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Ownership of Coalbed Methane Gas: Recent Developments in Case Law

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OWNERSHIP OF COALBED METHANE GAS: RECENT DEVELOPMENTS IN CASE LAW

I. INTRODUCTION

Coalbed methane gas is the natural gas found in underground coal seams.[1] It is formed during the "process of peat turning into coal."[2] Coal and decomposed peat have a very fine pore structure that holds much of the methane that is produced during the coalification process.[3] The existence of coalbed methane has been known for well over a century, and prior to 1970 the gas was considered only a nuisance and a danger to coal miners.[4] Mines must be ventilated to remove the dangerous methane gas and prevent fires and explosions.[5] During the 1970s, however, improved technology made it possible to capture and sell coalbed methane

1 Paul N. Bowles, *Coalbed Gas: Present Status of Ownership Issue and Other Legal Considerations*, 1 E. MIN. L. INST. 7-3 (1980).

2 Sarah Kathryn Farnell, *Methane Gas Ownership: A Proposed Solution for Alabama*, 33 ALA. L. REV. 521, 521 n.1 (1982) (quoting Mutchler & Sachse, *Legal Aspects of Coalbed Gas*, 33 J. PETROLEUM TECH. 1861(1981).

3 Ronald K. Olson, *Coalbed Methane: Legal Considerations Affecting Its Development as an Energy Resource*, 13 TULSA L.J. 377, 379 (1978) (citations omitted).

4 Bowles, *supra* note 1, at 7-5.

5 *Id.* Ventilation of methane gas is required by both state and federal statutes. *See, e.g.*, W. Va. Code §§ 22-2-2 to -9 (1997); 30 U.S.C. §§ 1-863 and -877(h) (1997). Bowles, *supra* note 1, at 7-5.

gas for profit, while at the same time improving mine safety.[6] Unfortunately, the biggest problem relating to the production of coalbed methane is of a legal nature.[7] "[C]onflicting claims of ownership of coalbed methane and conflicting uses of the methane-bearing strata"[8] have led to widespread debate over the production of this resource. In the past, coalbed methane was considered valueless, so most mineral leases did not refer to the gas.[9] This omission led to disputes over methane ownership between the coal owners and the oil and gas owners.[10] This Note will examine these disputes, discuss the various theories of natural resource ownership and how they relate to coalbed methane, and present the major court decisions addressing the ownership of coalbed methane gas.

II. THEORIES OF OWNERSHIP

All states have come to recognize the proposition that the various parts of land are valuable and their ownership can be severed.[11] Ownership of the surface can be separate from ownership of the various strata below it.[12] When oil and gas were discovered, it was learned that they are fugacious, or "capable of movement or escape from one tract of land to another."[13] Because development of oil or gas on a particular tract of land can cause the oil or gas to migrate across property lines, three theories of ownership have evolved.[14]

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6 Bowles, *supra* note 1, at 7-6 to 7-7.

7 *See id.* at 7-10; Farnell, *supra* note 2, at 521; Olson, *supra* note 3, at 382.

8 Farnell, *supra* note 2, at 521.

9 *Id.* at 522.

10 *Id.*

11 J. THOMAS LANE, COAL, OIL AND GAS 29 (West Virginia University College of Law 1996).

12 *Id.*

13 *Id.*

14 *Id.*

First, the absolute theory of ownership in place[15] recognizes that oil and gas are subject to ownership the same as any other form of real estate.[16] In *Boggess v. Milam*,[17] the West Virginia Supreme Court of Appeals held that

> the owner of the fee is vested with title in the oil and gas underlying the boundary to which he holds title, although it is admitted that due to the nature of both or either they may not remain in place and are not the subject of actual possession until brought to the surface.[18]

This theory leads to the idea that the coal owner owns not only coal, but a strata. This concept may produce two results with regard to coalbed methane. First, the coal owner may argue that he owns not just the coal, but the entire strata in which the coal is found, including the coalbed methane found in the coal strata.[19] On the other hand, if the owner of gas rights has absolute title to all gas below the surface, including the coalbed methane, then "competing interests arise concerning different substances located in the same strata" and the "question then arises as to what duty each owner owes to the other."[20]

Second, according to the qualified theory of ownership, the oil and gas owner has title to the minerals only as long as they remain under his land.[21] The owner can remove the oil and gas even though the removal may drain adjacent

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15 "Ownership in place" is a term of art referring to gas and oil "embedded in the sands or rocks beneath the earth's surface." Olson, *supra* note 3, at 387 (quoting Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290, 292 (1923)).

16 LANE, *supra* note 11, at 29-30.

17 34 S.E.2d 267 (1945).

18 *Id.* at 269-70. *Accord* Snodgrass v. Koen, 96 S.E. 606 (W. Va. 1918); Toothman v. Courtney, 58 S.E. 915 (W. Va. 1907); Headley v. Hoopengarner, 55 S.E. 944 (W. Va. 1906); Couch v. Clichfield, 139 S.E. 314 (Va.1927).

19 Olson, *supra* note 3, at 388.

20 *Id.*

21 LANE, *supra* note 11, at 30.

lands.[22] In *Barnard v. Monongahela Natural Gas Co*,[23] the Supreme Court of Pennsylvania stated that

> every landowner or his lessee may locate his wells wherever he pleases, regardless of the interests of others . . . . He may crowd the adjoining farms so as to enable him to draw the oil and gas from them. What then can the neighbor do? Nothing; only go and do likewise. He must protect his own oil and gas. He knows it is wild and will run away if it finds an opening and it is his business to keep it at home.[24]

Third, under the non-ownership theory, "fugacious minerals are not the subject of ownership in place," but "the landowner has the exclusive right to reduce them to possession at which time they become personal property and are subject to ownership as such."[25] This theory appears to give title of the methane to the gas owner, not the coal owner, because the gas owner has the exclusive right to search for gas below the surface.[26]

Underlying all theories of ownership is the rule of capture, originating with the idea that wild animals are *ferae naturae*, free to roam across the lands and owned by no one.[27] As applied to oil and gas, the rule of capture serves more as a rule of non-liability, absolving from responsibility a mineral owner that reduces to possession oil or gas that may have migrated from another's lands.[28] This principle is recognized in all states, regardless of the theory of ownership adopted.[29]

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22 *Id. See, e.g.*, Kelly v. Ohio Oil Co., 49 N.E. 399 (Ohio 1897); Barnard v. Monongahela Natural Gas Co., 65 A. 801 (Pa. 1907); Sellars v. Ohio Valley Trust Co., 248 S.W.2d 897 (Ky. 1952).

23 65 A. 801 (Pa. 1907).

24 *Id.* at 802.

25 LANE, *supra* note 11, at 30. *See also* Farnell, *supra* note 2, at 523.

26 Olson, *supra* note 3, at 386.

27 LANE, *supra* note 11, at 31.

28 *Id.*

29 *Id. See also* Olson, *supra* note 3, at 390 (stating that the "rule of capture has been recognized in one form or another in all jurisdictions but would seem decidedly more compatible with the non-ownership theory").

III. CASE LAW

A. *Pennsylvania*

Any discussion of coalbed methane ownership case law must necessarily begin with *United States Steel Corp. v. Hoge*,[30] "the first major case to directly consider the issue."[31]

In this case, the Supreme Court of Pennsylvania determined whether the coal owners (United States Steel Corporation) or the surface owners (Hoge, Cowan, and Murdock) had title to the coalbed gas.[32] The coal owner's predecessor received title to the coal from the surface owners' predecessors in 1920.[33] The deed provided in part,

> All of the coal of the Pittsburgh or River Vein underlying all that certain tract of land . . .Together with all the rights and privileges necessary and useful in the mining and removing of said coal, including the right of mining without leaving any support . . ., the right of ventilation and drainage and of access to the mines for men and materials . . . The parties of the first part [surface owners] hereby reserve the right to drill and operate through said coal for oil and gas without being held liable for any damages. Together with all and singular the improvements, ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances.[34]

Then in 1976 and 1977 the surface owners conveyed the reserved gas rights to the gas lessee, Cunningham.[35] . The gas lessee began drilling operations in 1978 to

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30 468 A.2d 1380 (Pa. 1983).

31 Farnell, *supra* note 2, at 525-26.

32 *Hoge*, 468 A.2d at 1381.

33 *Id.* at 1382.

34 *Id.* (alteration and omissions in original).

35 *Id.*

recover coalbed gas through the process of hydrofracturing.[36] When the coal owner learned of the operations, it "initiated actions in equity to terminate the intrusion upon its coal seam and to determine the ownership of, and right to develop, the coalbed gas."[37] The chancellor allowed the gas lessee to drill for coalbed gas in the coal seam, but prohibited the use of hydrofracturing, and the Superior Court affirmed.[38]

The Pennsylvania Supreme Court stated that they "have long recognized that gas may be owned prior to being recovered from its natural underground habitat. . . . Gas necessarily belongs to the owner in fee, so long as it remains part of the property; ownership in it will be lost only upon grant or upon the gas leaving the property through migration."[39] According to Pennsylvania case law, water, oil, and gas are minerals *ferae naturae* and have "a power and a tendency to escape without the volition of the owner."[40] As long as the minerals remain on or in the land or under the landowner's control, they belong to the landowner, but the landowner loses title when the minerals leave his land or are brought under another's control.[41] Thus, whoever owns the property in which a gas rests also owns the gas itself.[42] The court concluded that gas 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. The landowner, of course, has title to the property surrounding the coal, and owns such of the coalbed gas as migrates into the surrounding property."[43]

In construing the deed language reserving "the right to drill and operate through said coal for oil and gas without being held liable for any damages," the court considered the intent of the parties and the "conditions existing at the time of

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36 *Id.* Hydrofracturing involves forcing fluids under pressure into the gas well to fracture the stratum. When the process is applied to coal seams, fractures in the coal result through which the gas can flow to the well shaft. Hydrofracturing was developed in the 1940s to recover natural gas from strata other than coal seams. *Hoge*, 468 A.2d at 1392, n.1.

37 *Hoge*, 468 A.2d at 1382.

38 *Id.*

39 *Id.* at 1383 (citations omitted).

40 *Id.* (quoting Cambria Natural Gas Co. v. DeWitt, 18 A. 724 (Pa. 1889)).

41 *Hoge*, 468 A.2d at 1383.

42 *Id.*

43 *Id.*

its execution."[44] At the time the deed was executed, coalbed methane gas was considered a dangerous substance that had to be ventilated from the coal seam for safety purposes.[45] The court could not believe that the parties to the deed would have intended to reserve rights to a dangerous gas, having no knowledge of its potential value.[46] Instead, the court held that the language of the deed "intended only a right to drill through the seam to reach the unconveyed oil and natural gas generally found in strata deeper than the coal."[47]

Thus, Pennsylvania adheres to the qualified theory of resource ownership.[48] As applied to *Hoge*, this theory vests title to the coalbed gas in the coal owner, so long as the gas remains in the coal. Just as the qualified theory of ownership recognizes the ability of oil and gas to move, the *Hoge* court recognized the ability of coalbed methane to leave the coal and enter the adjacent property.[49] If the coalbed methane leaves the coal, the coal owner loses title.[50]

B. Alabama

Two cases define the position of Alabama as to the ownership of coalbed methane gas. The first of these decisions, *Vines v. McKenzie Methane Corp.*,[51] presented two appeals addressing the same issue. The first involved a dispute between a landowner, Vines, and McKenzie Methane, who had a leasehold interest in "all of the coal, iron ore, and other minerals, in, under, and upon" Vines's property.[52] The trial court found that McKenzie Methane had the right to drill for

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44 *Id.* (citations omitted).

45 *Id.*

46 *Hoge*, 468 A.2d at 1384-85.

47 *Id.* at 1385.

48 *See* LANE, *supra* note 11, at 30; Barnard v. Monongahela Natural Gas Co., 65 A. 801 (Pa. 1907).

49 *Hoge*, 468 A.2d at 1383.

50 *Id.*

51 619 So.2d 1305 (Ala. 1993).

52 *Id.* at 1306.

coalbed methane.[53] This right was included in the coal estate. The second appeal involved McKenzie Methane and the Traywicks.[54] McKenzie Methane had a leasehold interest in "all the coal and other minerals, in, under, or upon" the Traywicks' property, and sought a declaratory judgment giving it the right to drill for coalbed methane gas from the property.[55] The Alabama Supreme Court had to determine whether the mineral lease granting rights to the coal and other minerals included the rights to coalbed methane gas.[56]

The court recognized that "[c]oal is a reservoir for the gas, like any other stratum containing natural gas reserves. While some of the gas generated during the coal-forming process migrates out of the coal, a large amount is retained within the coal itself; that is, the gas is physically bound to and absorbed into the coal."[57]

In construing the coal and mineral leases, the court stated that the meaning of the word "minerals" as used "in any particular grant or reservation is not to be determined by rigid and arbitrary definitions, but from the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor, if it can be ascertained."[58]

The court discussed three prior cases dealing with the same issue. The Alabama court recognized that in *Hoge*, the Pennsylvania Supreme Court found "it inconceivable that the parties intended a reservation of all types of gas . . . . It strains credulity to think that the grantor intended to reserve the right to extract a valueless waste product. . . ."[59] Second, the court discussed a decision originating in the United states District Court for the Northern District of Alabama, *Rayburn v. USX Corp.*,[60] which held that a 1960 deed conveying "minerals and mining rights," but retaining oil and gas rights, did not also retain the rights to extract coalbed methane.[61] At that time coalbed methane gas was not extracted for profit,

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53 *Id.*

54 *Id.*

55 *Id.*

56 *Vines*, 619 So.2d at 1307.

57 *Id.* at 1306-07 (citations omitted).

58 *Id.* at 1307 (citing Exxon Corp. v. Waite, 564 So. 2d 941 (Ala. 1990)).

59 *Id.* at 1308 (quoting United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983)).

60 No. 85-G-2261-W, (N.D. Ala. July 28, 1987), *aff'd*, 844 F.2d 796 (11th Cir. 1988).

61 *Vines*, 619 So. 2d at 1308 (quoting *Rayburn*, No. 85-G-2261-W).

and according to the court, the parties could not have considered the gas to be severable from the coal.[62] Third, the court examined *Carbon County v. Baird*,[63] a Montana state trial court case, in which Carbon County had in 1974 conveyed "all coal and coal rights" to Red Lodge-Bear Creek Partners, who conveyed the rights to Union Reserve Coal Company. In 1991 Carbon County leased oil and gas rights, including the right to produce coal seam methane, to Florentine Exploration and Production Company.[64] The court held that the lease of rights to coalbed methane was invalid because "coal seam methane is part of the coal itself," and drilling for the gas, which involved invading the coal, would interfere with Union Reserve's mining operations.[65] *Carbon County*, in effect, held that the right to drill for methane gas was not severable from the right to mine for coal. Although the court in *Vines* compared these three cases, it is not clear how the court relied upon any of them in making its decision.[66]

Ultimately, in *Vines*, the Alabama Supreme Court found that because "the processes of drilling for coalbed methane gas and mining for coal are inextricably intertwined,"[67] and "one who is granted the exclusive right to mine coal upon a tract of land has the right of possession so far as is reasonably necessary to carry on his mining operations."[68] Therefore, "an express grant of 'all coal' necessarily implies the grant of coalbed methane gas," absent a showing to the contrary in the language of the grant.[69] McKenzie Methane retained the rights to the coalbed methane gas because of the lack of "limiting language that would indicate that the grantor intended to retain any portion of any substance that could be characterized as a part of the coal or intended to grant anything less than total control over such a substance."[70]

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62 *Id.*

63 No. DV 90-120, *available at* 1992 WL 464786 (Mont. Dist. Dec. 15, 1992), *rev'd*, 898 P.2d 680 (Mont. 1995).

64 *Vines*, 619 So.2d at 1308 (citing *Baird*, 1992 WL 464786).

65 *Id.*

66 *See generally id.*

67 *Id.* at 1308.

68 *Id.* (citing Williams v. Gibson, 4 So. 350 (Ala. 1888)).

69 *Id.* at 1309.

70 *Id.*

The second major case in Alabama, *NCNB Texas National Bank v. West*,[71] dealt with the question of what is necessary to separate the estates in coal and coalbed methane gas. NCNB was the administrator of a trust created by Hortense Davant and represented the interests of the gas owners.[72] In 1953, Davant deeded his interest in coal and coal mining rights in the land in question to Center Coal Company, retaining the rights to all gas.[73] The deed provided,

> It is the intention of the undersigned Grantor to convey by this instrument the undivided interest of the undersigned Grantor in all the coal, and mining rights owned by the Grantor . . . , whether all of the interest so owned by the undersigned Grantor is hereinafter specifically described or not.
>
> The undersigned Grantor specifically reserves all interests which he may have in said land other than the above-described interests in coal and mining rights held in connection with said interests in said coal, and without limiting the generality of the foregoing, the undersigned Grantor specifically reserves all of the oil, gas, petroleum and sulphur in, on and under and that may be produced from any part thereof, together with. . . .the full and exclusive right at all times to enter upon said lands to explore, develop, operate and occupy said lands for the purpose of exploring, mining, drilling and developing the said lands and holdings for the production of oil, gas, petroleum and sulphur, or any one or more of them, . . . and, in addition and without limiting the foregoing, each and every other right and privilege necessary and proper for the full enjoyment of the ownership of all such oil, gas, petroleum and sulphur in, on, under and that may be produced from said lands, and each and every right incident to Grantor's full ownership thereof.[74]

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71 631 So. 2d 212 (Ala. 1993).

72 *Id.* at 213-14.

73 *Id.* at 212.

74 *Id.* at 220.

The trial court held, as a matter of law, that the deed "conveyed to the coal owners all coalbed methane gas and that, as a matter of law, the reservation of all gas includes no interest in coalbed methane gas."[75] However, the Alabama Supreme Court disagreed with this conclusion,[76] finding it necessary to "determine what the parties intended by the grant of coal interests and the reservation of gas interests . . . ."[77]

The court stated that Alabama adheres to the nonownership theory in deciding oil and gas ownership.[78] This theory "recognizes the migratory nature of oil and gas and requires actual possession to establish ownership. . . . The owner of property containing gas has the right to reduce the gas to possession or to sever the gas rights by conveyance."[79] The court distinguished its own theory from that of Pennsylvania, where the landowner holds title in fee to oil, gas, and minerals under the surface, not just the right to reduce them to possession.[80]

Coal is subject to "ownership, severance, and sale," and includes the "bundle of property rights . . . incident and necessary to the recovery of the coal."[81] The court held that this bundle of rights "includes the right to reduce to possession any gas trapped within the coal itself, so long as that gas remains within the coal until the time of its capture."[82] But because of the migratory character of the gas, the coal owner will lose his right to possession after the gas leaves his property.[83] Furthermore, the court stated that the rule of capture applies to coalbed methane gas.[84] According to the rule of capture, when gas migrates from one property to another it is subject to recovery and possession by the gas owner on the property to

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75 *Id.* at 220-21.

76 *Id.* at 220.

77 *Id.* at 221.

78 *Id.* at 223.

79 *Id.* (citations omitted).

80 *Id.* (citations omitted).

81 *Id.* (citing Williams v. Gibson, 4 So. 350, 353-54 (1888)).

82 *Id.* at 223-24.

83 *Id.* at 224.

84 *Id.*

which it migrates.[85] As applied to methane gas, "a migratory mineral resource," once the methane leaves the coal seam the rule of capture gives the right to recover the gas to the owner of the gas estate.[86]

The court then pointed out that in *Vines v. McKenzie Methane Corp.*,[87] the court did not deal specifically with the reservation of gas rights.[88] Although *Vines* discussed previous cases involving the ownership of coalbed methane, the cases were not considered in light of whether a reservation of gas rights includes a reservation of coalbed methane. The court distinguished the Pennsylvania case of *Hoge* on two points. First, Hoge reserved "the right to drill and operate through said coal for oil and gas without being held liable for any damages," but *West* dealt with an explicit reservation of "all gas."[89] Second, the *Hoge* court had to "find the parties' intent through interpretation of the facts and circumstances existing when they executed the deed," where the Davant deed was unambiguous.[90] The Alabama court distinguished *West* from *Rayburn v. USX Corp.* based on the fact that *Rayburn* did not directly answer the question of whether coalbed methane belongs to the gas owner or the coal owner.[91]

Finally, the court distinguished *Carbon County v. Baird* because the Montana court did not decide who owns the coalbed methane after it leaves the coal seam and migrates into other strata.[92] In addition, the Alabama Supreme Court disagreed with *Baird* to the extent that "it treats the coal miner's qualified right to ventilate dangerous methane gas as if it were an absolute right of ownership .... [C]oalbed methane gas constitutes a separate and severable interest in land that cannot be taken against the will of the owner without just compensation."[93]

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85 *Id.* (citing Robert E. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 393 (1935)).

86 *Id.*

87 619 So. 2d 1305 (Ala. 1993).

88 *West*, 631 So. 2d at 225.

89 *Id.* at 225-26 (citing United States Steel Corp. v. Hoge, 468 A.2d 1380, 1382 (Pa. 1983)).

90 *Id.*

91 *Id.* at 226.

92 *Id.*

93 *Id.* (citation omitted).

The Alabama court concluded that the owner of the gas estate has the right to collect coalbed methane gas that migrates out of the coal seam into other strata, but has no interest in the gas that is removed directly from the coal seam before mining begins.[94] The owner of coal and mining rights also has "those rights incident to, and necessary to, the mining of the coal, which include the qualified right to properly ventilate existing or proposed coal mining operations. The rights to 'all gas' reserved by the grantor cannot, therefore, impair coal mining operations. To the extent that ventilation is required by law, the coal owner will not be liable to the owner of gas rights for any waste of methane gas that occurs during ventilation."[95]

C. *Montana*

The state of Montana has taken an entirely different position with regard to the ownership of coalbed methane gas. The position of Montana on this issue is stated in *Carbon County v. Union Reserve Coal Co., Inc.*[96] In this case, Carbon County executed a 1984 deed to Red Lodge-Bear Creek Coal Partners, the predecessor of Union Reserve Coal Co., conveying "[a]ll coal and coal rights with the right of ingress and egress to mine and remove the same . . . ."[97] The deed did not refer to gas in any form.[98] In 1990, Carbon County leased oil and gas rights to Florentine, giving Florentine the rights to "oil and all gas including coal seam methane of whatsoever nature or kind[.]"[99] Later in 1990, Carbon County sought to quiet title to all of the mineral and mineral rights, filing suit against Union Reserve and other defendants.[100] Florentine intervened, asserting its rights under the oil and gas lease and seeking to quiet title to the coalbed methane gas.[101] Union Reserve sought a judgment declaring that it owned the right to the coalbed methane

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94 *Id.* at 229.

95 *Id.*

96 898 P.2d 680 (Mont. 1995).

97 *Id.* at 682 (alteration and omission in original).

98 *Id.*

99 *Id.* (omission in original).

100 *Id.*

101 *Id.*

through its rights to the coal and damages for Florentine's trespass on its property.[102]

The trial court found that Union Reserve had the right to extract the coalbed methane gas as a part of the coal estate.[103] The court also found that Florentine did not have the right to extract the coalbed methane and awarded nominal damages against Florentine. Union Reserve appealed the issue of punitive damages, and Florentine appealed the decision of the ownership of the methane gas.[104]

The Montana Supreme Court began its consideration of the present case by distinguishing it from the decisions of other courts. The court distinguished *Hoge* based on the fact that in 1920 (the year of the deed in question), coalbed methane "was considered a waste product," but "its value was certainly established by 1984, the time of the conveyance to Union Reserve."[105] The Montana court distinguished *Rayburn* and *Vines* based on the language in the deeds of conveyance.[106] Finally, the court rejected *West* because Alabama adheres to the nonownership theory of oil and gas and Montana follows the ownership in place theory of ownership.[107]

The Montana Supreme Court instead chose to adopt the reasoning of *Southern Ute Indian Tribe v. AMOCO Production Co.*,[108] a federal case which ultimately held that Congress did not intend to include coalbed methane gas in its reservation of coal in the Coal Lands Acts.[109] The court decided that "the plain meaning of the language of the deed must be examined to determine the intent of the parties."[110]

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102 *Id.*

103 *Id.*

104 *Id.*

105 *Id* at 684.

106 *Id.*

107 *Id* at 685.

108 874 F. Supp. 1142, 1151-52 (D. Colo. 1995).

109 *Union Reserve*, 898 P.2d at 685-86 (citing *Southern Ute Indian Tribe*, 874 F. Supp. at 1151-52).

110 *Id.* at 686.

Relying upon statutory definitions at the time of the deed,[111] the court concluded that "coal and gas are mutually exclusive terms."[112] The court also considered two opinions of the Solicitor of the Department of the Interior, finding that "coal seam methane gas is not a constituent part of coal and, thus, it may be severed from the coal estate."[113]

The court emphasized that "Montana is an ownership-in-place state with regard to oil, gas and other minerals. Both petroleum and gas, as long as they remain in the ground, are a part of the realty. They belong to the owner of the land, and are a part of it as long as they are on it or in it, or subject to his control."[114] Title to the mineral interest can be separated from the rest of the fee title in the land.[115] Thus, according to the granting language, Carbon County "conveyed the coal to Union Reserve, but retained ownership of all other mineral interests including coal seam methane gas."[116]

The court explained that Montana has long held "that the grant of a particular interest in property tacitly carries with the grant those incidents without which the grant would be of no avail."[117] Likewise, the transfer of mineral rights includes "the incidental rights reasonably necessary to extract the mineral."[118] Consequently, the coal owner can "extract and capture coal seam methane gas for safety purposes during the mining process," but has no title to the gas estate or the right to produce it.[119] The court reversed the lower court's decision, holding that

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111 The court used definitions given by THE AMERICAN HERITAGE DICTIONARY, and definitions of the Montana Department of State Lands and the Department of Natural Resources and Conservation. *Id.*

112 *Id.*

113 *Id.* at 686-87 (citing Rights to Coalbed Methane Under an Oil & Gas Lease for Lands in the Jicarilla Apache Reservation, 98 I.D. 59 (Dep't Interior 1990); Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits, 88 I.D. 538 (Dep't Interior 1981)).

114 *Id.* at 688 (quoting Stokes v. Tutvet, 328 P.2d 1096, 1099 (Mont. 1958)).

115 *Id.*

116 *Id.*

117 *Id.* (citations omitted).

118 *Id.* at 689 (citations omitted).

119 *Id.*

Florentine did have the right to produce the coalbed methane gas and that Union Reserve had the rights to remove the gas for safety purposes.[120]

In 1993, after the execution of both grants in question in the case, the Montana Legislature addressed the question of whether coalbed methane gas is part of coal in a series of legislative amendments.[121] The new statute stated that "[c]oal does not include . . . methane gas or any other natural gas that may be found in any coal formation. . . ."[122] However, this statute was prospective, and did not affect the disputes addressed in that case.[123]

IV. STATUS OF THE LAW IN WEST VIRGINIA

The West Virginia Supreme Court has not yet ruled on the issue of coalbed methane ownership. The legislature has not taken the initiative to decide the issue, either. The Legislature has provided, however, that "the value of coal is far greater than the value of coalbed methane and any development of the coalbed methane should be undertaken in such a way as to protect and preserve coal for future safe mining and maximum recovery of the coal," but that "commercial recovery and marketing of coalbed methane should in some cases be facilitated because the energy needs of this state and the United States indicate that the fullest practical recovery of both coal and coalbed methane should be encouraged. . . ."[124] The legislature apparently believes that no matter who actually owns the methane, the coal owners ultimately have the right to safe mining, even if exercising that right infringes on the coalbed methane owners, whoever they might be.

Like Montana, West Virginia ascribes to the absolute theory of ownership-in-place.[125] Alabama adheres to the nonownership theory, and Pennsylvania follows the qualified theory. Although the Alabama court in *West* attempted to differentiate its own theory from that of Pennsylvania,[126] it is not clear that the difference in theories actually affected the outcome. Both Alabama and Pennsylvania ultimately

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120 *Id.*

121 *Id.*

122 *Id.* (quoting MONT. CODE ANN. § 82-1-111 (1993)).

123 *Id.* at 690.

124 W. VA. CODE § 22-21-1(a) (1994).

125 *See* Boggess v. Milam 34 S.E.2d 267 (W. Va. 1945).

126 *See* NCNB Texas Nat'l Bank v. West, 631 So.2d 212; 223 (Ala. 1993).

reached the same result. In both states, the coal owner has title to the coalbed methane so long as it remains in the coal seam, but as soon as the gas leaves the coal seam, the gas owner has the right to capture the methane. Likewise, in the Montana decision, although that court reached a different conclusion, it appears that the court relied more upon the definitions of coal and gas to determine coalbed methane ownership, rather than upon its general theory of mineral ownership.

West Virginia could adopt either position on the issue, that of Montana, or that of Alabama and Pennsylvania, regardless of its theory of mineral ownership. However, I would suggest that West Virginia should adopt the position of Alabama and Pennsylvania, and assign ownership of coalbed methane gas to the coal owners so long as the gas remains in the coal seam itself. This theory has several benefits over the Montana position.

First, since the gas owners cannot drill directly into the coal seam, conflicts over damage to the coal and the mining process are greatly reduced, if not nearly eliminated. Any damage to the coal would be caused by the operator himself, not the gas owner. Second, it seems as though conflicts over gas waste would also be reduced. Under the Alabama and Pennsylvania theory, the gas owner could have no objections to the coal operator ventilating the coal seam because the gas owner has no rights to that methane. Under the Montana approach, the gas owner could object to ventilation as a waste of his gas (and profits), and parties would be forced to litigate the question of how much ventilation safety mandates. The gas owner would allow no more waste than is absolutely necessary, and mine safety may decline as a result. A third reason West Virginia should adopt the Alabama/Pennsylvania approach lies in the seams shared by Pennsylvania and West Virginia. A coal owner who has title to the coal seams that cross the West Virginia and Pennsylvania border would operate more efficiently if he did not have to utilize different processes for coal in different states.

V. CONCLUSION

Coalbed methane gas has become an important resource in coal producing states. With its increased profit-making possibilities, more conflict is likely to erupt. Pennsylvania, Alabama, and Montana courts have decided the issue, but West Virginia has yet to determine which interest has the right to develop coalbed methane. Although surface, mineral, and gas owners in West Virginia have not had to settle their disputes in court, the issue is likely to be settled officially by litigation or legislation. With the link between states' theories of ownership and the decisions of the courts unclear, the ownership of unclaimed coalbed methane in West Virginia remains up in the air.

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