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AMOCO PRODUCTION COMPANY v. SOUTHERN UTE INDIAN TRIBE: A FINAL RESOLUTION TO THE BATTLE OVER OWNERSHIP OF COALBED METHANE GAS?

INTRODUCTION

The United States' demand for natural gas, an energy source that is critical for power generation and heating, is expected to increase sixty-two percent by the year 2020.¹ Energy analysts question whether current supplies of traditional natural gas will be able to meet this demand.² Given this high demand and the potential for limited supply, alternative gas sources, such as methane gas, are becoming increasingly more valuable, spurring ownership disputes over those previously untapped gas reserves.³

On June 7, 1999, the United States Supreme Court in Amoco Production Co. v. Southern Ute Indian Tribe,⁴ reversed the en banc opinion of the Tenth Circuit⁵ and held that a Colorado Indian Tribe does not own the rights to valuable underground coalbed methane gas (CBM), despite the fact that it owns the surrounding coalbed.⁶ At issue in the Amoco case was ownership of CBM in over 200,000 acres of Native American-owned coal land in southern Colorado and resolution of the Tribe's demand for back CBM production royalties of approximately $1 billion.⁷

¹ See EIA's Annual Outlook 2001 Projects Gas Reserve Additions After 2004, Despite Demand Growth; Reviews Land Access, Electric Market Issues, Rep. No. 2317, FOSTER NAT. GAS REP., Jan. 4, 2001, at 17 (hereinafter EIA's Annual Outlook). Demand will increase at an average annual rate of 2.3%. See id. In addition to increased demand, natural gas prices are expected to soar over the next twenty years. See id.
² See id.
The Supreme Court granted certiorari to review the Tenth Circuit's decision and to determine if a grant of "all coal" in the Coal Lands Acts of 1909 and 1910 necessarily included a grant of the CBM found both in and around the coal.\(^8\)

The outcome of this case had serious implications for the many parties involved in the litigation (including nearly three thousand landowners with whom Amoco held natural gas leases).\(^9\) Also immediately affected was an estimated twenty million additional acres of privately held coal land in the West, patented to landowners under the Coal Lands Acts.\(^10\) Finally, though beyond the scope of *Amoco*, the decision inevitably affected other private coal and land owners who received their coal land from other grant or lease instruments.\(^11\) As the value and importance of alternative energy sources increase, so will coal owners' desire to fight for CBM development rights.\(^12\)

Part I of this Comment examines the history of the coal land conveyances to the Southern Ute Indian Tribe and the 1909 and 1910 Coal Lands Acts. Part II explains what CBM is, its relationship to coal, and why it is such an important resource for America's future energy needs. Part III examines the Department of the Interior agency opinions and state and federal court cases that eventually led to the Supreme Court decision in *Amoco*. Part IV considers why the Supreme Court in *Amoco* might have decided as it did. Finally, although this narrowly-written decision applied only to federal coal lands reserved under the 1909 and 1910 Coal Lands Acts, Part V examines the potential effect that the decision will have on other federal and private coal lands in the United States, as well as administrative and legislative attempts to prevent future coal and CBM development conflicts.

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9. *See Court Favors Amoco, supra note 7.*
10. *See Court Rules for Amoco, supra note 7; see also High Court Affirms Coalbed Methane Leases, OIL & GAS J., June 14, 1999, available at 1999 WL 9724126.*
11. *See Bowman, supra note 3.*
12. *See generally id.; EIA's Annual Outlook, supra note 1.*
I. THE COAL LANDS ACTS OF 1909 AND 1910

A. Historical Background of the Acts

In an effort to promote development across the country and to encourage homesteaders to settle the American West, Congress passed the 1862 Homestead Act, the Coal Lands Acts of 1864 and 1873, and the 1877 Desert Land Act. Collectively, these statutes enabled homesteaders to purchase up to 160 acres of coal lands in fee simple absolute for approximately $10 per acre with no mineral reservation to the United States government. The government also encouraged natural resource and energy development through a sale of coal lands for only $2.50 per acre to oil and gas explorers. Because of these laws, homesteaders and explorers came from all over the country to settle the western United States and to profit from the land.

Near the turn of the twentieth century, famine and fraud in the American West prompted President Theodore Roosevelt to order the Department of the Interior to withdraw from public sale sixty-four million acres of public land that contained "workable" coal. Facing the daunting demands of the Industrial Revolution, President Roosevelt took this action to protect and preserve the country's coal resources for the benefit of the public. Homesteaders could only maintain ownership of the land that they had settled if they could show the Land Office that the land contained no coal. This decision outraged the homesteaders, and they demanded that the President reconsider his order. Over the next few years, Congress and the President worked toward a compromise that would both

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13. See Amoco, 526 U.S. at 888.
14. See id.
16. See id.
17. See Amoco, 526 U.S. at 888-89.
19. See Amoco, 526 U.S. at 888-89.
20. See id.
preserve the ownership rights of the settlers and promote mineral and energy development of the land. 21 That compromise was the Coal Lands Acts of 1909 and 1910. 22

B. The Acts

The Coal Lands Act of 1909 created limited land patents for homesteaders who had settled lands that were later found to contain coal. 23 The issuance of the land patent was contingent upon the United States keeping a reservation to "all coal" in the land and the right to mine the land for that coal. 24 This statute only addressed lands that had already been settled through the earlier homestead laws, and made no provision for the other western surplus lands that were still unoccupied. 25

To fill this gap in the statute, Congress enacted the Coal Lands Act of 1910. 26 This statute was very similar to the 1909 Act, but the 1910 law also included lands that had not yet been settled. 27 It offered limited land patents that were subject to the United States government's coal reservation. 28 In sum, well over twenty million acres of land were patented under these two statutes. 29

21. See id.
22. See id. at 870.
24. See id. The statute states that a person may "receive a patent . . . 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 . . . ." Id.
25. See Amoco, 526 U.S. at 870.
27. See Amoco, 526 U.S. at 870.
   Unreserved public lands of the United States . . . which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only . . . with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same.
Id.
29. See Amoco, 526 U.S. at 870.
C. Ownership Rights of the Southern Ute Tribe

In 1864, the Southern Ute Indian Tribe, along with other Ute tribes, formed the Confederated Band of Utes.30 They then negotiated with the United States government and exchanged their scattered, reserved lands in Utah, New Mexico, and Colorado for 15.7 million contiguous acres of land in southern Colorado.31 By the middle of the 1870s, the Confederated Utes ceded 3.7 million acres of that southern Colorado land back to the United States government.32 In reaction to, and as punishment for, the bloody 1879 Ute uprising in which many non-Indians were killed, Congress divided the Confederated Utes' commonly-held land into smaller land parcels that would be made available for sale to homesteaders.33 The Ute Confederation dissolved, and by 1882, only the Southern Ute Tribe remained on 200,000 acres of the southern Colorado land.34 Much of that 200,000 acres of land was later patented to homesteaders in the 1909 and 1910 Coal Lands Acts, with the Tribe only holding a small land reservation in southern Colorado.35

In an act of goodwill toward the Indian nation, in 1934 the United States gave any surplus of the previously ceded land back to the Ute Tribe under the Indian Reorganization Act.36 Finally, in 1938 the United States conveyed, in trust, title to the previously ceded, unsettled lands still held by the government.37 In addition to the land, the United States gave the Ute Tribe all of the coal that was reserved to the government under the 1909

31. See id.
32. See id. at 469-70. Congress insisted that the Utes cede this land when it was discovered that it contained valuable minerals. See id. at 470 n.8. Congress promised the tribe that it would be given additional tribal lands further west once the government had completed exploration of the proposed area. See id.
33. See Amoco, 526 U.S. at 870; Francis, supra note 30, at 470.
34. See Francis, supra note 30, at 470.
35. See Amoco, 526 U.S. at 870.
36. See Francis, supra note 30, at 471; see also 25 U.S.C. § 463 (1994) (stating that "If [the Secretary of the Interior] shall find it to be in the public interest, [he] is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation ").
37. See Amoco, 526 U.S. at 870.
and 1910 Coal Lands Acts. As such, the Tribe had equitable title to the coal within the boundaries of its 200,000-acre reservation (including the coal under the reservation land that was settled by homesteaders under the Coal Lands Acts).

II. COALBED METHANE GAS—WHAT IS IT? AND WHY IS IT IMPORTANT?

Coalbed methane is a gas that is formed naturally when plants and other organic material decay and form peat. Years of intense geological pressure compress and change the peat into coal and methane gas through a process called "coalification." Coalbed methane gas (CBM) is found either within the microscopic pores and fissures of the solid coal or is "adsorbed" to the surface of the coal through van der Waals forces. Although most of the methane eventually migrates out of the solid coal during periods of man-made depressurization or natural shifting within the earth, nearly all of the CBM stays within the coal seam or the coal strata.

When a mining company extracts the coal, it drills into the fragile coal seam, thus unavoidably depressurizing it such that CBM seeps (or even explodes) to the surface through the natural or man-made fissures in the coal bed. Until technology was developed to contain the CBM gas expulsion, coal miners considered CBM a nuisance and a potential mining hazard. That view changed when scientists realized that CBM was a potential energy source.

By the 1970s, an energy crisis rendered the United States desperate to find new energy sources within its own borders, to
reduce reliance upon foreign oil. As such, Congress established the Federal Energy Regulatory Commission (FERC) under the Natural Gas Policy Act of 1978 to research and develop potential energy resources in the United States. The energy industry soon realized that CBM was a valuable and untapped energy source. Once a nuisance, CBM became an exploitable national asset seemingly overnight.

Today CBM accounts for an estimated fifteen percent of potential United States natural gas reserves. The United States Geological Survey estimates that there may be 700 trillion cubic feet of CBM in the United States. Thus, CBM is extremely valuable because natural gas is now being developed as an alternative fuel source for home heating and other energy uses. As an incentive to increase CBM production, the United States government instituted a generous package of grants and federal tax credits for companies engaged in CBM development and mining.

By the late 1970s and early 1980s, with coal and natural gas companies clamoring for CBM mining rights, the fundamental question arose—who owns CBM: the landowners, the coal owners, or the natural gas owners? This question would not be answered for twenty years.
III. THE DEPARTMENT OF THE INTERIOR OPINIONS AND COURT DECISIONS LEADING TO THE SUPREME COURT DECISION IN AMOCO

A. The Department of the Interior Opinions

Responding to numerous requests for clarification from oil and gas companies and landowners as to ownership of CBM gas (and in an effort to increase production of CBM), in 1981 the Solicitor of the Department of the Interior issued an opinion which stated that the Coal Lands Acts of 1909 and 1910 did not reserve the CBM to the United States government with its coal reservation.\(^{57}\) To reach his decision, the Solicitor examined the physical properties of coal, the legislative intent of the 1909 and 1910 Acts, and the meaning given to CBM in subsequent statutes such as the Mineral Leasing Act (MLA).\(^{58}\)

The Solicitor’s ultimate opinion was that CBM is “scientifically defined and legally regarded as a gas.”\(^{59}\) Furthermore, he wrote that “although coalbed gas exists in coal deposits, the two resources are distinct and potentially severable.”\(^{60}\) The Solicitor also carefully examined the statements of Representative Mondell in the 1909 congressional debates of the Coal Lands Act.\(^{61}\) Representative Mondell stated that the proposed statute would reserve only coal to the United States, not other minerals like oil or gas.\(^ {62}\) The Solicitor found these statements both persuasive and conclusive that Congress only intended to reserve coal, not CBM.\(^ {63}\) In reliance on the Department of the Interior opinion, natural gas companies, such as Amoco

\(^{57}\) Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits, 88 Interior Dec. 538 (1981). The Solicitor wrote: “I conclude that: (1) the reservation of coal to the United States in the [1909 and 1910] Act[s] . . . did not include the coalbed gas found in the reserved coal . . . .” Id. at 540.

\(^{58}\) Id. “The Mineral Leasing Act refers only to ‘gas’ or ‘natural gas’ without any qualifying adjectives, thus supporting a nonrestrictive reading of those terms.” Id. at 545–46. Coal and gas leasing are addressed in two separate sections of the MLA. Id. at 547. This seemed to convince the Solicitor that CBM was considered as a gas in the MLA. Id.

\(^{59}\) Id. at 540.

\(^{60}\) Id.

\(^{61}\) Id. at 542.

\(^{62}\) Id. (discussing 43 CONG. REC. 2504 (1909)).

\(^{63}\) Id.
Production Company, drilled into the Tribe's coal beds and extracted valuable CBM from the coal seam. 64

Unfortunately, the 1981 opinion only created more questions and controversies between coal, land, and gas owners. Coal rights owners, such as the Southern Ute Tribe, felt that their coal and property rights were being infringed upon by the intrusive techniques used to drill for the CBM gas. 65 To release the CBM, miners typically use a technique called "hydro fracturing." 66 In this process, liquid is forced into the coal seam and the coal is then broken apart. 67 This depressurization of the coal seam releases the gas which the mining company then collects. 68 This process, many argue, damages the integrity and value of the coal. 69

In a 1990 Department of the Interior opinion, the Solicitor confirmed yet again that despite any potential damage that may occur to the coalbed through CBM mining, CBM is a natural gas, not coal. 70 His opinion was that CBM cannot be reserved without a specific reference in the lease or grant. 71 Furthermore, he found that coal and CBM are severable, and that whoever holds the gas rights also holds the CBM drilling rights. 72

B. Earlier Court Decisions

Although very few courts have considered CBM ownership issues, most of those that have hold that he who owns the coal also owns the CBM. 73 The first major case to consider the issue

64. See Supreme Court Rules for Producers and Royalty Owners in Dispute with Indian Tribe Over Ownership of Coalbed Methane Gas Contained in Coal Formations Owned by the Tribe, Rep. No. 2238, FOSTER NAT. GAS REP., June 17, 1999, at 10, available at 1999 WL 8407888 [hereinafter Court Rules for Producers]. Some estimate the value of the CBM at issue in the Amoco case at as much as $1 billion. See Court Favors Amoco, supra note 7.
65. See Court Rules for Producers, supra note 64.
66. See Francis, supra note 30, at 473.
67. See id.
68. See id.
69. See id.
71. Id. at 61.
72. Id.
of CBM ownership was the landmark case of *United States Steel Corp. v. Hoge*.\(^4\) In this case, the Pennsylvania Supreme Court held that the owner of the coal also possessed a limited ownership right to the CBM within the coal.\(^5\) The court found that any CBM incidental to coal mining operations is available for possession by the coal miner.\(^6\) To reach its decision, the court evaluated the physical relationship of the coal to the CBM and found it persuasive that the CBM is physically contained within the coal seam.\(^7\) Therefore, if in addition to the coal, a landowner owns the area surrounding the coal, he would also own the CBM even if it migrates out of the coal.\(^8\) In his dissent, Justice Flaherty wrote that the gas that is commonly referred to as natural gas includes CBM, and that to pretend that CBM is anything other than gas is to ignore the scientific composition of the material.\(^9\)

Other courts have also considered the issue of CBM ownership rights. The Supreme Court of Alabama in *Vines v. McKenzie Methane Corp.*\(^50\) held that the ownership of CBM was included in the mineral estate conveyance.\(^81\) This court found that the process of drilling for CBM and mining for coal are "inextricably intertwined."\(^82\) The court seemed to imply that because the mining operations are so interrelated, to have one company mine the coal and another company mine the gas would be impractical.\(^83\) The court went on to state that when there is an express grant of "all coal,"\(^84\) the grant includes the CBM.\(^85\) The only time that the grant would not include a CBM

\(^74\) 468 A.2d 1380 (Pa. 1983).
\(^75\) United States Steel Corp. v. Hoge, 468 A.2d at 1383. Ownership of the CBM will only be lost to the coal rights owner if the CBM migrates out of the owner's property. *Id.*
\(^76\) *Id.*
\(^77\) *Id.* at 1382.
\(^78\) *Id.* at 1383 (stating that "such gas as is present in coal must necessarily belong to the owner of the coal, so long as it remains within his property and subject to his exclusive dominion and control") (emphasis in original).
\(^79\) *Id.* at 1386, 1389 (Flaherty, J., dissenting).
\(^80\) 619 So. 2d 1305 (Ala. 1993).
\(^81\) Vines v. McKenzie Methane Corp., 619 So. 2d at 1308.
\(^82\) *Id.*
\(^83\) See generally *id.*
\(^84\) Though not relevant to this case, it is interesting to note that these are precisely the words used in the Coal Lands Acts to reserve the coal to the United States. See 30 U.S.C. §§ 81, 83-85 (1984).
\(^85\) *Vines*, 619 So. 2d at 1309.
grant is if the language of the grant or lease specifically provided otherwise.\(^{86}\)

Later in 1993, the Alabama Supreme Court held that the coal owner has the right to mine or sell the CBM if that gas is within the owned coal seam.\(^{87}\) The Alabama court found, as it did in the \textit{Vines} decision, that when a coal grant conveys "all the coal," it includes a conveyance of CBM.\(^{88}\) According to the court, a coal grant creates a "bundle of property rights" that include possession of any CBM contained within the coal.\(^{89}\) However, if the gas migrates out of the coal, the CBM is no longer within the possession of the coal owner (unless he or she also owns the rights to the land or natural gas surrounding the coal).\(^{90}\)

Parallels can also be drawn to other natural resources (non-CBM) ownership rights cases. Generally in these cases, the courts interpreted statutes that reserved natural resources to the United States very broadly, so that the government would maintain possession over the natural resources even if they were not specifically referenced in the particular statutes.\(^{91}\) For example, the Tenth Circuit held that a conveyance of oil in a land grant necessarily included a conveyance of oil shale.\(^{92}\) A comparison can be drawn between the relationship of oil to oil shale and CBM to coal (because liquid oil exists within the solid oil shale).\(^{93}\)

In a controversy over whether the United States government also reserved ownership to geothermal steam when it reserved ownership of subsurface minerals, the Ninth Circuit in \textit{United States v. Union Oil Co.}\(^{94}\) found that the Stock-Raising Homestead Act (SRHA) should be read broadly in light of the purposes of the Act.\(^{95}\) The court found that the SRHA's purpose was to protect and preserve valuable mineral resources of the United States.\(^{96}\) Because geothermal steam was a valuable
resource, the United States retained possession over it (even though it is not commonly thought of as a mineral) because all of the elements of the steam, such as magma, porous rock, and water, are minerals. 97

Although neither specifically mentioned in the SRHA nor typically considered to be a mineral, gravel was also held to be included in the SRHA, and thus reserved to the United States government. 98 The United States Supreme Court held that the underlying purpose of the statute was to sever the surface estate from the mineral estate to promote concurrent development of both. 99 Thus, the Court found that it could reasonably be assumed that Congress would have intended to include gravel in the statute. 100

These broad judicial interpretations of seemingly specific mineral reservation statutes demonstrate that when confronted with an ownership controversy, the courts will typically err on the side of a government reservation of the mineral. 101 The courts generally rely on the congressionally-designated purpose of these statutes, which normally is to preserve and protect this country’s natural and energy resources. 102 Because the overriding purpose of the Coal Lands Acts was also to preserve and encourage development of the country’s energy resources, it would seem to be in keeping with these earlier court decisions for the Supreme Court in Amoco to include CBM with the government’s coal reservation under the Coal Lands Acts. 103

The one case on the other side of the CBM ownership spectrum is the 1995 decision of the Supreme Court of Montana in Carbon County v. Union Reserve Coal Co. 104 The court, relying heavily on the United States District Court’s decision in

97. Id. at 1273; see also Rosette, Inc. v. United States, 64 F. Supp. 2d 1116 (D.N.M. 1999) (holding that geothermal steam and water were “other minerals” that were reserved by the United States in the SRHA).
99. Id. at 47.
100. Id. at 53, 55.
101. See, e.g., Id.; United States v. Union Oil Co., 549 F.2d 1271 (9th Cir. 1977); Brennan v. Udall, 379 F.2d 803 (10th Cir. 1967); Rosette, Inc. v. United States, 64 F. Supp. 2d 1116 (D.N.M. 1999).
102. See, e.g., Union Oil, 549 F.2d at 1271; Rosette, 64 F. Supp. 2d at 1120.
104. 898 P.2d 880 (Mont. 1995).
Southern Ute Indian Tribe v. Amoco Production Co., held that "coal and gas are mutually exclusive terms." The court also looked to the state's own statutory definition of coal. According to the Montana statute, "coal does not include: (a) methane gas or any other natural gas that may be found in any coal formation." The court found that coal and CBM were separate (coal is solid and gas is not); therefore, a conveyance of the coal did not include a conveyance of the CBM.

C. The Southern Ute Tribe Cases

1. The District Court Decision

The Southern Ute Indian Tribe (Tribe) initially brought suit against Amoco Production Company (Amoco) in 1991. The Tribe claimed ownership of the CBM found within the coal seam that the United States granted to the Tribe in trust in 1938. The Tribe sought an ownership declaration from the court and requested damages for loss of CBM royalty payments, as well as for trespass and conversion of property. Amoco was named as the principle defendant and class representative in the lawsuit. The Tribe also brought suit against the United States government for breach of fiduciary duty as trustee for the Tribe’s interests.

In 1995, the United States District Court for the District of Colorado granted summary judgment for Amoco and for the federal defendants and held that the word "coal" in the 1909 and 1910 Acts did not include CBM gas, but only the solid coal. The court relied heavily on statutory construction of the Acts, congressional intent, and deference to the 1981 and 1990 Department of the Interior Solicitor’s opinions.

105. 874 F. Supp. 1142 (D. Colo. 1994); see infra Part III.C.1.
107. Id. at 689.
108. Id. (quoting MONT. CODE ANN. § 82-11-111 (1993)).
109. Id.
111. Id. at 870.
113. Id. at 1146.
114. Id.
115. Id. at 1161.
116. Id. at 1152-61.
Legislative intent and canons of statutory construction played a very large role in the outcome of the case.\textsuperscript{117} The court found that the intent must be examined from the perspective of the time that the statutes were enacted, not in the light of modern technology.\textsuperscript{118} To determine what Congress' intent would have been in 1909, the court examined various dictionary definitions of coal from the turn of the twentieth century.\textsuperscript{119} In those definitions, the court found that coal was only referred to as a solid rock, not CBM.\textsuperscript{120} Furthermore, the court stated that there is still scientific debate today as to whether CBM is even a constituent of the coal.\textsuperscript{121}

In furtherance of its opinion, the district court noted that at the time of the enactment of the Coal Lands Acts, CBM was considered a hazardous gas, not a natural resource.\textsuperscript{122} The court found that it seemed unlikely that there would have been congressional intent to reserve a substance that had a negative value both to the country and to the coal mining industry.\textsuperscript{123} Congressional debates referred to the coal in terms of tons and never discussed CBM.\textsuperscript{124} This type of measurement in tons would not indicate a gas reservation (which is usually referred to in terms of cubic feet).\textsuperscript{125}

Finally, the court found that the 1981 Solicitor's Opinion should be granted deference because the agency seemed to have thoroughly examined the statutes before rendering its opinion.\textsuperscript{126} The court, using a \textit{Chevron} analysis,\textsuperscript{127} did not second

\begin{thebibliography}{99}
\bibitem{117} See generally id.
\bibitem{118} \textit{Id.} at 1152; see also \textit{Leo Sheep Co. v. United States}, 440 U.S. 688 (1979) (holding that when construing a statute, courts should look at the meaning of the statute in the light of the time of enactment).
\bibitem{119} \textit{Southern Ute,} 874 F. Supp. at 1153.
\bibitem{120} \textit{Id.}
\bibitem{121} \textit{Id.} at 1154.
\bibitem{122} \textit{Id.} at 1155.
\bibitem{123} \textit{Id.} at 1154.
\bibitem{124} \textit{Id.} at 1155-59.
\bibitem{126} \textit{Southern Ute,} 874 F. Supp. at 1160.
\bibitem{127} In \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council}, 467 U.S. 837 (1984), the Supreme Court held that if there is a gap in the relevant statute, then the administering agency has the duty and authority to make specific regulations to address those gaps. \textit{Id.} at 843-44. Furthermore, "if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." \textit{Id.} at 837-38. \textit{Chevron} creates a two-
guess that opinion. It found that the agency was in the best position to review all of the issues and make a sound judgment.

2. The Tenth Circuit Panel Reversal

The Tribe appealed the district court’s grant of summary judgment, and a panel of the Tenth Circuit Court of Appeals reversed it in 1997. The panel held that the key to determining the ownership of the CBM was to apply the longstanding rules of statutory construction to the Coal Lands Acts of 1909 and 1910. The court held that the language of the Coal Lands Acts was ambiguous as to whether CBM was reserved along with the coal to the United States government. To the Tenth Circuit, anything other than a clear conveyance would be considered ambiguous. The court determined that nowhere in the statute was CBM mentioned, or even alluded to. As such, there was no congressional intent within the statute regarding CBM, which indicated ambiguity.

The panel also found that Chevron deference was not owed to the Solicitor’s 1981 opinion because it was only an advisory pronouncement and had no binding regulatory effect. This is because there was neither a public notice of the agency policy nor a period of public comment, a requirement for formal agency rule-making under the Administrative Procedure Act. The court found that to give Chevron deference would be to extend to private coal owners an advisory opinion that was

prong test for the court to apply. Id. at 842. First, has Congress clearly addressed the issue? Second, if the statute is silent on that specific issue, then the court must determine if the agency made a fair interpretation of the statute. Id. at 842-43.

129. Id.
131. Id. at 824.
132. Id.; see also Watt v. W. Nuclear, Inc., 462 U.S. 36, 59 (1983). “[L]and grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.” Id. at 59 (quoting United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957)).
133. Southern Ute, 119 F.3d at 821.
134. Id.
135. Id.
136. Id. at 835-36.
137. Id. at 830.
meant only to address conflicts over federally-owned coal lands.  

3. The Tenth Circuit En Banc Decision

Amoco petitioned for an en banc rehearing by the Tenth Circuit Court of Appeals.  In a nearly identical opinion, the full Tenth Circuit held that the Coal Lands Acts were ambiguous and that CBM within the coal seam is maintained by the coal owner. The court applied the common property law principle that ambiguous property grants are resolved in favor of the sovereign (the United States government). The United States' reservation of coal in the Acts included a reservation of the CBM. Because the United States conveyed its coal rights to the Southern Ute Tribe in 1938, it also conveyed the CBM rights.

The court also found dictionary definitions for the word "coal" that differed from those cited by the district court. The court found that "while contemporaneous dictionary definitions of words in a statute are relevant . . . the existence of alternative dictionary definitions may themselves indicate that the statute is ambiguous." By examining legislative intent, the court found that Congress might have intended to include the CBM in the reservation. In 1909, Congress was interested in preserving the economic and energy resource value of the coal. Even though Congress did not know that CBM would be a resource, the overall purpose of the statute was to preserve the United States' valuable energy sources. The court seemed to

138. Id.
140. Id. at 1256.
141. Id.
142. Id.
143. Id.
144. Id. at 1259. One dictionary definition cited by the court defined "coal" as a "substance . . . containing different hydrocarbons." Id. (citing NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 508 (1913 ed.).) In 1909, methane was considered to be a hydrocarbon, and as such, it fit within this definition of coal. Id.
145. Id.
146. Id. at 1260.
147. Id. at 1261.
148. Id.
speculate that had Congress known in 1909 or 1910 that CBM would turn out to be so valuable, it would have reserved it as well.\textsuperscript{149}

Furthermore, in 1909, CBM could not be commercially extracted from the coal.\textsuperscript{150} The court stated that because CBM was not severable from the coal, it had no value at the time.\textsuperscript{151} It further surmised that at the time Congress may not have even known that CBM was a component of coal.\textsuperscript{152} Therefore, the specific intent to convey CBM with the coal was ambiguous, and the statute should be interpreted in favor of the United States government.\textsuperscript{153}

\textit{4. The Pendulum Swings Again: The Supreme Court Decision}

In June 1999, the Supreme Court reversed the Tenth Circuit decision and held that CBM was not reserved by the United States in the Coal Lands Act, and as successor-in-interest, the Tribe therefore had no ownership rights to the CBM.\textsuperscript{154} The Court found that the land patentees owned the gas and had the right to lease that gas to companies such as Amoco.\textsuperscript{155}

In its decision, the Court considered not how modern science defines coal and CBM, but rather how Congress in 1909 and 1910 would have defined the two substances.\textsuperscript{156} The Petitioner persuaded the Court that Congress would have considered coal to mean only the solid rock.\textsuperscript{157} According to the Court, “most dictionaries [in 1909] defined coal as the solid fuel resource” and CBM as a “distinct substance that escaped from coal as the coal was mined, rather than as a part of the coal itself.”\textsuperscript{158} These dictionaries defined coal as a “black, or brownish black, solid,
combustible substance.” At the turn of the century, CBM gas was referred to as “marsh gas,” “methane,” or “fire damp.” Discussing the importance of these dictionary definitions, Justice Kennedy wrote:

As these dictionary definitions suggest, the common understanding of coal in 1909 and 1910 would not have encompassed CBM gas, both because it is a gas rather than a solid mineral and because it was understood as a distinct substance that escaped from coal as the coal was mined, rather than as a part of the coal itself.

Furthermore, according to the Court, CBM (as well as other natural gases) had little to no value at the turn of the century. Congress was only concerned with reserving valuable minerals, such as coal, to help in the Industrial Revolution, but did not want to burden homesteaders with estates that were difficult to manage. In addition, Congress chose not to reserve other natural gases or oil in the Acts. Oil, natural gas, and other mineral reservations were dealt with in later statutes.

In its brief, the Petitioner argued that it was error for the Tenth Circuit to mistake silence in the statute for ambiguity. If there were no apparent ambiguity, then there would be no need for the court to construe the land grant in favor of the sovereign. The Supreme Court refused to consider the

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159. Id. at 874 (quoting AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 244 (N. Webster 1889) and WEBSTERS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 424 (W. Harris & F. Allen eds., 1916)).
160. Id. The Court found persuasive that “fire damp” was defined as “[t]he gas contained in coal,” but not as the coal itself. Id. (quoting 3 CENTURY DICTIONARY AND CYCLOPEDIA 2229 (1906)).
161. Id. at 874-75.
162. Id. at 875.
163. Id. Justice Kennedy wrote that “it is clear that . . . Congress intended to reserve only the solid rock fuel that was mined, shipped throughout the country, and then burned to power the Nation’s railroads, ships, and factories.” Id.
164. Id. at 877.
165. Id. at 878 (citing 30 U.S.C. §§ 121-123); see also 43 U.S.C. § 289 (1994).
ambiguity issue in depth and simply found that the Coal Lands Acts were not ambiguous.\textsuperscript{168}

Much of what was contained in the Supreme Court’s decision was initially posited by Amoco in its brief.\textsuperscript{169} Amoco argued that the 1909 congressional debate indicated that at least one Congressman (Representative Mondell) found a distinction between gas and coal.\textsuperscript{170} In 1909, Amoco argued, coal was considered a solid rock, not a gas.\textsuperscript{171} Gas that happened to be found in a coal seam was still natural gas, not coal.\textsuperscript{172}

Not long before the Court delivered its decision, the United States government, once a co-defendant in the dispute, transferred its support to the Tribe.\textsuperscript{173} Although this change of loyalty could have dealt a death blow to Amoco’s case, it actually seemed to have had very little effect on the outcome.\textsuperscript{174} The government claimed that it had reevaluated its position in light of facts that it had learned in the course of litigation.\textsuperscript{175} The Solicitor of the Department of the Interior formally withdrew his 1981 opinion (the opinion relied upon by both Amoco and the district court).\textsuperscript{176} As the Petitioner noted in its brief, however, the Solicitor never withdrew his virtually identical 1990 opinion.\textsuperscript{177}

In its brief to the Supreme Court, the United States opined that the reasonable interpretation of “coal” includes all of its co-existing constituents—liquid and gas.\textsuperscript{178} In response to the Petitioner’s claim that the U.S. House of Representatives’ debate indicates that Representative Mondell did not consider anything but the solid coal to be reserved, the United States wrote that “[r]eliance on a statement of a single legislator is, of course, a hazardous method of determining congressional

\textsuperscript{168} Amoco, 526 U.S. at 880.
\textsuperscript{169} See generally Petitioners’ Brief, Amoco, 526 U.S. 865.
\textsuperscript{170} Id. at 30.
\textsuperscript{171} Id. at 22.
\textsuperscript{172} Id. at 7.
\textsuperscript{173} Amoco, 526 U.S. at 872.
\textsuperscript{174} See generally id.
\textsuperscript{176} Amoco, 526 U.S. at 872.
\textsuperscript{177} Petitioners’ Brief at 5, Amoco, 526 U.S. 865.
\textsuperscript{178} Federal Respondents’ Brief at 25, Amoco, 526 U.S. 865.
The United States felt that the Supreme Court should have followed the lead of the Pennsylvania and Alabama state courts to hold that CBM within the coal seam is owned by the coal owner. However, CBM that migrates from the coal stratum may be captured by either the gas or land owners.

In its brief to the Court, the Southern Ute Tribe argued that it would defeat the purpose of the Coal Lands Acts to hold that CBM is not a part of the coal. Also, the United States Geological Survey (USGS) studies indicated that CBM is a component of coal. The Tribe noted that Congress relied on the USGS opinion to create the Coal Lands Acts in 1909 and 1910.

In response to the Petitioner's claim that CBM cannot be distinguished from other gases and, as such, should be included in the natural gas estate rather than the coal estate, the Tribe argued that gas producers have had to distinguish CBM from other gases for years so that they could claim the federal tax credit for CBM production. The Tribe argued that if the Court found that CBM and coal are two separate substances, it would create a split estate. The Court responded by saying that if it were to hold that CBM was included in the coal grant, a split gas estate would be created (CBM and other natural gases). The Court further found that a coal and CBM split estate would be just as difficult to administer as a CBM and natural gas split estate. Justice Kennedy wrote that "[i]f CBM gas were reserved with the coal estate, those developing the natural gas resources in the land would have to allocate the gas between the natural gas and coal estates based on some assessment of how much had migrated outside the coal itself."

179. Id. at 31.
180. Id. at 38.
181. Id. at 35.
183. Id. at 24.
184. Id. at 35.
185. Id. at 40-47.
186. Id.
188. Id. at 879-80.
189. Id. at 880.
The Tribe's final contention reiterated the holding of the Tenth Circuit: that ambiguous land grants should be resolved in favor of the government. Ultimately, the Court held that the Tribe did not own any rights to the CBM gas found within its coal beds.

Justice Ginsburg, the lone dissenting Justice, believed that the Tenth Circuit's decision was correct. She found that it was "[m]ore likely [that] Congress would have assumed that the coal owner had dominion over, and attendant responsibility for, CBM." Justice Ginsburg stated that she would have applied the statutory interpretation canon that ambiguous land grants are resolved in favor of the sovereign.

IV. ANALYSIS OF THE SUPREME COURT'S DECISION

In light of other court decisions that interpreted government reservations broadly, the Supreme Court in Amoco is departing from the course of action established by the Alabama and Pennsylvania courts, and even by the U.S. Supreme Court in other mineral statute interpretation cases. For years, in both state and federal courts, coal grants and reservations were held to include CBM gas. Similarly, in the past, the Supreme Court held that geothermal steam and gravel were meant to be included in the mineral reservations of the Stock-Raising Homestead Act.

The Court in Amoco adopted a completely different line of reasoning that relied on congressional intent, rather than other

190. Respondent's Brief at 47, Amoco, 526 U.S. 865. The Court found it unlikely that the possibility of creating a split coal and gas estate would have deterred Congress from making the coal reservation. Amoco, 526 U.S. at 878.
191. Amoco, 526 U.S. at 880.
192. Because his wife owned stock in Amoco, Justice Breyer took no part in the decision of this case. See Supreme Court Rules, supra note 51.
193. Amoco, 526 U.S. at 880 (Ginsburg, J., dissenting).
194. Id.
195. Id. at 880-81.
196. See supra Part III.B.
197. See Watt v. W. Nuclear, Inc., 462 U.S. 36 (1988); see also United States v. Union Oil Co., 549 F.2d 1271 (1977). Since the Amoco decision was handed down, one federal district court distinguished the mineral reservation in the SRHA from the coal reservation in the Coal Lands Acts so as to hold that geothermal steam was a reserved mineral under the SRHA even though it was not specifically referenced in the Act. See Rosette, Inc. v. United States, 64 F. Supp. 2d 1116 (D.N.M. 1999).
canons of statutory construction or common law approaches to shared estates. One author wrote that the Court's choice of statutory interpretation did not address "the question of what the Coal Lands Acts mean in the context of today's technical world where disputes arise concerning the ownership of mining and surface rights." That author argued that a better approach to a case of textual interpretation would be to consider what the Congress of 1909 would have thought given the current facts and circumstances of this particular case, rather than attempt to deduce congressional intent by "thumbing through dictionaries and studying the antiquated practices of miners at the turn of the century."

Although the Court adhered to a strict textualist analysis of the Coal Lands Acts, it was also, no doubt, influenced by the arguments of Amoco and its supporters. Amoco and its numerous supporting amici curiae submitted briefs that seemed to have a persuasive effect on the Court. In some briefs, the amici appealed to the Court's sense of justice for those individuals who live in the area in question and who "have conducted business believing that gas was gas and not included as part of the coal." Similarly, La Plata County reminded the Court that the county receives large tax proceeds from oil and gas production, and because the Tribe is tax-exempt, the county would cease to receive funds from the CBM production if the Tribe owned the CBM.

These briefs also helped the Court to define the word "coal" and reminded the Court of the accepted mining law principle that "the owner of one mineral estate may use the mineral

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198. See generally Bryant, supra note 156.
199. Id. at 814 (emphasis in original).
200. Id. at 818.
201. See supra Part III.C.4.
202. See supra Part III.C.4. for a discussion of the parties' Supreme Court briefs.
204. Brief of Amici Curiae La Plata County, Colo. at 1, Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865 (1999) (No. 98-830), available at 1999 WL 115525. La Plata County claimed that the valuation of oil and gas in 1998 was $501.7 million. Id.
estate of another to exploit his estate and, in turn, must accord the other owner the same consideration . . . ." This principle assisted the Court in answering the Respondent's concern about the difficult administration of a split resource estate. The Independent Petroleum Association found it persuasive that Congress considered including additional reservations in the 1910 Act, but failed to adopt those provisions.

The National Mining Association (NMA) filed the only amicus brief on behalf of the Tribe. Because of the concerns in the early 1900s about CBM gas explosions, according to the NMA, "Congress was well aware at the time that methane is 'always there' in the coal that is reserved." The NMA was clearly most concerned with the time, expense, and hassle to the coal miners if they had to deal with a gas company drilling into their coal. The NMA explained that the "exploitation of the coal reservation will be followed by compensatory claims for the waste or use of the liberated [CBM] gas." The NMA insisted that this was not a result that Congress would have intended or wanted.

V. RAMIFICATIONS OF THE DECISION

Many CBM producers, such as Amoco, see the Supreme Court's decision as a final resolution to a long eight-year battle with the Southern Ute Tribe and, on a larger scale, a final resolution to CBM ownership uncertainty. Many CBM

206. *Id.* at 11 (quoting 6 AMERICAN LAW OF MINING § 200.04(1) (2d ed. 1997)).
210. *Id.* at 17.
211. *Id.* at 19.
212. *Id.*
213. *Id.*
production operations were on hold for years, pending the outcome of the *Amoco* case.\textsuperscript{215} For example, the Bureau of Land Management had halted a major CBM drilling operation in the coal-rich Powder River Basin.\textsuperscript{216} Only recently has the mining resumed.\textsuperscript{217}

Many have argued that the Supreme Court decision in *Amoco* will be a blow to energy production in this country.\textsuperscript{218} As the NMA argued in its brief to the Supreme Court, ownership debates will continue and will slow down mining and production of coal and CBM.\textsuperscript{219} Furthermore, although the Court found otherwise, the decision seems to create a split estate, one for coal and one for CBM, that will be difficult to manage.\textsuperscript{220}

Although the specific terms of the decision apply only to federal land grants under the Coal Lands Acts of 1909 and 1910, many argue that the decision will undoubtedly become precedential for other private land actions.\textsuperscript{221} One author speculates that the arguments used in the *Amoco* case could be applied to many other situations in which landowners sold their rights to their coal with no intent to sell rights to the valuable CBM.\textsuperscript{222} Litigation is expensive, however, and it is doubtful that any small landowner in rural America will be able to bring suit against the large gas and coal companies.\textsuperscript{223} After *Amoco*, the individual who holds the natural gas or land rights also holds the CBM rights.\textsuperscript{224} Landowners who conveyed their coal rights to coal mining companies, in addition to having a possible cause of action, now have another bargaining chip to get more

\begin{footnotes}
215. *See id.*
217. *See Feriancek, supra* note 216, at 260. Although mining has resumed, many see a new coal and CBM conflict in the Powder River Basin right around the corner. *See id.*
218. *See Nat'l Mining Ass'n (NMA) Brief at 24, Amoco, 526 U.S. 865.
219. *See id.*
220. *See Federal Respondents' Brief at 40-41, Amoco, 526 U.S. 865* (describing the "substantial problems" that occur with a split coal/CBM estate).
221. *See Nat'l Mining Ass'n (NMA) Brief at 24, Amoco, 526 U.S. 865.*
222. *See Bowman, supra* note 3. It is estimated that in 1998, CBM wells in the Appalachian region of the United States produced over 31.4 billion cubic feet of CBM at a value of nearly $90 million. *See id.*
223. *See id.*
\end{footnotes}
royalties for the CBM gas production. Some questions that will inevitably arise are: Will they be entitled to back royalties, and will they receive damages for their lost proceeds from CBM gas sales?

Certainly Amoco and its fellow gas producers in the 200,000 acres of Colorado are pleased by the Supreme Court's decision. Now Amoco will not have to pay royalties to the Tribe for the CBM that it removes from the Tribe's coal beds. Amoco can simply mine the increasingly valuable gas and pay nominal royalties to the land owners. The logistical downside to the natural gas and coal producers is that the mining companies may now have to wait to extract the coal until the gas companies have extracted the methane. Federal coal leasing laws provide coal miners with only a narrow window of time to file for permits. Delays caused by CBM drilling could cost coal investors money as they wait to file permits and start mining.

If coal mining occurs first, then the gas could escape, and the coal mining company would be forced to capture that gas for the gas company or possibly pay damages. If the CBM extraction occurs first, it is possible that the coal seam will be damaged, thus reducing the value of the coal. These are issues that must be resolved if future coal and CBM mining conflicts are to be avoided.

Since the Amoco decision was handed down, the Bureau of Land Management (BLM) and the U.S. Senate have attempted to pacify some of these inevitable future disputes. Since February 2000, the BLM has encouraged coal and CBM owners and developers to resolve ownership and mining disputes.

225. See Bowman, supra note 3.
227. See Supreme Court Rules, supra note 51.
228. See BLM Plans Advice, supra note 214.
230. See id.
231. See id.
232. See id.
233. See Francis, supra note 30, at 473.
234. See Feriancek, supra note 216.
235. See id.
through "cooperative agreement," not litigation.\textsuperscript{235} The BLM has offered to assist these parties by either reviewing their agreements or approving cooperative development agreements.\textsuperscript{237} This BLM policy is unlikely to have much effect, however, as coal and CBM developers often find little to agree upon.\textsuperscript{238} Furthermore, BLM policies only apply to federally-owned or leased lands.\textsuperscript{239}

In November 1999, Senators from Wyoming sponsored Senate Bill 1950, which would establish a judicial arbitration procedure for CBM and coal developers in the Powder River Basin region.\textsuperscript{240} An initial period of private negotiation must occur first.\textsuperscript{241} Then, if no resolution to the conflict can be reached, one of the parties may petition the district court for relief, including a suspension of the mining operations.\textsuperscript{242} This bill, still under consideration by the Senate, is supported by the coal industry and opposed by oil and gas trade associations.\textsuperscript{243} Even if the bill eventually becomes law, it will only apply to the Powder River Basin and will far from eliminate the potential for future litigation.\textsuperscript{244}

Some lobbyists have asked for a moratorium on all CBM mining until comprehensive legislation can be enacted to resolve conflicts between coal owners and gas owners on federal and private lands.\textsuperscript{245} Others feel that these mining disputes can be resolved through private negotiations and litigation.\textsuperscript{246} In order for the Amoco decision to be of any use to energy producers and landowners, there must be legislative clarification, or it seems inevitable that there will only be more

\textsuperscript{236} See id.
\textsuperscript{237} See id.
\textsuperscript{238} See id.
\textsuperscript{239} See id.
\textsuperscript{240} See S. 1950, 106th Cong. (2000).
\textsuperscript{241} See id.
\textsuperscript{242} See id.
\textsuperscript{243} See Feriancek, supra note 216.
\textsuperscript{244} See id.
\textsuperscript{245} See Sullivan, supra note 229. In Wyoming, the coal industry tried to get the legislature to impose a moratorium on CBM mining until the State could pass a law to deal with the Amoco decision. See id. Although the moratorium request failed, both the Wyoming Legislature and the Bureau of Land Management, Wyoming office, stated that they are committed to pushing through "good faith" legislation as soon as possible. See id.
\textsuperscript{246} See id.; see also Bowman, supra note 3.
litigation and production delays. As the value of CBM increases, so will the conflict over its ownership and development. Hopefully, Congress, the BLM, and the Department of the Interior will continue to meet with coal and gas companies and try to make sense of the Court’s decision and lay some regulatory or legislative ground rules for future CBM development.

VI. CONCLUSION

Although the United States Supreme Court has finally laid this particular case to rest, the issues and the potential litigation will almost certainly go on. The question facing many coal and gas producers, as well as landowners is: Where do we go from here? When CBM litigation first began in the early 1980s, in response to, and perhaps despite the 1981 Department of the Interior opinion, Pennsylvania and Alabama state courts considered CBM to be a component and constituent if the coal. Gas companies, such as Amoco, continued to rely on the 1981 opinion and entered into gas leases with landowners.

The gas companies’ reliance on the Department of the Interior opinion was validated with the district court’s decision in Amoco. Then, in a complete reversal, the Tenth Circuit Court of Appeals, first in a panel and then in an en banc decision, held that the Coal Lands Acts did include a reservation of CBM with the coal. With this decision, Amoco and its fellow gas producers launched an all-out assault on the Southern Ute Indian Tribe in the Supreme Court, bringing in powerful and influential supporters. Finally in 1999, the Supreme Court swung the pendulum again and held that CBM was not reserved with the coal and that the Southern Ute Indian Tribe had no rights to the CBM within its coal beds.

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247. See generally Feriancek, supra note 216.
248. See generally EIA’s Annual Outlook, supra note 1; Bowman, supra note 3; supra Part III.
249. See supra Part III.B.
251. See supra Part III.C.1.
252. See supra Part III.C.2-3.
253. See supra Part IV.
254. See supra Part III.C.4.
In the *Amoco* decision, the Supreme Court only addressed coal conveyances from the 1909 and 1910 Coal Lands Acts.\textsuperscript{255} Many of the nation's coal reserves are on privately-owned, rather than federal, lands.\textsuperscript{256} In reliance on *Amoco*, CBM mining companies could now try to sue coal companies for back royalties and damages for escaped CBM gas through coal mining operations.\textsuperscript{257} Landowners could sue coal companies for theft of their CBM rights without any compensation.\textsuperscript{258} Coal companies could sue gas miners for damage caused to the coal bed from CBM extraction.\textsuperscript{259} Is this the end, or is it just the beginning of new uncertainty and CBM ownership litigation?

*Laura D. Windsor*

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\textsuperscript{255} See supra Part III.C.4.  
\textsuperscript{256} See generally Bowman, supra note 3.  
\textsuperscript{257} See supra Part V.  
\textsuperscript{258} See supra Part V.  
\textsuperscript{259} See supra Part V.