

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: AMOCO PRODUCTION COMPANY, ETC., Petitioners v.
SOUTHERN UTE INDIAN TRIBE, ET. AL.

CASE NO: 98-830 *p. 2*

PLACE: Washington, D.C.

DATE: Monday, April 19, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AMOCO PRODUCTION COMPANY, :

4 ETC., :

5 Petitioners :

6 v. : No. 98-830

7 SOUTHERN UTE INDIAN TRIBE, :

8 ET. AL. :

9 - - - - -X

10 Washington, D.C.

11 Monday, April 19, 1999

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:02 a.m.

15 APPEARANCES:

16 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
17 the Petitioners.

18 THOMAS J. DAVIDSON, ESQ., Deputy Attorney General,
19 Cheyenne, Wyoming; on behalf of the Amici States.

20 THOMAS H. SHIPPS, ESQ., Durango, Colorado; on behalf of
21 the Respondent Southern Ute Indian Tribe.

22 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
23 General, Department of Justice, Washington, D.C.; on
24 behalf of the United States.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-830, Amoco Production Company v.
5 Southern Ute Indian Tribe.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONERS

9 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 The issue in this case is the meaning of the
12 word coal, as used by Congress in reserving the right to
13 mine and remove coal in the 1910 and 1909 Coal Lands Act.

14 The court of appeals held that coal also
15 includes methane gas that happens to reside within the
16 coal bed, and that in addition to the right to mine the
17 coal, that the United States and its assignees also have
18 the right to mine and to remove the gas from the coal bed,
19 the rationale here being that you can not only essentially
20 take out all of the coalbed methane, but that you can
21 leave all of the coal behind. It seems to me that this
22 counterintuitive description of the rights of the United
23 States and its assignees is absolutely wrong, and that the
24 judgment of the court of appeals ought to be reversed.

25 QUESTION: Mr. Phillips, you already brought up

1 just implicitly in what you said an issue that I was going
2 to ask you to speak to, and I'll ask you now. You spoke
3 of mining and removing. The acts involved here, both 1909
4 and 1910, referred to, I think it was, what, prospecting
5 mining and removing the coal?

6 MR. PHILLIPS: That's correct, Justice Souter.

7 QUESTION: Was the usage at the time such that
8 it would make sense to speak of mining gas?

9 MR. PHILLIPS: Not typically, although to be
10 honest with you, I wish I could make more of that
11 argument, Justice Souter, but if you look at the 1914 act
12 and its description of dealing with gas and oil,
13 phosphate, and the other minerals that it identifies
14 there, it uses essentially the same language.

15 QUESTION: They used it generically.

16 MR. PHILLIPS: So while I'd like to take
17 advantage of that particular language, I can't. On the
18 other hand, it is still absolutely clear, I think, to go
19 back to the word coal, which is the pivotal term in this
20 particular statute, that you would hardly find a word that
21 is more commonly understood by the average individual in
22 1909 and 1910. It was the source of energy for 75 percent
23 of this Nation's energy, and Congress, according to this
24 Court, at that time acted in a practical way and defined
25 the rights in practical terms that could be understood by

1 average homesteaders.

2 QUESTION: Well, I mean, as I understand it, you
3 assert the right not only to take out the methane that --
4 the gas that happens to be in the coal when you mine the
5 coal, you assert the right to by whatever means drill a
6 hole and take out just the gas and leave the coal, right?

7 MR. PHILLIPS: Well, I don't have the right to
8 take the coal, you're right, Justice Scalia. All I have
9 is the right to the natural gas.

10 QUESTION: Right.

11 MR. PHILLIPS: It's my opponents who claim that
12 they have the right to -- that based on their right to the
13 coal, that they in fact can take out all the gas, leave
14 all the coal behind, and that, what is to me --

15 QUESTION: What if -- what if --

16 MR. PHILLIPS: -- Justice Scalia, is the
17 counterintuitive nature of the argument of the holding
18 below.

19 QUESTION: -- there's some water that adheres to
20 the coal as well, I mean, a certain -- that is, in its
21 composition. Suppose somebody had water rights to this
22 land. Would they be able to extract the water from the
23 coal?

24 MR. PHILLIPS: There is a fundamental difference
25 between water and coalbed methane, Justice Scalia, both

1 chemically and as a matter of law. First of all, as you
2 well would understand, out in Colorado and in the West,
3 the rights to water are essentially held by the States and
4 the relationship between the States and private parties
5 are fundamentally different than the relationships
6 involved in a litigation like this one.

7 But second of all, the coal -- excuse me, the
8 water that is in the coal is chemically bonded, or at
9 least some of it is chemically bonded to the coal, and it
10 is not our position that chemically bonded elements which
11 are in fact constituents of the coal are subject to
12 removal by those who have rights to other minerals that
13 may exist.

14 Our basic point here is that coalbed methane is
15 essentially a physically separate item that just happens
16 to reside within the coal bed.

17 QUESTION: Well, what if the coal miner digs
18 into the coal and in the process releases this gas that
19 you say the petitioner owns? Is the coal miner liable to
20 the petitioner for the release of that gas?

21 MR. PHILLIPS: Well, it's going to depend on
22 the, essentially the State tort law, or the tort law that
23 would be applied to it. In ordinary circumstances, under
24 the rule of accommodation, each party with respective
25 rights, when they conflict with respect to particular

1 minerals, has a certain amount of right to get at their
2 property, and so the coal miner is allowed to --

3 QUESTION: But as a practical matter, what would
4 happen to the coal miners who are trying to take out the
5 coal and at the same time releasing gas, if your position
6 is correct?

7 MR. PHILLIPS: Well, I think if they release the
8 gas and we don't assert any rights to the gas, we have no
9 basis to come in after --

10 QUESTION: Well, let's say you do assert the
11 rights to the gas. That's why you're here.

12 MR. PHILLIPS: Right. Then the solution to that
13 problem is to say to the coal miner, if you go ahead and
14 waste the gas under those circumstances, you do so on
15 notice of the claim, of our claim to that gas, and that
16 claim is one that ought to be respected by the courts --

17 QUESTION: It's the --

18 MR. PHILLIPS: -- and there is an accommodation
19 then that would be worked out between the coal rights
20 owner and the gas rights owner.

21 QUESTION: The same accommodation problem arises
22 when oil and gas rights are owned by different parties at
23 different levels.

24 MR. PHILLIPS: Exactly. It is precisely the
25 same, Justice Kennedy. And Justice O'Connor, it's no

1 different from the surface owner's rights and the coal
2 rights owners.

3 QUESTION: Well, except that the gas doesn't
4 adhere to the oil the way it adheres to the coal. I mean,
5 you can say he's taken away your methane if he just fills
6 up a truck with coal and carts it off. It isn't just that
7 there are pockets of gas, as I understand it. There is
8 gas that adheres to the coal when he carts it away, and
9 indeed, some of the energy that is derived from burning
10 the coal is, in fact, derived from burning the methane.

11 MR. PHILLIPS: Well, the amount that's derived
12 from burning the methane is negligible as a scientific
13 matter, so that's not likely to be particularly important.
14 But second of all, I mean, the point of this, I think, is
15 to step back and say, what did Congress understand by all
16 of this when it made the reservation of coal?

17 Did Congress mean to say that we were going to
18 engage in an extended chemical or chemistry analysis of
19 this problem, or did Congress say, look, we know coal when
20 we see coal, and we know --

21 QUESTION: Right, but --

22 MR. PHILLIPS: -- coalbed methane when we know
23 that because it comes out and gets vented as a part of the
24 process of mining the coal.

25 QUESTION: But that's the point I was making, at

1 least as to the methane that is not in a pocket. In a
2 pocket, I think you make a strong point that Congress
3 couldn't have intended that, but I think on the other
4 hand, as to that methane that is not in a separate pocket
5 but has really been -- I guess it isn't absorbed, but it
6 just adheres to the coal, I can't imagine that Congress
7 thought that when somebody loaded up a truck with coal
8 from his coal mine he was stealing your methane.

9 MR. PHILLIPS: I don't doubt that they don't --
10 that there's no notion that we have a right to make an
11 argument along those lines. Once the coal's been removed
12 and out, I don't see that we have any basis for going in
13 there, but the more fundamental question is, do they have
14 the right, when we own the gas inside the coal, whether it
15 is adsorbed or held in a free state, to go in, drill into
16 that coal and release all of the gas that otherwise
17 belongs to us, and our argument there is clearly no, you
18 can't. That cannot be the rule.

19 QUESTION: Mr. Phillips, you said what -- when
20 Congress used the word coal, it had a meaning, and in
21 1910, if I were to put the question, who has dominion over
22 this gas -- as I understand it, it was bad gas in 1910,
23 and wouldn't the answer be, of course the coal miner is
24 responsible, has the care of, the guard of that gas, has
25 dominion over it, and if there's an explosion, the coal

1 owner is going to be responsible? Wasn't that the
2 understanding that Congress had in 1910 --

3 MR. PHILLIPS: Well --

4 QUESTION: -- when this gas was not considered
5 any kind of an asset?

6 MR. PHILLIPS: No. There's -- I mean, there's
7 no evidence that Congress had an understanding that the
8 coal miner had, quote, dominion over the gas. What
9 Congress knew in 1909 and '10, just as we do today, is
10 that there is such a thing as coal, and there's such a
11 thing as gas, and that Congress had the authority to
12 reserve either coal or gas or all of the minerals or none
13 of the minerals.

14 QUESTION: There had to be some control over
15 this when it was a hazardous waste.

16 MR. PHILLIPS: Yes. I mean --

17 QUESTION: Didn't someone in 1910 have
18 responsibility for handling that bad gas?

19 MR. PHILLIPS: Yes. The coal miners had to vent
20 the gas in order to allow the mining to go forward, that's
21 absolutely correct.

22 QUESTION: So they had the control over the gas
23 to see that it didn't cause injury.

24 MR. PHILLIPS: Well, you describe it, Justice
25 Ginsburg, as control. I describe it as, they were

1 permitted to waste the gas in order to exercise their
2 rights over the coal. It didn't have anything to do with
3 their, quote, rights over the gas. There are lots of
4 situations where you have conflicting property interests,
5 where your right is to waste or otherwise injure somebody
6 else's property rights in order, effectively, to protect
7 your own ability to use your own property.

8 But what that doesn't give you is then the title
9 to the other property, so if I go through the -- to get
10 coal, and go through the surface, in injuring the surface
11 I don't get title to the surface. I'm responsible to a
12 certain extent, but I don't get title to it. And the
13 point here is that Congress was dealing with a practical
14 subject in a practical way, trying to decide who should
15 get title to what element, to what minerals, and in 1909
16 and 1910, Congress took a baby step in depriving the
17 patent holders of their rights to a full-fee property, and
18 it said, we're going to take back the coal, and the reason
19 it did that was for a very specific problem. There was a
20 coal famine in the West, and Congress needed the coal.

21 QUESTION: Now, later --

22 QUESTION: Why doesn't it make sense to say that
23 that methane which has been adsorbed, as you put it, is
24 coal, but that methane which is in pockets, and separate
25 under the ground, is not coal? But that's not your

1 argument.

2 MR. PHILLIPS: No, Justice Scalia.

3 QUESTION: Your argument is that all of it,
4 whether it's --

5 MR. PHILLIPS: Exactly. And the reason for
6 that, Justice Scalia, is that the method of extraction is
7 identical. The point of this is, once I decrease the
8 pressure, all of the gas moves, not just the gas that's in
9 a free form, but the gas that's adsorbed. The adsorption
10 is van der Waals forces, which I'm 100 percent sure
11 Congress never thought about in 1909, and --

12 QUESTION: Well, I certainly didn't, I know.

13 MR. PHILLIPS: -- they'd break immediately upon
14 the reduction of pressure, and then the gas flows out.
15 That's why it's meaningless to distinguish one from the
16 other, because the extraction process is identical.

17 QUESTION: May I just follow up on one of
18 Justice Scalia's questions, because I think I under --
19 it's a tough case. It's a tough case, there's no doubt
20 about that.

21 QUESTION: But supposing your extraction method
22 allowed you to take large lumps of coal out. I know often
23 it's pulverized, but you had large lumps of coal where you
24 use a pick ax, the old-fashioned way. You load it on a
25 truck, you put it out in the yard, and you sell it to a

1 wholesaler. Those large lumps of coal still have some
2 methane within them. Am I right on that, factually?

3 MR. PHILLIPS: There will be, at least for a few
4 days.

5 QUESTION: Who owns that methane?

6 MR. PHILLIPS: We own that methane, but there's
7 nothing we can do about it.

8 QUESTION: You still own that, even though
9 it's --

10 MR. PHILLIPS: Sure. We own that methane, but
11 there's nothing we can do about that methane, because
12 again, in order to get methane anywhere, just like --
13 because methane's natural gas. It's like every other
14 natural gas in the world. It's no different if it's in
15 coal, or if it's in limestone or sandstone. It's all
16 chemically the same.

17 QUESTION: And if a large piece of coal happened
18 to have some foreign object in it, whatever it might be, a
19 piece of gold, an old shoe, or whatever it was, you would
20 own that old shoe, too?

21 (Laughter.)

22 MR. PHILLIPS: As I understand it, I mean, the
23 reservation of rights is quite clear here. Congress meant
24 only to reserve the coal, and that's what it reserved, and
25 the rest of it, whatever it happens to be --

1 QUESTION: But not whatever might be within a
2 piece of coal.

3 MR. PHILLIPS: That's correct, and if you go
4 back to the Smoot case, for instance, the Illinois court
5 of appeals decision that was rendered at or around the
6 early part of the 20th Century, talking about pyrite and
7 coal, and they were both removed, and one was a waste
8 product for the coal, and the Illinois court of appeals,
9 relying on general common law principles, said the owner
10 of the pyrite is different from the owner of the coal.
11 They are separate estates. Now --

12 QUESTION: Was there ever a commercial practice
13 of taking the coal, in the ordinary sense that we think of
14 a lump of black stuff, and refining it or processing it to
15 get gas?

16 MR. PHILLIPS: There was a very early stage
17 process. There's some literature on that.

18 QUESTION: If that had happened, would you have
19 said that they were mining coal or extracting gas?

20 MR. PHILLIPS: They were mining coal, because
21 that, you have to take the coal, you have to work on it.

22 QUESTION: Just like if you take timber and make
23 it paper, you're taking timber, not paper.

24 MR. PHILLIPS: Exactly. We are not saying that
25 we are allowed to use solvents, which the Government

1 relies upon as part of its argument that this is a
2 constituent of coal. We're not saying we're allowed to
3 use heat in order to get gas out of it. All we're saying
4 is that we're allowed to use the same simple extraction
5 process that we would use if we were trying to get the gas
6 underneath the coal.

7 QUESTION: Do you know --

8 MR. PHILLIPS: We can go right through the same
9 coal seam.

10 QUESTION: Do you know whether or not in the
11 West Virginia and Pennsylvania area -- maybe you don't
12 know the answer to this question -- did the common lease
13 say that the lessee is entitled to extract coal, reserving
14 to the owner all other minerals?

15 MR. PHILLIPS: I don't know the answer to that,
16 Justice Kennedy.

17 QUESTION: Mr. Phillips, after the legislation
18 you're talking about, 1909, 1910, subsequently Congress
19 enacted other laws, I believe, in subsequent land grant
20 legislation to reserve gas estates, did it?

21 MR. PHILLIPS: Yes, Justice O'Connor, and I
22 think that reveals plainly Congress' ability to
23 distinguish gas from --

24 QUESTION: Well, what is the best indication
25 that in those subsequent legislation, in the subsequent

1 legislation reserving gas to the Government, that it
2 intended the gas to include the coalbed methane?

3 MR. PHILLIPS: Well, if you look at the
4 regulatory definition of gas as it's implemented in the
5 coal -- I mean, excuse me, the Mineral Leasing Act of
6 1920 -- and in the Mineral Leasing Act, remember, Congress
7 decides how it's going to obtain moneys for the rights
8 that it reserved under both the 1909 and 1910 acts, and
9 the 1914 acts. The definition of gas in that statute
10 absolutely is dead on with coalbed methane, because all
11 it's talking about is a substance that in ordinary
12 circumstances will expand infinitely, and that is exactly
13 what coalbed methane will do.

14 QUESTION: So Congress did later have
15 legislation that reserved gas that you think can
16 persuasively be shown to include coalbed methane.

17 MR. PHILLIPS: Not only can it be persuasively
18 shown to do that, but the Solicitor of the Interior in
19 1991 took precisely that position and concluded that
20 coalbed methane is a gas deposit within the meaning of the
21 Mineral Leasing Act of 1920. That decision has never been
22 challenged. That decision is absolutely correct today,
23 and that's the reason. Congress has always known the
24 difference between coal and gas, and has treated them
25 fundamentally differently.

1 QUESTION: Mr. --

2 QUESTION: Mr. Phillips, could you explain to me
3 a little more about this accommodation, because am I right
4 in thinking that the coal miner still must exercise
5 dominion over that gas, at least to the extent of
6 preventing hazardous conditions in the mine?

7 MR. PHILLIPS: Yes, but that doesn't come from
8 ordinary property concepts. That comes from Federal and
9 State regulatory requirements for the protection of the
10 mine workers.

11 QUESTION: Yes, but in doing that, some of it
12 may escape.

13 MR. PHILLIPS: Oh absolutely, and we don't have
14 any claim to that. The truth is, we -- the accommodation
15 doctrine will clearly never give us the opportunity to get
16 recovery for that. I mean, we can make an argument about
17 it, but you won't recover for that. But what we're
18 talking about is the right to actually mine and remove the
19 natural gas.

20 QUESTION: And how does it determine who goes
21 first? The coal miner says, I want to get out the coal,
22 and you say, well, we want to get the methane out first?

23 MR. PHILLIPS: Well, you're going to have to get
24 the methane out before you can mine the coal, otherwise
25 it's a safety hazard. Remember, the fundamental point

1 here is, if you take the coalbed methane out of the coal,
2 what you have left is coal. That's why you know that this
3 is not a constituent of coal.

4 QUESTION: In other words, you would be saying,
5 you can't mine until we do our thing first.

6 MR. PHILLIPS: That's correct.

7 QUESTION: Mr. Phillips, I think you contrasted
8 the clear advertence of Congress in 1920 to coalbed
9 methane as at least against the language that it used in
10 the time we're concerned with here. Was there any
11 technological advance during that period of time? In
12 other words, was there a way of extracting coalbed methane
13 in 1920 that was not known, or at least had not been
14 developed and was not familiar in 1909 and 1910?

15 MR. PHILLIPS: No. The basic technology hasn't
16 changed. My only point is that it became economically
17 feasible --

18 QUESTION: But they knew it just as well in
19 1909 --

20 MR. PHILLIPS: It was exactly the same
21 information.

22 QUESTION: -- as they did in 1920.

23 MR. PHILLIPS: That's correct.

24 I'd like to reserve the balance of my time,
25 Mr. Chief Justice.

1 QUESTION: Mr. Davidson.

2 ORAL ARGUMENT OF THOMAS J. DAVIDSON

3 ON BEHALF OF THE AMICI STATES

4 MR. DAVIDSON: Thank you, Mr. Chief Justice, and
5 may it please the Court:

6 As you know, I'm here on behalf of the amici
7 States. There are five amici States which represent one-
8 tenth of the Union. We're here on behalf of our citizens
9 and ourselves. We're here as friends of the Court because
10 we believe the decision was inherently wrong, but we're
11 also here in our own interests.

12 We, as amici States, we as States, are owners of
13 lands that are subject to these very same acts. Upon our
14 admission to Statehood for the creation of the States and
15 for the benefits of our public schools we were granted
16 lands specifically for the purpose of funding education,
17 and we were constitutionally in our enabling acts required
18 to dedicate the proceeds from those lands to the purpose
19 of our State educational systems.

20 In 1906, with the presidential withdrawal of the
21 coal lands, we were not allowed to select in lieu lands.
22 Now, in lieu lands -- first of all, upon admission to the
23 States, the States were granted specific sections of land
24 within each township, but oftentimes those lands had
25 already been homesteaded or withdrawn, so we were

1 entitled, then, to take in lieu lands instead of those
2 lands, but with the 1906 reservation, that also applied to
3 in lieu lands.

4 So the States were in the position of not being
5 able to select in lieu lands until a 1912 act came along,
6 which is referenced in our brief, that specifically
7 incorporated the provisions of the 1909 and 1910 acts, so
8 that's how the States are here. That's why we are here as
9 property owners as well as on behalf of our citizens.

10 In these acts, the States received title to
11 everything but the coal on our subsequent school
12 selections in lieu lands. The amici States here are
13 holders of tens of thousands of acres for the benefit of
14 our public schools. Again, they're constitutionally
15 required for school funding.

16 We also have regulatory authority, and given
17 time, I'm going to get to that. We have regulatory
18 agencies that are responsible for oil and gas production,
19 and the regulation of oil and gas production, as well as
20 separate entities that are responsible for mineral
21 production, such as coal production.

22 So anyway, we're here both as the owner and
23 regulators today.

24 Now, as the Court recognized in the Andrus case,
25 Andrus v. Utah, and it's cited in all of the briefs, I

1 believe, these lands were granted to the States under a
2 solemn agreement for the support of our public schools.
3 It was an inducement for the States to come into the
4 Union, and in inducing the States to come into the Union,
5 they granted the lands for the purpose of our public
6 schools.

7 QUESTION: Do you think the States would have
8 reacted differently whether they knew how this case would
9 be decided?

10 MR. DAVIDSON: Your Honor, I don't believe I can
11 accurately answer that, but I do believe that the States
12 took into account that they were getting everything in
13 under these acts but coal, and making --

14 QUESTION: Everything except the coal, but did
15 they know exactly what the coal was?

16 MR. DAVIDSON: The States knew what the coal was
17 at the time, Your Honor. I submit that everyone knew what
18 coal was at the time, and the acts that had preceded the
19 1906 reservation had been acts under which, if there was a
20 coal seam that actually appeared on the surface, or if
21 there was active mining, then those particular lands would
22 be reserved, because then the States or the private
23 parties would know that there was coal, because it was
24 physically there, physically present, something that was
25 tangible.

1 QUESTION: No, but isn't it at least conceivable
2 they might have thought, well, we get everything except
3 whatever's in the coal seam?

4 MR. DAVIDSON: Your Honor, that was not the
5 understanding I believe of the States at the time. It was
6 not the understanding of the parties. It hasn't been --
7 and Your Honor, if I might, it hasn't been the subsequent
8 administration. It hasn't been the subsequent
9 administration either under the States' own regulatory
10 schemes or under the practice of any of the parties.

11 As was alluded to earlier, the coalbed methane
12 is obtained by normal drilling techniques, not by coal
13 removal techniques that were known to the parties at the
14 time. Those removal techniques, as Mr. Justice Scalia I
15 think pointed out, those were, when you took a chunk of
16 coal, and you took a chunk of coal, or several chunks of
17 coal, and you loaded them into a wagon or subsequently a
18 truck, and you hauled them away.

19 Now, in response to Justice Scalia's question
20 regarding ownership, the gas, the natural gas, the very
21 faint remnants of natural gas that would remain in that
22 coal, under normal mining law practices would belong to
23 the owner of the gas estate, but the mining practices have
24 always followed the rules of reasonable development,
25 reasonable diligence, and in following the rules of

1 reasonable development and reasonable diligence at this
2 point in time, even now in 1999, it's not reasonable to
3 extract the methane gas from those chunks of coal that are
4 removed from a coal mine.

5 But while they're in the ground, and you can use
6 normal gas-drilling techniques to produce those, produce
7 the gas, then that is reasonable in some circumstances.
8 There are still many coal beds throughout the country to
9 which no coalbed methane is ever going to be produced,
10 probably, at least under present technology.

11 QUESTION: But I take it -- I want to make sure
12 I understand one thing. You're claiming that the gas that
13 is to be distinguished from the coal is not only the gas
14 that has formed or collected in a pocket in the ground,
15 but the gas that can be extracted from the coal while the
16 coal still is in the ground, is that correct?

17 MR. DAVIDSON: Your Honor --

18 QUESTION: You're talking about both kinds of --
19 you're talking about gas in both those aspects, is that
20 correct?

21 MR. DAVIDSON: In the simplest of terms, Your
22 Honor, what I'm talking about is what can be removed with
23 drilling techniques, and in the instance of coal, while
24 there may be some pockets, typically what forms is cleats,
25 where you've got a layer of coal and another somewhat

1 layer of coal, and then you've got interspersed, there's
2 little tiny particles that respondents have referred to,
3 and when the water is extracted, these cleats allow the
4 gas that's adsorbed in there to come up through, because
5 the pressure is released, come up through the hole, the
6 drilling hole and then be escaped either into the
7 atmosphere --

8 QUESTION: And you say that's yours.

9 MR. DAVIDSON: That would belong to --

10 QUESTION: Yes, okay.

11 MR. DAVIDSON: -- whoever is the owner of the
12 remainder of the estate.

13 QUESTION: You say the gas even in the lump of
14 coal that's on the cart is technically yours, although
15 there's nothing you can do about it, but you say that's
16 yours, too.

17 MR. DAVIDSON: That's correct, Your Honor.

18 QUESTION: But the doctrine of reasonable
19 accommodation takes account of that, presumably --

20 MR. DAVIDSON: Your Honor, that's --

21 QUESTION: -- and protects the miner of the
22 hard coal.

23 MR. DAVIDSON: That's exactly right, Your Honor,
24 and the doctrine of accommodation is something that the
25 States and State court systems, and particularly State

1 regulators, have had to deal with ever since mineral
2 activity has -- had ever commenced.

3 When oil drilling was first started, the natural
4 gas that was associated with oil drilling, and the first
5 oil well in Wyoming, anyway, I believe was prior to
6 Statehood, 1884, but the natural gas that comes up with
7 the oil well was flared initially, because it wasn't
8 valuable for anything.

9 But as was pointed out in an earlier question,
10 where the oil and gas estates are separate, that can't be
11 done anymore, and in fact the oil and gas, the State oil
12 and gas regulators ensure that that kind of flaring
13 doesn't happen, because the States have an interest.

14 Even where it's not their own property, as such,
15 the States have an interest because of severance taxes and
16 other interests that the States have in taxing those
17 products that there be conservation, that the mineral
18 resources, whatever they may be, be conserved, and so
19 therefore the oil and gas commissions don't allow flaring,
20 and don't allow wasting of natural gas products.

21 Your Honor --

22 QUESTION: Mr. Davidson, am I right in thinking,
23 in relation to your opening remarks, that the States, when
24 they came into the Union, as this was an inducement, could
25 not have been contemplating the asset of this gas, because

1 practically there was no way economically that it could be
2 extracted?

3 MR. DAVIDSON: Your Honor, with specific respect
4 to coalbed methane gas, I believe that answer, that that
5 is correct, that they could not have specifically been
6 thinking about coalbed methane gas because it was not a
7 valuable resource. There was no value. There was no
8 ability to get the pipelines in and get the gas developed
9 and get it out. It just was not a valuable commodity at
10 that time.

11 But just as natural gas that's associated with
12 oil production has now become a valuable commodity, so has
13 the natural gas associated with coal production, and so
14 the States, as owner of everything but what was
15 specifically reserved -- and keep in mind, Wyoming v.
16 United States establishes a standard that only what is
17 specifically reserved for the Federal Government can apply
18 to the States, and the legislation is to be construed
19 liberally for the benefit of the State.

20 Contrary to the presumption that the respondents
21 would like to raise with respect to States in particular,
22 who took under the very same acts as the private parties,
23 with respects to States in particular, grants, land grants
24 to the States have to be construed liberally. Well, there
25 was no reservation to the U.S. of gas, and the U.S. at the

1 time of passing these lands to the States certainly knew
2 the existence of gas.

3 Thank you, Your Honor.

4 QUESTION: Thank you, Mr. Davidson.

5 Mr. Shipps, we'll hear from you.

6 ORAL ARGUMENT OF THOMAS H. SHIPPS

7 ON BEHALF OF THE RESPONDENT SOUTHERN UTE INDIAN TRIBE

8 MR. SHIPPS: Mr. Chief Justice, and may it
9 please the Court:

10 When Congress passed the 1909 and 1910 acts, the
11 substance it reserved for subsequent disposition was the
12 same substance that we know today, coal, and common
13 descriptions of coal in 1909 and 1910 made reference to
14 the occluded gaseous constituents of coal dissolved within
15 the mass or body of coal.

16 QUESTION: If the methane comes out in drilling,
17 as in gaseous form, and I'm a chemistry student, is the
18 formula for the methane gas the same as the formula for,
19 say, hard anthracite coal?

20 MR. SHIPPS: Well, there is no specific formula
21 for coal. It's a heterogenous substance. The formula for
22 gas, once it's removed to the surface, CH₄ would be the
23 formula for methane, would be the same formula as the
24 methane molecule located as an integral component of the
25 coal --

1 QUESTION: But if you're describing the coal in
2 chemical terms, you'd have to add a lot of other chemical
3 descriptions.

4 MR. SHIPPS: But there is no chemical
5 description for coal. Coal, other -- the -- coal's a
6 generic term. Coal talks about inorganic material,
7 organic material, definitionally it's based upon the
8 relative volume or weight of those very heterogenous
9 materials versus organic materials.

10 QUESTION: It's always hard, though.

11 MR. SHIPPS: It -- well, it's --

12 QUESTION: -- look at a glass of fluid and say
13 that's coal, or, you know, a balloon filled with some gas
14 and say it's filled with coal.

15 MR. SHIPPS: Well --

16 (Laughter.)

17 MR. SHIPPS: It does pass the hit in the head
18 and hurt test.

19 QUESTION: But that's an important point. If
20 black acre has coal in the hard form, and it's right next
21 to white acre, and white acre does not have any coal in
22 extractable solid form, and you drill on white acre, and
23 you begin draining gas from the adjacent coal field, are
24 you in white acre? Are you taking coal? That's your
25 position, it seems to me.

1 MR. SHIPPS: No, our position is that if you own
2 the property, the measurable boundaries, whether they be
3 adjacent property boundaries or subsurface boundaries, and
4 you complete a well into the property that you own, then
5 the rule of capture makes clear that you have no liability
6 from draining coal -- from draining gas or a fugaceous
7 substance --

8 QUESTION: Well, but in common sense terms,
9 under your theory you are taking coal.

10 MR. SHIPPS: You --

11 QUESTION: I read your brief.

12 MR. SHIPPS: No. What we are saying is, coal is
13 defined by the location of the material within it, and
14 when Congress was passing these statutes, it clearly
15 intended to reserve the entire coal estate, the entire
16 coal resource, and it intended to reserve a resource that
17 was located in nature, and found in nature.

18 Petitioner's argument is one which can prevail
19 only if you concur that Congress intended to reserve a
20 degasified, dehydrated lump of resource that does not
21 exist in nature, and Congress made it clear --

22 QUESTION: Well, the Federal Government didn't
23 adopt your position until very recently, until this thing
24 became valuable, and until then the Federal Government
25 took the position urged by Mr. Phillips.

1 MR. SHIPPS: Justice O'Connor, I respectfully
2 disagree. The Federal Government has taken a number of
3 positions relative to this case --

4 QUESTION: Well, they've danced --

5 MR. SHIPPS: -- and certainly the early -- I'm
6 sorry.

7 QUESTION: They've danced all around the maypole
8 on it.

9 (Laughter.)

10 MR. SHIPPS: They have indeed, Mr. Chief
11 Justice, but certainly earlier, when Congress --

12 QUESTION: At the time -- at the time that it
13 became necessary to rely on alternative energy forms and
14 it appeared that coalbed methane gas was valuable, the
15 Government actively encouraged people to take the position
16 that the CBM was not part of the coal, and to develop it,
17 and gave them tax incentives to do so, and now it takes a
18 position like yours, but it certainly didn't.

19 MR. SHIPPS: Let me say that with respect to
20 Congress and recent incentives for developing the
21 resource, Congress has never -- never expressed a
22 viewpoint with respect to ownership of coalbed methane
23 occluded in coal. In fact, its definition is that
24 coalbed -- coal seam gas is occluded within the resource,
25 dissolved within the resource.

1 QUESTION: Well, the attorneys for the Federal
2 agencies dealing with it certainly took that position.

3 MR. SHIPPS: And we believe, and have believed
4 throughout this litigation and expressed the viewpoint
5 that they were sadly wrong, and in fact they were doing --
6 they were not looking at the statutory language here.

7 Here, Congress reserved coal in its natural
8 condition, coal deposits, and made it clear that's what it
9 was reserving, and the common understanding in 1909 and
10 1910 by the person that held a piece of coal that he
11 thought or she thought that he owned, or she owned, wasn't
12 that, oh, I own everything here except the iron pyrite, I
13 own everything here except the sulphur, I own everything
14 here except the moisture, I own everything except the
15 methane.

16 The common person in 1909 and 1910 didn't
17 understand the details of microporosity, the complexities
18 of adsorption, but that person certainly thought that this
19 lump of coal that I own, when I put it in my furnace, or I
20 put it in my stove, I'm not burning somebody else's
21 property, and that's the -- that is the position that is
22 taken by the petitioners in this case.

23 QUESTION: No, I don't think it is. They
24 acknowledge that any easement for extraction implies
25 reasonable methods of extracting, and if you must take

1 some gas that adheres to the coal, that's just a
2 reasonable exercise of your right to excavate, but that's
3 far different from saying that you own all the gas that's
4 in free form and that remains. That's quite different.

5 MR. SHIPPS: Well, we're not talking about gas
6 in free form. We're talking about gas that's absorbed in
7 the coal. It's a gas -- it's a component of the coal, and
8 that's -- and that, it seems to be clear and undisputed
9 with respect to the --

10 QUESTION: But the coal that's ultimately
11 extracted is in no way less valuable, is it, because there
12 has been a drilling that preceded the extraction of the
13 coal? It might be more difficult and expensive to extract
14 the coal, but the coal itself is no less valuable, is it?

15 MR. SHIPPS: Well, it -- that begs the question
16 as to what you define as coal, but it certainly no longer
17 has the value of the coalbed methane that was adsorbed
18 within the coal, and in terms of conventional --
19 conventional uses after the --

20 QUESTION: I want to be very clear on this. Two
21 cases. One case where there's no extraction of gas, and
22 the coal is mined, and the methane is flared off, and
23 there's a lump of black, solid coal. Case 1. Case 2,
24 there has been drilling previously, and the black, solid
25 coal is thereafter removed. In your submission, the coal

1 in the latter instance is less valuable?

2 MR. SHIPPS: It is because it no longer
3 contains --

4 QUESTION: Is there anything in the record --

5 MR. SHIPPS: Potentially it no longer
6 contains -- if -- it depends upon, if you're looking upon
7 changes in mining techniques and changes in commerce,
8 clearly, it no longer contains the heat value of the
9 coalbed methane.

10 Now, in 1910 and 1910 -- 1909 and 1910, that was
11 a hazard, and that wasn't of value then, but the
12 definition of what we own doesn't change based upon
13 improvements in mining techniques, but in fact, Justice
14 Kennedy, the depletion of that value, which now has become
15 under current technologies very valuable, is a loss of the
16 coal estate that we would no longer have. It's a loss of
17 the coal resource that we would no longer have.

18 QUESTION: Well, but then again, that assumes
19 the answer on your part.

20 MR. SHIPPS: It also incorporates what was
21 understood in terms of the circumstances of this
22 legislation. What the USGS was doing in 1909 and 1910,
23 Congress relied upon the U.S. Geological Survey to
24 determine what was, what were coal resources, and the U.S.
25 Geological Survey expressly looked to not just the present

1 value of coal, but to the potential value of coal when it
2 made its classification of lands. And the USGS, with the
3 encouragement and funding from Congress, investigated the
4 science of how gas was held in coal, and the USGS looked
5 to the potential fuel values of other gases that could be
6 removed from coal.

7 The USGS was looking at, through the producer-
8 generator, how can you -- how can we obtain the gases from
9 coal as a fuel source, and that certainly, we think, is
10 significant in this case. And simultaneously --

11 QUESTION: Mr. Shipps --

12 MR. SHIPPS: Yes, Justice Scalia.

13 QUESTION: I don't know enough about mining
14 techniques. Suppose there's a pool of oil under my
15 neighbor's land, and just a little bit of it comes onto my
16 land, can I sink a well and suck out all of his oil? Is
17 that all my oil?

18 MR. SHIPPS: It's all your -- everything that
19 you obtain by drilling a well on your land --

20 QUESTION: Right.

21 MR. SHIPPS: -- that happens to capture
22 migrating substances from his land, you have no liability
23 to him for, and you own, once you reduce to possession.
24 But the premise --

25 QUESTION: In every State of the Union you can

1 drain?

2 QUESTION: Gee, I didn't think --

3 MR. SHIPPS: I --

4 QUESTION: That's not -- some States you can
5 drain, some States you can't.

6 MR. SHIPPS: My understanding is that you can do
7 that in any State, even States with a stratum theory, if
8 they're talking about fugaceous minerals.

9 If in Pennsylvania you drill a well on your land
10 and your neighbor happens to have a fugaceous material
11 located in the stratum on his land, so long as you
12 complete your well in the property that you own, you have
13 no liability for what you recover, and that's -- and
14 actually you don't get to any different place whether
15 you're talking about a stratum theory State or whether
16 you're not.

17 QUESTION: But haven't State regulators changed
18 the common law in that regard with unitization and that
19 sort of thing, so that you no longer can, even if the
20 common law allows you, simply drill straight down and
21 drain your neighbor's pool?

22 MR. SHIPPS: Oh, no, that's frequently correct,
23 Mr. Chief Justice. There are rules and regulations as to
24 how this can be done. And in fact, rules and regulations
25 with regard to what happened in this case made it clear

1 that until 1988 the coal formation and neighboring
2 sandstone formations were treated as one producing zone.

3 QUESTION: When were those rules and regulations
4 adopted?

5 MR. SHIPPS: 1988, Your Honor, Mr. Chief
6 Justice.

7 QUESTION: Well, they scarcely, then, speak to
8 the intent of Congress in 1910, I take it.

9 MR. SHIPPS: That's correct. They do not
10 speak -- but they do go to the impacts question that's
11 been raised by counselor from Wyoming.

12 QUESTION: Well, you say that they cannot be one
13 producing zone anymore, so that if you have, let's say, a
14 pool of methane that is surrounded by limestone, but it is
15 contiguous to a coal bed, you wouldn't be allowed to
16 drain -- you would say they're taking away your coal, that
17 they have no right to that methane even though it's
18 fugaceous.

19 MR. SHIPPS: No. We take the position that no
20 one can drill and complete a well in the tribe's coal
21 deposits, which was the term that was used by Congress in
22 1909 and 1910 --

23 QUESTION: No, but they're doing it next door.
24 They're doing it next door. They drill a well, and they
25 get out the -- a pocket of methane, but as we've heard,

1 what will happen is, that pocket will suck the methane out
2 of your coal.

3 MR. SHIPPS: If they think they can do that,
4 then they're perfectly welcome to attempt to do that,
5 subject to whatever the rules may be that have adjusted
6 the common law relative to pooling and unitization.

7 QUESTION: But you say it's not fugaceous gas.
8 You say it's your coal. You say it shouldn't be treated
9 the way oil, a pool of oil is, or a pocket of gas, that
10 traverses two properties. You're saying, this methane in
11 my coal is coal. It's my coal, it's not your gas or
12 anybody's gas, right?

13 MR. SHIPPS: That's correct, Justice Scalia.

14 QUESTION: So we have to have some new rules for
15 what you do when you drill into a pocket of methane if
16 you're sucking it off of somebody's coal.

17 MR. SHIPPS: If -- they just -- they don't have
18 the right to drill into our coal deposit in the first
19 instance. If for some reason --

20 QUESTION: They're not drilling into your coal
21 deposit. They're drilling into this pocket of methane.
22 Your coal deposit is next door.

23 MR. SHIPPS: Oh. Oh, I beg your pardon.

24 QUESTION: This methane comes up, they take the
25 methane, but it --

1 MR. SHIPPS: if they're able to do that, then
2 under the rule of capture, we don't have a claim. We're
3 saying that they can't --

4 QUESTION: They're capturing your coal, is your
5 theory. They are not capturing methane.

6 MR. SHIPPS: The location of the methane
7 molecule is critical to our position. If it's located in
8 the coal deposit, if it is an integral component of the
9 coal deposit, then it was reserved by Congress in 1909 and
10 1910, and is now owned by us.

11 QUESTION: Suppose that it is commercially
12 feasible to extract the methane without affecting the
13 value of the coal estate.

14 MR. SHIPPS: Justice Kennedy --

15 QUESTION: Is it still coal under your theory?

16 MR. SHIPPS: Yes, and they can't do that.
17 Notwithstanding what they said, when they drill those
18 wells, they remove up to 100 tons of solid coal with
19 regard to every well bore. They acknowledge that we own
20 even the solid coal. They cannot remove coalbed methane
21 from the coal and leave all the coal there. They have to
22 remove the solid coal. They do remove the solid coal.
23 They have to inject things into the coal beds under
24 tremendous pressure. Hundreds of tons of sand gets
25 injected into our coal deposits.

1 QUESTION: Well, then, that's just a question of
2 the law of reasonable accommodation.

3 MR. SHIPPS: Except that the accommodation here
4 was expressly established by Congress in the statute.
5 There's -- this is not a common law accommodation. The
6 statute said that they have to --

7 QUESTION: It would seem to me a very strange
8 way to do it, to conflate the definition of gas and coal.

9 MR. SHIPPS: No, there were also other
10 provisions in the statute, Justice Kennedy, that dealt
11 specifically with the relative rights of an agricultural
12 patentee relative to the coal deposits, and what the owner
13 of the coal deposits would have relative to the surface
14 estate, and the only exception that Congress made for the
15 agricultural patentee to have any dominion over the coal
16 deposit, was the right to mine coal for domestic purposes
17 until the coal deposit was disposed to a third party.

18 And once that took place, he gave up any right,
19 he disclaimed any right -- as a condition for even getting
20 a patent, a limited patent to these properties, he agreed
21 I will no longer have anything to do with that coal
22 deposit, and that's the relative right of accommodations.

23 Thank you, Your Honor. Thank you, Court.

24 QUESTION: Thank you, Mr. Shipps.

25 Mr. Minear, we'll hear from you.

1 ORAL ARGUMENT OF JEFFREY P. MINEAR

2 ON BEHALF OF THE UNITED STATES

3 MR. MINEAR: Thank you, Mr. Chief --

4 QUESTION: Mr. Minear, sometime during your
5 argument, Mr. Davidson suggested that the principle you
6 relied on that at the point of where a grant is ambiguous
7 it is resolved in favor of the Government does not apply
8 where the grant is to a State, and he cited the case of
9 Wyoming v. United States. Sometime during your argument,
10 could you address that?

11 MR. MINEAR: Yes, Your Honor, I will do that.

12 Mr. Chief Justice, and may it please the Court:

13 Congress did not distinguish between coal and
14 CBM in 1909, because a reservation of coal at that time
15 had to include CBM. There are four reasons why. First,
16 coal in its natural state always contains CBM as an
17 inherent product of the coalification process. Second,
18 miners in 1909 necessarily had to remove the CBM as a part
19 of the mined coal. Third, the miners had no way of
20 setting the CBM apart or leaving it behind.

21 Congress used the term, coal, in light of those
22 realities, to describe what nature had deposited and what
23 miners mined. This usage is not only the ordinary,
24 practical, common sense usage, but is also consistent with
25 what science tells us about coal, both now and in 1909.

1 QUESTION: Well, it certainly wasn't the
2 position of the Government's lawyers back when all of a
3 sudden it was discovered that the coalbed methane gas was
4 valuable and its development should be encouraged.

5 MR. MINEAR: Justice O'Connor, you're referring
6 to the 1981 Solicitor's opinion, in which the Government
7 took the position that the coalbed gas was not a part of
8 the coal.

9 QUESTION: Which was withdrawn, as I recall,
10 after this litigation began.

11 MR. MINEAR: That is correct, and the reason why
12 it was withdrawn is because it proved that the reasoning
13 in that opinion was deficient. It didn't consider --

14 QUESTION: Well, I thought maybe it had
15 something to do with the fact that all of a sudden it was
16 valuable and the Federal Government thought it would like
17 to have that value.

18 (Laughter.)

19 MR. MINEAR: Justice O'Connor, that can't be the
20 case, because it was known to be of value -- valuable in
21 1981, when that opinion was issued.

22 What the Solicitor has tried to do in both 1981
23 and the present, and at the present, is try and resolve
24 this rather difficult technical issue. Its first attempt
25 in 1981 proved to be deficient, because it did not

1 consider what we think are all of the important
2 considerations, including the practicalities that I just
3 went through, the four points that I just raised with
4 regard to mining coal in 1909.

5 In addition, it relied very heavily on
6 statements in the legislative history that we think just
7 cannot bear the weight that they were given. And finally,
8 it did not take into any account some of the scientific
9 aspects of coal that were known both in 1909 and are known
10 presently, and I'm referring to the joint appendix --

11 QUESTION: Well, Congress, after the 1909-1910
12 acts, later passed legislation dealing with Federal land
13 grants reserving gas in some circumstances to the Federal
14 Government.

15 MR. MINEAR: Yes, Justice --

16 QUESTION: Do you think it thought then it was
17 reserving coalbed methane gas?

18 MR. MINEAR: Well, we think with regard to those
19 reservations it was probably ambiguous what Congress was
20 reserving. The 1914 act I think is the act that you're
21 referring to. In that case, those were lands that were
22 determined not to contain coal, so the issue probably in
23 Congress' mind never would have come up.

24 It's our current position that under the 1914
25 act, that certainly the United States did reserve the

1 coal, the methane gas, natural gas that lies outside of
2 the coal seams and, of course, it's not clear on this
3 record whether there's any 1914 lands that actually do
4 contain --

5 QUESTION: What about the Mineral Leasing Act of
6 1920?

7 MR. MINEAR: The Mineral Leasing Act of 1920
8 dealt with the question of disposition of what had been
9 previously reserved, so we don't think that it actually
10 touches upon the issue of what had been reserved 10 years
11 before.

12 QUESTION: But Congress did treat this sort of
13 thing separately from coal.

14 MR. MINEAR: It treated gas separately from
15 coal, but it --

16 QUESTION: It treated CBM as a gas, did it not?

17 MR. MINEAR: It did not make specific mention of
18 CBM. This issue did not really come to the forefront
19 until new technology was developed to develop the CBM and,
20 contrary to what Mr. Phillips says, that technology was
21 not in existence in 1909.

22 CBM is not developed through traditional wells.
23 Rather, it requires extensive so-called stimulation of the
24 coal bed. You have to enter the coal bed, fracture the
25 coal bed, and inject materials and remove water in order

1 to get the methane out, so the mining techniques for
2 removing CBM are quite different from the techniques for
3 removing natural gas from conventional limestone.

4 QUESTION: Where do we go to read about this
5 development in technology from 1909 to 1920? Could you
6 give me a good source?

7 MR. MINEAR: Yes. You can go to the joint
8 appendix, and put in the joint appendix in volume 2 is a
9 volume -- a submission that was provided by Mr. Fassett,
10 pages 553 through 578. He describes CBM production in
11 some detail, including CBM production in the Fruitland
12 formation, which has some unusual aspects to it as well.

13 QUESTION: But does he describe the development
14 of the technology in this period?

15 MR. MINEAR: I'm not sure --

16 QUESTION: That's what's important to me,
17 because if the -- you know, for obvious reasons. If the
18 technology has developed, you're going to draw a very
19 different inference, I think, from the use of the language
20 in 1920 from what would be the case if there had been no
21 development in the technology.

22 MR. MINEAR: Yes, I think that might be right.
23 Now, the type of development -- I think that the Fassett
24 article --

25 QUESTION: So does this -- does the period --

1 the material in the joint appendix describe that
2 technological development in that period of roughly 11
3 years?

4 MR. MINEAR: It -- no, it does -- I think that
5 that technology --

6 QUESTION: All right. Where will I find that?
7 where will I find that?

8 MR. MINEAR: I don't think the technology had
9 developed between 1909 and 1920. The technology was
10 actually developed as a form of removing natural gas from
11 so-called tight sands, which came into the fore in the
12 fifties or sixties. I don't think there was any CBM
13 production whatsoever before 1953.

14 QUESTION: So Mr. Phillips was right, then, in
15 his statement to me that there had been no technological
16 change during that period of time.

17 MR. MINEAR: But there was no way to develop CBM
18 in 1909. There was no way to develop CBM in 1920. I
19 believe that the first commercial development of CBM took
20 place in 1953.

21 Now, I'd like -- I think that one thing we have
22 not discussed here this after -- this morning that I think
23 is important, and that is the response of the State courts
24 to this problem.

25 Two States have had extensive experience with

1 this matter, Alabama and Pennsylvania, and both of those
2 courts, applying traditional mining law, concluded that
3 CBM belongs to the owner of the coal seam, and we think
4 that's quite important. These are States that have dealt
5 with the practical problems of CBM development.

6 I would also point out that the Solicitor's 1981
7 opinion did not have the benefit of those two opinions
8 from those two courts.

9 Now, the Montana court --

10 QUESTION: Did those arise because the owners
11 attempted to dispose of the estate separately after they'd
12 made a previous conveyance of the coal right, or --

13 MR. MINEAR: Yes. Those are both cases in which
14 the coal was conveyed away, and the question was whether
15 the surface owner continued to own the gas in the coal
16 seam, and in both of those cases -- and I think the
17 Pennsylvania case is particularly instructive, the Hoge
18 case -- the court indicated that, well, whatever coal
19 constituent, and it treated CBM as a coal constituent,
20 that is in the coal seam, remains part of the ownership of
21 that coal seam.

22 It's common in hard rock minerals to view the
23 ownership of the deposit as the ownership of the strata
24 itself, and I would like to make mention to the two cases
25 that I think that petitioners have cited that would appear

1 to be contrary authority. One is the Smoot case, which
2 involved a seam of iron pyrite --

3 QUESTION: What's the name of the case, Mr.
4 Minear?

5 MR. MINEAR: The case is called Smoot v.
6 Consolidated Coal. It was an intermediate decision from
7 the Illinois courts in 1907.

8 That was a case that dealt with a seam of pyrite
9 that was present in the coal stratum, and the pyrite
10 actually had to be removed to make the coal marketable.
11 The court indicated that the owner of the surface did not
12 give up his owner of his separate seam, or seam of pyrite,
13 which ranged from about 1 inch thick down to about the
14 thickness of paper, but it was clearly discernible, and
15 the court also indicated that a different rule would apply
16 if the iron pyrite was, in fact, intermixed within the
17 coal, which often happens, I should add.

18 QUESTION: Is that because of the notion of
19 accommodation principles?

20 MR. MINEAR: The court actually referred to the
21 principle of appurtenances, which is the notion that if
22 you're removing one material with another material, the
23 two necessarily go together, and it wasn't the idea of
24 simply accommodation, which is what we sometimes encounter
25 in other areas, but actually that it was a part of the

1 coal if it was truly intermingled.

2 Now, the court's reasoning is, I have to say
3 here it jumps from one point to another and it requires
4 careful reading, but I think you'll find that that's what
5 that opinion actually stands for.

6 The other State court decision that is contrary
7 to our position is the Montana supreme court decision from
8 just a few years ago. It dealt with a 1984 coal lease,
9 and it distinguished the Pennsylvania case on the basis
10 that that dealt with a 1920 coal deed, and said that,
11 well, CBM was not recognized in valuable in 1920, so the
12 surface owner would not have necessarily wanted to hold
13 onto it. That same reasoning would distinguish the 1909
14 and 1910 acts, so we think that actually State law is
15 consistent with the position that we've -- that we are
16 asserting here, and that's one of the things that has led
17 the Solicitor to change his view on this matter.

18 QUESTION: Are all the State cases -- what are
19 the dates of them? Are they all after 1953?

20 MR. MINEAR: Yes. Well, the Smoot case is 1907,
21 and that stands for the notion that coal is -- exists in a
22 stratum, and deals with the pyrite being in a separate
23 seam within the stratum. The cases that directly deal
24 with CBM are the Alabama case -- I believe it's called the
25 West case, which was decided in the early nineties --

1 QUESTION: These are on page 36 of your brief,
2 footnote 26?

3 MR. MINEAR: I believe that's right, yes. Yes,
4 those three cases, the Montana case, which is called the
5 Carbon County case, and then the Hoge case, which is the
6 Pennsylvania case.

7 Now, I would like to touch upon the point the
8 Chief Justice raised with regard to the question of the
9 canon of construction that's applicable here. We think
10 that the better view is that CBM is a part of the coal,
11 but even if the matter is debatable, we think that you
12 should apply the established rule that ambiguous grants
13 are interpreted in favor of continued public ownership for
14 the reason that Congress has not consciously determined
15 whether or not to give the material at issue up, and it
16 should be allowed under the Constitution to exercise its
17 right to make that determination.

18 We think that rule applies equally to the States
19 and private persons, because the reasoning for the rule is
20 the same in each case, and that is that Congress is vested
21 with the authority to hand out public property, and it
22 should be given the opportunity to make that --

23 QUESTION: You say then, Mr. Minear, that Mr.
24 Davidson is wrong in citing Wyoming v. United States for
25 the proposition that he cited it for?

1 MR. MINEAR: There are a number of different
2 canons that come into play, and I think it's true that
3 you'll find that there are statements that grants, for
4 instance, for schools should be construed liberally, that
5 grants to homesteaders should be construed --

6 QUESTION: Well, why shouldn't they -- you know,
7 if you want to say a number of different statements, the
8 things that you're relying on are statements also. Why
9 should one statement be elevated over another?

10 MR. MINEAR: Because we think this is the
11 statement, this is the canon that preserves the
12 prerogatives of Congress, which were truly important here
13 for disposing of the public property, and the States'
14 interests are -- will be reflected in the congressional
15 decision. If this material remains a part of public
16 property, then Congress can determine what to do with it,
17 and in that regard, we note that Congress has already
18 acted under the Enzi amendment to protect the justified
19 expectations of anyone who has drilled --

20 QUESTION: No, but it's not the Congress now
21 that it was then. The Congress then was giving away
22 public lands and was giving away public minerals. To say
23 no harm's done if, you know, we interpret the ambiguous
24 thing the wrong way, Congress will fix it, it's a
25 different Congress. It's not the same Congress. It seems

1 to me we ought to just take our best shot at resolving the
2 ambiguity. I don't know any basis for saying, you know,
3 no harm done. It's a 00-year-old Congress.

4 MR. MINEAR: Well, I think that the current
5 Congress is better-equipped than this Court to deal with
6 some of the issues, the outstanding issues such as the
7 safety issues arising from CBM development in
8 conjunction --

9 QUESTION: But they won't make the same
10 decision. I mean, to say that they would make the same
11 decision that a 1909 Congress would is simply false.

12 MR. MINEAR: But they're a better-educated
13 Congress. They're a Congress that knows more about this
14 resource that was not well-understood --

15 QUESTION: Well, you're just saying that if we
16 decide the case in your favor, maybe Congress will do
17 something equitable, but that certainly isn't the question
18 before us.

19 MR. MINEAR: The question is what Congress
20 intended, and we said --

21 QUESTION: What the Congress in 1909 and 1910
22 intended.

23 MR. MINEAR: Yes, and as I said before, I think
24 the better view is that they viewed CBM as part of the
25 coal because it could not be separate, it could not be

1 separated from the coal at that time, and Congress, this
2 Congress can deal, if that ownership is retained, with
3 these problems, and in fact it has dealt with them in
4 things such as the Enzi amendment, which has protected the
5 interests, the justified expectations of the States and
6 the individuals. There's no reason to think that Congress
7 cannot make these decisions wisely through the democratic
8 process.

9 QUESTION: Can they get back the money that on
10 the assumption that was adopted in the 1981 opinion some
11 companies have invested in getting gas rights that now no
12 longer exist? Can Congress fix that up?

13 MR. MINEAR: In fact, they have, in the sense
14 that they have disclaimed ownership of that methane that
15 has been developed in the past, so in fact those interests
16 are protected.

17 QUESTION: In the past.

18 MR. MINEAR: In the past.

19 QUESTION: But they paid for rights to take it
20 out in the future, as well.

21 MR. MINEAR: It's -- I think that the Enzi
22 opinion respects future leases, any leases that will
23 continue into the future. If someone wants to lease,
24 enter into a new lease for CBM development, that would be
25 an issue that Congress would have to deal with, and I have

1 confidence that Congress would deal with it equitably. It
2 would take into consideration the interests of the
3 landowners, the coal companies, the oil companies.

4 This is an issue that is really of the type that
5 requires legislative fact-finding. It is simply an issue
6 that is both complex and there are many different issues,
7 and it is one that Congress has never decided and never
8 addressed, and I believe that in our process, in our
9 democratic process, it's quite appropriate for Congress --

10 QUESTION: Well, if Congress never decided it,
11 then you're saying that the 1909 things didn't -- don't
12 speak one way or the other to it?

13 MR. MINEAR: Well, I'm saying that Congress
14 never explicitly addressed it. We think the better
15 interpretation, as I said before, but it has to be an
16 interpretation on either side by implication, is the CBM
17 goes with the coal. It's the tail that goes with the
18 hide, so to speak, in this situation.

19 Thank you, Your Honor.

20 QUESTION: Thank you, Mr. Minear.

21 Mr. Phillips, you have 2 minutes remaining.

22 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

23 ON BEHALF OF THE PETITIONERS

24 MR. PHILLIPS: Thank you, Mr. Chief Justice.

25 I'd like first to address Justice Scalia. It

1 seems to me that the questions that you asked about the
2 fugaceous nature of the gas in the coal demonstrates as
3 plainly as it can be, they have coal, mixing with gas in
4 three forms, adsorbed, free, and dissolved, they're all
5 the same, they're all extracted the same, there is no
6 basis for distinguishing one from another.

7 Justice Souter, with respect to the means of
8 extracting it, all you do is drill at anything that will
9 release the pressure. Now, whether you can economically
10 extract it to the maximum amount of value is a separate
11 issue. All that arose separately, and there was
12 absolutely no change between 1909 and 1920.

13 QUESTION: There was no economic extraction,
14 then, in that period.

15 MR. PHILLIPS: Not at that time, no, Justice
16 Souter.

17 Justice Kennedy, you asked the question, because
18 it's important to the Government's argument, they keep
19 saying it's a constituent of the coal. They say it over
20 and over again.

21 But if you look at 545 to 555 of the joint
22 appendix, and you look from the macro to the micro
23 elements of every particle of consideration that the
24 handbook on coal identifies, you will never see CH₄,
25 because methane is not a constituent of coal. It is found

1 within the coal, which is why the Government then turns to
2 say, well, it's not the coal, it's the coal deposit. It's
3 not the coal deposit, really, it's the coal seam and the
4 coal bed.

5 The problem is, that's not the language of the
6 statute. The statute says, coal deposit. Deposit was a
7 well-understood meaning at that time. It didn't imply an
8 entire seam or bed. What it meant was that you had an
9 identifiable quantity of the coal, and that's all Congress
10 gave it.

11 This Court in Western Nuclear specifically held
12 that prior to 1916 the regime was specifically identified
13 minerals. That's coal. It doesn't include any other
14 associated minerals. If Congress had wanted to do that,
15 it could have said associated minerals, it could have said
16 gas, it could have said anything. What it said was coal.
17 That's the right it has, and that's the only right it has.
18 The court of appeals erred in extending that to allow
19 these parties to drill for gas.

20 Thank you, Your Honors.

21 CHIEF JUSTICE REHNQUIST: Thank you,
22 Mr. Phillips.

23 The case is submitted.

24 (Whereupon, at 12:02 p.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

AMOCO PRODUCTION COMPANY, ETC., Petitioners v. SOUTHERN UTE INDIAN TRIBE, ET. AL.

CASE NO: 98-830

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: *Donna M. May*
(REPORTER)