# NOTE

# *SOUTHERN UTE INDIAN TRIBE v. AMOCO PRODUCTION COMPANY*: JUDICIAL CONSTRUCTION OF COALBED METHANE GAS OWNERSHIP

## I. INTRODUCTION

In recent years, heightened interest in the commercial recovery of coalbed methane gas (CBM gas)[1] has been spurred by technological advances[2] and congressional incentives.[3] Actual CBM gas production in the United States rose from 26 bcf in 1987 to 348 bcf in 1991[4], and CBM gas currently accounts for six percent of all proven gas reserves.[5] The United States has approximately 90 trillion cubic feet of recoverable CBM gas, the equivalent of five years of natural gas production.[6] CBM gas generally contains over 80 percent methane, the primary component in natural gas.[7]

1. CBM gas is a recognized by-product of the "coalification process." Jeff L. Lewin, Hema J. Siriwane, Samuel J. Ameri, and Syd S. Peng, *Unlocking the Fire: A Proposal for Judicial or Legislative Determination of the Ownership of Coalbed Methane*, 94 W.VA.L.REV. 563, 572 (1992). When plants incorporate carbon dioxide and water, hydrocarbon-based compounds are formed. These compounds decay to form peat which is buried under other sediments. Pressure and temperature eventually convert the peat to coal, methane, and other gaseous byproducts. *See* Carbon County v. Baird, 1992 WL 464786, *2 (Mont. Dist. 1993). *See also* Lee Davidson, *Oil and Gas Law: Ownership of Coalbed Methane Gas*, Vines v. McKenzie, 33 WASHBURN L.J. 911 (1994).

2. Donald F. Santa, Jr. and Patricia J. Beneke, *Federal Natural Gas Policy and the Energy Policy Act of 1992*, 14 ENERGY L.J. 1, 44-45 (1993). The increase in commercial recovery interest is attributed to a "greater understanding of the geology and the technology necessary to produce CBM gas." *Id.* at 44. With a push toward developing alternative energy resources, the production of CBM gas has grown significantly in recent years. Interest in the development of CBM gas in the United States did not become substantial until the energy crisis of the 1970s. European nations, however, have used CBM gas as an energy source since the 1950s. Lewin, et al., *supra* note 1, at 566.

3. Congress enacted a federal tax credit applicable to the production of CBM gas in the Internal Revenue Code. 26 U.S.C. § 29 (1996). Although CBM gas is not specifically addressed in the statute, CBM gas falls under the statutory definition as a gaseous product in the coal strata. Additional incentives for CBM production were included in the Energy Policy Act of 1992. Pub. L. No. 102-486, 106 Stat. 2776 (1992).

4. Santa and Beneke, *supra* note 2, at 44-45.

5. *Proved Oil and Gas Show Improvement*, 217 WORLD OIL 79 (1996). *See generally* 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, 632 (1994).

6. Lewin, et al., *supra* note 1, at 574. *See also* Herbert T. Black, *Update on U.S. Coalbed Methane Production*, NATURAL GAS MONTHLY, Oct. 1990.

7. Lewin, et al., *supra* note 1, at 572. Despite the characteristic similarities, natural gas and CBM gas are easily distinguishable because of their chemical make-up. For instance, CBM gas usually contains smaller quantities of ethane than does natural gas. Unlike natural gas, CBM gas contains no propane, butane, pentane, carbon monoxide or sulfur compounds. *Id.*

Although CBM gas can exist as a free gas, it is most commonly found within the micropores of coal.[8] During the coal mining process, CBM gas is released in two steps. First, CBM gas is released from the micropores and flows into larger macropores. CBM gas in the macropores then flows to the mine face through a system of fractures in the coal.[9]

Although the majority of CBM gas remains in the coal seam, some gas migrates from the coal strata.[10] When coal is mined using typical methods[11], the coal seam is often fractured and methane gas leaks out into areas of less pressure.[12]

The physical relationship between coal and CBM gas raises serious legal questions when there is a diversity of ownership in subsurface rights, with one party holding title to the coalbed and another party holding property interest in other subsurface resources such as oil and gas: (1) If the CBM is encountered during activities incident to coal mining, does the coal owner have a right to capture CBM gas or must a valuable energy resource be released into the atmosphere? (2) Since the CBM gas is contained in the coal seam, does the ownership of CBM gas carry the right to access the coal strata for purposes of production? (3) If the production of either coal or CBM gas diminishes or interferes with the recoverable quantity or value of the other resource, what forms of restitution are available to the owner of the affected resource?

A federal court recently addressed a dispute over CBM gas ownership as a case of first impression in *Southern Ute Tribe v. Amoco Production Company*.[13] The case turned on the court's interpretation of the Coal Lands Acts of 1909 and 1910[14], which reserved the coal beneath early homestead lands to the United States. Interest in some of these lands eventually passed to Amoco Production Company (Amoco) and other defendants. Equitable title to the coalbeds beneath these lands was eventually returned to the Southern Ute tribe. The question before the court

8. Lewin, et al., *supra* note 1, at 573. The percentage of methane in coal depends on a number of factors including, but not limited to: coal rank, pressure, temperature, permeability of coal, porosity of coal, the degree of fracturing, and the condition of the adjacent strata. Lewin, et al., *supra* note 1, at 572. *See generally*, Robert L. Shuman, *Subjacent Support: A Right Afforded to Surface Estates Alone?* 97 W.VA.L.REV. 1111 (1995).

9. Lewin, et al., *supra* note 1, at 573.

10. Davidson, *supra* note 1, at 6. The coal seam is the porous layer where solid rock coal is located.

11. For a general explanation of coal mining techniques, see DONALD N. ZILLMAN AND LAURENCE H. LATTMAN, ENERGY LAW, 1983. Underground mining typically employs two methods: (1) Room-and-pillar mining, in which coal is removed by cutting and blasting; and, (2) Longwall mining in which a cutting machine is moved back and forth across the working face of the coal. *Id.* at 317.

12. CBM gas collects in these areas, increasing the likelihood of explosions. This serious health hazard requires ventilation before miners can continue coal production. The hazard is so extreme that Congress requires constant monitoring of CBM gas in designated work areas. 30 U.S.C. § 836(h) contains special provisions for ventilation processes, mandates CBM level monitoring, and provides for minimal levels of methane concentration in mine areas.

13. 874 F. Supp. 1142 (D. Colo. 1995)(This opinion amends and supersedes a previous decision entered in Southern Ute Indian Tribe v. Amoco Prod. Co., 863 F. Supp. 1389 (D. Colo. 1994)). *See also* Southern Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023 (10th Cir. 1993).

14. 874 F. Supp at 1161.

was whether CBM gas attached to the surface owners or remained with the coalbed owners.

This Note scrutinizes the *Southern Ute* opinion and concludes that such a precedent could have a negative impact on the development of CBM gas as an alternative energy resource. The decision arguably affects the ownership of substantial quantities of CBM gas reserves in coal lands and is important not only to the numerous individuals with an identifiable economic stake but also to those in the energy field seeking to maximize resource development and protect existing resources.

Part II of this Note provides a general overview of federal Indian policy, clarifying the circumstances surrounding the tribe's reacquisition of property, and explains the legal uncertainties that gave rise to the present conflict. Part III sets forth the procedural history of the case. Part IV analyzes the court's reasoning and discusses the legal effects of this decision. Part V compares and contrasts judicial construction of CBM gas ownership in other jurisdictions. Part VI concludes that the *Southern Ute* decision hinders CBM gas production and calls for legislative action to clarify the status of CBM ownership.

## II. BACKGROUND

### A. *The Coal Lands Acts of 1909 and 1910*[15]*: How Amoco and Other Defendants Secured Title to the Surface Lands in Dispute*

In the 1860s, the Confederated Bands of Utes, a group of several tribes which included the Southern Utes, collectively traded their aboriginal lands in New Mexico, Utah, and Colorado to the United States, for a fifteen million acre reservation in southwestern Colorado.[16] In 1874, after the discovery of valuable minerals on the Ute lands, the United States obtained a 3.7 million acre cession of lands in the middle of the reservation[17], significantly altering the Ute reservation boundaries.

As a member of the Confederated Bands of Utes, the Southern Utes independently occupied and owned a strip of land located at the southernmost portion of the original Ute reservation.[18] In 1880, an uprising known as the "Meeker Massacre" resulted in the death of twelve non-Indians on the Ute reservation. Public outcry over the deaths lead to the Act of 1880 in which Congress terminated tribal ownership in the reservation lands of the Southern Ute.[19]

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15. The Coal Lands Act of 1909, 35 Stat. 844, 30 U.S.C. § 81; The Coal Lands Act of 1910, 36 Stat. 584, 30 U.S.C. § 85.

16. 874 F. Supp. at 1147.

17. The cession, which was granted to the United States by the Confederated Bands of Utes, took place in the Brunot Cession. 18 Stat. 36 (1874). *See* United States v. Southern Ute Tribe, 402 U.S. 159, 162 (1971).

18. 874 F. Supp. at 1147.

19. 21 Stat. 199 (1880). Although the Meeker Massacre was the justification given for the forced allotment of the Southern Ute lands, this federal action was simply one of the first manifestations of a new federal Indian policy of breaking up tribal ownership. This new federal Indian policy was formally implemented just seven years later in the General Allotment Act of 1887. 24 Stat. 388.

The Act of 1880 required the tribe to "cede to the United States all territory . . . except as hereinafter provided for their settlement."[20] The Act provided for the removal of the Southern Utes to an area of unoccupied "agricultural lands" on the La Plata River in Colorado. The Act further provided for the termination of common tribal ownership and required lands to be allotted to individual Indians.

After the lands were individually allotted, large tracts of land remained. The Act provided that these surplus lands be "conveyed to the United States . . . and deemed to be public lands of the United States and subject to disposal," for the financial benefit of the tribe.[21]

Over the next four decades, the federal government made these surplus lands available for public entry and settlement under various public land laws such as the Homestead Act of 1862[22] and the Coal Lands Act of 1873.[23] Homesteaders could obtain a fee simple absolute title to 160 acres of land at no cost.[24] Others could obtain 160 acres of coal lands at a price of ten to twenty dollars per acre, depending on geographic proximity to the railroads.[25] Oil and gas explorers could obtain fee simple absolute title for $2.50 per acre.[26]

Soon after the surplus lands were conveyed, it was discovered that many patents had been obtained fraudulently as a product of a passive application process. The Department of the Interior (DOI) approved applications for lands without investigating the mineral composition of the lands and permitted entrymen to classify their own lands and pay accordingly. This system of transferring title without inspection provided an incentive for coal speculators to purposely misclassify their lands. As a result, the DOI issued patents to numerous acres rich in minerals.

At the turn of the century, a coal shortage, at a time of increased need for coal, brought the need to preserve coal reserves to the attention of legislators. President Theodore Roosevelt acted to protect coal reserves and curb the fraudulent acquisition of public lands by ordering the Department of the Interior to withdraw lands containing "workable coal" from the lands slated for homesteading, and to cease approving patents for coal lands.[27]

President Roosevelt's order affected thousands of homesteaders who had entered and improved the land, because it reserved subsurface rights to the federal government.[28] To address the homesteaders' property interest concerns and to promote the development of coal as the nation's lead-

20. 21 Stat. at 200.
21. Southern Ute, 402 U.S. at 163-164.
22. 43 U.S.C. § 161 (repealed 1976).
23. 17 Stat. 607 (1873).
24. 3 Stat. 566 (1820).
25. 17 Stat. 607 (1873).
26. 30 U.S.C. §§ 29, 30, 37.
27. 874 F. Supp. at 1149, *citing* 41 Cong. Rec. 2614-15 (1907). This order affected over 65 million acres of western coal lands.
28. H.R. REP. No. 2019, 60th Cong., 2d Sess., 1-3 (1909). This report discussed the impact of the order on homesteaders who took patents in the late 1800s and early 1900s.

ing energy source, Congress passed the Coal Lands Act of 1909.[29] The 1909 Act expressly reserved to the United States "all coal" within withdrawn lands.[30] The 1909 Act was, however, limited to lands that were already settled and no provisions were drafted to deal specifically with future settlement on land tracts that had been withdrawn. The 1910 Act[31] reserved "all coal" on lands to be settled in the future.

### B. *Federal Indian Policy and the Restoration of Coal: How the Southern Utes Secured Title to the Coal Beneath the Lands in Dispute*

At the turn of the century, the prevailing federal Indian policy was a policy of "allotment and assimilation."[32] The federal government divided and allotted vast tribally owned tracts of land to individual Indians,[33] intending to encourage an agrarian lifestyle among individual Indians in anticipation of assimilating the Indians into the majority culture.[34] Policymakers viewed common tribal ownership of lands as an obstacle to assimilation, and believed that the existence of tribes as distinct political entities would soon end.[35]

By the 1930s it was apparent that the federal policy of allotment and assimilation had failed.[36] The tribes still existed as distinct political entities and the mainstreaming of the individual Indian into the majority culture

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29. 35 Stat. 844.

30. The 1909 Act reads: "Any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being of 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 the 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. The owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit. Nothing herein contained shall be held to affect or abridge the right of any locator, selector, or land located, selected, or entered by him. Such locator, selector, or entryman who has made or shall make final proof showing good faith and satisfactory compliance with the law under which his land is claimed with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal." *Id.* (emphasis added)

31. 36 Stat. 584.

32. FELIX S. COHEN, HANDBOOK ON FEDERAL INDIAN LAW, 127 (1982). The allotment and assimilation era in federal Indian policy began with the enactment of the General Allotment Act in 1887. 24 Stat. 388, as amended, 25 U.S.C. §§ 331-58 (1988).

33. *See generally* Hodel v. Irving, 481 U.S. 704 (1987).

34. *See* S.L. TYLER, A HISTORY OF INDIAN POLICY 95-104 (1973).

35. *Id.*

36. Of the 140 million acres of land which the tribes collectively owned in 1887, only 50 million acres of land remained when the IRA was enacted in 1934. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 5 (2d ed. 1992).

had failed. As a means of survival, Indians were leasing and selling allotted lands to non-Indians.[37]

Tribal land bases eroded rapidly as over 90 million acres of tribal lands passed from Indian ownership.[38] In response to the allotment policy failures, federal policy shifted toward a "revival of tribalism" and Congress enacted the Indian Reorganization Act of 1934 (IRA).[39] The IRA presumed that tribes would exist for an indefinite period of time and therefore sought to protect tribes and tribal resources.[40] Section five of the IRA authorized the Secretary of the Interior to restore to the tribe the remaining surplus lands the United States acquired from the tribes during the allotment period.[41]

In 1938, the Secretary of the Interior conveyed to the Southern Utes equitable title in approximately 200,000 acres[42] of coal which had previously been reserved to the United States under the Coal Lands Acts, thus setting the stage for the central question before the district court: Did reservation of coal by the United States also include reservation of CBM gas, in which case, title to the CBM gas was restored to the tribe in 1938?

## III. THE STATEMENT OF THE CASE

Plaintiffs, the Southern Ute Indian Tribe,[43] own the coal strata within the Southern Ute reservation. The tribe also claimed ownership of CBM gas in the coal strata. The tribe brought suit against a certified class of oil companies and individuals claiming ownership interest in CBM gas and

37. *See* F. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984).

38. South Dakota v. United States Dep't of the Interior, 69 F. 3d 878, 883 (9th Cir. 1995).

39. 48 Stat. 984 (codified at 25 U.S.C. § 461-494 (1988)). The purpose of the IRA was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. REP. NO. 1804, 73D CONG., 2D SESS. 6 (1934). *See* 25 U.S.C. § 450 (1988).

40. While the specific provisions of the IRA provide for tribal acquisition of "lands," this note employs the term "tribal resources," describing a broad category of tribal resources, i.e. land, water, mineral, oil, and gas. Specific regulations for land acquisitions are detailed at 25 C.F.R. § 151.3.

41. Section five of the IRA, codified at 25 U.S.C. § 465, was interpreted in South Dakota v. United States Dep't of Interior, 69 F. 3d 878 (1995)(holding that the Secretary of the Interior's power to take lands into trust for a tribe violated the non-delegation doctrine). A petition for a writ of certiorari has been filed in this case.

Due to reacquisition of lands under the IRA, the Southern Ute reservation is presently subject to several types of ownership classifications. Lands are either: (1) held in trust for the tribe by the United States; (2) held in trust for individuals by the United States; (3) owned in fee simple by the tribe; or (4) owned in fee simple by both Indians and non-Indians. This checkerboard pattern of land ownership coupled with a similar pattern of coalbed ownership provides the backdrop for the present conflict.

42. This 200,000 acres constitutes the entire Southern Ute reservation prior to allotment.

43. The Southern Ute Tribe is a federally recognized Indian tribe currently residing in southwestern Colorado. The tribe operates as a distinct political entity with a functioning tribal government that was formally established under the Indian Reorganization Act of 1934. The tribe currently owns and operates a number of businesses which employees over one half of all tribal members. The tribe also operates a range management program for preserving game. Richard O. Clemmer, *Hopis, Western Shoshones and Southern Utes: Three Different Responses to the Indian Reorganization Act of 1934*, 10 AM. INDIAN CULTURE & RES. J. 15, 29 (1986).

sought a declaration of ownership in the CBM gas, injunctive relief, and damages based on various theories including trespass and conversion.[44] The tribe named Amoco the principal defendant and class representative because Amoco owns oil and gas interests on approximately 150,000 of the tribe's 200,000 acres and operates nearly one half of the existing oil and gas wells on the tribe's land. At stake in this litigation were several million dollars worth of CBM gas and the future ownership status of CBM gas in lands affected by the Coal Lands Acts.

After cross-motions for summary judgment on the issue of CBM gas ownership, the district court entered judgment in favor of the defendant class. The tribe then appealed to the Tenth Circuit Court of Appeals.[45]

## IV. Decision Analysis

The central issue in *Southern Ute* was whether CBM gas was included in the reservation of coal to the United States under the 1909 and 1910 Acts.[46] If the court determined that the United States had reserved CBM gas in the reservation of "coal," then the tribe necessarily would have obtained ownership of the CBM gas when, in 1938, the United States restored coal ownership to the tribe. The court determined that CBM gas was not included in the reservation of coal to the United States, and that the tribe did not acquire title to such gas.

### *A. "Plain Meaning" Analysis*

The tribe argued that the meaning of the word "coal" in the 1909 and 1910 Acts is ambiguous, because it could refer to other elements of coal and not just the solid rock form. The court disagreed with the tribe and applied a "plain meaning" analysis to the Acts. In the statutory construction of the Acts, the court followed the principle that the primary task in construing a statute 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."[47]

The defendant class traced its title to patents issued under the Coal Lands Acts. Therefore, the court's statutory construction involved an analysis of contemporaneous congressional intent. To determine congressional intent, the court looked at the plain language of the statute and assumed that such language "accurately expresses legislative purpose."[48] The court posited that, in the absence of a congressional definition of coal, it is appropriate "to look to general dictionary definitions to ascertain the

44. *Summaries of Opinions From the Courts*, 24 Colo. Law. 725 (1995).

45. The *Southern Ute* case is currently on appeal to the Tenth Circuit. Oral arguments were held in November 1995. As this Note goes to print, the Tenth Circuit has not yet entered a decision.

46. 874 F. Supp at 1151.

47. 874 F. Supp at 1152 (quoting Negonsott v. Samuels, 113 S. Ct. 1119 (1993)).

48. 874 F. Supp. at 1152 (relying on United States v. James, 478 U.S. 597, 604 (1986)); Consumer Prod. Safety Comm'n v. G.T.E. Sylvania, Inc., 447 U.S. 102, 108 (1980); United States v. Shriver, 989 F. 2d 898, 901 (7th Cir. 1992).

plain meaning of the word," and then construe the statute in "a common sense fashion."[49]

According to the court, the plain meaning of the word "coal" does not include CBM gas. The court engaged in a thorough discussion of the various dictionary and encyclopedia definitions of the word "coal" and came to the "common sense" conclusion that coal is a solid rock substance and not a gas.[50] Since CBM gas is physically a gas and not a solid, the tribe could not hold title to the gas.

The tribe had asked the court to consider various technical and scientific theories concerning the physical relationship between coal and CBM gas. The court declined the tribe's request on the ground that "present day scientists who are experts in the field disagree whether CBM gas is a part of coal."[51] Because there is disagreement among experts, the court determined that there is "neither a genuine issue of material fact nor an ambiguity in the Acts."[52] After arriving at the "common sense" dictionary definition of "coal" and determining that the use of experts would not be helpful in deciding the central issue, the court concluded "that Congress did not intend to reserve CBM gas in the 1909 and 1910 Acts but only the solid rock coal."[53]

### *B. Legislative History*

Having completed its statutory construction analysis and fully deciding the central issue in the case, the court nonetheless engaged in a "secondary analysis" to justify the ruling,[54] namely an examination of legislative history and a 1981 Solicitor's Opinion.

The court's analysis of relevant legislative materials resulted in no indication that Congress ever considered whether "coal" could have other components that should also be reserved in the Coal Lands Acts. The court spent extensive time reiterating that "coal" refers only to the solid rock substance. For instance, congressional floor debates are quoted at length in the court's opinion to illustrate the understanding of what the term "coal" meant at the time of enactment.

Interestingly, the floor debate exchanges that are included in the text of the court's opinion raise serious questions as to the court's understanding of scientific and technical terms. For instance, the court includes in its opinion an excerpt from a floor debate in which the Representative views the coal shortage as "an important matter . . . [that] involves every ton of coal in the United States."[55] Rather than considering the entire dialogue in

49. 874 F. Supp. at 1152.

50. *Id.* at 1153-54.

51. *Id.* at 1154.

52. *Id.*

53. *Id.*

54. *Id.* "Although I do not think it necessary to resort to secondary materials or other rules to glean congressional intent, assuming the term 'coal' is ambiguous in the 1909 and 1910 Acts, [I] resort to such legal aids to the same result here." *Id.*

55. 45 CONG. REC. H6048 (1910)(statement of Rep. Ferris).

which the need to preserve resources is emphasized, the court took this sentence out of context and pointed out that "it is significant that coal was referred to by the 'ton' as a solid to be 'mined' from the land."[56] In this statement, the court incorrectly conveyed three concepts: (1) The floor debate *never* mentioned whether Congress was referring to a solid, gas, or liquid substance. In fact, the plain language of the Coal Lands Acts refers to "*all* coal" without reference to its state in nature; (2) The "ton" measurement was in no way limited to solid substances.[57] The court was making a determination of great importance to the energy field by using a layperson's understanding of scientific terms for measurement; and, (3) The term "mined," or "mining," is not limited to solid substances.

The most suspect area of the court's analysis of congressional materials, however, is the complete disregard of the purpose of the Coal Lands Acts. Congress' main objective "was to insure an adequate source of the nation's primary energy resource."[58] If Congress passed a bill in order to protect energy that could be generated from coal, "common sense" would suggest Congress' intent to include *all* energy that could be produced from *all* elements of coal. Despite the fact that Congress recognized that "possibly one day the CBM gas might have value,"[59] the court never addressed this issue in the context of the Act's purpose. On the contrary, the court states that Congress had no knowledge that CBM gas was of value, then quotes Committee testimony that such value was foreseeable.[60]

### *C. The 1981 Solicitor's Opinion*

The court also relied on an opinion of the Solicitor to the Secretary of the Interior to support the conclusion that Congress did not reserve CBM gas in the Coal Lands Acts. The 1981 opinion addressed the question of "who owns the coalbed gas in land where the coal or oil and gas was reserved to the U.S."[61] The Solicitor's Opinion concluded that, for purposes of the 1909 Act, CBM gas was not included in the reservation of coal.[62]

In its application of legal authority, the court "grants deference" to the Solicitor's Opinion.[63] The court assumed that *Chevron, U.S.A., Inc. v. Nat-*

56. 874 F. Supp at 1157.

57. Merriam-Webster's definition of ton is "a unit of weight or capacity" regardless of the physical state of the substance. WEBSTER'S NINTH COLLEGIATE DICTIONARY (1986).

58. 874 F. Supp. 1157.

59. *Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Committee on Public Lands*, 59th Cong., 2d Sess. (1907).

60. The court first states that "[w]hen the 1909 and 1910 Acts were passed, CBM gas was not known as a valuable mineral." 874 F. Supp. at 1155. Then, on the next page of the opinion, the court reveals that the "Committee hearings transcripts show that Congress was aware of the association of CBM gas with the coal, and that possibly one day the CBM gas might have value." *Id.* at 1156.

61. Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits, 88 Int. Dec. 538, 539 (1981).

62. *Id.* at 540.

63. 874 F. Supp. at 1159-60.

*ural Resources Defense Council, Inc.*,[64] "controls the analysis for evaluating the weight to be given the Solicitor's Opinion."[65] Quoting *Chevron*, the court reasons:

> 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. (fn omitted) [sic] 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.[66]

The court followed *Chevron*'s holding that gives controlling weight to the agency's decision unless it is "arbitrary, capricious, or manifestly contrary to a statute."[67]

Here, the court's application of *Chevron* is questionable. In *Chevron*, the Supreme Court considered whether an Environmental Protection Agency (EPA) decision was based on reasonable construction of a statutory term. The EPA's "decision" was an element of agency regulation. With the 1981 Solicitor Opinion, however, it is unclear whether the opinion is an agency decision or an opinion.[68] A district court is not necessarily bound by an such an opinion.[69]

The district court in *Southern Ute*, applying a statutory interpretation analysis of the Coal Land Acts, relied heavily on common dictionary definitions of the term "coal"[70] and conceded nothing to the opinions of experts in the energy field or to the practical realities of coal production. Arguably, the court incorrectly applied case law and granted deference to an agency opinion which is not necessarily binding on the court.

*Southern Ute* is specifically addressing the reservation of coal under the Coal Lands Acts. Therefore, the decision should be read narrowly and applied only to the Coal Lands Acts. This decision, by no means, should be broadly interpreted as a definitive ruling on the CBM gas ownership issue.

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64. 467 U.S. 837 (1984).

65. 874 F. Supp. at 1159.

66. 874 F.Supp. 1159, *quoting* Chevron, 467 U.S. at 842-43.

67. 467 U.S. at 844.

68. In a post-*Chevron* decision, the Eighth Circuit refused to defer to an Interior Department opinion. State of Missouri v. Andrus, 787 F.2d 270 (8th Cir. 1986). In fact, the court considered the Interior Department's opinion "a legal conclusion based solely on his reading of the statutory language — a function courts are capable of performing." *Id.* at 287. The 1981 opinion referred to by the *Southern Ute* court is similarly drafted. The 1981 opinion relies on law review articles, state court cases, and legislative materials in the same manner that a court would. *See, e.g.*, 88 Int. Dec. at 550.

69. Although the court in Washington Water Power Co. v. FERC, 775 F. 2d 305, 322 (D.C.Cir. 1985), deferred to a Secretary of the Interior opinion under the direction of *Chevron*, other cases raise questions of whether agency "opinions" are binding on federal courts to the same degree as agency "decisions" were in *Chevron*. *See, e.g.*, Rocky Mountain Oil and Gas Assoc. v. Andrus, 500 F. Supp. 1338 (D. Wyoming 1980). This court states that a Solicitor's Opinion is "considered to be the law of the Department of Interior and the Bureau of Land Management on both federal and state levels." *Id.* at 1341. However, the court stated that "[a]lthough the Solicitor's Opinion is binding on the Interior and BLM, it sets no precedent for this court." *Id.*

70. 874 F. Supp. at 1152-53.

## V. Other Cases Considering CBM Gas Ownership

Unlike *Southern Ute*, which determined CBM gas ownership on the basis of dictionary definitions, other courts have looked to the physical properties of CBM gas and the economic realities of recovery.[71] *United States Steel Corp. v. Hoge*[72], was the first case concerning CBM gas ownership.[73] The Pennsylvania Supreme Court held that absolute ownership of CBM gas is vested in the coalbed owner when the CBM gas remains within the coal seam.[74] This view eliminates the potential legal problems associated with producing CBM gas incident to coal mining and promotes efficiency since CBM gas and coal can be mined in the same process. When the coalbed owner is allowed to capture CBM gas during coal mining, there is no release of CBM gas into the environment through ventilation. The *Hoge* court did not look at the plain meaning of the grant, but rather at the physical characteristics of CBM gas.[75]

A Montana district court arrived at a similar conclusion in *Carbon County v. Baird*.[76] The court held that CBM gas was part of the coal estate because CBM gas exploration and extraction processes could interfere with the rights of the coalbed owner.[77] From a policy standpoint, the Montana court considered the economic efficiency of having separate developers in the same coal strata.[78] The Montana Supreme Court, however, citing the federal district court decision in *Southern Ute*, reversed the lower court decision effectively rejecting the lower court's analysis of CBM gas characteristics, economic considerations, and the practical aspects of CBM gas recovery.[79]

The facts in *Rayburn v. USX Corp.*[80] are similar to those in *Southern Ute*. The Northern District of Alabama resolved a conflict over a deed drafted in 1960. The court concluded that, at the time of the conveyance,

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71. U.S. Steel v. Hoge, 468 A.2d 1380 (Pa. 1983)(holding that the coalbed owner has "exclusive ownership of CBM gas"); Vines v. McKenzie Methane Corp., 619 So.2d 1305 (Ala. 1993)(holding that CBM gas ownership necessarily accompanies coal ownership); NCNB Texas Nat'l Bank, N.A. v. West, 631 So.2d 212 (Ala. 1993)(holding that a reservation of gas interest included CBM gas, but stipulated that the gas interest only takes effect when gas migrates outside the coalbeds. Therefore, where CBM gas remained within the coal seam, ownership remained with the coal estate).

72. 468 A.2d 1380.

73. 468 A.2d 1380 (Pa. 1983)(holding that any gas present in the coal estate must necessarily belong to the owner of the coal).

74. *Id.* at 1383.

75. See discussion of the *Hoge* court's reasoning in Carbon County v. Union Reserve Coal Co., 898 P.2d 680 (Mont. 1995).

76. 1992 WL 464786 (Mont. Dist. 1993)(reversed by the Montana Supreme Court following the *Southern Ute* decision). See *infra* note 79.

77. The court notes that the drilling of CBM gas wells disturbs the coalbed resulting in fractures to the coal seam. *Id.* at *3. "It is important for the coal mine operator to be able to mine the coal in the most economical and effective method and it is therefore necessary that he have control over the drilling of wells into the coal seam . . . . " *Id.*

78. *Id.*

79. Carbon County v. Union Reserve Coal Co., Inc., 898 P.2d 680 (Mont. 1995)(applying the *Southern Ute* analysis, the court held that CBM gas was not part of the coal estate. The court did not examine the economic considerations addressed by the lower court.)

80. 1987 U.S. Dist. Lexis 6920 (N.D. Ala. 1987), *aff'd*, 844 F.2d 796 (11th Cir. 1988).

CBM gas was not a commercial resource. Further, it was unknown in 1960 whether CBM gas would become a viable resource in the future. The *Rayburn* court held that because the parties to the lease did not consider the CBM gas severable, ownership remained with the coalbed owner. Had the *Southern Ute* court applied a similar line of reasoning, the court would have found that the coalbed owner retains *all* properties of coal unless CBM gas ownership is specifically addressed in a deed or governing statute.[81]

## VI. CONCLUSION

Although the *Southern Ute* decision distinguishes CBM gas ownership from coalbed ownership, the unique factual circumstances surrounding the case and certain questions concerning the court's reasoning leave the matter far from resolved. The *Southern Ute* decision is a fact-specific case and should be narrowly construed and applied only to Coal Lands Act cases, provided the Tenth Circuit upholds the decision. Unfortunately, the Montana Supreme Court court has already applied the *Southern Ute* decision to overturn a lower court that actually considered the economic viability and practical realities of CBM gas production.

CBM gas is a viable energy resource that is relatively abundant in the United States. Future development of CBM gas could be threatened by the current uncertainty over CBM gas ownership. In light of the *Southern Ute* decision, it is time for the legislature to clarify the issue of CBM gas ownership to ensure that future CBM gas development is not negatively impacted.

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81. The most recent decision addressing CBM gas ownership is Moore v. Pennsylvania Castle Energy Corp., 89 F.3d 791 (11th Cir. 1996). Although CBM gas ownership is mentioned, the case examines the admissibility of parole evidence as a matter of Alabama contract law.