View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by University of Kentucky

Journal of Natural Resources & Environmental Law

Volume 15
Issue 2 *Journal of Natural Resources & Environmental Law, Volume 15, Issue 2*

Article 3

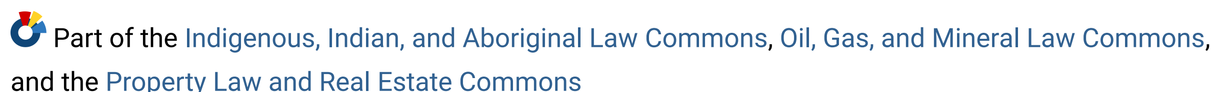
January 2000

Southern Ute: Trial Court to Supreme Court

Elizabeth A. McClanahan

Jill M. Harrison

Follow this and additional works at: https://uknowledge.uky.edu/jnrel



Part of the Indigenous, Indian, and Aboriginal Law Commons, Oil, Gas, and Mineral Law Commons, and the Property Law and Real Estate Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

McClanahan, Elizabeth A. and Harrison, Jill M. (2000) "*Southern Ute*: Trial Court to Supreme Court," *Journal of Natural Resources & Environmental Law*: Vol. 15 : Iss. 2 , Article 3.
Available at: https://uknowledge.uky.edu/jnrel/vol15/iss2/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Journal of Natural Resources & Environmental Law by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

SOUTHERN UTE: TRIAL COURT -TO-SUPREME COURT[1]

ELIZABETH A. MCCLANAHAN* AND JILL M. HARRISON**

One of the most interesting coalbed methane cases in the United States involved the historical relationship between the United States Government and Native Americans. This article focuses on the development of the case and its legal aspects from its origin at the United States District Court of Colorado to its 1999 decision in the United States Supreme Court. This eight year battle will have far-reaching effects throughout the country.

I. UNITED STATES DISTRICT COURT OF COLORADO

In *Southern Ute Indian Tribe v. Amoco Production Co.*,[2] the Southern Ute Indian Tribe ("Tribe") asserted that it owned the coalbed gas underlying approximately 200,000 acres of land within the Southern Ute Indian Reservation in southwestern Colorado ("land"). The United States opened the land to non-Indian settlement, in particular to homestead patentees, under the Act of March 3,

---

[1]The author wishes to thank the Natural Resources Law Center of the University of Colorado School of Law and the El Paso Natural Gas Foundation for providing her with the opportunity for extensive research on coalbed methane as their 1993-94 El Paso Natural Gas Law Fellow and the University of Oklahoma Law Review for publishing the fruits of that research. *See* Elizabeth A. McClanahan, *Coalbed Methane: Myths, Facts, and Legends of its History and the Legislative and Regulatory Climate in the 21st Century*, 48 OKLA. L. REV. 471 (1995). She also wishes to acknowledge and thank Sharon O. Flanery, Esq., co-author of the Mineral Law Update presented at the 15th Annual Energy and Mineral Law Foundation Annual Institute in Lexington, Kentucky, for her assistance with the first case summary of the *Southern Ute* pending litigation.

*Member, Board of Trustees of the Energy and Mineral Law Foundation, recognized as a national authority on coal bed methane. Selected as the El Paso Natural Gas Law Fellow for the Natural Resources Law Center, University of Colorado School of Law in 1994. Member of the National Chamber Foundation Board of the United States Chamber of Commerce, Virginia Bar Association Judiciary Committee, Vice President of the Board of Directors for the Virginia Oil and Gas Association., Member of the Board of Directors for the North American Coalbed Methane Forum. In addition, she serves as Vice-Rector of The College of William and Mary, is past chairman of the State Council of Higher Education for the state of Virginia, and serves on the Board of Trustees for Emory & Henry College, as well as the Board of Directors for the Wellmont Bristol Regional Medical Center. J.D., University of Dayton School of Law.

**Jill M. Harrison has extensive experience performing title examinations for coal, oil and gas acquisitions and development. She also appears before the Virginia Gas and Oil Board on various administrative matters. She is a member of the Appalachian Association of Professional Landmen (AAPL). Harrison also serves on the Bristol Tennessee Planning Commission.

[2]Southern Ute Indian Tribe v. Amoco Prod. Co., 874 F. Supp. 1142 (D. Colo. 1995) [hereinafter Southern Ute]. *See also Native Americans Denied Valuable Coalgas* 38 COAL & SYNFUELS TECH., Vol. 18, (Oct. 3, 1994); *Indian Mineral Rights Don't Include Gas*, GAS DAILY, Oct. 12, 1994.

1909,[3] and the Coal Lands Act of 1910[4] ("1909 and 1910 Acts"). The patentees received all surface and mineral rights except "coal," which was reserved to the federal government. The federal government conveyed the coal to the Tribe in 1938. Subsequently, the Tribe claimed that the coal estate included coalbed gas.

II. BACKGROUND: HISTORICAL TREATMENT OF COAL

The reservation lands became available for public entry either under the Homestead Act of 1862,[5] which allowed entry for agricultural purposes, or the Coal Lands Act of 1873[6] and the Mining Law of 1872,[7] which provided for entry for mining purposes. These acts were subject to substantial abuse, however, because entrymen predominately classified their lands as agricultural, which entitled them to ownership of the land in fee without payment. The acts required coal miners or oil and gas explorers to pay statutorily mandated amounts for lands they acquired. The Department of the Interior relied on the entrymen's classification without further investigation, and the Department conveyed vast amounts of mineral wealth without payment.

In response to this practice, President Theodore Roosevelt ordered the Department of the Interior to withdraw those lands that contained "workable coal" from the entry lands and to suspend the issuance of homestead patents on such lands.[8] This left agricultural homesteaders who had been working coal lands for agricultural purposes in a quandary because they had already invested time and labor in tracts which were no longer available for homestead patents. The congressional response was the 1909 and 1910 Acts. Under the 1909 and 1910 Acts, homestead patentees were granted all surface and mineral rights except "coal," which was reserved to the federal government. Approximately 1.47 million acres of the withdrawn acreage, located near Durango, Colorado, included the acreage in the *Southern Ute* case. Many homesteaders were issued patents subject only to the United States' coal reservation. Consequently, "[t]he non-

[3] Act of March 3, 1909, ch. 270, 35 Stat. 844 (codified at 30 U.S.C. § 81 (1995)).

[4] Coal Lands Act of 1910, ch. 318, 36 Stat. 583 (codified as amended at 30 U.S.C. §§ 83-85 (1995)).

[5] Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified as amended at 43 U.S.C. §§ 161-162, 164, 171 (1995)).

[6] Coal Lands Act of 1873, ch. 279, 17 Stat. 607 (codified as amended at 30 U.S.C.§§ 71-76 (1995)).

[7] Mining Law of 1872, ch. 152, 17 Stat. 91 (1812) (codified as amended at 30 U.S.C. §§ 21-24 (1995)).

[8] 41 CONG. REC. 2614-15, 2806-08 (1907).

federal defendants in this case claim their respective rights, titles and interests as successors in interest to these patentees."[9]

In 1934, however, the Indian Reorganization Act ("IRA") reversed federal policy towards tribal ownership.[10] The IRA authorized restoring any surplus Indian reservation lands to tribal ownership. Pursuant to the IRA, the federal government conveyed the reserved rights to approximately 200,000 acres of coal. Patents issued to non-Indian entrymen under the 1909 and 1910 Acts had reserved this coal to the United States.

III. THE PARTIES AND THEIR POSITIONS

The defendants were comprised of an estimated 20,000 individuals ("mineral owner defendants") who owned the oil and gas estates underlying the land, approximately twenty oil and gas companies ("oil company defendants") that had extracted coalbed gas under oil and gas leases issued by mineral owner defendants, and federal government defendants who had not opposed the extraction of the coalbed gas by the oil company defendants. The relief the Tribe requested included a beneficial interest in the coalbed gas and an award of damages for the value of the extracted coalbed gas. Additionally, the Tribe requested an order granting them ownership of all facilities owned by oil company defendants and installed for the purpose of extracting the coalbed gas. Lastly, they asked for a declaratory judgment that the federal defendants had a fiduciary duty to hold the coalbed gas in trust for the Tribe.[11]

The primary issue in the case was whether coalbed gas was included in the "coal" reserved to the federal government in the 1909 and 1910 Acts. Since 1981, the Department of the Interior had taken the position that coalbed gas was *not* included.[12] Defendants moved for summary judgment. They asserted that the legislative history of the 1909 and 1910 Acts compelled the conclusion that Congress intended to reserve only solid mineral coal, and not coalbed gas.[13]

---

[9] *Southern Ute*, 874 F. Supp. at 1151.

[10] Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1995)).

[11] *Southern Ute*, 874 F. Supp. at 1149-50.

[12] Ownership of And Right to Extract Coalbed Gas in Federal Coal Deposits, 88 Interior Dec. 538 (1981) [hereinafter "1981 Solicitor's Opinion"] ("I conclude that . . . the Reservation of coal to the United States in the Act of Mar. 3, 1909 and the Act of June 22, 1910, 30 USC § 81, 83-85 (1976), did not include the coalbed gas found in the reserved coal."). *Id.* at 540. *See infra* text accompanying note 79 (1981 Solicitor's Opinion withdrawn).

[13] Brief for Defendant in Support of its Motion for Summary Judgment at 13, *Southern Ute*, 874 F. Supp. 1142 (D. Colo. 1995) (No. 91-B02273) [hereinafter Brief for Defendant].

Defendants also relied on the legislative history and substantive provisions of: (1) the 1914 Act,[14] by which the United States reserved gas, including coalbed gas, to itself; (2) the Stock-Raising Homestead Act of 1916,[15] by which, for the first time, the United States reserved in itself all minerals and not just the specifically enumerated minerals; (3) the Mineral Leasing Act of 1920,[16] by which the United States provided separate procedures for the exploration and development of gas and coal and narrowly defined "coal" absent any reference to gases associated with coal; and, (4) the Uraniferous Lignite Act of 1955,[17] by which the United States recognized that patentees under the 1909 and 1910 Acts owned, and had the right to develop, uranium found in association with coal.[18] They also cited the extensive and separate regulatory schemes under federal law for coal and gas, and the different practical considerations governing the development of coal and coalbed gas resources.

Defendants' next argument was based upon the 1981 Solicitor's Opinion that the United States did not reserve coalbed gas under the 1909 and 1910 Acts. Defendants contended that the court was bound by the Department of the Interior's construction of the 1909 and 1910 Acts because the construction was not unreasonable.[19] Defendants also asserted that they were entitled to summary judgment because the only claim against the United States was time-barred and the United States was an indispensable party to the action.[20] The six-year statute of limitations in 28 U.S.C. § 2401(a) governed the Tribe's claim of breach of fiduciary duty against the United States. Defendants asserted that the claim accrued not later than July 22, 1985, when the Tribe admits it received a copy of the 1981 Solicitor's Opinion, and that consequently the claim was time-barred because the Tribe did not bring this action until December 31, 1991, more than six years and five months after accrual.[21] The United States was claimed to be an indispensable party under the Federal Rules of Civil Procedure[22] because resolution of the Tribe's claim will effect the rights and duties of the United States and will determine whether the United States owns the coalbed gas underlying

---

[14]30 U.S.C. §§ 121-123 (1995).
[15]43 U.S.C. § 299 (1995).
[16]30 U.S.C. 181-287 (1995).
[17]*Id.* 541-541(i).
[18]Brief for Defendant, at 43-55.
[19]*Id.* at 94-96.
[20]*Id.* at 132-37.
[21]*Id.*
[22]*Id.* at 137 (citing FED. R. CIV. P. 19).

about 16.2 million acres of land throughout the United States, and not just the 200,000 acres involved in this case.[23]

Finally, defendants asserted that the doctrine of laches barred the Tribe's claims, in addition to the doctrines of acquiescence and estoppel. The Tribe brought this action more than ten years after the 1981 Solicitor's Opinion was issued and more than six years after the Tribe had received a copy of the opinion. Defendants alleged that the Tribe did not assert its claim of ownership promptly, but instead encouraged coalbed gas development on the reservation.[24] The Tribe voluntarily entered into communitization agreements whereby Tribal and private lands were pooled to produce coalbed gas, received and retained royalties for coalbed gas produced pursuant to Tribal oil and gas leases, entered into rights-of-way and water disposal agreements, which facilitated the development of coalbed gas, and sponsored a forum on coalbed gas development. The Tribe delayed bringing its action until after virtually all land on the Reservation had been leased for oil and gas development, after oil company defendants had incurred enormous costs and taken substantial risks, and after coalbed gas had been proven to be a valuable resource.[25]

IV. DISTRICT COURT DECISION

On September 13, 1994, the United States District Court ruled on the summary judgment motions filed by Amoco and the Tribe.[26] The district court held that under the 1909 and 1910 Acts, the reservation of "coal" did not include coalbed methane. The court found that the plain meaning of the word "coal" was a solid combustible mineral substance as evidenced by dictionaries of the time and by modern dictionaries. The statute was, therefore, clear on its face and contained no ambiguity. Secondary materials such as legislative history were unnecessary to make the determination of ownership. Nonetheless, the court exhaustively reviewed the legislative history. The court found that the 1909 and 1910 Acts were intended to be only a narrow departure from previous laws, which had provided for the issuance of homestead patents in fee.

---

[23]*Id.* at 140.

[24]Brief for Defendant, at 143-46.

[25]*Id.*

[26]Prior to the district court's ruling, the case was appealed to the U.S. Court of Appeals (10th Circuit) on procedural issues. *See* Southern Ute Indian Tribe v. Amoco Production Co., 2 F.3d 1023 (1993) (appealing the district court's cost allocation order requiring the Tribe to pay 25% of the cost of mineral and land title examinations from which the Tribe desired to obtain names for class defendant notification purposes. Reversed and remanded to the district court for further proceedings.).

Because all mineral rights had previously been granted, the court held that the 1909 and 1910 Acts included only solid coal, and not coalbed gas.

The court based its rulings, in part, on the history of federal coal legislation beginning with the Act of 1880 ("1880 Act").[27] The 1880 Act terminated tribal ownership in the reservation lands which the government opened to non-Indian settlement. In addition, it limited Indian land ownership to a specific amount allotted in severalty to individual Indians.[28] The court held that "the central feature of the 1880 Act was the *termination of tribal ownership* in the reservation lands . . . ."[29] "All lands not allotted in severalty to individual Indians, then, including the lands in question here, were conveyed by the Utes . . . to become public lands of the United States."[30]

The Tribe claimed that the United States' coal reservations in the 1909 and 1910 Acts included the coalbed gas.[31] However, the district court held as a matter of law that Congress's coal reservation in the 1909 and 1910 Acts did not reserve coalbed gas. The title to coalbed gas was conveyed by United States patents issued to homesteaders under the 1909 and 1910 Acts. Therefore, the Tribe did not acquire title to the coalbed gas when the United States restored the coal to the Tribe under the IRA.[32]

V. COAL INCLUDING COALBED GAS

The Tribe argued that in the 1909 and 1910 Acts the word "coal" might refer to the rock as well as the gas contained in and around the rock. The court disagreed stating that statutory construction is a question of law. In construing a statute, the primary task is "to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."[33] Furthermore, the court held that the relevant congressional intent is that existing at the time of a statute's enactment.[34]

---

[27]Act of June 15, 1880, ch. 223, 21 Stat. 199.

[28]10 CONG. REC. 2059, 2066 (1880).

[29]*Southern Ute*, 874 F. Supp. at 1148 (citing United States v. Southern Ute, 402 U.S. 159, 163 (1971)).

[30]*Id. See also* United States v. Southern Ute Tribe, 402 U.S. 159 at 169.

[31]*Southern Ute*, 874 F. Supp. at 1151.

[32]*Id.* at 1152.

[33]Negonsott v. Samuels, 507 U.S. 99, 103-04 (1993).

[34]Watt v. Western Nuclear, Inc., 462 U.S. 36, 62 (1983).

To determine congressional intent when Congress does not specifically define a term, courts presume the ordinary meaning applies.[35] Thus, the court held that it is appropriate to look at general dictionary and encyclopedia definitions for the ordinary meaning.[36] The court analyzed the differences between the Act of 1909 and the Act of 1910. The Act of 1909 provided that the reservation patent contained "*all coal in said lands* . . . ."[37] The Act of 1910 stated that the reservation patent contained "*all the coal in the lands so patented* . . . ."[38]

The term "coal" was not defined in the 1909 and 1910 Acts. Therefore, the court held that the common ordinary meaning of the word shall apply.[39] The court based its decision upon several definitions of coal.[40] All the definitions reviewed were consistent with the definition of coal used throughout the decades of coal related legislation. In addition, the court also reviewed the term "gas."[41] The definitions of both gas and coal have remained constant since the

---

[35]Russello v. United States, 464 U.S. 16, 21 (1983). *See also* Balanced Rock Scenic Attractions, Inc. v. Town of Anitou, 38 F.2d 28, 30 (10th Cir. 1930); United States v. Colorado and N.W. Ry. Co., 157 F. 321, 332 (8th Cir. 1907).

[36]*See* Addison v. Holly Hill Fruit Prod., 322 U.S. 607, 617-18 (1944); United States v. Jackson, 759 F.2d 342, 344 (4th Cir. 1985); Torti v. United States, 249 F.2d 623, 626 (7th Cir. 1957).

[37]30 U.S.C. § 81 (1995) (emphasis added).

[38]*Southern Ute*, 874 F. Supp. at 1152 (citing 30 U.S.C. § 85 (1995) (emphasis added).

[39]*Id.* at 1153.

[40]In *Southern Ute*, the following definitions of "coal" were reviewed by the court:
"[A] black, or brownish black, *solid*, combustible substance consisting . . . mainly of carbon." AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 244 (1889) (emphasis added).
"[A] black or brownish black *solid* combustible mineral substance . . . ." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 432 (1986) (emphasis added).
"[A] black or brownish black *solid* combustible carbonaceous *rock*, classified as anthracite, bituminous, subbituminous, or lignite . . . ." 25 C.F.R. § 216.101 (1993) (coal on Indian lands) (emphasis added).
"[A] *solid, brittle*, more or less distinctly stratified, combustible carbonaceous *rock*, formed by partial to complete decomposition of vegetation . . . ." A DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 222 (1968) (emphasis added).
"[A] *solid* . . . substance varying in color from dark-brown to black, *brittle*, combustible, and used as a fuel. A GLOSSARY OF THE MINING AND MINERAL INDUSTRY 163 (1920) (emphasis added). *Southern Ute*, 874 F. Supp. at 1152-53.

[41]In *Southern Ute*, the following definitions of "gas" were considered by the court:
"[A]n aeriform fluid supposed to be permanently elastic . . . now applied to any substance when in the elastic or aeriform state." AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 560 (1889).
"[A]n aeriform fluid, having neither independent shape nor volume, but tending to expand indefinitely." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 892 (1902).
"[A] fluid (as air) that has neither independent shape nor volume but tends to expand indefinitely . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 937 (1986).
Southern Ute, 874 F. Supp. at 1153.

enactment of the 1909 and 1910 Acts.[42] According to all the definitions, "coal" is defined in narrow, specific terms under which coalbed gas does not qualify.[43] In contrast, "gas" is defined in broad, general terms under which coalbed gas does qualify.

In sum, the court reasoned that Congress did not intend for coalbed gas to be included in the definition of the 1909 and 1910 Acts for two reasons. First, congressional intent must be derived as of the enactment date.[44] Secondly, the 1909 and 1910 Acts dealt with coal in a "practical way"; therefore, coal should be applied in its ordinary meaning.[45]

VI. CONGRESSIONAL INTENT TO RESERVE COALBED GAS

The Tribe argued that Congress intended to reserve coalbed gas relying on two principles: (1) nothing passes by implication in a public land grant; and (2) such grants should be interpreted in favor of the government.[46] The court held that the Tribe neglected the maxim that "public land grants are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication.'"[47]

The court viewed the legislative history of the 1909 and 1910 Acts and focused on Congress' intent at the time the statutes were enacted. The 1909 and 1910 Acts were passed when coalbed gas was not believed to be a valuable mineral. Instead, it was believed that coalbed gas was only a hazard associated with coal mining. Committee hearings and debates were conducted on the coal lands legislation which illustrated congressional knowledge about coal. Transcripts of the hearings show that Congress was aware of coalbed gas and that it could be valuable in the future. However, no one testified that coalbed gas was a valuable energy resource which should be reserved by the United States in the 1909 and 1910 Acts. Representative Franklin Mondell spoke about the bill when it was being considered by Congress and never mentioned or referred to coalbed gas.[48] The committee raised the question: "[w]hy is it necessary to preserve and reserve . . . the *coal* and not at the same

[42] *Southern Ute*, 874 F. Supp. at 1153.

[43] *Id.*

[44] Watt v. Western Nuclear, Inc., 462 U.S. 36, 62 (1983).

[45] *Southern Ute*, 874 F. Supp. at 1154.

[46] *Id.* at 1159 (citing Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604, 617 (1978)).

[47] *Id.* (citing Leo Sheep Co. v. United States, 440 U.S. 668, 682-83 (1979); United States v. Denver & Rio Grand R.R., 150 U.S. 1, 14 (1893)).

[48] *Id.* at 1156 (citing 45 CONG. REC. 2502-04 (1909)).

time reserve . . . *other fuels such as gas and oil?*"[49] Mr. Mondell answered "oil and gas present much greater difficulties [than coal], when we propose to separate the surface from the mineral . . . ."[50]

The court concluded that these congressional debates indicated that Congress intended for the 1909 and 1910 Acts to reserve only solid rock. The "overriding objective for Congress was to insure an adequate reserve for the nation's primary energy source"— coal.[51] Congress issued the 1909 and 1910 Acts as unlimited patents to reserve a single specific mineral — coal. The legislative reservation of minerals in the Act of 1914[52] demonstrated a much broader scope of mineral reservation by listing each mineral: "phosphate, nitrate, potash, oil, *gas*, or asphaltic minerals."[53]

VII. STATUTORY CONSTRUCTION RULES FOR INDIAN LAWS

The Tribe argued that when ambiguity exists in federal Indian statutes or regulations, the general rule is to resolve these matters in favor of the Tribes. The court held that the 1909 and 1910 Acts are not federal Indian laws. Instead, they are public land laws. Although the Acts may affect Indian lands, the Acts were not passed for the specific benefit of the Tribes. Therefore, the court would not apply the rule in this case.[54]

VIII. 1981 SOLICITOR GENERAL'S OPINION[55]

The court reviewed the effect of the 1981 Solicitor's Opinion which addressed the issue of ownership of coalbed gas in land where the minerals were reserved to the United States.[56] The 1981 Solicitor's Opinion did not address minerals on Tribal lands but concluded that the United States coal reservation did not include the coalbed gas.[57] The court found that *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[58] controlled the analysis for determining the weight given to the 1981 Solicitor General's Opinion:

---

[49] *Id.* (citing 45 CONG. REC. 6044 (1910) (emphasis added)).
[50] *Id.* at 1157.
[51] *Southern Ute*, 874 F. Supp. at 1158.
[52] *Id.* (citing 30 U.S.C. § 121 (1914)).
[53] *Id.* (citing 30 U.S.C. § 121 (1914) (emphasis added)).
[54] *Id.* at 1159.
[55] *See infra* text accompanying note 79 (opinion withdrawn).
[56] *Southern Ute*, 874 F. Supp. at 1159.
[57] *Id.* (citing 1981 Solicitor's Opinion, *supra* note 12 at 540). *See also Rights to Coalbed Methane Under an Oil & Gas Lease for Lands in Jicarilla Apache Reservation*, 98 Interior Dec. 59 (1990).
[58] Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984).

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[59]

The agency's decision is given controlling weight unless it is "arbitrary, capricious, or manifestly contrary to the statute."[60] The 1909 and 1910 Acts do not mention coalbed gas or define "coal." Therefore, the issue for the District Court was whether the 1981 Solicitor's Opinion was based on a permissible construction of these statutes. The court affirmed this position.[61]

IX. THE COURT OF APPEALS[62]

The issues that were presented for appeal were:

1. Whether Congress intended to grant to agricultural entrymen who elected to receive limited patents under the Act of March 3, 1909 or the Coal Lands Act of 1910 the right to extract coalbed methane and other substances from coal deposits underlying the patented lands, even though those Acts reserved to the United States "all coal in said lands" and "the right to prospect for, mine, and remove the same."[63]

2. Whether, under the circumstances of this case and the doctrines set forth in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court is required to defer to the ex parte 1981 opinion of the Solicitor of the Department

[59] *Id.* at 842-43 (citations omitted).

[60] *Southern Ute*, 874 F. Supp. at 1159.

[61] *Id.*

[62] Southern Ute Indian Tribe v. Amoco Production Co., 874 F. Supp. 1142 (D. Colo. 1995), *rev'd* 119 F.3d 816 (10th Cir. 1997).

[63] Alice E. Walker, Presentation of "Summary of *Southern Ute Indian Tribe v. Amoco Production Company* at the Eastern Mineral Law Foundation Coalbed Methane Workshop 4 (June 6, 1995) (copy of the presentation on file with the author).

of the Interior, when that opinion is contrary to Congress' intent and established rules of public land law.[64]

3. Whether the District Court erred in entering judgment against the Tribe on its second claim for relief, which asserted that tribal consent was required to invade tribal coal deposits to extract coalbed methane, no matter who owned the coalbed methane.[65]

The Tribe sought a declaration that the owner of coal deposits and the owner of the right to prospect for, mine, and remove coal reserved under the 1909 and 1910 Acts also owned the coalbed methane located in the deposits and the right to extract coalbed methane from the coalbeds.

On July 16, 1997, the United States Court of Appeals for the Tenth Circuit reversed the lower court's decision and held that the Tribe, as the successor in interest to the United States' statutory reservation of coal, was the owner of the coalbed methane underlying the subject lands. In reaching its decision, the court analyzed the Acts that were the source of the Tribe's interest.

The Court of Appeals further considered the 1981 Department of the Interior Solicitor's opinion, *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*.[66] The court found that the Solicitor's opinion was not binding policy because it was not promulgated through the adequate administrative procedures. It was only a "public pronouncement that Interior will not assert the federal government's right to CBM under its reservation of coal" but rather under its oil and gas reservations.[67] The court also stated that the case on which the Solicitor relied in support of his conclusion was overruled on appeal and that the opinion was inconsistent with Interior statements made contemporaneously with the acts. The court was convinced that the Solicitor's interpretation of the acts was arbitrary because he did not explain how "Congress could have intended to convey a substance neither known to be valuable nor severable at the time of the enactments," and so omitted potentially

---

[64] *Id.*

[65] Brief for Plaintiff at 1-2, Southern Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023 (10th Cir. 1995) (No. 94-1579).

[66] 88 Interior Dec. 538 (1981). *See infra* text accompanying note 79 (opinion withdrawn).

[67] *Southern Ute*, 119 F.3d at 833.

determinative factors from his analysis.[68] The *Southern Ute* case was remanded to the trial court to address various issues raised by the defendants.

Subsequently, the Tenth Circuit Court of Appeals granted a rehearing *en banc* which was held on March 17, 1998. In its July 20, 1998 opinion,[69] the court again reversed the trial court. The July 20, 1998 opinion follows much of the same reasoning set forth in the 1997 decision. The only issue addressed in the rehearing was whether the use of the term "coal" in the acts unambiguously included or excluded coalbed methane.[70]

The Court of Appeals found that the Acts were ambiguous with reference to the definition of "coal." Because ambiguities in land grants are construed in favor of the government and no interest passes other than those conveyed by clear language, the reservation of coal in the Acts included coalbed methane.[71] Therefore, the Tribe, as successor in interest to the United States, is the owner of the coalbed methane.

In assessing whether the Acts were ambiguous, the court attempted to determine whether Congress intended to reserve coalbed methane when it reserved coal. The court first looked to the plain meaning of the statutes, finding that the Acts did not define coal and did not mention coalbed methane. Therefore, the court found the statutes' plain language failed to reveal congressional intent regarding coalbed methane.[72]

The Court of Appeals next evaluated Congress' specific intent when passing the Acts. The court examined whether there was sufficient evidence to conclude that Congress unambiguously intended the term "coal" to include coalbed methane. The court noted that the Acts themselves revealed nothing about specific congressional intent. It found that at the time the Acts were passed, the commercial value of the gas had not been recognized. Furthermore, at that time there was no clear definition of the term "coal." Some definitions characterized "coal" as a solid rock, while others used descriptions which could include coalbed methane. Therefore, the court concluded that the specific intent of Congress could not be determined.[73]

---

[68] *Id.* at 836.

[69] Southern Ute Indian Tribe v. Amoco Prod. Co., 151 F.3d 1251 (10th Cir. 1998) (*en banc*).

[70] *Id.* at 1256.

[71] *Id.*

[72] *Id.* at 1258.

[73] *Id.* at 1261-63.

The Court of Appeals then considered Congress' general intent in passing the Acts. The court reviewed the historical events behind the Acts and the reasons for the coal reservations. It recognized that Congress considered, and rejected, the idea of reserving "all minerals" in the Acts. However, the court found that Congress' decision not to reserve "all minerals" did not reveal whether the reservation of coal included coalbed methane. The court also noted that:

> Congress knew there was indeterminate potential value in the reserved coal and intended to secure that value for the United States. Rather than indicating a limited reservation of coal to the United States, the legislative history suggests that Congress adopted an interpretation of coal which encompassed both the present and future economic value of coal for energy purposes, including value that could only be realized through advances in technology such as those which drive the present day exploration for CBM.[74]

This broad general intent, combined with the fact that Congress failed to clearly convey coalbed methane to the surface owners, persuaded the court that the United States reserved the coalbed methane.

Finally, the Court of Appeals reviewed other statutory reservations of minerals and "found no occasion in which a reservation of a mineral asset to the United States has been treated narrowly to exclude a newly appreciated value associated with that mineral . . . ."[75] The court concluded that the use of the term "coal" in the Acts did not unambiguously exclude or include coalbed methane. Because all uncertainties involving mineral reservations and land grants must be construed in favor of the United States, the coal reservation in the Acts included coalbed methane. Congress' general intent in passing the Acts and interpretations of other statutory mineral reservations also supported this holding.[76]

X. COURT OF APPEALS DISSENT

Judge Tacha authored a dissenting opinion in which two other judges joined. The dissent argued that the term "coal" is not ambiguous. It reasoned that at the time the Acts were passed, the

[74] *Id.* at 1265.
[75] *Id.*
[76] *Id.* at 1267.

plain and ordinary meaning of "coal" clearly excluded coalbed methane. Furthermore, the existence of coalbed methane "was very much a part of the general knowledge in 1909."[77] The dissent also argued that the Acts sought to protect the nation's supply of coal, and did not reserve what was then considered a dangerous waste product. It also claimed that no difference existed between coalbed methane, which is trapped in coal, and other gases, which are commonly found trapped in shale, sandstone, or other rock.[78]

XI. THE SUPREME COURT[79]

Amoco filed a writ of certiorari with the Supreme Court and oral argument on the writ was held on April 19, 1999. Interestingly, "[on] the day the Government's response to petitioners' certiorari petition was due . . . the Solicitor of the Interior withdrew the 1981 opinion in a one-line order stating, . . . '[t]he United States now supports the Tribe's position that CBM gas is coal reserved by the 1909 and 1910 Acts."[80]

On June 7, 1999, the United States Supreme Court reversed the Court of Appeals decision. Justice Kennedy authored the opinion, holding that "coal," as used in the Acts, does not include coalbed methane. The Supreme Court focused on the question of whether, in 1909 and 1910, Congress considered coalbed methane to be a part of coal. The Supreme Court noted that Congress "was dealing with a practical subject in a practical way."[81] Therefore, it was appropriate to examine the relevant terms as they were used in "their ordinary and popular sense."[82] The Court found that, at the time the Acts were passed, the concept of "coal" included only the solid rock mineral.[83]

The Court explained that dictionaries from that time consistently define "coal" as a solid mineral.[84] These dictionaries also define "methane", "marsh gas" or "fire-damp" as "a gas 'contained in' or 'given off by' coal, but not as coal itself."[85] The Court concluded that the definitions indicated that, at the time the Acts were passed, the common understanding of the term "coal" would not have

[77] *Id.* at 1268 (Tasha, J., dissenting).
[78] *Id.* at 1271 (Tasha, J., dissenting).
[79] Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999).
[80] *Id.* at 872.
[81] *Id.* at 873.
[82] *Id.*
[83] *Id.* at 874.
[84] Amoco Prod. Co. 526 U.S. at 874.
[85] *Id.* at 875.

included coalbed methane.[86] The Court further stated that coalbed methane was viewed as a "distinct substance that escaped from coal as the coal was mined, rather than as a part of the coal itself."[87]

The Supreme Court supported its position by looking to the history of the Acts. It noted that the purpose of the Acts was to preserve the nation's energy resources. At the time, coalbed methane was not an energy source. Instead, it was thought to be a dangerous by-product of coal mining. Therefore, Congress had no reason to reserve the coalbed methane.[88]

Finally, the Court addressed the Tribe's argument that if the coalbed methane was owned separately from the coal, a split estate would be created which would make coal mining difficult due to the necessity of venting the gas. The Court observed that it was unlikely Congress considered this issue.[89] It further noted that the issue before it was not one of damage or injury (caused by split estates), but a question of ownership.[90] Nevertheless, the Court indicated that coal owners may, without liability to the gas owner, vent gas while mining,[91] and it noted that the Tribe's position would also result in a split gas estate. If the Court were to find that coalbed methane was owned by the coal owner, gas producers would be faced with the problem of determining which gas originated from the coal seam.[92] The Court held that "the most natural interpretation of 'coal' as used in the 1909 and 1910 Acts does not encompass CBM gas . . . ."[93]

XII. SUPREME COURT DISSENT

Justice Ginsburg dissented from the decision. She stated that she would affirm the Tenth Circuit's holding for the reasons set forth in that decision.[94]

XIII. BEYOND *SOUTHERN UTE*

Thus ended a landmark case in the ongoing saga of coalbed methane development in the United States. The decision in this case will be far-reaching and, in fact, has spawned other legislation. It

---

[86] *Id.*
[87] *Id.* at 874.
[88] *Id.* at 875-876.
[89] Amoco. Prod. Co., 526 U.S. at 878.
[90] *Id.* at 879.
[91] *Id.* at 879-80.
[92] *Id.* at 879.
[93] *Id.* at 880.
[94] *Id.*

will also certainly be interesting to mark the progress of coalbed methane disputes on private lands in the years to come.

XIV. LEGISLATION

A. Public Law No. 105-367[95]

On November 10, 1998, President Clinton signed into law new federal coalbed methane legislation as Public Law No. 105-367. This legislation was a direct result of the 10th Circuit Court of Appeal's holding in the *Southern Ute* case. Congress enacted the legislation to "protect the sanctity of contracts and leases entered into by surface patent holders with respect to coalbed methane gas."[96] Basically, the law protects leases and contracts covering any land that was conveyed by the United States under the 1909 and 1910 Acts that were entered into by a person who has title to land derived under the Acts and that conveyed the rights to explore for, extract, and sell coalbed methane from this land. In addition, the law protects coalbed methane production from the lands derived from the 1909 and 1910 Acts by a person who has title to the land and who, on or before the date of enactment of this Act, has filed an application with a state agency for a permit to drill an oil and gas well to a target in a coal formation.

The applicability of the act was limited to valid contracts or leases in effect as of the enactment date (Nov. 10, 1998).[97] In addition, it only applies to lands to which the United States is the owner of the coal reserved to it in a patent issued under the 1909 or 1910 Acts, the position of the United States as the coal owner not having passed to a third party by deed, patent, or other conveyance.[98] Most importantly, the act shall not apply to any interest in coal or land conveyed, restored, or transferred by the United States to a federally recognized Indian Tribe. The act shall not be construed as a waiver of any rights of the United States with respect to coalbed methane production that is not subject to subsection (a).[99]

---

[95]Pub. L. No. 105-367, 112 Stat. 3313 (codified as 30 U.S.C. § 81 (Supp. 2000)).
[96]*Id.*
[97]*Id.*
[98]*Id.*
[99]*Id.* at 3313-14.

B. Public Law No. 106-31[100]

On May 21, 1999, President Clinton signed into law a bill commonly referred to as the Kosovo Funding Bill. One of the riders attached to this bill affects coalbed methane permitting in the Powder River Basin. Specifically, the bill appropriates $1,000,000 for the Bureau of Land Management to use in the processing of CBM well permit applications for wells in the Powder River Basin.[101] This program may not process applications where the proposed well site is located in an area covered by a coal lease, a coal mining permit, or an application for a coal mining lease, unless the coal and gas operators entered into a written agreement.

XV. THE EFFECT OF *SOUTHERN UTE* ON STATE COURT DECISIONS

In evaluating coalbed methane disputes, state courts have looked to three basic theories to determine ownership, which has been simplified below for purposes of illustration.[102] First, if the conveyancing or reservation terms are ambiguous, the intent of the parties should be considered (the "intent theory"). The second theory evaluates the words "coal" and "gas" and their definitions as used in the relevant documents and statutes. If the instruments do not explicitly grant rights to "gas" or "coalbed gas," then such rights were reserved (the "definitions theory"). The third theory reasons that removal of coalbed methane is so essentially and inextricably tied to the mining process that the rights to the coalbed methane gas must necessarily be intended to be conveyed when the rights to the coal are conveyed (the "production method theory").

These three theories were addressed in the *Southern Ute* analysis and have been used in the coalbed methane cases involving private lands. These approaches would also most likely be applied by a state court evaluating a private lands dispute. The major

[100] Kosovo Funding Bill, Pub. L. No. 106-31, 113 Stat. 57 (1999).

[101] *Id.* at 88.

[102] Three Approaches to Coalbed Methane Case Decisions

1 - INTENT - What was the intent of: (a) the parties to the deeds; and/or (b) the legislators when legislation was drafted?

2 - DEFINITIONS - the definitions or plain meanings of the terms gas, coal, and minerals have played a factor in many of the courts' decisions

3 - PRODUCTION METHOD - the location (or site) of the coalbed methane at the time of its capture has influenced certain of the decisions, along with the methods used for production of coalbed methane Definitions - the definitions or plain meanings of the terms gas, coal, and minerals have played a factor in many of the court's decisions. *See* Elizabeth A. McClanahan, *Coalbed Methane: Myths, Facts, and Legends of its History and the legislative and Regulatory Climate in the 21st Century*, 48 OKLA. L. REV. 471 (1995). *See generally*, Southern Ute Indian Tribe v. Amoco Prod. Co., 151 F.3d 1251 (10th Cir. 1998) (*en banc*).

difference in analysis between the *Southern Ute* decision and a state court analysis would involve the application of the intent theory. The *Southern Ute* Court looked at congressional intent behind the 1909 and 1910 Acts, while a court examining the private lands cases would look to the intent of the parties to the relevant agreements.

XVI. DEFINITIONS AND INTENT METHODS

When deciding *Southern Ute*, the Supreme Court examined the definitions of "coal" and "gas." The Court looked at the understanding of "coal" and "gas" and found that the historical and current understandings about the resources support the holding that the coalbed methane belongs to the gas estate. In *Southern Ute*, the Court also looked at dictionary definitions at the time of the Acts in an attempt to discern congressional intent behind the Acts. Although we have not examined dictionaries from 1948 through the present, modern sources continue to refer to "coal" as a solid substance and "methane" as a clear gas.[103] We can be assured that, when adjudicating a private lands case, a state court will look to the definitions of the terms and the intent of the parties to the relevant leases or deeds.[104] While reliance on dictionary meanings and common usage may be appropriate in assessing congressional intent, it may not be appropriate in a private lands situation. The legislators who were dealing with the problems addressed in the Acts were not experts in the coal or energy fields; they were elected officials with various backgrounds. By contrast, the parties negotiating private instruments may be experts in the industries with which they were dealing. The dictionary definitions, while useful and appropriate to the lay person, do not fully reflect the terms' meanings as understood by those engineers and businessmen operating in the industry.

---

[103] *See, e.g.*, THE NEW LEXICON WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE: DELUXE ENCYCLOPEDIA EDITION (1987) ("coal . . . a combustible deposit of vegetable matter . . . rendered compact and hard by pressure and heat"; "methane . . . an odorless, colorless, inflammable hydrocarbon . . . found in natural gas and coal mines (fire-damp). It is an important constituent of coal gas."); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997).

[104] "Deeds are constructed in the same manner and under the same principles as other written instruments, the fundamental purpose being to arrive at the intention of the parties." 23 AM. JUR. 2D *Deeds* § 222, n.40 (1983) (citing Rush v. Champlin Refining Co., 321 P.2d 697 (Okla. 1958); Crow v. Thompson, 131 S.W.2d 1064, *writ dism.* (Tex. Civ. App. 1939); Joseph Mann Library Ass'n v. Two Rivers, 272 Wis. 44, 76 N.W.2d 388 (1956)).

XVII. PRODUCTION METHOD

In *Southern Ute*, the Court addressed the Tribe's argument that if the coalbed methane was owned separately from the coal, a split estate would be created, which would make coal mining difficult due to the necessity of venting the gas. The Court indicated that the coal owners may have vented gas while mining without liability to the gas owner, and it specifically found that the right to vent gas for mining purposes did not imply ownership of the coalbed methane. The Court thus rejected the Tribe's split-estate argument, noting that if the Court were to conclude that coalbed methane is owned by the coal owner, the gas estate would be split and producers would be faced with the problem of determining which gas originated from the coal seam and which gas did not. This theory, which has been analyzed and adopted in Alabama, Florida, Montana, and Pennsylvania, may have less weight for future courts considering the issue after the Southern Ute case.[105]

XVIII. CONCLUSION

A United States Supreme Court decision is binding upon state courts in cases of federal questions and U.S constitutional issues.[106] Since the *Southern Ute* decision is an interpretation of federal land acts, it is not binding on state courts in questions involving private land and contract disputes. Although the decision is not binding on state courts, I expect that state courts would find the decision persuasive and advisory.[107] It may, therefore, weaken some of the analysis made by the state courts in previous coalbed methane decisions.

---

[105]The following decisions were determined based all or in part upon the production method: NCNB Texas Nat'l Bank v. West, 631 So. 2d 212 (Ala. 1993); Vines v. McKenzie Methane Corp., 619 So. 2d 1305 (Ala. 1993); *In re* Hillsborough Holdings Corp., 207 B.R. 299 (Bankr. M.D. Fla. 1997); Carbon County v. Union Reserve Coal Co., 898 P.2d 680 (Mont. 1995); United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983).

[106]Henderson v. State *ex rel* Frazier, 65 So. 2d 22, 26 (Fla. 1953); New Orleans Water-Works Co. v. Southern Brewing Co., 36 F. 833 (C.C.E.D. La. 1888); Dodge v. Adams Express Co., 54 Pa. Super. 422, 425 (1913).

[107]Railway Passenger Assurance Co. of Hartford v. Pierce, 27 Ohio St. 155 (1875).