

Tulsa Law Review

Volume 33
Number 3 *Mineral Law Symposium*

Volume 33 | Number 3

Spring 1998

Southern Ute Indian Tribe v. Amoco Production Company: A Conflict over What Killed the Canary

Amy Callard

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Amy Callard, *Southern Ute Indian Tribe v. Amoco Production Company: A Conflict over What Killed the Canary*, 33 Tulsa L. J. 909 (1998).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol33/iss3/6>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

NOTES

SOUTHERN UTE INDIAN TRIBE v. AMOCO PRODUCTION COMPANY: A CONFLICT OVER WHAT KILLED THE CANARY

I. INTRODUCTION

A 1913 newspaper report of the Dawson, New Mexico coal mine disaster details the use of canary birds as gas detectors for rescue crews: "The canary bird is a sure test for white damp (carbon monoxide) and black damp (carbon dioxide)."¹ Both of these gases are produced as by-products of the ignition of methane, which continuously seeps out of coal and collects in coal mines.²

[The birds] are taken into the mine [and] watched closely. If they die suddenly, without a tremor of their little limbs, the presence of the dreaded white damp is known and retreat is begun at once unless the rescue crew is equipped with oxygen helmets. If the bird is seen to go into convulsions before death, black damp and black death is near and advance must cease. This is a sure test and these little birds are invaluable in testing for the noxious gases.³

Rescuers also carried safety lamps enclosed with a mesh screen in order to detect black damp and unignited methane.⁴ Black damp immediately extinguishes the safety lamp, whereas methane gas explodes the light within the wire screen, warning the men of danger while confining the explosion.⁵ The canaries and safety lamps were necessary to detect methane, because "[i]t is a colorless,

1. *Canary Birds Die In Mine Gas At Dawson, That Men May Live*, DAWSON NEWS, Oct. 23, 1913, reprinted in *Historical Mining Disasters* (Jane DeMarchi ed., 1997).

2. See Eric Margolis, *Western Coal Mining as a Way of Life: An Oral History of the Colorado Coal Miners to 1914*, 24 J. OF THE WEST 1, 23 (1985).

3. *Canary Birds Die In Mine Gas At Dawson, That Men May Live*, *supra* note 1.

4. See *id.*

5. See *id.*

odorless, tasteless gas which is lighter than air."⁶ As one memoir reveals, "[a] wiff of it almost paralyzes a man, and a good breath of it renders him unconscious. Then he falls as if in a sleep and dies unless instantly carried into purer air."⁷

For decades, miners typically dealt with the accumulations of methane by forcing fresh air through gassy areas and venting it into the atmosphere.⁸ When the methane collected in an area of the mine that was difficult to vent, "firemen" were sent in, wrapped in water saturated blankets, to "cause an explosion by projecting a candle at the end of a long pole into an area . . . then fling themselves on the ground while the flames passed overhead."⁹

As evidenced by these rudimentary techniques for dealing with the gas, methane was not valued; it was thought to be nothing more than a nuisance to be controlled by the mining operator.¹⁰ Although knowledge of methane's valuable properties was evolving,¹¹ for the most part, the sentiment that it was primarily a nuisance persisted until the energy crisis of the early 1970's forced the search for alternate sources of energy.¹²

Whenever a substance suddenly comes to have a value which it hithertofore did not have or when an already valuable substance is found at a place previously not thought to contain it, there is a likelihood of conflict between grantors and grantees, lessors and lessees as to whether earlier, broadly-phrased grants, leases, or reservations had actually included the newly desirable substance within their provisions.¹³

Although this statement was made in regard to oil shale, it also applies to coal bed methane ("CBM").¹⁴ The recent case of *Southern Ute Indian Tribe v. Amoco Production Company*¹⁵ confronted just such a dispute over the ownership of CBM. Plaintiff, Southern Ute Indian Tribe, asserted its right to CBM based on its ownership of the coal within its reservation borders.¹⁶ Defendant class representative, Amoco Production Company, claimed its right to produce CBM from the coal by way of its oil and gas leases.¹⁷ Thus, the central issue¹⁸ as framed by the court was "whether the Tribe, as successor in interest to

6. Margolis, *supra* note 2, at 23.

7. *Id.* at 32.

8. *See id.* at 25.

9. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1155 (D. Colo. 1995).

10. *See* Ronald K. Olson, *Coalbed Methane: Legal Considerations Affecting its Development as an Energy Resource*, 13 TULSA L.J. 377, 379, 382 (1978).

11. By 1941, at least one scholar was recognizing the value of CBM. Professor C.C. Williams wrote, "The abundant presence of gas in various coal strata is a matter of common knowledge, but the intrinsic worth of these deposits seldom gets attention." C.C. Williams, Jr., *On Leasing Gas from Coal Seams*, 47 W. VA. L. Q. 211, 212 (1941).

12. *See* Olson, *supra* note 10, at 377.

13. Douglas Hale Gross, M.A., J.D., Annotation, *Grant, Lease, Exception, or Reservation of Oil And/Or Gas Rights As Including Oil Shale*, 61 A.L.R.3d 1109, 1111 (1975).

14. *See* Olson, *supra* note 10, at 378.

15. 119 F.3d 816 (10th Cir. 1997).

16. *See id.* at 819.

17. *See id.*

18. Collateral issues raised by the defenses of Amoco and the federal defendants were not reached, and have been remanded. *See id.* at 836.

a statutory reservation of coal to the United States made in the coal lands acts of 1909 and 1910, is also the owner of CBM, a gaseous substance contained in coal."¹⁹ The United States Court of Appeals, 10th Circuit, decided the case in favor of the Southern Ute Tribe based on its interpretation of 1909 and 1910 statutory language which reserved ownership of coal for the United States, the Tribe's predecessor in interest.²⁰

A basic understanding of the nature of CBM as well as the interests vested in all concerned parties will be useful prior to discussing the holding in this case. Therefore, this note begins with an analysis of the properties of CBM and its production in section II. This is followed by a history of the various ownership interests involved in the case in section III. Section IV contains a statement of the case and is followed by Section V, which describes the District and the 10th Circuit Court's decisions. In section VI analysis of the decisions is undertaken.

The analysis section reaches the conclusion that while the court's decision is correct, it does not go far enough. A determination that the owner of coal necessarily owns CBM is appropriate in this case, and would be much more responsive to the growing conflicts over CBM ownership. The court could have extended the basis for its determination to include the properties of CBM without going beyond the scope of the court's decision making authority.

II. COALBED METHANE: PROPERTIES AND PRODUCTION

"CBM is a by-product of the 'coalification' process."²¹ Coalification is the biochemical and bacterial transformation of plant life, carbon dioxide and water which decay to form peat.²² The intermediate product, peat, is converted into coal, methane, and other gaseous by-products through sedimentary pressure and the earth's temperature.²³ Methane produced in this manner is known as coal bed methane or CBM.

The average methane gas content of coal is 200 cubic feet per ton, with a range of 0.1 to 500 cubic feet per ton of coal.²⁴ The volume of methane found in particular coal strata depends primarily on the characteristics of the coal.²⁵ Geologists rank coal into three major types according to its stage in the coalification process: lignite, bituminous, and anthracite.²⁶ Methane capacity

19. *Id.* at 820.

20. *See id.* at 836.

21. *See* Jeff L. 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, 572 (1992) [hereinafter Lewin et al., "*Unlocking the Fire*"].

22. *See id.*; *see also* Olson, *supra* note 10, at 379.

23. *See id.*

24. *See* Olson, *supra* note 10, at 380; *see also* Maurice Deul & Ann G. Kim, *Coal Beds: A Source of Natural Gas*, 31 (June 16, 1975) OIL AND GAS J. 45, 48 (1975) [hereinafter Deul & Kim, "*A Source of Natural Gas*"].

25. *See* Olson, *supra* note 10, at 380. Several factors characterize coal, "including the coal rank, the pressure and temperature, the permeability and porosity of the coal, the degree of fracturing, the distance to the outcrop, and the permeability of adjacent strata." Lewin et al., *Unlocking the Fire*, *supra* note 21, at 573.

26. *See* Jeffrey R. Levins, *Coalification: The Evolution of Coal as Source Rock and Reservoir Rock for*

tends to increase with rank, with the anthracites in particular having extremely high methane capacities.²⁷ Much of the coal in the Western United States is located in deeper strata and is thus subjected to greater pressure, which produces a higher level of CBM in place (less likely to have migrated into fractures).²⁸ In the San Juan Basin, the location of the interests at issue, the coal is primarily bituminous.²⁹

CBM typically consists of between 80 to 99 percent methane, and has a heating value over approximately 1,000 BTU per cubic foot.³⁰ It contains none of the more hazardous sulphur compounds nor carbon dioxide commonly found in natural gas, and therefore requires little remediation for use as a fuel.³¹ Coalbed gas is of pipeline quality, and can be used in almost any application that normally uses natural gas.³²

The amount of CBM in the United States is significant. There may be as much as 300 trillion cubic feet ("tcf") of recoverable methane in United States coalbeds.³³ In 1992, the San Juan Basin alone produced 446.7 billion cubic feet ("bcf") which amounted to 80 percent of the total CBM produced in the United States.³⁴ This amount correlates to energy for 4.9 million homes per year at an average rate of 250 cubic feet per day.

The technology required to claim CBM is already available.³⁵ Methane production techniques are simple and cost effective.³⁶ This is primarily because methane naturally migrates to boreholes drilled into the coal and rises to the surface.³⁷ Although some production techniques may interfere with subsequent coal mining operations,³⁸ this inference is not a significant issue in the Western United States because much of the coal is non-mineable by known methods due to its depth.³⁹ Dynamic openhole cavity completion techniques pioneered in the San Juan Basin have proven quite successful in that deep strata, with one well experiencing a 30-fold increase in rate of gas production over the vertical cased hole method which had been utilized.⁴⁰

Oil and Gas, in AAPG STUDIES IN GEOLOGY #38: HYDROCARBONS FROM COAL 39, 43-47 (B.E. Law and D.D. Rice eds., 1993).

27. *See id.* at 47.

28. *See* Lewin et al., *Unlocking the Fire*, *supra* note 21, 575-576.

29. *See* R. Choate, et al., *Upper Cretaceous Geology, Coal, and the Potential for Methane Recovery from Coalbeds in San Juan Basin-Colorado and New Mexico*, AAPG STUDIES IN GEOLOGY SERIES #17: COALBED METHANE RESOURCES OF THE UNITED STATES 185, 192 (Craig T. Rightmire, et al. eds., 1984).

30. *See* A.G. Kim and M. Deul, *Conservation of Methane Drained From Coal*, METHANE CONTROL RESEARCH: SUMMARY OF RESULTS, 1964-80, 150 (Maurice Deul and Ann G. Kim, eds., Bureau of Mines Bulletin/1988) [hereinafter Kim & Deul, "Conservation"].

31. *See id.*

32. *See id.* at 150-51.

33. *See* Deul & Kim, *Coal Beds: A Source of Natural Gas*, *supra* note 24, at 47.

34. *See* D. Keith Murray, *Coalbed methane in the USA: analogues for worldwide development*, COALBED METHANE AND COAL GEOLOGY 1, 4 (R. Gayer & I. Harris eds., 1996).

35. *See* Deul & Kim, *Coal Beds: A Source of Natural Gas*, *supra* note 24, at 48.

36. *See* Olson, *supra* note 10, at 381.

37. *See id.* The natural migration of methane is explained by the fact that the methane pressure within coal usually exceeds atmospheric pressure. *See* Lewin et al., *Unlocking the Fire*, *supra* note 21, at 572.

38. *See id.* at 578.

39. *See id.* at 575-576.

40. *See* Murray, *supra* note 34, at 45.

Interest in CBM's value and capture techniques are of fairly recent vintage.⁴¹ Although CBM's hazardous nature has been studied by the Bureau of Mines since its inception in 1910,⁴² the beneficial aspects of the gas were relegated to a secondary position, while studies focused on controlling the gas.⁴³ This focus makes sense, in that ignition of accumulated CBM is the greatest cause of deadly mine explosions.⁴⁴ At least until 1969, legislation regarding CBM was also more concerned with its hazardous nature than with its value as an energy source.⁴⁵

CBM's value in the United States has only been sought on a significant scale since the energy crisis of the 1970's.⁴⁶ Since that time, CBM production has undergone dramatic growth. From 1987 to 1991, CBM gas production in the United States underwent more than a thirteen-fold increase from 26 bcf to 348 bcf.⁴⁷ In 1992, the San Juan basin alone provided over 80 percent of total production from only 38 percent of all CBM wells.⁴⁸

The foregoing establishes that CBM is a readily producible gas that comes from coal. As such, it has been considered both an element of coal and a gas. This distinction is not important when dealing with a complete fee simple absolute, because the interest holder controls the entire estate.⁴⁹ Even if mineral interests have been severed as a bundle from the surface estate, ownership of CBM is not in doubt; the holder of mineral interest controls.⁵⁰ A problem arises where mineral interests have been further dispersed. Specifically, if the coal interest has been severed from other mineral interests, there exists an understandable tension between the oil and gas interest holder and the coal interest holder.⁵¹ They each claim that CBM is their rightful province.⁵² The oil and gas interest holder can point to CBM's gaseous properties and similarities to natural gas. The coal interest holder can argue that coal is the origin of CBM, and thus CBM is a coal derivative. These very arguments are the basis of *Southern Ute Indian Tribe v. Amoco Production Company*, and will be examined more fully in sections IV through VI.

41. See Donald F. Santa, Jr. & Patricia J. Beneke, *Federal Natural Gas Policy and the Energy Policy Act of 1992*, 14 ENERGY L.J. 1, 44-45 (1993).

42. See Olson, *supra* note 10, at 380.

43. See Kim & Deul, *Conservation*, *supra* note 30, at 150.

44. See Olson, *supra* note 10, at 380.

45. The Federal Coal Mine Health and Safety Act of 1969 regulates acceptable concentrations of methane and provides penalties for mines operating above the proscribed levels. See generally 30 U.S.C. §§ 801-960 (1976).

46. See Lewin et al., *Unlocking the Fire*, *supra* note 21, at 567.

47. See Santa, *supra* note 41, at 44-45.

48. See Murray, *supra* note 34, at 4.

49. See 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, 636 (1994) [hereinafter Lewin, "Coalbed Methane"].

50. See *id.* Case law also holds that both coal and gas are included in a mineral estate. See, e.g., *Scott v. Laws*, 215 S.W. 81, 82 (Ky. 1919); *Kentucky West Virginia Gas v. Preece*, 86 S.W.2d 163, 165 (Ky. 1935); *Hurley v. West Kentucky Coal*, 171 S.W.2d 15, 17 (Ky. 1943); *Berry v. Hiawatha*, 198 S.W.2d 497, 498 (Ky. 1946).

51. See Lewin, *Coalbed Methane*, *supra* note 49, at 636.

52. See *id.* at 637.

III. HISTORICAL BACKGROUND

A. *Southern Ute Property Interests*

The Southern Ute's occupation and ownership of property, both surface and subsurface, in the Southwestern United States has undergone significant changes since the mid-1800's due to Federal government actions. These changes play a consequential role in understanding the issue of current CBM ownership.

In the 1800's the Ute Indians⁵³ occupied a region spanning Western Colorado, Northern New Mexico, and Utah.⁵⁴ However, by the Treaty of 1868, the Ute Indian Bands collectively traded their aboriginal lands to the United States for a 15.7 million acre reservation located exclusively in Southwest Colorado.⁵⁵ Less than ten years later, the discovery of valuable minerals on reservation lands prompted the government to convince the Utes to approve the Brunot Cession in 1874.⁵⁶ This agreement ceded an additional 3.7 million acres of the east central portion of the reservation, isolating the Southern Utes in the southernmost part of the reservation on a strip of land 15 miles wide and 110 miles long.⁵⁷

This isolation may have helped the Southern Utes to remain on their land after an uprising, in 1879, termed The Meeker Massacre.⁵⁸ Public outcry over the massacre led to the Act of 1880⁵⁹ which terminated tribal ownership of reservation lands, and limited individual Indian ownership to lands allotted for the purpose of settlement.⁶⁰ The settlement areas for the three current Bands were circumscribed and led to the departure from Colorado of the White River Utes and the Uncompahgre Utes.⁶¹ The Southern Utes remained on the land they had occupied since the Brunot Cession in 1874.⁶² Allotments to individual

53. Original Ute tribes included the Tabeguache, Moache, Capote, Weeminuche, Yampa, Grand River and Uintah Bands of Utes. By the late 1860's, the Moache, Capote and Weeminuche Bands were known collectively as the Southern Utes, while the Tabeguaches were called the Uncompahgre Utes, and the Yampa, Grand River and Uintah were known as the White River Utes. All the bands were informally organized and referred to as the Confederated Band of Utes. *See* United States v. Southern Ute Tribe or Band of Indians, 423 F.2d 346, 348 (Ct. Cl. 1970).

54. *See id.*

55. *See id.* (citation omitted).

56. *See id.* (citation omitted).

57. *See* United States v. Southern Ute Tribe or Band of Indians, 402 U.S. 159, 162 (1971). A combination of band migration and the Brunot Cession were contributing factors. *See id.*

58. *See* Southern Ute Indian Tribe v. Amoco Prod. Co., 874 F. Supp. 1142, 1148 (D. Colo. 1995). Twelve non-Indians, including Indian Agent Meeker, were killed. *See id.*

59. *See id.* The Act provided that by agreement, the Confederated Bands would "cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement." Act of June 15, 1880, ch. 223, 21 Stat. 200.

60. *See* Southern Ute Tribe or Band of Indians, 402 U.S. at 163. The purposes of the Act of 1880 were to break up tribal structure and to convert the Indians from nomadic to agrarian people. *See* 10 CONG. REC. 2056, 2059 (1880).

61. *See* Act of June 15, 1880, ch. 223, 21 Stat. 200. The settlement required the White River Utes leave Colorado and settle agricultural lands on the Uintah Reservation in Utah; the Uncompahgre Utes agreed to settle on agricultural lands on the Grand River, near the mouth of the Gunnison River in Colorado. The Southern Utes were to settle near the La Plata River in Colorado. *See id.*

62. *See* United States v. Southern Ute Tribe or Band of Indians, 423 F.2d 346, 348 (Ct. Cl. 1970).

Southern Ute Indians were not made until 1895.⁶³

B. Governmental Management and Sale of Non-Allotted Lands

The most important feature of the Act of 1880, as it relates to the Southern Ute's case against Amoco, is the United States ownership of non-allotted land.⁶⁴ The United States was empowered to sell the non-allotted lands to which they held title, with proceeds to be distributed to the Confederated Bands by share,⁶⁵ after certain Government reimbursements.⁶⁶

Throughout several decades from the late-1800's through the early-1900's, the United States government made the non-allotted lands available for public entry and settlement under various public land laws.⁶⁷ Under the Homestead Act of 1862, fee simple absolute title to 160 acres could be acquired at no cost.⁶⁸ The Coal Lands Act of 1873 provided that fee simple absolute title to 160 acres would cost between \$10 and \$20 depending on the proximity of the land to a railroad.⁶⁹ Oil and gas explorers were able to purchase land for \$5 per acre.⁷⁰

Due to the passive nature of classifying lands⁷¹ as primarily valuable for agriculture, coal, or other minerals, patents issued for millions of acres of valuable western coal lands were erroneously reported to be valuable primarily for non-coal mining use.⁷² By the turn of the century the increasing dependence on coal as the country's primary energy source, coupled with the awareness of widespread fraud,⁷³ spawned a movement to replace the troubled land classifi-

George W. Manypenny, chairman of the Ute Commission founded to aid in the implementation of the Act of 1880, recommended that due to the difficulty envisioned in relocating the Band, the strip of land that the Southern Utes were occupying be maintained as an Indian reservation indefinitely. *See id.* at 350-51 (citing H.R. Doc. No. 10-2018, at 383 (1882)).

63. *See* Act of Feb. 20, 1895, ch. 113, 28 Stat. 677-78. By the Act of 1895, allotments were made to individual Indians, and a portion was set aside for those Southern Utes who wanted their own reservation rather than allotments. *See id.*

64. *See* Act of June 15, 1880, ch. 223, 21 Stat. 203. "[A]ll the lands not so allotted, the title to which is . . . released and conveyed to the United States, shall be held and deemed to be public lands of the United States." *Id.*

65. The apportionment was to be one-third to the Southern Utes: one-half to the Uncompahgre Utes and one-sixth to the White River Utes. *See* Act of June 15, 1880, ch. 223, 21 Stat. 201.

66. *See* Act of June 15, 1880, ch. 223, 21 Stat. 203.

67. *See* Southern Ute Indian Tribe v. Amoco Prod. Co., 874 F. Supp. 1142, 1148 (D. Colo. 1995). Three of the public land laws that allowed entry include the Homestead Act of 1862, the Coal Lands Act of 1873, and the Mining Law of 1872. *See id.*

68. 43 U.S.C. §161 et seq. (1891)(repealed 1976).

69. *See* Act of March 3, 1873, ch. 279, 17 Stat. 607.

70. *See* 42 Stat. 1144, 1145 (1925) (codified at 30 U.S.C.A. §§ 29, 30, 37 (1988)).

71. *See* Watt v. Western Nuclear, 462 U.S. 36, 49 n.9 (1983). Classification was based primarily on the affidavits of entrymen, which were brought into question only by surveyor reports or other contradictory information. *See id.*

72. *See id.* Lands conveyed under a land-grant statute gave the patentee title to the entire land, including any subsequently discovered minerals. The Government had no recourse once title passed, even where the lands were misclassified. *See id.*

73. *See* Southern Ute Indian Tribe v. Amoco Prod. Co., 874 F. Supp. 1142, 1149 (D. Colo. 1995). Price differentials and allowed usage of agricultural land versus mineral land served as incentives for entrymen to misclassify lands. Of the more than 6 million acres of coal lands entered between 1873 and 1906, only about 400,000 were purchased under the Coal Lands Act of 1873. Railroad monopolies were implicated in fraudulently acquiring much of the coal land. *See id.*

cation system with a system of mineral reservations.⁷⁴ In 1907, citing the need to manage coal in a manner that would benefit the public as a whole, President Theodore Roosevelt withdrew approximately 65 million acres of land in the western states, thought to contain coal, from public entry programs.⁷⁵ Included in the withdrawal was the acreage ceded to the United States by the Southern Utes.⁷⁶

In addition to the withdrawal, issuance of patents to those already on the lands were suspended.⁷⁷ The suspension alarmed homesteaders who had made improvements to the land they occupied and to which they intended to obtain title.⁷⁸ In response, President Roosevelt urged Congress to enact legislation separating rights to the surface of public land from rights to the "forests upon it and to minerals beneath it," making them subject to separate disposal.⁷⁹ Congress responded with enactment of the Coal Lands Act of 1909:

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 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. 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 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.⁸⁰

The scope of the 1909 Act was limited to lands already settled.⁸¹ Thus, the potential remained that vast tracts of withdrawn land would remain unsettled.⁸² Although substantially similar to the 1909 Act, the 1910 Act was promulgated to provide the limitations for new entrants on land included in the withdrawal.⁸³

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See* *Watt v. Western Nuclear*, 462 U.S. 36, 39 (1983).

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

81. *See id.*

82. *See id.*

83. The 1910 Act reads:

During the first three decades of the 20th century, the United States patented more than 16 million acres in the west under the 1909 and 1910 Acts.⁸⁴ Of that number, 1.35 million acres were located in Colorado, including the surplus lands on the Southern Ute Reservation which had been opened to non-Indian homestead entry.⁸⁵ The patents issued to homesteaders between 1909 and the early 1930's reserved the coal to the United States.⁸⁶ The gas interest holders that made up "[t]he non-federal defendant class in [*Southern Ute Indian Tribe v. Amoco Production Company*] . . . claim their respective rights, titles, and interests as successors in interest to these patentees."⁸⁷

C. A New Era for Native American Diplomacy

Acknowledging its failure to adequately deal with Indian Tribes throughout the country, including the situation in Ute territory, the United States changed its policy of tribal minimization through individual allotment and assimilation in the early to mid-1930's.⁸⁸ This return to a tribal system was codified as the Indian Reorganization Act of 1934 (IRA).⁸⁹ The IRA empowered the Secretary of the Interior, acting in the public interest, to restore remaining surplus lands of reservations, to tribal ownership.⁹⁰

In 1938, under the authority of the IRA, the Department of the Interior conveyed to the Southern Ute Tribe equitable title in approximately 200,000 acres of coal which had previously been reserved to the United States in patents issued over the years to non-Indian entrymen under the 1909 and 1910 Acts.⁹¹

Upon 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. 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. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented . . . for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages. The owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits. Nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Act of June 22, 1910, ch. 318, §36 Stat. 584 (codified at 30 U.S.C. §85).

84. See *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1151 (D. Colo. 1995).

85. See *id.*

86. See *id.*

87. *Id.*

88. See *id.*

89. 25 U.S.C.A. §§ 461-479 (1988).

90. See *id.*

91. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1151 (D. Colo. 1995).

IV. STATEMENT OF THE CASE

The Acts of 1909 and 1910, in conjunction with the Indian Reorganization Act of 1934, placed ownership of "coal" located within the boundaries of the Southern Ute reservation⁹² in the hands of the Southern Ute Indian Tribe.⁹³ Successors in interest to patents issued by the government under the 1909 and 1910 Acts own all other property interests, including oil and gas.⁹⁴ The Tribe's claim to the CBM is based on their ownership of the source of CBM, coal.⁹⁵ The successors in interest's claim to the CBM is based on their ownership of gas.⁹⁶

The Tribe brought suit against Amoco and others⁹⁷ claiming that by exploring for and extracting CBM under oil and gas leases, the Amoco defendants had: "1) trespassed on Tribal lands; 2) trespassed on Tribal coal; 3) converted Tribal coal; 4) failed to pay severance tax to the Tribe; and 5) in collusion with State of Colorado officials, deprived the Tribe of federally guaranteed rights in violation of 42 U.S.C. § 1983."⁹⁸

The Tribe sought a variety of remedies including:

- 1) a declaratory judgment vesting in the Tribe ownership of CBM and other substances contained in Tribal coal; 2) a declaratory judgment that Tribal consent is required for CBM extraction; 3) an order quieting title to CBM in the Tribe; 4) injunctive relief to prevent continued exploration and production of CBM without Tribal consent; 5) damages for present and future injuries to coal, for extraction of CBM, for conversion of coal, for civil rights violations, and for failure to pay severance taxes; 6) title to all exploration and production facilities on Tribal lands which, if removed, would interrupt production of CBM; and 7) costs and attorney's fees.⁹⁹

92. The reservation is an amalgamation of varied ownership interests, including: tribal lands held in trust by the United States for the benefit of the Tribe, lands held by the Tribe in its own name, individual Indian land allotments subject to federal trust restrictions, land owned in fee simple by individual Indians, and lands held in fee simple by non-Indian third parties.

Southern Ute Indian Tribe v. Board of County Comm'rs, 855 F. Supp. 1194, 1196 (D. Colo. 1994).

93. See 30 U.S.C. §§ 81, 85 (reserving the coal interest).

94. See *id.*

95. See *Southern Ute I*, 874 F. Supp. at 1147.

96. See *id.* at 1146.

97. The District Court certified a defendant class comprised of other oil companies and individuals who claim ownership interests in the CBM. See *id.* "An estimated 20,000 individuals hold interests in the oil and gas estates underlying approximately 200,000 acres of land in which the Tribe owns the coal interests." *Southern Ute Indian Tribe v. Amoco Production Company*, 2 F.3d 1023, 1025 (10th Cir. 1993). Amoco, owner of approximately 150,000 acres of oil and gas leasehold interests, and operator of approximately 160 of the 350 coalbed methane wells, see *id.*, was named as the defendant class representative. See *Southern Ute Indian Tribe*, 874 F. Supp. at 1146. "The Tribe also sued various federal governmental entities (federal defendants) claiming breach of fiduciary duty to manage the Tribe's trust resources." *Id.* The claims against the federal defendants are not resolved in the underlying case, and are beyond the scope of this note.

98. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 819 (10th Cir. 1997).

99. *Id.*

V. DECISIONS BY THE COURTS

A. *Southern Ute Indian Tribe v. Amoco Production Company*¹⁰⁰ (“*Southern Ute I*”)

The issue of CBM ownership under the Coal Lands Acts of 1909 and 1910 was one of first impression at the district court level.¹⁰¹ District Judge Babcock held as a matter of law that the United States Reservation of “coal” did not include a reservation of coal bed methane gas.¹⁰² His theory was that if the CBM was not reserved to the United States, it passed under the patents issued to entrymen under the 1909 and 1910 Acts.¹⁰³ Therefore, when the Secretary of the Interior returned interests it had been holding for the benefit of the Indians, the title to the CBM had already been transferred, and all that remained was the coal rock.¹⁰⁴

In light of this holding, and upon cross-motions for summary judgment, the district court awarded judgment in favor of the defendant class on the issue of ownership of CBM.¹⁰⁵ This judgment made moot the claimed breach of fiduciary duty in the management of CBM as a tribal resource.¹⁰⁶ Thus, summary judgment was also entered in favor of the federal defendants.¹⁰⁷

B. *Southern Ute Indian Tribe v. Amoco Production Company*¹⁰⁸ (“*Southern Ute II*”)

On appeal, the 10th Circuit reversed the district court, holding “that the Southern Ute Indian Tribe, as successor in interest to coal reserved to the United States by the Acts of 1909 and 1910, is the owner of coal bed methane contained in that coal.”¹⁰⁹ This holding required the court to remand the case because the district court did not reach the Southern Ute Tribe’s actual claims against any of the defendants or weigh any defenses offered.¹¹⁰

C. *Statutory Interpretation and Construction*

As *Southern Ute I* and *II* make clear, the nature of CBM complicates statutory construction and ownership determinations. Both cases were primarily

100. 874 F. Supp. 1142 (D. Colo. 1995) [hereinafter “*Southern Ute I*”].

101. See *Southern Ute I*, 874 F. Supp. at 1151. Although the question of CBM ownership is not a new one, this is the first federal case that set about determining whether Congress included CBM gas in its reservation to the United States of “coal” under the Coal Lands Acts of 1909 and 1910. See *id.*

102. See *id.* at 1151-52.

103. See *id.* at 1152.

104. See *id.*

105. See *id.* at 1146.

106. It follows logically that if the Southern Ute Indian Tribe did not own the CBM, the federal defendants were under no duty to manage it for them.

107. See *Southern Ute I*, 874 F. Supp. at 1146.

108. 119 F.3d 1023 (10th Cir. 1997) [hereinafter “*Southern Ute II*”].

109. *Southern Ute II*, 119 F.3d at 836.

110. See *id.*

concerned with only one issue, ownership of CBM.¹¹¹ Both courts sought the answer to the central question in the same place, the statute that severed the interests.¹¹² And, both cases applied the same basic rules of statutory construction.¹¹³ Yet the resolution of CBM ownership in the cases are diametrically opposed.¹¹⁴ Therefore, the following discussion juxtaposes the two cases and highlights the areas where *Southern Ute I* and *II* diverge.

As noted above, the district court and the 10th Circuit Court reached their holdings in *Southern Ute I* and *II* by analyzing the language of the 1909 and 1910 Coal Land Acts. The courts engaged in both statutory interpretation and construction. First, an attempt was made to ascertain the Acts' plain meaning, looking primarily at the specific language in question and then to the 1909 and 1910 Acts *in toto*.¹¹⁵ Second, a determination of Congressional intent at the time of the Acts' passage was sought by application of various rules of construction.¹¹⁶

1. Plain Meaning of the Statutes

Both the district court and the 10th Circuit began with an examination of the relevant statutory language because when construing a statute, the will of Congress is primary, "and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."¹¹⁷ The relevant language in the 1909 and 1910 Acts are virtually identical. The 1909 Act states, "[a]ny person . . . shall . . . 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."¹¹⁸ The 1910 Act states that the "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."¹¹⁹

As emphasized, the key word is "coal." However, as both courts note, the word is not defined in either the 1909 or 1910 Act.¹²⁰ There is no mention of the constituents of coal or its by-product, methane.¹²¹ The 10th Circuit, in

111. Compare *Southern Ute I*, 874 F. Supp. at 1146 with *Southern Ute II*, 119 F.3d at 820.

112. Compare *Southern Ute I*, 874 F. Supp. at 1152 with *Southern Ute II*, 119 F.3d at 820-21.

113. Compare generally *Southern Ute I*, 874 F. Supp. 1142 with *Southern Ute II*, 119 F.3d 816 (Both opinions apply the plain meaning test, and a variety of rules including resort to legislative history to determine specific and general congressional intent.)

114. Compare *Southern Ute I*, 874 F. Supp. at 1161 with *Southern Ute II*, 119 F.3d at 836.

115. See *Southern Ute I*, 874 F. Supp. at 1152; *Southern Ute II*, 119 F.3d at 821.

116. See *Southern Ute I*, 874 F. Supp. at 1154; *Southern Ute II*, 119 F.3d at 821 (a discussion of the rules of construction applied by both courts follows, in the text).

117. *Southern Ute I*, 874 F. Supp. at 1152 (quoting *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993)). *Southern Ute II* agrees, using virtually identical language. See *Southern Ute II*, 119 F.3d 821 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)).

118. 30 U.S.C. §81 (1909) (emphasis added).

119. 30 U.S.C. § 85 (1910) (emphasis added).

120. See *Southern Ute I*, 874 F. Supp. at 1153; *Southern Ute II*, 119 F.3d at 821.

121. See *Southern Ute I*, 874 F. Supp. at 1154; *Southern Ute II*, 119 F.3d at 821.

Southern Ute II, felt that this lack of specificity alone was enough to render the reservation ambiguous.¹²² Therefore, it immediately looked to other means to determine congressional intent.¹²³ It is on this threshold analysis of plain meaning and ambiguity that *Southern Ute I* and *II* first diverge.

The *Southern Ute I* decision is premised on the finding that use of the word "coal" in the 1909 and 1910 Acts is not ambiguous.¹²⁴ The theory is that Congress, by not broadly defining "coal," intended to accord the word its ordinary and common meaning at the time of enactment, a solid rock fuel.¹²⁵ Therefore, there was no need to search for additional Congressional intent.¹²⁶ District Judge Babcock's decision is based primarily on the rule of construction that "[t]he apparent natural meaning of a statute will be preferred to any hidden, curious 'signification.'"¹²⁷ And, that "if words of common use [are contained in a statute, they] are to be construed in their natural, plain and ordinary significance."¹²⁸

District Judge Babcock offers several dictionary definitions of coal and gas from the time that the Acts were promulgated until now, noting that the definitions remained consistent from 1889 until 1986.¹²⁹ At the time of enactment, coal was defined as, "a black, or brownish black, solid, combustible substance consisting . . . mainly of carbon."¹³⁰ Gas was defined as "an aeriform fluid supposed to be permanently elastic . . . now applied to any substance when in the elastic or aeriform state."¹³¹ The judge points out that over time coal has been defined narrowly whereas gas has been defined broadly, reaching the conclusion that CBM has never, and still does not, fit into the narrow definition of coal, but is consistent with the definition of gas.¹³²

The 10th Circuit disagreed with the district court in its evaluation of dictionary definitions. Specifically, the 10th Circuit found that CBM does not fit the typical definition of gas.¹³³ In reaching this conclusion, the 10th Circuit discussed the physical properties of coal and the fact that through adsorption, the CBM does not, for the most part, migrate away from its source rock as other natural gases do, but is trapped within its source, coal.¹³⁴ Thus, *in situ*, CBM is not a fluid substance with the ability to expand indefinitely without

122. See *Southern Ute II*, 119 F.3d at 821.

123. See *id.*

124. See *Southern Ute I*, 874 F. Supp. at 1152.

125. See *id.* at 1153-54.

126. See *id.* at 1154.

127. *Id.* at 1152 (citing *United States v. Colorado & N.W.R. Co.*, 157 F. 321, 322 (8th Cir. 1907)).

128. *Southern Ute I*, 874 F. Supp. at 1152 (quoting *Balanced Rock Scenic Attractions v. Town of Manitou*, 38 F.2d 28, 30 (10th Cir. 1930)).

129. See *Southern Ute I*, 874 F. Supp. at 1153. The dictionary definitions of coal and gas come from the *American Dictionary of the English Language* 244, 560 (1889), *The Webster's New International Dictionary of the English Language* 424, 892 (1920) and *Webster's Third New International Dictionary* 432, 937 (1986) (all in respective order). See *id.*

130. *Id.* (citation omitted).

131. *Id.* (citation omitted).

132. *Id.*

133. See *Southern Ute II*, 119 F.3d 822 & n.9.

134. See *id.* at 822.

inducing a physical change in its reservoir.¹³⁵

Under the preliminary analysis of plain meaning, the district court determined that Congressional intent was clear, to reserve only the solid rock coal to the United States by the Coal Land Acts of 1909 and 1910. The 10th Circuit Court of Appeals found that the lack of specificity of the Acts, in regard to the meaning of coal, rendered them ambiguous.

2. Specific Congressional Intent

Even though the *Southern Ute I* holding is based on the district court's understanding of the plain meaning of the 1909 and 1910 Acts, the court went on to apply alternate rules of construction and to discuss congressional intent as a means of supporting that holding.¹³⁶ In *Southern Ute II*, the 10th Circuit applied alternate rules of construction in order to determine Congressional intent where it perceived ambiguity.¹³⁷ As discussed in relation to the plain meaning of "coal," congressional intent is determined at the time the Acts were promulgated, in 1909 and 1910.¹³⁸

Southern Ute I begins the analysis of intent with a listing of rules to support its position that both the legislative history and the construction placed on the statute by the agency which administers it can be used to determine Congressional intent.¹³⁹ While case law supports *Southern Ute I*'s propositions: that clear evidence of legislative intent trumps construction, that it is appropriate to look to the object and policy of a statute as well as the context of its enactment, and that intentional silence is probative of intent,¹⁴⁰ *Southern Ute II* found that the district court's reliance on the administrative agency's construction of the Acts was misplaced in this case.¹⁴¹ The portion of both opinions dealing with the Solicitor to the Secretary of the Interior's opinion are not integral to the determinations made in either case, and therefore will not be discussed here.¹⁴²

Southern Ute I stresses that legislators in 1909 were informed on the topic of coal, and knew of the hazardous nature of CBM.¹⁴³ The committee responsible for authoring the bills that were passed as the 1909 and 1910 Acts had access to many reports addressing various aspects of coal.¹⁴⁴ The court ac-

135. *See id.* at 822 & n.8.

136. *See Southern Ute I*, 874 F. Supp. 1154.

137. *See Southern Ute II*, 119 F.3d at 821.

138. *See id.* at 822; *Southern Ute I*, 874 F. Supp. at 1155.

139. *See Southern Ute I*, 874 F. Supp. at 1154 (citing *Amgen Inc. v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532, 1538 (Fed. Cir. 1990)).

140. *See Southern Ute I*, 874 F. Supp. at 1154-55 (citing *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988); *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *Nuclear Regulatory Comm'n v. Federal Labor Relations Author.*, 879 F.2d 1225, 1230 (4th Cir. 1989); *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984); *FDIC v. Isham*, 777 F. Supp. 828, 831 (D. Colo. 1991); *In re Providence Television Ltd. Partnership*, 75 B.R. 139, 140 (N.D. Ill. 1987)).

141. *See Southern Ute II*, 119 F.3d at 835-36 (The Solicitor to the Secretary of the Interior opinion contains factual limitations that militate against its application here.).

142. *See Southern Ute I*, 874 F. Supp. at 1160; *Southern Ute II*, 119 F.3d at 836 & n.26.

143. *See Southern Ute I*, 874 F. Supp. at 1155.

144. *See id.*

knowledges that “[a] pervasive theme in these reports is the focus on coal as the primary energy resource for the United States.”¹⁴⁵ Committee hearings transcripts indicate congressional awareness of the relationship of CBM to coal and the possibility that CBM would have value in the future.¹⁴⁶ Critical to the decision in *Southern Ute I* was that nowhere in the written reports or congressional testimony, was it specified that CBM ought to be reserved in the United States by the Acts.¹⁴⁷

The breadth of the Acts was discussed on the House floor, where the question was raised whether a reservation of all minerals would be preferable to reserving only coal under the 1909 Act.¹⁴⁸ The answer was no, because it was believed that a reservation of coal was as significant a departure from past practice as was necessary to protect governments interests.¹⁴⁹ In 1910, when the more specific question was raised as to why other fuels such as gas and oil were not included, the response was that “[o]il and gas present much greater difficulties, when we propose to separate the surface from the mineral.”¹⁵⁰ *Southern Ute I* emphasizes these portions of legislative history to indicate that Congress intended a narrow departure from the practice of granting fee simple absolute title to homesteaders.¹⁵¹ *Southern Ute I* also points to the progressive broadening of United States Government reservations of valuable interests.¹⁵² As the 1909 and 1910 Acts came early in the evolution of public land acts, the district court determined that Congress intended a narrow reservation, which did not include CBM although that intent is not specified.¹⁵³

The district court’s rationale accords with Amoco’s argument in *Southern Ute II*. Amoco asserts that because Congress was aware of methane in 1909, it had the opportunity to broaden the definition of coal to retain more than the solid rock coal if it so desired, but it did not. Thus, its silence is probative of an intent not to include CBM.¹⁵⁴ In response, the 10th Circuit points out that Congress’ silence could be attributable to other factors. Specifically, “Congress may have considered CBM to be a part of that solid coal.”¹⁵⁵ *Southern Ute II* acknowledges that “Congress almost certainly knew in 1909 that gas could be extracted from coal.”¹⁵⁶ However, the 10th Circuit highlights fundamental differences in extraction methods between the early 1900’s and current times:¹⁵⁷ “[c]oal degasification required mining and extraction of coal, then releasing the

145. *Id.* at 1156.

146. *See id.*

147. *See id.*

148. *See* 45 CONG. REC. 2504 (1909).

149. *See id.*

150. 45 CONG. REC. 6044 (1910).

151. *See* *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1157 (D. Colo. 1995).

152. *See id.* at 1158.

153. *See id.* at 1159.

154. *See* *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 822 (10th Cir. 1997).

155. *Id.* at 822. “Indeed, it seems to us quite unlikely that Congress, if it had considered the matter, would have reasoned, ‘We want the Government to hold on to the solid bituminous core of these coal deposits, but we make no claim to the thin layer of molecules of CBM which coats the surfaces.’” *Id.* at 823.

156. *Id.* at 823 n.11.

157. *See id.*

gas by mechanically crushing the coal . . . or heating it."¹⁵⁸ In 1909, the technology did not exist to remove CBM from coal leaving the solid rock behind, thus CBM was necessarily a part of the coal.¹⁵⁹

The 10th Circuit declined to infer from Congress' silence or use of the word "coal" a specific intent towards CBM, knowing there were no means for commercial production.¹⁶⁰ The gist of the 10th Circuit's determination was that CBM's value was unappreciated in 1909 and 1910, therefore the Acts did not reveal Congress' specific intent.¹⁶¹ This view accords with other cases concerning reservations where the grantor either did not know of the existence of an element, or did not appreciate its value.¹⁶² Under such circumstances, the court would have to assume that Congress "viewed CBM as a component distinct from solid rock coal, knew CBM was severable, knew that it had a value, and purposefully chose to reject that value" in order to hold that Congress had a specific intent not to reserve CBM.¹⁶³

3. General Congressional Intent

Since the 10th Circuit Court determined that evidence of specific congressional intent was lacking, it looked to the purposes of the grant in terms of enjoyment of the rights created in order to determine general congressional intent.¹⁶⁴ The court relied on the concept that general intent can be more accurate than specific intent when a component previously regarded as a nuisance becomes valuable.¹⁶⁵ The court found a broad general congressional intent to retain coal, even that coal which was not currently valuable commercially, for the benefit of the United States.¹⁶⁶

While the 10th Circuit agreed with the district court that Congress considered and rejected a reservation of all minerals, it disagreed that the decision was telling of Congress' intent towards CBM.¹⁶⁷ It determined that a rejection of all minerals did not compel a construction as narrow as the district court urged.¹⁶⁸ The 10th Circuit pointed to the fact that Congress considered and rejected other alternatives, including a reservation of only coal which was marketable in 1907 in favor of reserving all coal.¹⁶⁹ "[T]he legislative history suggests that Congress adopted an interpretation of coal which encompassed both the present and future economic value of coal, including value that could only

158. *Id.*

159. *See id.* at 823.

160. *See id.*

161. *See id.*

162. *See id.* (citing *United States v. Union Oil Co. of Cal.*, 549 F.2d 1271, 1273 (9th Cir. 1977); *Northern Natural Gas Co.*, 441 F.2d 704, 714-15 (10th Cir. 1971); *Aulston v. United States*, 915 F.2d 584, 594 (10th Cir. 1990)).

163. *See Southern Ute II*, 119 F.3d at 824.

164. *See id.*

165. *See Northern Natural Gas*, 441 F.2d at 714-15.

166. *See Southern Ute II*, 119 F.3d at 826.

167. *See id.* at 825-826.

168. *See id.* at 825.

169. *See id.* at 826.

be realized through advances in technology such as those which drive the present day exploration for CBM.”¹⁷⁰ A broad interpretation finds support in other decisions concerning United States land grants.¹⁷¹ In *Watt v. Western Nuclear*,¹⁷² the United States Supreme Court determined that gravel was included in a coal and mineral reservation under the Stock-Raising Homestead Act of 1916.¹⁷³ Interpreting the same Act, the 9th Circuit held that geothermal energy was also reserved.¹⁷⁴ The 1914 Agricultural Entry Act,¹⁷⁵ which reserved “phosphate, nitrate, potash, oil, gas, or asphaltic minerals” was at issue in *Aulston v. United States*, where the 10th Circuit determined that the reservation included carbon dioxide.¹⁷⁶ That court also held in *Brennan v. Udall* that “oil” in the 1914 Act included oil shale.¹⁷⁷ The 10th Circuit in *Southern Ute II* noted, “we have 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.”¹⁷⁸

As additional support for its determination, the 10th Circuit pointed out that Congress itself has considered the breadth of the 1909 and 1910 Coal Lands Acts, and indicated that “coal” should be interpreted broadly.¹⁷⁹ In 1955, Congress passed an Act entitled “Entry and Location on Coal Lands on Discovery of Source Material,” in which it granted to surface patentees the right to mine for coal containing uranium where the United States held the coal rights.¹⁸⁰ The court accepted that a House of Representatives Report articulates the presumption that entrymen possessed fee simple title to all other minerals in the land, including valuable source minerals, regardless of the host material or the mode of occurrence.¹⁸¹ However, it concluded that “[t]he fact that Congress ultimately decided it must pass a statute to grant the surface patentees rights to uranium suggests that Congress did not believe the presumption extended to source minerals contained in federally owned coal.”¹⁸² The court’s understanding of the congressional rationale that an imbedded mineral like uranium was reserved applies with even greater force to integral components of coal like CBM, making it even more likely that the 1955 Congress would have considered CBM reserved with the coal in the 1909 and 1910 Acts.¹⁸³

In summary, the 10th Circuit Court found that CBM was intended to belong to the coal owner. Congress knew of CBM in 1909 and 1910, and did not

170. *Id.*

171. *See id.* at 826-27.

172. 462 U.S. 36 (1983).

173. *See id.* at 36.

174. *See Union Oil Co. of Cal.*, 549 F.2d at 1279.

175. 30 U.S.C. §§ 121-125 (1914).

176. *See Aulston v. United States*, 915 F.2d 584, 585 (10th Cir. 1990).

177. *See Brennan v. Udall*, 379 F.2d 803, 806 (10th Cir. 1967).

178. *Southern Ute II*, 119 F.3d at 827.

179. *See id.*

180. 30 U.S.C. §§ 541-541i, 541c (1955).

181. *See H.R. REP. NO. 84-1478* (1955), reprinted in 1955 U.S.C.C.A.N. 2992, 2996.

182. *Southern Ute II*, 119 F.3d at 828.

183. *See id.*

specify non-inclusion, perhaps understanding that at the time it was not severable without destroying the underlying coal.¹⁸⁴ Congress was interested in reserving coal as a valuable resource for the benefit of the United States.¹⁸⁵ It follows logically that if Congress had known of CBM's value and severability, it would have intended its inclusion in the reservation, considering it did reserve coal that at the time was not commercially valuable.¹⁸⁶ Additionally, the principle of statutory construction that ambiguity should be resolved in favor of the government works to include CBM in reservations of coal made in 1909 and in 1910.¹⁸⁷

VI. ANALYSIS

The divergent results of *Southern Ute I* and *II* are based significantly on the court's self-imposed limitation of making a determination based solely on interpretation of the 1909 and 1910 Acts. This necessarily encouraged the hyper-technical examination of the word "coal" instead of expanding the analysis to consider whether CBM, as a general proposition, rightfully belongs to the coal or gas interest holder.¹⁸⁸ While this note commends the result of placing ownership of CBM with the coal interest holder, it also criticizes the 10th Circuit for failing to include the physical properties of CBM as a basis for its determination, thereby forfeiting its opportunity to offer guidance to others struggling with the question of CBM ownership.

The court in *Southern Ute II* made the better decision for legal, equitable, and scientific reasons. The *Southern Ute II* decision was legally sound for the simple reason that use of the word "coal" in the Acts of 1909 and 1910 was latently ambiguous: "[a]mbiguity exists if reasonable persons can find different meanings in a statute."¹⁸⁹ District Judge Babcock, author of *Southern Ute I*, and 10th Circuit Chief Judge Seymour, author of *Southern Ute II*, qualify as reasonable people, and clearly they found different meanings for the word "coal" in the Coal Lands Acts of 1909 and 1910. The ambiguity was *latent* because although on its face, "coal" appeared clear and intelligible and suggested a single meaning, extraneous evidence created a necessity for interpretation or a choice among whether the term included CBM or not.¹⁹⁰

As *Southern Ute II* stressed, when ambiguity existed in the context of land grants, such ambiguity should be resolved in favor of the sovereign.¹⁹¹ This fundamental rule of statutory construction finds support in precedent.¹⁹² When

184. *See id.* at 823.

185. *See Southern Ute II*, 119 F.3d at 825. President Theodore Roosevelt explained the purpose of the withdrawal of valuable coal lands in his Sixth Annual Message (Dec. 3, 1906). *See id.*

186. *See id.* at 826.

187. *See id.*

188. *See Southern Ute I*, 874 F. Supp. at 1146; *Southern Ute II*, 119 F.3d at 819-20. Both courts spent significant energy on determining what Congress meant by the term "coal." *See id.*

189. Black's Law Dictionary 52 (Abridged 6th ed. 1991).

190. *Id.*

191. *See Southern Ute II*, 119 F.3d at 821.

192. *See Burke v. Southern Pac. R.R. Co.*, 234 U.S. 669, 680 (1914); *Watt v. Western Nuclear*, 462 U.S.

applied to the case at hand, the rule placed ownership of CBM in the hands of the coal interest holder, the Southern Ute Indian Tribe.

Equity was satisfied by the *Southern Ute II* decision. In 1938, under authority of the Indian Reorganization Act of 1934, the United States returned to various tribes, including the Southern Utes, rights to coal which had previously been reserved.¹⁹³ This was done in an attempt to rectify past unfair treatment of the Indians.¹⁹⁴ If it had been determined that the right to CBM belonged to the gas interest holder, the return of coal interests to the Southern Ute Tribe would have been rendered meaningless. The depth of the majority of coal in question made it unmineable by current technology.¹⁹⁵ Thus, the coal's primary value to the Southern Ute Tribe, or for that matter its predecessor in interest, the United States, came from extraction of CBM. It seems clear that the United States sought to reserve, and then grant to the Tribe, coal for its value as an energy source not just an unaccessible, thereby valueless black rock.

There are three other equitable concerns which weigh against granting the gas interest holder rights to CBM. First, during the period in which CBM was considered nothing more than a nuisance, the coal interest holder was burdened with managing the gas during mining operations.¹⁹⁶ This is still true today.¹⁹⁷ It makes little sense that CBM should belong to the gas interest holder, who has never carried a burden related to it, simply because it now has a value. Second, "release of either absorbed or fracture-trapped CBM requires production techniques which often cause significant damage to the coal."¹⁹⁸ Third, production of CBM necessarily reduces the amount of CBM within the coal, thereby reducing the value of the coal rock in the event that future technology allows for its extraction.¹⁹⁹ For these equitable reasons CBM rights belong with the coal.

The result of the *Southern Ute II* holding makes scientific sense due to the nature of coal as both the source rock and the reservoir for CBM.²⁰⁰ Although some methane does migrate to cracks or fractures within the coal seam, the highly porous structure of coal traps most of the methane that is produced during coalification.²⁰¹ Thus, in place, the CBM physically trapped in coal is nec-

36, 59 (1983); *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116(1957).

193. See *Southern Ute I*, 874 F. Supp. at 1151.

194. See *id.*

195. See Choate, *supra* note 29, at 196. The area in dispute is located in the northern portion of the Fruitland formation of the San Juan Basin. Of the 200 billion tons of coal within the Fruitland formation, approximately 14 billion tons are strippable, 14 billion are at a depth between 500 and 1,000 feet, and 28 billion are between 1,000 and 2,000 feet. The remainder is located between 2,000 and in excess of 4,000 feet, with the deepest beds occurring in the North. See *id.*

196. See Maurice Deul and Ann G. Kim, *Research in Methane Control*, in METHANE CONTROL RESEARCH: SUMMARY OF RESULTS, 1964-80 at 3 (Maurice Deul and Ann G. Kim, eds., Bureau of Mines Bulletin/1988).

197. 30 U.S.C. §§801-960 (1976).

198. See *Southern Ute II*, 119 F.3d at 822.

199. See C.T. Rightmire, *Coalbed Methane Resource*, in AAPG STUDIES IN GEOLOGY SERIES #17: COALBED METHANE RESOURCES OF THE UNITED STATES 1, 11 (Craig T. Rightmire, et al. eds., 1984). For high-volatile A-bituminous coal, the maximum producible gas is estimated to be 68%, leaving a residual of only approximately 32%. See *id.*

200. See Levine, *supra* note 26, at 40.

201. See Lewin et al., *Unlocking the Fire* *supra* note 21, at 573.

essarily retained with the coal reservoir and should belong to the coal owner.²⁰² From an historic perspective, this is especially true “[b]ecause no effective means existed in 1909 to remove CBM leaving the coal behind.”²⁰³

The 10th Circuit’s decision was based solely on interpretation and construction of the 1909 and 1910 Acts.²⁰⁴ Because of the narrowness of the 10th Circuit holding, it offers little aid to those in conflict over CBM where the severance of the coal interest was not undertaken by the United States government. Thus, the decision falls short in addressing disputes over CBM where the coal and gas interests have been severed from one another under any other circumstances. The 10th Circuit decision does not have direct application to any lands not included in the 65 million acres in the western United States specified by the 1906 withdrawal of lands to which patents were issued under the Coal Lands Acts of 1909 and 1910.²⁰⁵ By definition, the entire eastern United States was left out. This is unfortunate because nationally there is a real need for legal conclusiveness regarding the ownership of CBM.²⁰⁶ Specifically, the court could have based its holding on both legal and scientific theories.

A holding that CBM always belongs to the coal interest holder absent specific language transferring that right away may conflict with some case law, which has been mixed regarding migrated CBM.²⁰⁷ The varied results in prior case law is due to the more tenuous relationship between the coal and migrated CBM. The 10th Circuit declined to even address migrated coal in *Southern Ute II*.²⁰⁸ However, it makes sense to place ownership of both in-place and migrated CBM with the coal interest holder. When CBM migrates, it does so through fractures, either man-made,²⁰⁹ or naturally occurring.²¹⁰ Once a fracture exists, the CBM will migrate to secondary reservoirs; “the coalbed continues to recharge the [secondary] reservoir as that reservoir is depleted by the well.”²¹¹ Thus, production of CBM located in adjacent non-coal strata drains CBM from the source coal.

A determination that all CBM belongs to the coal interest holder is ultimately easier to manage than splitting ownership based upon which strata the CBM is extracted from. It would be difficult, if not impossible, to determine where the gas produced is from, while a scientific analysis can identify whether

202. See *Southern Ute II*, 119 F.3d at 823.

203. *Id.*

204. See *id.*

205. See *Southern Ute I*, 874 F. Supp. at 1149. This was the acreage originally withdrawn that the Coal Lands Acts were meant to address. See *id.*

206. An often cited inhibitor to production of CBM is the lack of legal guidance. See, e.g., Rightmire, *supra* note 199, at 11; Olson, *supra* note 10, at 378; Lewin et al., *Unlocking the Fire supra* note 21, at 568.

207. See, e.g., *Carbon County v. Baird*, No. DV 90-120, slip op. At 11, 1992 WL 464786 at *5 (coal owner has title to CBM); *United States Steel Corp. v. Hoge*, 468 A.2d 1380 (Pa. 1983) (coal owner has title to CBM “in-place,” suggesting that migrated CBM belongs to the gas interest holder); *Pinnacle Petroleum Co. v. Jim Walter Resources, Inc.*, No. CV-87-3012 (Cir.Ct. Mobile County, Ala. 1989) (coal owners have title to CBM, including that migrated).

208. See *Southern Ute II*, at 822 fn 7.

209. See Deul & Kim, *Coal Beds: A Source of Natural Gas*, *supra* note 24, at 49.

210. See Rightmire, *supra* note 199, at 10.

211. *Id.* at 11.

the gas is CBM or another type of natural gas.²¹²

VII. CONCLUSION

The 10th Circuit holding in *Southern Ute Indian Tribe v. Amoco Production Company*, placing rights to CBM in the Tribe, was well supported by law and science. The congressional enactment that led to the Tribe's ownership of coal was latently ambiguous, and therefore, application of the canon of construction that ambiguity in government reservations should be resolved in favor of the sovereign was appropriate. The result of this construction was that the government reservation of coal included CBM, both of which were subsequently transferred to the Southern Ute Tribe subject to their exclusive control.

Although the court did not rely on the scientific relationship between coal and CBM in reaching its decision, science supports the holding. CBM is produced while coal develops, and is retained within the coalbed until a fracture allows for release. Thus, the owner of the coalbed necessarily owns the CBM trapped within it. Classifying all CBM as property of the coal owner is scientifically legitimate. The court could have broadened the basis for its decision to include the nature of CBM, thereby aiding the production of this valuable resource by offering legal guidance to producers.

Amy Callard

212. *See id.* at 6.

