc.*, Civ. No. 87-3012 (Cir. Ct. Mobile County, Ala. July 28, 1989).

46. Some legislative attempts have been made on both the federal and state levels. For an overview of the recent developments see Lewin et al., *supra* note 38. See also, MONT. CODE ANN. § 82-1-111 (1997); N.M. STAT. ANN. § 19-9-10 (Michie 1997); UTAH CODE ANN. § 40-6-2 (Michie 1997); W. VA CODE §§ 22-21-1 to -28 (1997). The first state to adopt CBM legislation was Virginia in the Virginia Gas and Oil Act

Methane Corporation, Alabama's Supreme Court held that "an express grant of 'all coal' necessarily implies the grant of coalbed methane gas."⁴⁷ The court looked at the methods used to mine for coal and extract CBM and found that due to the "intertwined" nature of the resources, it would be impossible to extract one without affecting the other.⁴⁸ Looking into the intent of the parties and noting that CBM was not of value at the time of the reservation, the *Vines* court concluded that the parties did not intend to reserve the gas.⁴⁹

A later Alabama Supreme Court case held that coal owners own the CBM from wells drilled directly into the coal seam and that oil and gas owners on the same parcel of land do not.⁵⁰ The court also held that any gas from the "gob" area⁵¹ above the source coalbed belongs to the gas estate.⁵² The court decided that based on the rule of capture, the right to CBM depends upon the location of the gas at the time it is recovered.⁵³

In *United States Steel Corporation v. Hoge*, the Pennsylvania Superior Court held that a reservation in coal includes the right to only the methane gas released in order to mine the coal or which is incidental to the coal mining.⁵⁴ The court based its holding on the right of the miner to ventilate the gas in order to acquire the coal, but concluded that the coal owner does not have an absolute right to the methane.⁵⁵

More recently, in *Carbon County v. Union Reserve Coal Co., Inc.*, the Montana Supreme Court applied the district court's decision in *Southern Ute* to place CBM ownership in the hands of the gas owner.⁵⁶ The court here interpreted the plain meaning of a coal grant and concluded that since CBM was not mentioned, it was not included in the grant.⁵⁷ The court's decision allows the coal owner to capture CBM for purposes incidental to mining but maintains that the gas owner has the right to produce the CBM.

of 1990. The Act does not specifically address the ownership issue but provides escrow provisions, which allow development to continue in the case of ownership disputes. The Act also gives the coal owner the right to block hydrofracturing and provides permit procedures. VA. CODE ANN. § 45.1-361.22 (Michie 1997).

47. 619 So. 2d 1305, 1309 (Ala. 1993).

48. *Id.* at 1308.

49. *Id.* at 1309.

50. NCNB Texas Nat'l Bank, N.A. v. West, 631 So. 2d 212, 229 (Ala. 1993).

51. A gob is produced by longwall mining in which a machine grinds into a wall of the coal seam. This method causes the ceiling of the mine to collapse forming "gobs" of rubble which contain coalbed methane that may have a tendency to migrate upward into non-coal strata. *Id.* at 215.

52. *Id.* at 229.

53. *Id.* at 224.

54. 450 A.2d 162, 172 (Pa. Super. 1982).

55. *Id.*

56. *Carbon County v. Union Reserve Coal Co., Inc.*, 898 P.2d 680, 687 (Mont. 1995).

57. *Id.*

Solicitor Opinions

The department of the Interior has issued two Solicitor's Opinions regarding ownership of CBM in federally-owned coal.⁵⁸ The 1981 Solicitor's Opinion, of interest here, defined the coal reservation in the 1909 and 1910 acts as excluding CBM.⁵⁹ The Solicitor based his opinion on the theory that CBM and coal are distinctly different resources.⁶⁰ Legislative history representing congressional intent also informed the decision.⁶¹ The Solicitor's Opinion was meant to expedite the development of CBM on federal land by clarifying ownership under the 1909 and 1910 Acts.⁶²

Federal Mineral Reservations

Cases involving other minerals suggest that courts generally construe mineral rights broadly in favor of the U.S. government, giving the federal government rights to minerals in questionable cases. In *Watt v. Western Nuclear*, the Supreme Court construed the Stock Raising Homestead Act broadly to include gravel in a general mineral reservation to the United States.⁶³ The court reasoned that the statute's purpose—to encourage the development of both the surface and the sub-surface of the land—was best served by construing the mineral reservation broadly.⁶⁴ The decision was based in part on the rule that land grants are construed favorably to the government and doubts are resolved in favor of the government.⁶⁵

Other expansive interpretations of mineral reservations include *Brennan v. Udall*, in which the Tenth Circuit held that oil shale was included in a reservation of oil,⁶⁶ and *United States v. Union Oil Company*, in which a reservation to the United States of "all coal and other minerals" was held to

58. Ownership of and Right to Extract Coal Bed Gas in Federal Coal Deposits, 88 Int. Dec. 538 (1981) [hereinafter 1981 Opinion]; Rights to Coalbed Methane Under an Oil & Gas Lease for Lands in the Jicarilla Apache Reservation, 98 Int. Dec. 59 (1990). The Solicitor's second opinion, issued in 1990, clarifies the meaning of a Bureau of Indian Affairs lease form. The opinion prescribes that in such a lease, the term "natural gas" unambiguously includes CBM. The Solicitor based his opinion on the language of the lease and the common meaning of the words "gas" and "natural gas." According to the opinion, before issuing a drilling permit the Department of the Interior must ensure that the drilling will occur with regard to the rights of the coal owner. *Id.*

59. 1981 Opinion, *supra* note 58, at 545. The opinion assigned ownership of CBM to the United States where oil and gas were reserved to the United States in agricultural patents issued under the Act of July 17, 1914.

60. *Id.* at 540.

61. *Id.* at 542-44.

62. *Id.* at 539. The Tribe's brief suggests that the Solicitor's opinion was brought about after "noteworthy involvement" by Amoco. Brief for Appellant at 17, *Southern Ute*, 119 F.3d 816.

63. *Watt v. Western Nuclear Inc.*, 462 U.S. 36, 45 (1983).

64. *Id.* at 47.

65. *Id.* at 59 (citing *United States v. Union Pacific R.R. Co.*, 353 U.S. 112, 116 (1957)).

66. 379 F.2d 803, 804 (10th Cir. 1967).

include geothermal energy.⁶⁷

PRINCIPAL CASE

In *Southern Ute*, the Tenth Circuit held that a federal reservation of coal includes CBM gas.⁶⁸ In doing so the court rejected Amoco's argument that CBM was conveyed with the land patents issued under the 1909 and 1910 acts.⁶⁹

Statutory Construction

Interpreting the 1909 and 1910 statutes, the Tenth Circuit followed general principles of statutory construction. The court noted that its principle obligation was to ascertain congressional intent.⁷⁰ Throughout its analysis, the court considered the context in which the statutes were enacted⁷¹ and adhered to the general rule of construing mineral reservations in favor of the United States.⁷² The court also recognized the principle that nothing passes except by clear conveyance.⁷³

In construing the statutes, the court began by interpreting the plain meaning of the words.⁷⁴ Amoco argued that the common definition of coal at the time Congress passed the Acts did not include gaseous substances like CBM.⁷⁵ However, the court determined that the 1909 and 1910 Acts neither defined coal nor mentioned CBM.⁷⁶ Thus the statutes by their plain meaning, indicated no congressional intent regarding CBM.⁷⁷ In its plain meaning analysis, the Tenth Circuit court found that due to the intermingled nature of the minerals, "CBM ownership . . . cannot be disposed of by the simple tautology that gas is gas."⁷⁸

The court then examined congressional intent in both its general and specific contexts. The court was unpersuaded by Amoco's argument that Congress was aware of CBM as a distinct product from coal and could have reserved it if they had so desired.⁷⁹ The Tenth Circuit found that CBM has qualities sufficiently different from other gases to make it possible for Con-

67. 549 F.2d 1271, 1273 (9th Cir. 1977).

68. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 836 (10th Cir. 1997).

69. Brief for Appellee at 94, *Southern Ute*, 119 F.3d 816.

70. *Southern Ute*, 119 F.3d at 820.

71. *Id.* at 821-24.

72. *Id.* at 821. See *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983).

73. *Southern Ute*, 119 F.3d at 821.

74. *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997).

75. Brief for Appellee at 111, *Southern Ute*, 119 F.3d 816.

76. *Southern Ute*, 119 F.3d at 821.

77. *Id.*

78. *Id.* at 822-23.

79. *Id.* at 823.

gress to have specifically intended it to be included in the reservation.⁸⁰ The court reasoned that since CBM was not valuable and not easily severable when Congress passed the 1909 and 1910 Acts, Congress demonstrated no specific intent whatsoever with regard to CBM ownership.⁸¹

Concluding that the statutes are ambiguous with regard to specific intent, the panel considered Congress's general intent and the purpose of the Acts.⁸² The court relied on the concept that general intent may be more reliable than specific intent when changes in circumstances indicate that specific intent may be difficult to discern.⁸³ The district court had found that Congress knowingly rejected a broad meaning of the word "coal" by not including any other minerals in the reservation.⁸⁴ However, the Tenth Circuit found that rejection of an "all mineral" reservation does not prove congressional intent with regard to the extent of a coal reservation.⁸⁵ The Tenth Circuit suggested that Congress knew there was indeterminate value in the coal land and did not choose to limit the reservation to only that which was valuable in 1909 and 1910.⁸⁶ Realizing that the coal in question could not have been developed before advances in technology, the court concluded that Congress meant to reserve the potential value of the coal—including the CBM—in the United States.⁸⁷

The court continued its general intent analysis by developing a list of related cases in which mineral reservations have been treated expansively.⁸⁸ For example, the Supreme Court found that gravel is a mineral reserved to the United States in lands patented under the Stock-Raising Homestead Act.⁸⁹ Also, the United States District Court for the Ninth Circuit found that geothermal energy was included in the reservation to the United States of all coal and other minerals under the same Act.⁹⁰

The circuit court also addressed Amoco's argument that the Uranifer-

80. *Id.*

81. *Id.* at 824.

82. *Id.* (citing *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 715 (10th Cir. 1971)).

83. *Id.* at 821-24 (citing *Northern Natural Gas*, 441 F.2d at 715) (holding that "when a component previously regarded as an impurity becomes valuable" general intent is closer to original intent).

84. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1156-57 (Colo. 1995). The district court offers excerpts from congressional hearings in which possible variations of the reservation were discussed. Also, the court pointed out the historical trend, when issuing land patents, of issuing a fee simple absolute. The 1909 and 1910 acts were the first departure from that trend and from this the court reasoned that the reservation in the 1909 and 1910 acts were narrow. *Id.* See *infra* note 118.

85. *Southern Ute*, 119 F.3d at 826.

86. *Id.*

87. *Id.*

88. *Id.* at 826-28.

89. *Watt v. Western Nuclear Inc.*, 462 U.S. at 53 (citing 43 U.S.C. §§ 291-301 (1916)).

90. *United States v. Union Oil Co.*, 549 F.2d 1271 at 1272. (9th Cir. 1977).

ous Lignite Act (ULA)⁹¹ supports the idea that Congress recognizes a right for land patent owners to exploit source minerals contained in federally owned coal.⁹² The ULA specifically granted patent holders on lands where the United States had reserved a coal interest, the right to extract uranium and similar minerals from the coal. Amoco claimed that the ULA demonstrated congressional intent to recognize the independent nature of minerals, including CBM.⁹³ However, the Tenth Circuit reasoned that by enacting a statute specifically allowing patent holders to extract uranium from the coal, Congress recognized that without such a statute, the minerals would remain an inseparable part of the coal under the 1909 and 1910 coal acts. The circuit court found that Congress did not intend a presumption that the right to extract minerals under the ULA extended to all source minerals contained in the coal.⁹⁴

Chevron Analysis

After determining that congressional intent was unclear, the court addressed whether deference was owed to the 1981 Department of the Interior Solicitor's Opinion which construed the 1909 and 1910 Acts to exclude CBM from the federal coal reservation.⁹⁵ To determine whether the Solicitor's construction of the statute was binding, the court applied the two part test set forth in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*⁹⁶ First, *Chevron* requires a determination of whether Congress "has directly spoken on the precise question at issue." If so, an agency must follow Congress's express intent. Second, if Congress has not spoken, the court must ask whether the agency's construction is permissible.⁹⁷ Finding that Congress did not speak directly to the definition of coal in the Acts, the court proceeded to the second step of the analysis.⁹⁸ The court was persuaded by the Tribe's argument that the effect of *Chevron* deference in this case would be an adjudication of the rights of private landowners who were neither present nor aware that this decision was being made.⁹⁹ The panel found that adopting the Solicitor's Opinion in this case would, in effect, apply an opinion meant for federal coal to privately-owned coal.

In addition, by differentiating between the Solicitor's Opinion and

91. 30 U.S.C. § 541-41i (1995).

92. *Id.* The act authorizes surface owners to remove lignite (a low-grade coal) containing source materials such as uranium, within federal coal seams. Brief for Appellee at 119, *Southern Ute*, 119 F.3d 816.

93. Brief for Appellee at 119, *Southern Ute*, 119 F.3d 816.

94. *Southern Ute*, 119 F.3d at 828.

95. 1981 Opinion, *supra* note 59.

96. 467 U.S. 837 (1984).

97. *Id.* at 842-43.

98. *Southern Ute*, 119 F.3d at 830.

99. *Id.* The agency position was put forth in order to clarify ownership as to federal lands and did not consider private land rights. 1981 Opinion, *supra* note 59, at 539.

other agency informal rule-making procedures and adjudications, the court found that the opinion does not warrant *Chevron* deference.¹⁰⁰ Specifically, the court noted that agency informal rule-making proceeds through a notice and comment process, which allows for public review of a proposed regulation. A Solicitor's Opinion is merely an advisory pronouncement issued without procedural safeguards and lacking the force of law.¹⁰¹ The court determined that while such an opinion may be afforded some consideration, such decisions should not have binding effect.¹⁰² Moreover, the court deemed the Solicitor's Opinion arbitrary, not well reasoned, and therefore not entitled to deference.¹⁰³ The court focused on the Solicitor's acknowledgment that coal and CBM were only potentially severable in 1909 and 1910. The panel decided it was unreasonable for the Solicitor to decide that the 1909 and 1910 reservations excluded CBM because at the time the two resources could not have been severed.¹⁰⁴

The court concluded that the coal reservation to the federal government in the 1909 and 1910 Acts includes the CBM gas found in the coal.¹⁰⁵

ANALYSIS

The Tenth Circuit's determination in *Southern Ute* is long overdue. The use of CBM in Europe as an energy resource began in the 1940s and 50s,¹⁰⁶ but development of CBM technology has been slower in the United States, in part because of uncertainty over ownership.¹⁰⁷ CBM's growing stature as a valuable commodity forced the court, in interpreting the 1909 and 1910 Acts, to place a relatively new resource in an old framework. A court's statutory interpretation requires a determination of intent *at the time* Congress passed the legislation.¹⁰⁸ Such a determination is difficult in the case of CBM since, at the turn of the century it was not seen as a valuable resource but rather as a part of the coal. Thus the court was faced with legal precedent that did not address the question at issue. While perhaps further definition is required, the circuit court made a policy-based, practical decision that promotes economic and efficient development of CBM.

100. *Southern Ute*, 119 F.3d at 832.

101. *Id.* at 833.

102. *Id.* at 832. The court cited a number of appellate court decisions which held that *Chevron* deference is only given to legislative rules and agency adjudications (citations omitted). *Id.*

103. *Id.* at 835-36.

104. *Id.* at 836.

105. *Id.*

106. Lewin et al., *supra* note 2, at 567.

107. *Id.* at 598.

108. *Southern Ute*, 119 F.3d at 820; *Perrin v. United States*, 444 U.S. 41, 42 (1979).

Plain meaning

The court's plain meaning analysis is a crucial part of the decision. If a statute is deemed unambiguous, then the court's "inquiry is complete, except in rare and exceptional circumstances."¹⁰⁹ Ambiguity leads a court to consider congressional intent. The Tenth Circuit found ambiguity in the term "coal" despite its having a commonly understood meaning. The court's logic in finding ambiguity in this instance is compelling in view of the difficulties faced when considering a resource like CBM—essentially a constituent part of the coal resource at the time Congress passed the Acts. The court is not entirely persuasive, however, in relying solely on the lack of a definition of coal in the statute to demonstrate ambiguity. A statute ought not be automatically found ambiguous because it fails to define a word that has a commonly understood meaning. Nonetheless, coal was understood at the turn of the century to contain gaseous substances, and CBM was a known component of coal ownership.¹¹⁰ Although the statutes clearly reserve coal and say nothing about CBM, it is probable that the plain meaning of coal in 1909 and 1910 assumed the CBM constituent, along with the coal owner's responsibility for safely extracting the gas.¹¹¹

Congressional Intent

CBM was not known to be valuable in 1909 and 1910, and was not considered as a separate resource upon creation of the Acts. If it was considered at all, presumably it was thought of as a safety hazard associated with coal and a problem for the coal owner to solve. Since Congress did not mention CBM nor define coal in the Acts, there is no clear specific intent with respect to the meaning of coal or CBM.¹¹² Furthermore, CBM itself is not mentioned in the congressional record, making it more difficult to ascertain whether Congress affirmatively included or excluded it from the reservation.¹¹³ Instead of imposing specific intent upon Congress, as the district court did, the circuit court

109. *Aulston v. U.S.*, 915 F.2d 584, 589 (10th Cir. 1990).

110. Supplemental Brief of Appellant for Rehearing *en banc* at 10-14, *Southern Ute*, 119 F.3d 816 (No. 94-1579).

111. While the district and circuit courts focus on the word "coal," the reservations also include "the right to prospect for, mine, and remove" the coal. Incidental to mining coal, is the need to first remove CBM, as was the case in 1909 and 1910. An inference of a right to ventilate, and even waste CBM in order to extract coal comports with legal precedent. The right to coal, in itself, does not compel a conclusion that the coal owner owns the CBM. Nor does it necessarily exclude the right of a gas owner to recover for gas related in mining. The court does not address this argument but it is worth confronting since it could have led the court to a conclusion similar to that in *United States Steel v. Hoge*, 450 A.2d 162, 172 (Pa. Super. Ct. 1982), *NCNB Texas Nat'l Bank, N.A. v. West*, 631 So. 2d 212, 215 (Ala. 1993), or similar shared ownership arrangements. See *supra* notes 51 and 55. For a discussion of other possible ownership outcomes, see Lewin, *supra* note 38.

112. *Southern Ute*, 119 F.3d at 821-22. See also *U.S. v. Union Oil Co.*, 549 F.2d 1271, 1273 (1977).

113. *Southern Ute*, 119 F.3d at 821-22.

convincingly chose to find no specific intent at all.¹¹⁴

The Tenth Circuit's examination of general congressional intent and the purpose of the statutes offers insight into interpretation of the language. The 1909 and 1910 Acts were Congress's first attempt to give less than a fee simple estate to a patent owner, signifying the beginning of the trend of narrow government reservations.¹¹⁵ The district court had demonstrated, through the congressional record, an intent to define the reservation narrowly to include only coal, thereby releasing other substances for separate development despite where they occur.¹¹⁶ Even so, such a narrow reservation does not demonstrate what would amount to clairvoyant congressional intent to exclude or include a substance with the unique adsorptive characteristics of CBM which was valueless and hazardous at the time of enactment. The fact that Congress may have refused to reserve other minerals as well, does not indicate intent with regard to the extent of the coal reservation itself, or with regard to CBM. The purpose of the statutes was to encourage agricultural development of land while ensuring that the mineral resources would not be kept from development.¹¹⁷ The circuit court's determination is consistent with that purpose. The holding does not interfere with surface land development. However, the decision does encourage production of a mineral, which has not been easily developed due to ownership questions.

The circuit court found that Congress meant to reserve the future value of the coal including CBM.¹¹⁸ Much of the reserved coal was not minable at the time and Congress was aware that it might become more valuable in the future.¹¹⁹ Even so, it does not automatically follow that the future value in *other minerals* was reserved as well. By concluding that CBM is a part of coal rather than "another mineral," the court avoided including any *other minerals*, which would be directly contrary to the congressional intent to reserve only coal.¹²⁰ This conclusion was reasonable considering that in the minds of both Congress

114. *Id.* at 822-24.

115. 43 CONG. REC. 2504 (1909).

116. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1158 (Colo. 1995). The dialogue cited by the court as evidence of intent is as follows:

Mr. Stephens: Could the gentleman better arrive at what he desires by only patenting the surface of the land and reserving all minerals, precious and otherwise?

Mr. Mondell: That has been discussed at some length, and the Committee on Public Lands is not of the opinion that ought not be done. We believe this is quite a sufficient departure from the past practice of the Government. The lands which this legislation will affect are lands which the department has claimed contain some coals of value.

Mr. Stephens: Is not this a step in that direction of issuing limited patents?

Mr. Mondell: It is; and I trust it is as far as we will go in that direction.

45 CONG. REC. 2504 (1909)

117. 43 CONG. REC. 2504.

118. *Southern Ute*, 119 F.3d at 826.

119. *Id.* See also 43 CONG. REC. 2504.

120. *Southern Ute*, 119 F.3d at 836.

and coal owners it is likely that CBM was considered part of the coal reserved.

To inform the analysis of general intent, the court compared the Coal Acts to the Agricultural Entry Act (AEA)¹²¹ and the Stock Raising Homestead Act (SRHA).¹²² The court demonstrated a tendency for the judiciary to interpret the various statutes broadly to include minerals not specified in the language. The plain language in both the AEA and SRHA provides for multiple mineral reservations.¹²³ Accordingly, these statutes have potential for more expansive interpretation. In *Watt v. Western Nuclear, Inc.*,¹²⁴ the court interpreted “minerals” in the SRHA broadly to include gravel. The United States Supreme Court in *Watt* noted that precedent exists for defining gravel as a mineral,¹²⁵ whereas in *Southern Ute* no dispositive supporting law included CBM with a coal reservation. Although distinguishable, *Watt* is an example of a broad interpretation of a mineral-reserving statute.

Brennan v. Udall demonstrates a situation similar to that in *Southern Ute*. The Tenth Circuit in *Brennan* included oil shale in an oil reservation under the AEA.¹²⁶ Oil shale and oil are widely accepted to be interrelated, as are coal and CBM. The determination in *Brennan* is preceded by years of treating oil and oil shale as one substance in various statutes and agency decisions.¹²⁷ Similarly, evidence such as regulations governing methane levels in mines and dictionary definitions in the early 1900s, supports the idea that coal and CBM were historically thought of as interrelated.¹²⁸

United States v. Union Oil demonstrates perhaps the broadest interpretation of a mineral-reserving statute, however there the court interpreted a general term—“minerals.”¹²⁹ *Union Oil* is similar to *Southern Ute* because it dealt with geothermal steam, a mineral that had a newly appreciated value.¹³⁰ The court noted that there was no mention of geothermal steam in the SRHA itself, or its legislative history.¹³¹ However, the scope of the Act considered by that court and the legislative history allow for an expansive interpretation.¹³² Because the steam was of no commercial value in 1916, the court held that Congress had no specific intent to reserve it. In *Union Oil*, the court found that it

121. 30 U.S.C. §§ 121-25(1914).

122. 43 U.S.C. §§ 291-301 (1916).

123. 30 U.S.C. §§ 121-25(1914) (reserving “phosphate, nitrate, potash, oil, gas, or asphaltic minerals”); 43 U.S.C. §§ 291-301(1916) (reserving “all coal and other minerals”).

124. 103 S. Ct. 2218 (1983).

125. *Id.*

126. 379 F.2d 803 (1967).

127. *Id.* at 806-07.

128. See *supra* notes 40 and 112.

129. 549 F.2d 1271 (9th Cir. 1977).

130. *Id.* at 1273.

131. *Union Oil*, 549 F.2d at 1273.

132. *Id.*

would not be inconsistent with Congress's general intent of encouraging agricultural development while still maintaining U.S. ownership of the resources to include geothermal steam with the reservation.¹³³

The court's discussion of the ULA lends more context to the analysis.¹³⁴ With the ULA, Congress gave surface owners the right to mine for source materials within the coal reserved to the United States in the 1909 and 1910 Acts.¹³⁵ This demonstrates a willingness for Congress to separate two concurrent minerals. But as the court found, a specific statute was required to do so. This comports with the view that minerals within coal were presumed to be a part of the coal until specifically omitted. Congress has not specifically excluded CBM from the statutes though the gas has been deemed valuable for some time. This failure to statutorily except CBM from the reservation indicates a congressional intent to maintain concurrent ownership.¹³⁶

Chevron

The court's *Chevron* analysis focused on the method by which Solicitor's opinions are promulgated.¹³⁷ This aspect of the decision is not being reheard by the *en banc* court but still requires some analysis.¹³⁸ Without the notice and comment process, the court was rightly concerned that private landowners who had no knowledge of the decision would be affected.¹³⁹ Hesitant to give deference to an opinion that would have a substantial impact on private coal and gas rights, the court refused to be bound by it.¹⁴⁰

The court specifically refused to address the degree of deference due the Solicitor's Opinion as it concerns federal coal interests.¹⁴¹ The decision may nonetheless be persuasive in determining CBM ownership in that context. If agencies are concerned about the opinion's persuasive force, they may choose to create formal rules contrary to this opinion.

Policy Analysis

More important than the legal analysis perhaps, is the practical effect of

133. *Id.* at 1274-75.

134. *Southern Ute*, 119 F.3d at 827-28.

135. 30 U.S.C. § 541-541i (1994).

136. Additionally, this act allowed removal of minerals from lignite coal and CBM is found mostly in anthracitic and steam coals. ENCYCLOPAEDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES, LITERATURE AND GENERAL INFORMATION 588 (11th ed. 1910).

137. *Southern Ute*, 119 F.3d at 832-33.

138. *See supra* note 33.

139. *Southern Ute*, 119 F.3d at 830.

140. *Southern Ute*, 119 F. 3d at 836 n.26. The court explained that deference is not owed to the Solicitor's Opinion in the case of private land interests but did not address the degree of deference due in the case of federal land interests or federal lease forms. *Id.*

141. *Id.*

the court's decision. *Southern Ute* achieves two important policy objectives. First, it helps to clarify the law of CBM ownership, thereby promoting future CBM development. Second, it creates the potential for developing the competing resources efficiently by providing for one owner of both resources.

Clarity with regard to CBM ownership is important where uncertainty existed. Negotiations regarding CBM and its development have been slow because of ownership doubts.¹⁴² Developers would conceivably be hesitant to contract or invest in extraction technology without confirmation of ownership. Some uncertain landowners simply vent what is otherwise valuable gas.¹⁴³ Other reasons for the delayed technological development include the potential of CBM production to restrict the independence of mining operations and interfere with coal extraction in general.¹⁴⁴

By putting coal and CBM in the hands of one party, the court encourages both development and efficiency. Already, the coal owner is required to monitor and vent CBM, thus they will already have technologies in place for handling the gas. Removal of CBM is vital to the development of the coal, rendering the two integrally related.¹⁴⁵ Under this decision, owners will be encouraged to conserve valuable energy resources by coordinating coal and CBM development.

A decision in favor of Amoco on the other hand, would have created competing interests with no means of resolution. The commingled nature of the resources due to the adsorptive tendency of CBM and the current methods of extraction would require cooperation of separate coal and CBM owners. This would increase litigation over issues such as waste and development practices. The future value of the coal is speculative as mining technology continues to improve. Calculating damages owed to a coal owner would be difficult if a CBM owner were held liable. More importantly, perhaps, a decision for Amoco would have put every developer of a coal estate at risk for damages to the owner of the gas resources. Such a result could inhibit coal development and would certainly increase the likelihood of litigation between the coal and gas owners. *Southern Ute* avoids this outcome, arguably preventing large amounts of litigation.

142. Lewin et al., *supra* note 2, at 575.

143. *Id.* at 568.

144. *Id.* at 569 n.16.

145. The court in its analysis gives the impression that these resources are unavoidably competing. In fact the CBM in question is found in the deepest coalbeds and is, for all practical purposes, currently unminable. This detracts from the court's reasoning, suggesting that perhaps these particular minerals are not necessarily competing. The court does not address this in its decision, but regardless, the practicality of the holding is still apparent. Lewin et al., *supra* note 2, at 650. Lewin notes that CBM in the eastern United States is found within minable coal. This could make the analysis with regard to CBM different depending upon the geographic location of the coal. A blanket rule with regard to CBM ownership is illogical then, if it is based upon the unseverability characteristic.

Since the Solicitor's Opinion, considerable development and financial investment has been made in federally-owned coal.¹⁴⁶ If found persuasive in the federal context, *Southern Ute* may render these investments futile. The court does not consider whether reliance upon the Solicitor's Opinion would have been reasonable or whether, if reliance were demonstrated, a remedy would be available. While the court attempts to limit the application of its decision to the lands at issue, it may be found persuasive in unintended contexts such as analogous cases in which the ownership of other coexisting minerals is split. At least one court has relied on the district court's opinion in the context of a coal grant outside the Coal Lands Act.¹⁴⁷ This expansion of the circuit court's holding could pose a problem since the decision may be relied on in less applicable situations and have a confusing and inconsistent effect on the law which traditionally treats gas as gas. Neither does the court sufficiently address the decision's possible overriding effect on state statutes, which legislate CBM ownership and production.¹⁴⁸

Further agency refinement of CBM ownership in federal coal interests is necessary and appropriate. Regulations governing leasing would be helpful as would guidance defining rights of compensation for gas which may have migrated from other sources outside the coal.¹⁴⁹

CONCLUSION

Advances in technology have made development of CBM increasingly valuable in recent years. This decision is a positive step in defining CBM ownership in light of its coming of age. The Tenth Circuit decision clarifies some ownership questions and facilitates development of CBM. The decision is supported by law and consistent with the policy of encouraging agricultural and economic development, conservation, and technological advancement. But this pragmatic decision leaves some questions unanswered. At least 127,000 land patents are affected by this decision including over 20.4 million acres of land in Colorado, New Mexico, Wyoming and Utah.¹⁵⁰

With its decision, the court offers the agency the opportunity to more

146. Appellees petition for rehearing *en banc* at 2, *Southern Ute*, 119 F.3d 816. According to the petition, many private landowners have depended on royalties from CBM development since the Solicitor's Opinion was issued in 1981. *Id.*

147. *Carbon County v. Union Reserve Coal Co.*, 898 P.2d 680, 686 (Mont. 1995). In this case, the Supreme Court of Montana overruled the earlier trial court decision. It held that under *Amoco*, a grant of coal did not include CBM.

148. See Lewin, *supra* note 38. Since states have begun to legislate CBM ownership, there could be inconsistencies between state and federal treatment of the gas.

149. Gases have the potential to migrate from other strata and then become mixed with the CBM. This detracts from the argument that CBM is a part of coal since it is created by and from coal. Lewin, *supra* note 38, at 639-40.

150. Defendants' Petition for Rehearing *en banc* at 2, *Southern Ute*, 119 F.3d 816.

thoroughly define CBM interests. Despite the court's failure to defer to the Solicitor's Opinion, the agency should confirm the outcome of the panel decision and establish policy for applying the decision in all relevant contexts through rulemaking procedures. The Tenth Circuit's panel decision sensibly maximizes production of both CBM and coal resources and provides some measure of certainty in a manner that promotes mineral development. The *en banc* panel should affirm the three judge panel's decision.

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