

ALBERTA ENERGY AND UTILITIES BOARD

IN THE MATTER OF the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 (the “EUB Act”), and the regulations made thereunder; and

IN THE MATTER OF section 40(1) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, (the “ERC Act”) and the regulations made thereunder; and

IN THE MATTER OF Part 2 of Proceeding No. 1457147, Bears paw Petroleum Ltd. (“Bears paw”), Carbon Development Partnership (Successor in Interest to Prairie Mines and Royalties Ltd., Formerly Luscar Ltd.) (“CDP”), Devon Canada Corporation (“Devon”), EnCana Corporation (“EnCana”), and Fairborne Energy Ltd. (“Fairborne”), in relation to the Clive, Ewing Lake, Stettler and Wimborne Fields; and

IN THE MATTER OF Alberta Energy and Utilities Board (“EUB” or “Board”) Bulletin 2006-19 (“Bulletin 2006-19”); and

IN THE MATTER OF EUB Notice of Hearing dated June 23, 2006 (“Notice of Hearing”); and

IN THE MATTER OF EUB letter to Legal Counsel dated July 27, 2006 (“Letter to Counsel”).

**SUPPLEMENTARY ARGUMENT OF
CONOCOPHILLIPS CANADA
RESOURCES CORP.
 (“CONOCOPHILLIPS CANADA”)**

FEBRUARY 12, 2007

ALBERTA ENERGY AND UTILITIES BOARD

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I. INTRODUCTION

1. ConocoPhillips Canada files this supplementary written argument (the “Supplementary Argument”) in response to the Alberta Energy and Utilities Board’s (the “Board” or the “EUB”) letter dated January 31, 2007 concerning Part 2 of EUB Proceeding No. 1457147 (“Proceeding No. 1457147”).

2. ConocoPhillips Canada’s Supplementary Argument addresses the following:

- EnCana fundamentally misconstrues *Continental Resources of Illinois Inc. v. Illinois Methane LLC*¹ (“*Continental Resources*”), a decision inapplicable to determining the central issue in Proceeding No. 1457147 – entitlement to coalbed methane (“CBM”);
- *Continental Resources* is distinguishable from Proceeding No. 1457147 on the basis of relevant lease wording and differences between Illinois and Alberta law; and
- new evidence introduced by CDP and EnCana (collectively the “Coal Owners”) is either consistent with Mr. Mavor’s testimony or irrelevant to Proceeding No. 1457147.

3. ConocoPhillips Canada adopts its individual and joint submissions previously filed in this proceeding and relies on them for the purposes of this Supplementary Argument. Certain Coal Owner arguments have been addressed in previous submissions. ConocoPhillips Canada seeks to avoid repetition in its Supplementary Argument. Accordingly, silence on an issue should not be interpreted as agreement.

II. ENCANA MISCONSTRUES *CONTINENTAL RESOURCES*

4. EnCana’s Surrebuttal Argument of January 4, 2007 contends that Proceeding No. 1457147 should be decided in the same way as a single Illinois case, *Continental Resources*. ConocoPhillips Canada disagrees. EnCana ignores important distinctions between the *Continental Resources* decision and Proceeding No. 1457147. *Continental Resources* is entirely distinguishable on the basis of differences between Illinois and Alberta law as well as the wording of the leases considered.

¹ *Continental Resources of Illinois Inc. v. Illinois Methane LLC*, 847 N.E. 2d 897, 364 Ill. App. 3d 691, 2006.

A. Continental Resources Is Distinguishable on the Basis of Law

5. *Continental Resources* and Proceeding No. 1457147 are distinguishable on the basis of clear differences between Illinois and Alberta law. Legal distinctions exist in respect of property law, ownership and the rule of capture. Furthermore, as *Continental Resources* does not apply the same interpretive approach to subsurface mineral rights as *Southern Ute*,² *Anderson v. Amoco Canada*,³ and *Borys*⁴ and does not consider the vernacular meaning of “coal”, it is of no assistance to the Board in determining CBM entitlement.

6. The Appellate Court of Illinois concluded that the plaintiff in *Continental Resources* "does not and cannot own the coalbed methane gas at issue here".⁵ It further indicates that: "[o]il and gas are incapable of ownership until actually found and produced"⁶ and in particular, "coalbed methane gas cannot be owned until it is reduced to possession".⁷ As a matter of Illinois law it is impossible for the Appellate Court to declare that the plaintiff owns any type of oil and gas, including CBM, until the CBM is actually captured and produced. The *Continental Resources* approach to ownership is not applicable in Alberta.

7. *Continental Resources* is distinguishable from Proceeding No. 1457147 on the basis of differing ownership laws in Alberta and Illinois. The court in *Continental Resources* focuses on unique lease wording in the context of Illinois state property law, which is fundamentally different from Alberta property law. Illinois is a non-ownership jurisdiction.⁸ Under the non-ownership principle, “no person owns oil and gas until it is produced and any person may ‘capture’ the oil and gas if able to do so”.⁹ By contrast, Canadian courts have not settled on a specific theory of ownership when parties have divided rights by instrument or deed as there is

² *Amoco Production Co. v. Southern Ute Tribe*, (1999) 144 L. Ed. 2d 22 (US Supreme Court) (“*Southern Ute*”).

³ *Anderson v. Amoco Canada*, (2004), 241 D.L.R. (4th) 193 (S.C.C.).

⁴ *Borys v. Canadian Pacific Railway*, [1953] A.C. 217 (P.C.) (“*Borys*”).

⁵ *Continental Resources*, page 6.

⁶ *Continental Resources*, page 5.

⁷ *Continental Resources*, page 6.

⁸ Williams and Meyers, *Oil and Gas Law*, Release 40, December 2005, Pub. 820, paragraph 203.1, pages 33-35.

⁹ *Ibid.*

no need to¹⁰. The parties have, by instrument, divided the entitlement to *in situ* minerals. Moreover, in Canada the rule of capture is inapplicable to an intra-tract dispute.

8. Contrary to EnCana's assertions,¹¹ the court in *Continental Resources* applies the rule of capture in making its determination. The Appellate Court of Illinois states "there is no reason that the rule of capture and the laws governing the ownership of migratory natural gas should not apply to coalbed methane".¹² The Canadian approach is fundamentally different.

9. *Continental Resources* is inconsistent with *Borys* and *Anderson v. Amoco Canada* because the Canadian jurisprudence establishes that ownership is not determined by capture, but by a construction of words of the deed according to the circumstances at the time they were made. Moreover, *Continental Resources* is inconsistent with *Borys* and *Anderson v. Amoco Canada* because the deed in those decisions, and therefore a declaration of ownership, was made long before human intervention or capture. The rule of capture, however applicable in Illinois, is therefore irrelevant to the Board's analysis in Proceeding No. 1457147.

10. In relying on *Continental Resources*, EnCana also ignores that U.S. courts have decided CBM ownership on a state-by-state basis.¹³ The Appellate Court of Illinois in *Continental Resources* determines:

While the ownership of and the right to develop coalbed methane gas are questions of first impression in Illinois, courts in other jurisdictions have struggled with these issues for more than a

¹⁰ See, for example, *Anderson v. Amoco Canada Oil and Gas*, (Fruman J) 63 Alta. L.R. (3rd) 1, page 39, paras 99-101 (Alta. Q.B.). Although Fruman J. at paragraph 101 indicated in obiter that if she had to settle on an ownership theory, which she held she did not, that Alberta would be a jurisdiction of *in situ* ownership, which is fundamentally different than Illinois.

¹¹ EnCana Surrebuttal Argument, January 4, 2007, page 4

¹² *Continental Resources*, page 5; The migratory nature of natural gas, acknowledged by the Appellate Court of Illinois, supports the position of the natural gas rights holders and not the Coal Owners.

¹³ For example in the September 25, 2006 Kentucky decision of *Michael F. Geiger, LLC, et al. v. United States of America, et al.*, 456 F. Supp. 2d 885, ("*Geiger*"). An action was brought pursuant to the *Quiet Title Act*, 28 U.S.C. § 2409(a) and the *Declaratory Judgment Act*, 28 U.S.C. § 2201 to determine ownership rights to CBM. The *Geiger* Court refers to *Southern Ute* and explains that it "has been adopted in large part by every court handling this issue since 1999" (*Geiger*, page 2). While the *Geiger* court recognized the issue of CBM ownership has been ruled on with varied results, by the United States Supreme Court and several state courts, it stated the scientific and legal communities have never disputed that CBM gas constitutes a separate and severable mineral interest in land. (*Geiger*, page 3); Furthermore, as indicated in Bruce Kramer and Owen Anderson in "The Rule of Capture - An Oil and Gas Perspective", *Rocky Mountain Mineral Law Foundation Journal* Vol. 43, No. 2 (2006), page 369, courts in the Western United States have consistently found that CBM is owned by the oil and gas owner.

decade. A review of these cases reveals a split of authority. Many of the cases have resolved the issues by resorting to interpreting or looking to the intent of the original leases and/or grants ... [o]thers have relied upon the general property laws of their respective states with respect to the production of all "minerals" and the manner in which the coal is mined in that particular jurisdiction ... [n]o one answer is right for every state and/or every lease or grant.¹⁴

11. U.S. state court decisions "hold different theories of ownership of oil and gas in their original reservoir"¹⁵ and are therefore of limited use in Proceeding No. 1457147. The Appellate Court of Illinois concludes that while cases from other states may be helpful, it is required to make its "own determinations based on Illinois law".¹⁶ *Continental Resources* involves the application of state property law. Accordingly, the Appellate Court of Illinois correctly determined that it is not bound by decisions of other state courts. For the same reasons, the Board is not bound by the decision of the Illinois court or any other state court.

12. The Appellate Court of Illinois decided that it "need not determine to whom the coalbed methane gas belongs in the absolute",¹⁷ because it was concerned only with the wording of the specific lease in question. The idiosyncratic nature of the lease at issue in *Continental Resources* makes the Illinois court's decision not to apply *Southern Ute* immaterial to Proceeding No. 1457147. Moreover, while the Illinois court did not apply *Southern Ute*, it mentioned the decision without any words of approval or disapproval. The *Southern Ute* case dealt with broader issues relating to the ownership of natural gas and coal, which the Appellate Court of Illinois expressly found were not at stake in the *Continental Resources* case.

13. The *Southern Ute* decision remains persuasive authority in Canada. Firstly, it takes the same approach as the *Borys* decision to fundamental questions of ownership which were not decided in *Continental Resources*. Secondly, as a U.S. Supreme Court decision *Southern Ute* has precedential weight in Canada.

¹⁴ *Continental Resources*, page 4.

¹⁵ See Exhibit 18-003a-2006-09-29, Attachment A, Dean Percy Report, pages 16-18 for an analysis of United States state court litigation.

¹⁶ *Continental Resources*, page 4.

¹⁷ *Continental Resources*, page 5.

14. The *Southern Ute* and *Borys* decisions employ the same interpretive approach to distinguishing between subsurface mineral rights - a vernacular understanding of coal at the time of the grant at issue. The application of the common law, as exemplified in *Southern Ute* and *Borys*, would likely result in a finding that entitlement to CBM rests with the natural gas rights holders.¹⁹ *Continental Resources* does not address the vernacular meaning of coal and therefore neither makes a “determination that a lease of ‘gas’ does not include CBM”²⁰ as EnCana alleges, nor provides a basis for the Board to determine CBM entitlement.

15. *Southern Ute* would be persuasive in a Canadian proceeding and falls within the principles that guide Canadian courts on the use of U.S. precedent.²¹ With respect to non-Canadian jurisprudence, the doctrine of precedent in Canada operates such that “the degree of persuasiveness is dependent upon the level of court which decided the precedent case in the other jurisdiction ... [t]he decision of the highest court that has dealt with the particular matter would be the most persuasive”.²² Accordingly, there can be no credible suggestion that *Continental Resources* - of interest only as a state and lease-specific decision - merits anything near the same credence as *Southern Ute*, a decision of the U.S. Supreme Court.

B. *Continental Resources* Is Distinguishable on the Basis of Lease Language

16. In addition to being wrong on issues of law, the Coal Owners fundamentally misinterpret lease language. EnCana incorrectly argues that lease language at issue in *Continental Resources* “materially parallels” the language of the leases at issue in Proceeding No. 1457147. In fact, there are fundamental wording differences between the leases relevant to ConocoPhillips Canada in this proceeding and those at issue in *Continental Resources*.

17. Firstly, the *Continental Resources* decision concerns a “reservation of the right to drill through the coal [which] does not include the right to drill into the coal and develop coalbed methane”.²³ By contrast, under its leases relevant to this proceeding ConocoPhillips Canada enjoys the right to produce gas from the entirety of the subsurface, unless zonal restrictions are

¹⁹ Tr. Vol. 5, October 20, 2006, page 729, line 18 to page 730, line 3.

²⁰ EnCana Surrebuttal Argument, January 4, 2007, paragraph 2.

²¹ See, for example *Scurry-Rainbow Oil v. Galloway Estate* (1994), 157 A.R. 65 at paragraphs 13-14 (Alta. C.A.).

²² See Gerald L. Gall, *The Canadian Legal System*, 5th ed., (Toronto: Thomson Carswell, 2004), page 431.

²³ *Continental Resources*, page 5.

specifically mentioned in the lease. There are no restrictions in the leases that specifically or generally prohibit drilling into or through coal bearing zones. Furthermore, many of the leases relevant to ConocoPhillips Canada provide that the lessee may surrender its leasehold interest in the leased lands as to specified formation(s), while retaining its interest in and to the leased substances in all other geologic formations therein.

18. EnCana further suggests the Appellate Court of Illinois' determination that Continental's lease was for the right to drill through coal was based on a "conclusion" and not "express lease wordings". With respect, EnCana is simply trying to foist its own lease interpretation onto the EUB.

19. The court in *Continental Resources* interpreted Continental's lease to include a right to drill through coal, not into coal. There is no reason why EnCana's self-serving interpretation of lease wording should be given more weight than that of the presiding appeal court. Despite EnCana's assertions to the contrary, *Continental Resources* remains distinguishable on "drill through coal" lease wording.

20. Secondly, EnCana misconstrues the lessee's requirement in *Continental Resources* to case and cement all holes drilled through coal seams or mine workings. Continental's lease, including language in respect of casing and cementing, specifically deals with the development of oil and gas in a location where coal mining is contemplated and where coal seams have been identified.²⁴ The leases at issue in Proceeding No. 1457147 are different and distinguishable because they do not specifically contemplate natural gas production in areas of active coal mining. Furthermore, the obligation to case and cement all holes drilled through coal seams or mine workings is immaterial to the issue of entitlement to a substance, but rather pertains to not infringing on a producing zone or hindering the economics of that zone.

21. Continental's lease requires pre-approval of the lessor with respect to the location of any well to be "drilled in or through coal seams or mine workings" so as to not interfere with

²⁴ EnCana Surrebuttal Argument, January 4, 2007, Appendix 1, Clause 4, *Continental Resources* (Old Ben Coal Company) Lease.

underground tunnels.²⁵ By contrast, the leases at issue in Proceeding No. 1457147 have no similar restriction and make only general reference to non-embarrassment of mining operations in relation to the disposal of earth, rock, waste or refuse from its workings on leased lands. Moreover, the leases of concern to ConocoPhillips Canada include a full and unfettered grant of natural gas. Continental's lease wording requiring pre-approval of the lessor with respect to drilling in or through coal seams or mine workings is idiosyncratic language unique to a circumstance of oil and gas development in an area of identified coal seams and coal mining. *Continental Resources* is therefore of no assistance to the Board in determining entitlement to CBM.

22. In addition, the *Continental Resources* decision is based on lease language irrelevant to the western Canadian/CPR grants context. The peculiar language of Continental's lease led the Appellate Court of Illinois to determine that the lessee was not granted the right to produce CBM. As Dean Percy's written submissions indicate: "decisions of the American state courts are of little precedential value, because they depend heavily on the often idiosyncratic wording of the deed in dispute in a particular case".²⁶ His statements are directly applicable to *Continental Resources*. *Continental Resources* is distinguishable from Proceeding No. 1457147 on the basis of lease language as well as legal principles.

III. RESPONSE TO THE SEQUESTRATION PATENT

23. The Coal Owners allege - albeit without putting the issue to Mr. Mavor in cross-examination - that there are supposed inconsistencies between Mr. Mavor's testimony and U.S. Patent 6,412,559 B1 (the "Sequestration Patent"). In fact, for the reasons indicated at paragraphs 13 to 15 of the Natural Gas Rights Holders' Reply Argument,²⁷ Mr. Mavor's testimony and the Sequestration Patent are entirely consistent.

24. Contrary to the Coal Owners' claims, Mr. Mavor's evidence does not diverge from the Sequestration Patent on issues of molecular density or coal matrix swelling. With respect to the

²⁵ Clause 4 of the *Continental Resources* (Old Ben Coal Company) Lease states that the "Lessor reserves the right to refuse permission to drill in any part of the premises where drilling would reduce the amount of valuable or recoverable coal otherwise available from the #6 coal seam".

²⁶ Exhibit 18-003a-2006-09-29, Attachment A, Dean Percy Report, page 18.

²⁷ Natural Gas Rights Holders Joint Reply Argument, December 13, 2006, paragraphs 13 to 15.

first issue, Mr. Mavor has been consistent and clear that adsorbed CBM exists, *in situ*, as a dense vapour.²⁷ Regarding the second issue, Mr. Mavor's opening statement indicates that coal matrix swelling results in small changes in the coal matrix volume.²⁸ The Sequestration Patent is in complete harmony with Mr. Mavor's evidence.

IV. RESPONSE TO THE WHITSON AND BRULÉ EXCERPT & GRI REPORT

25. In their final arguments, the Coal Owners introduce an excerpt entitled "Phase Behaviour" by Curtis Whitson and Michael Brulé (the "Whitson and Brulé Excerpt")²⁹ and Chapter 4 of 1996 Gas Research Institute publication number GRI-94/0397 (the "GRI Report"). While neither document was put to Mr. Mavor in cross-examination, they in no way contradict his evidence. Moreover, EnCana's use of the Whitson and Brulé Excerpt is highly selective and undermined by other portions of the Whitson and Brulé text not included in its submissions.

26. EnCana parses wording from the Whitson and Brulé Excerpt to erroneously suggest: "the presence of water will complicate the phase behaviour of pure methane".³⁰ It conveniently ignores the wording in the Whitson and Brulé text that follows on from its quotation: "[a]t typical reservoir conditions, the effect of connate water on hydrocarbon phase behaviour can usually be neglected".³¹ Had EnCana canvassed Whitson and Brulé more extensively, it would recognize - contrary to its stated position - that water content in natural gas is generally ignored in underground phase behaviour calculations and has little or no impact on hydrocarbon phase behaviour.

27. In addition to selectively quoting from Whitson and Brulé, EnCana incorrectly interprets the Exhibit 20-45 phase diagram. In the Appendix to its final argument, EnCana attempts to use the phase diagram for methane-ethane mixtures to support a groundless position that methane can exist as a liquid above its critical temperature. While the cricondentherm temperature in Exhibit 20-45 is above the critical temperature of methane, the record in Proceeding No.

²⁷ Exhibit 18-001-2006-08-25, Attachment A, Mavor Report, page 20, para 3. Tr. Vol. 2, October 17, 2006, page 232, line 21 to page 233, line 19.

²⁸ Tr. Vol. 2, October 17, 2006, page 157, lines 7-20.

²⁹ C.H. Whitson and M.R. Brulé, *Phase Behaviour*, Monograph Vol. 20, Henry L. Doherty Series, Society of Petroleum Engineers, Richardson, Texas, 2000.

³⁰ EnCana Argument, November 30, 2006, Appendix 1, page 1.

³¹ *Supra*, Note 30, page 5, section 2.1, column 1.

1457147 is clear that the cricondentherm is far below the temperature of commercial CBM reservoirs, even the relatively low temperature reservoirs found in Alberta.³³ The arguments set out in the Appendix to EnCana's Argument are therefore irrelevant.

28. Turning to the GRI Report, CDP unsuccessfully attempts to portray Mr. Mavor as distancing himself from the position that density of adsorbed gas is similar to the liquid density of the molecules at the atmospheric pressure boiling point temperature. In fact, the passage CDP quotes from the GRI Report at paragraph 93 of its final argument is consistent with Mr. Mavor's testimony.

29. In the GRI Report, Mr. Mavor uses the term "gas" to describe the adsorbed phase. He testified in Proceeding No 1457147 that gas and vapour are synonymous and distinct from liquids and solids.³⁴ Furthermore, in the GRI Report Mr. Mavor refers to the values for the adsorbed densities as "assumed" and does not equate the state of the adsorbed molecules with a liquid. There is therefore no inconsistency between Mr. Mavor's evidence and either the Whitson and Brulé Excerpt or the GRI Report.

V. CONCLUSIONS

30. ConocoPhillips Canada submits that the *Continental Resources* decision is not material to a determination of entitlement to CBM in Proceeding No. 1457147 and that new evidence introduced by the Coal Owners is either consistent with Mr. Mavor's testimony or irrelevant to this proceeding.


³³ Natural Gas Rights Holders Joint Argument, November 15, 2006, pages 4-5.

³⁴ Tr. Vol. 2, October 17, 2006, page 231, lines 18-20.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF
CONOCOPHILLIPS CANADA RESOURCES CORP. THIS 12TH DAY OF FEBRUARY,
2007.**

**CONOCOPHILLIPS CANADA RESOURCES CORP.
by its Counsel Borden Ladner Gervais LLP**

Per:



Alan L. Ross

LIST OF AUTHORITIES

1. *Michael F. Geiger, LLC, et al. v. United States of America, et al.*, 456 F. Supp. 2d 885 (United States District Court, Western District of Kentucky at Owensboro).
2. Gerald L. Gall, *The Canadian Legal System*, 5th ed., (Toronto: Thomson Carswell, 2004), page 431.

**TAB 1 TO SUPPLEMENTARY ARGUMENT OF
CONOCOPHILLIPS CANADA**

(Cite as: 456 F.Supp.2d 885)

C

Motions, Pleadings and Filings

United States District Court,
W.D. Kentucky,
Owensboro Division.
MICHAEL F. GEIGER, LLC, et al., Plaintiffs
v.
UNITED STATES of America, et al., Defendants.
Civil Action No. 4:04CV-40-M.

Sept. 25, 2006.

Background: Property owners brought action against coal estate owner under Quiet Title Act and Declaratory Judgment Act to determine ownership rights to coal bed methane (CBM) gas under property. Parties filed cross-motions for summary judgment.

Holdings: The District Court, McKinley, J., held that:

- (1) property owners had ownership rights to CBM gas under property;
- (2) coal estate owner did not have right to reduce to possession and ownership CBM gas captured as result of coal mining process; and
- (3) coal estate owner retained right to utilize underground voids and mine works.

Motions granted in part and denied in part.

West Headnotes

[1] Mines and Minerals ¶55(5)

260k55(5) Most Cited Cases
Under Kentucky law, property owners, rather than coal estate owner, had ownership rights to coal bed methane (CBM) gas under property, including CBM gas still within coal strata, where owners were granted "all the oil, gas, and all other minerals and mineral rights of every kind and character except the coal and coal rights, in, on, or under, or which may be produced from" property, and reservation of coal occurred well before profitability of CBM gas

was contemplated.

[2] Mines and Minerals ¶47

260k47 Most Cited Cases
Under Kentucky's version of capture rule, owner of gas estate has right to capture and reduce to possession gas, but does not own it in its place.

[3] Mines and Minerals ¶47

260k47 Most Cited Cases
Under Kentucky law, gas estate owner has right to exclude all others from attempting to exercise right to capture gas on his premises.

[4] Mines and Minerals ¶48

260k48 Most Cited Cases
Under Kentucky law, coal bed methane (CBM) gas is separate and severable mineral interest in land.

[5] Mines and Minerals ¶55(5)

260k55(5) Most Cited Cases
Under Kentucky law, coal estate owner did not have right to reduce to possession and ownership coal bed methane (CBM) gas captured as result of coal mining process, even though it had right to right to dissipate CBM gas where reasonable and necessary to mine coal.

[6] Mines and Minerals ¶55(6)

260k55(6) Most Cited Cases
Under Kentucky law, coal estate owner retained right to utilize underground voids and mine works for all lawful purposes, absent showing that current use or future use of old mine works was inconsistent with recovery of coal from property.

*886 A. George Mason, Jr., Lexington, KY, Bryan R. Reynolds, Sullivan, Mountjoy, Stainback & Miller, P.S.C., Owensboro, KY, Lloyd D. Bright, Evansville, IN, for Plaintiffs.

Michael D. Ekman, U.S. Attorney Office, Louisville, KY, Edwin W. Small, Maureen H. Dunn, Peter K. Shea, Tennessee Valley Authority, Knoxville, TN, for Defendants.

MEMORANDUM OPINION AND ORDER

McKINLEY, District Judge.

This matter is before the Court upon cross-motions for summary judgment filed by the Defendants Tennessee Valley Authority ("TVA") and the United States of America ("the government") [DN 43 & 44] and Plaintiffs Michael F. Geiger, LLC and Bill S. Gough ("the Geiger plaintiffs") [DN 45]. Having been fully briefed, the matter now stands ripe for decision. For the reasons discussed below, the motions for summary judgment filed by TVA and the government are **GRANTED in part, and DENIED in part** while the Geiger plaintiffs' motion for summary judgment is **GRANTED in part, and DENIED in part**.

I. BACKGROUND

The Geiger plaintiffs brought this action under the Quiet Title Act, 28 U.S.C. § 2409(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201, to determine the ownership rights to coal bed methane ("CBM") gas in approximately 27,000 acres of property located in the western Kentucky Counties of Union, Webster and Henderson, an area the government previously designated as "Camp Breckenridge." The Geiger plaintiffs own "all the oil, gas, and all other minerals and mineral rights of every kind and character except the coal and coal rights, in, on, or under, or which may be produced from" Camp Breckenridge tracts 2, 3, 4, 6, 7 and 8. TVA and the government own all the "coal and coal rights" in and to the subject property. Neither party currently extracts CBM gas from the subject property, however, each claims ownership of it. The Plaintiffs claim that they have the exclusive right to explore for, develop, produce, market, sell and otherwise use the CBM gas from these properties. Furthermore, Plaintiffs claim exclusive ownership of the right to use the abandoned mine works under the subject property. [DN 1 at 10]. TVA claims ownership of the CBM gas within the coal strata and alternatively, contests the Plaintiff's claim regarding the use of the abandoned mine works.

II. LEGAL STANDARD

The summary judgment standard requires that the

Court find that the pleadings, together with the depositions, interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. The moving party bears the *887 initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The facts are largely undisputed, as the Plaintiffs and Defendants have made cross-motions for summary judgment. Thus, the Court reviews the uncontested facts and legal arguments.

III. DISCUSSION

CBM gas has existed as long as coal has existed. However, CBM gas development has only recently become commercially viable. Consequently, disputes have arisen in recent years over the ownership of CBM gas. Given the nature of CBM gas, the dispute is generally between the owner of the coal estate and the owner of the gas estate, as it is in this case.

The Supreme Court gave an overview of the composition of coal and CBM gas in *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 119 S.Ct. 1719, 144 L.Ed.2d 22 (1999), which has been adopted in large part by every court handling this issue since 1999. Justice Kennedy writing for the Majority described coal as:

... a heterogeneous, noncrystalline sedimentary rock composed primarily of carbonaceous materials. It is formed over millions of years from decaying plant material that settles on the bottom of swamps and is converted by microbiological processes into peat. Over time, the resulting peat beds are buried by sedimentary deposits. As the beds sink deeper and deeper into the earth's crust, the peat is transformed by chemical reactions which increase the carbon

(Cite as: 456 F.Supp.2d 885)

content of the fossilized plant material. The process in which peat transforms into coal is referred to as coalification.

The coalification process generates methane and other gases. Because coal is porous, some of that gas is retained in the coal. CBM gas exists in the coal in three basic states: as free gas; as gas dissolved in the water in coal; and as gas "adsorped" on the solid surface of the coal, that is, held to the surface by weak forces called van der Waals forces. These are the same three states or conditions in which gas is stored in other rock formations. Because of the large surface area of coal pores, however, a much higher proportion of the gas is adsorped on the surface of coal than is adsorped in other rock. When pressure on the coalbed is decreased, the gas in the coal formation escapes. As a result, CBM gas is released from coal as the coal is mined and brought to the surface.

Amoco, 526 U.S. at 872-873, 119 S.Ct. 1719 (internal citations omitted).

A. Ownership of CBM Gas

The issue of CBM gas ownership is one of first impression in Kentucky, but the United States Supreme Court and several state courts have ruled on it with varying results. See *Amoco*, 526 U.S. 865, 119 S.Ct. 1719, 144 L.Ed.2d 22; *NCNB Texas National Bank, N.A. v. West*, 631 So.2d 212 (Ala.1993); *Cont'l Res. of Ill., Inc. v. Ill. Methane, LLC*, 364 Ill.App.3d 691, 301 Ill.Dec. 887, 847 N.E.2d 897 (2006); *Carbon County v. Union Reserve Coal Co.*, 271 Mont. 459, 898 P.2d 680 (1995); *U.S. Steel Corp. v. Hoge*, 503 Pa. 140, 468 A.2d 1380 (1983); *Harrison-Wyatt, LLC v. Ratliff*, 267 Va. 549, 593 S.E.2d 234 (2004); *Energy Dev. Corp. v. Moss*, 591 S.E.2d 135 (W.Va.2003); *Newman v. RAG Wyo. Land Co.*, 53 P.3d 540 (Wyo.2002).

*888 Despite the differing results, there is no dispute in the scientific or legal communities that CBM gas constitutes a separate and severable mineral interest in land. See *West*, 631 So.2d 212, 227. The courts which found for the coal estate owner reasoned that as long as the CBM gas is

adsorped or present in the coal strata, it is under the exclusive control of the coal estate. *Hoge*, 468 A.2d at 1383 (Pa.1983); *West*, 631 So.2d at 225; *Cont'l Res. of Ill.*, 301 Ill.Dec. 887, 847 N.E.2d at 902. These courts, however, following the "capture rule," [FN1] also found that any CBM gas that escaped the coal strata may be captured by the gas estate holder. *Hoge*, 468 A.2d at 1383; *West*, 631 So.2d at 224. The courts which ruled in favor of the gas estate owners generally found that the gas estate holders have the exclusive rights to drill for and produce CBM gas wherever it may be found, even if adsorped to coal in the coal seam. *Carbon County*, 271 Mont. 459, 898 P.2d 680; *Ratliff*, 267 Va. 549, 593 S.E.2d 234; *Newman*, 53 P.3d 540.

FN1. All jurisdictions which have ruled on CBM gas ownership adhere to the capture rule with the exception of Montana in *Carbon County v. Union Reserve Coal Co.* 271 Mont. 459, 898 P.2d 680 (1995) which is an "ownership in place" jurisdiction. The capture rule gives the gas estate owner a right to capture and reduce to possession any gas. The ownership in place rule gives the gas estate ownership of gas in its place, in the ground or otherwise.

[1] All of the courts which have grappled with this issue focused on the meaning of the contract language used to create the mineral interest. Using this same approach, the Court easily concludes that the Plaintiffs own the CBM gas estate. In *Sellars v. Ohio Valley Trust Co.*, 248 S.W.2d 897, 899 (Ky.1952), the Kentucky Supreme Court held that when an instrument uses the term "minerals" without qualification, it is construed as conveying all organic and inorganic substances that can be taken from the earth. The Plaintiffs were granted "all the oil, gas, and all other minerals and mineral rights of every kind and character except the coal and coal rights, in, on, or under, or which may be produced from" the subject property. [DN 1 at 4-5]. The only exception contained in the mineral interest grant to Plaintiffs is the "coal and coal rights" in and to the subject property.

TVA concedes that the Plaintiffs have the right to

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capture and reduce to possession and ownership CBM gas which has migrated out of the coal strata. However, the more difficult question raised here is whether the Plaintiffs have that same right to CBM gas still within the coal strata. TVA frames the question in this manner: (1) whether the gas estate owner has the right to capture CBM gas in coal strata, and if so, (2) whether the coal estate owner nevertheless has the right to reduce to possession and ownership CBM gas captured in connection with coal mining.

[2][3] TVA maintains that if the CBM gas is in the coal when it is captured, it belongs to the coal estate owner. However, the Court is of the opinion that the gas estate owner has the right to capture CBM gas still within the coal strata. First, there is no indication in any of the documents in question that CBM gas was intended to be included as a part of "coal and coal rights." Like the reservation in *Amoco*, the reservation of coal here occurred well before the profitability of CBM gas was contemplated. In *Amoco*, the Supreme Court found that since CBM was not contemplated as a valuable commodity at the time, "the most natural interpretation of 'coal' as used in the 1909 and 1910 Acts does not encompass CBM gas," but instead most likely means "solid fuel resource." *Amoco*, 526 U.S. at 874, 880, 119 S.Ct. 1719. The reservation here also includes "coal rights" but the same reasoning *889 would apply. Secondly, Kentucky law recognizes the rule of "capture" as have many of the other courts considering this issue. Under Kentucky's version of the capture rule, an owner of a gas estate has the right to capture and reduce to possession the gas, but does not own it in its place. *Sellars* 248 S.W.2d at 900. In Kentucky, the gas estate owner

does not own the oil and gas in the sense that he owns the surface or the solid minerals. His ownership is limited to the exclusive legal right to explore and, if oil or gas should be found, to reduce the same to possession and ownership. Until that is done, the oil and gas might escape and be captured by another from wells on other premises. But he has the right to exclude all others from attempting to exercise the right on his premises.

Sellars 248 S.W.2d at 900.

[4] CBM gas is a separate and severable mineral interest in land. Kentucky law allows for the capture of similar type minerals wherever they can be found. Therefore, the Court concludes that the Geiger plaintiffs have the right to capture and reduce to possession CBM gas which is still within the coal strata.

[5] The next question is whether TVA, as the coal estate owner, has the right to reduce to possession and ownership CBM gas which is captured as a result of the coal mining process. Historically, TVA argues, CBM gas has been controlled by the owner of the coal estate. TVA claims that its right to capture and vent CBM during coal mining necessarily includes the right to reduce the gas to possession and ownership. The Court disagrees.

TVA obviously has the right to capture and vent CBM gas but this right does not equate to ownership of the gas. TVA makes some solid policy arguments related to waste and the environment in arguing for a rule which would allow a coal owner to market CBM gas rather than vent it into the atmosphere. However, the Court does not make policy decisions. The Kentucky General Assembly has enacted legislation "in order to encourage and ensure the fullest practical safe recovery of both coal and coalbed methane" and the Court must believe that the state will regulate the recovery of CBM gas in a manner sufficient to address the concerns raised by TVA. In any event, such considerations do not change the fact that TVA does not own the rights to the CBM gas.

TVA also argues the difficulties of administering split mineral estates, but there is no reason to be "more concerned about the creation of a split coal/CBM gas estate than the creation of a split gas estate." *Amoco*, 526 U.S. at 880, 119 S.Ct. 1719. As noted by the Supreme Court in *Amoco*,

[i]t may be true, nonetheless, that the right to mine the coal implies the right to release gas incident to coal mining where it is necessary and reasonable to do so. The right to dissipate the CBM gas where reasonable and necessary to

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mine the coal does not, however, imply the ownership of the gas in the first instance. Rather, it simply reflects the established common-law right of the owner of one mineral estate to use, and even damage, a neighboring estate as necessary and reasonable to the extraction of his own minerals.

Id. at 878-879, 119 S.Ct. 1719.

It would seem logical to expect the owner of the CBM gas to negotiate some sort of financial arrangement with the coal producer to allow for the marketing of the gas rather than its waste. Such an arrangement would address the environmental concerns as well. However, in the absence of such an agreement, TVA does not possess the right to reduce the CBM gas captured during the mining process to possession and ownership.

*890 B. Exclusive Right to Underground Voids

The Geiger plaintiffs seek to have the Court declare that they have the exclusive right to capture CBM gas in the voids of the abandoned mine works. Plaintiffs also argue that they are entitled to exercise sole and exclusive dominion over the underground mine voids. Plaintiffs contend that any notion that TVA or Peabody owns the CBM gas in the void space is contrary to the law of capture. The Court agrees for the reasons previously set forth in this opinion. However, the Court does not agree that the Plaintiffs have exclusive dominion over the underground mine voids.

[6] The Plaintiffs argument in this regard is based on their assertion that the mine works have been abandoned. TVA has submitted an affidavit disputing the contention that there has been an abandonment of the mine works. This raises a question of fact sufficient to warrant denial of the Plaintiffs' motion on this point. Instead, the Court is of the opinion that TVA is entitled to summary judgment as a matter of law. Coal owned by TVA and the government remains under the subject property. According to *Middleton v. Harlan-Wallins Coal Corp.*, 252 Ky. 29, 66 S.W.2d 30 (1933), TVA retains the right to utilize the underground voids and mine works for all lawful

purposes. The Plaintiffs have failed to raise a genuine issue of fact that the current use or future use of the old mine works is inconsistent with the recovery of coal from the subject property.

For these reasons, the Court denies that portion of Plaintiffs' motion for summary judgment seeking a declaration that Plaintiffs are entitled to exclusive dominion and control over the underground mine voids. TVA's motion for summary judgment on this point is granted. While the Plaintiffs do not have exclusive dominion and control over the mine voids, under the capture rule, they have the exclusive right to capture the CBM gas that is found within the voids.

IV. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that the motion for summary judgment filed by Plaintiffs Michael F. Geiger, LLC and Bill S. Gough [DN 45] is **GRANTED in part and DENIED in part** and the motions for summary judgment filed by TVA and the government [DN 43 & 44] are **GRANTED in part, and DENIED in part**.

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Motions, Pleadings and Filings (Back to top)

- 2005 WL 4157277 (Expert Deposition) (Deposition) (May 20, 2005)
- 2004 WL 3712678 (Trial Pleading) Answer of United States (Jul. 19, 2004)
- 2004 WL 3712677 (Trial Pleading) Answer of Tennessee Valley Authority (Jun. 14, 2004)
- 2004 WL 3712676 (Trial Pleading) Answer of Defendant Peabody Coal Company, Inc. (Jun. 4, 2004)
- 2004 WL 3712675 (Trial Pleading) Complaint (Apr. 12, 2004)
- 4:04cv00040 (Docket) (Apr. 12, 2004)

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**TAB 2 TO SUPPLEMENTARY ARGUMENT OF
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THE
CANADIAN
LEGAL SYSTEM

Fifth Edition

by

Gerald L. Gall

O.C., B.A., LL.B.

*Member of the Ontario Bar
Professor of Law
The University of Alberta*

With Chapter 8

The Legal System in Quebec

by F. Pearl Eliadis, B.C.L., LL.B., B.C.L. (Oxon.)

and revised by

France Allard, B.C.L., LL.B.

*General Counsel — Comparative Law, Legislative Services Branch,
Department of Justice, Canada*

THOMSON
—★—
CARSWELL

Essentially, precedent is the doctrine that requires a judge, in resolving a particular case, to follow the decision in a previous case, where the fact situations in the two cases are similar. Of course, no fact situations are ever absolutely identical. A judge may avoid the theoretical constraints imposed upon him by the doctrine of precedent by utilizing a process called "distinguishing". This permits a judge to exercise some flexibility and perhaps even creativity. Nevertheless, there may be many past cases with similar fact situations dealing with the same particular legal problem which require a judge to decide which precedent case to follow. This is particularly important when, in dealing with the same set of facts, different judges have rendered different decisions in law. In order to resolve this problem, the doctrine of stare decisis requires that a judge of a particular court must follow the previous decision of the highest court within that particular provincial jurisdiction, although he may be persuaded to differing extents by co-ordinate and higher courts outside this provincial jurisdiction. Of course, all courts in Canada are bound by the highest court in the land, the Supreme Court of Canada.

THE OPERATION OF STARE DECISIS

The operation of the doctrine of stare decisis is best explained by reference to the English translation of the Latin phrase. "Stare decisis" literally translates as "to stand by decided matters". The phrase "stare decisis" is itself an abbreviation of the Latin phrase "stare decisis et non quieta movere" which translates as "to stand by decisions and not to disturb settled matters".

Basically, under the doctrine of stare decisis, the decision of a higher court within the same jurisdiction acts as binding authority on a lower court within that same jurisdiction. The decision of a court of another jurisdiction only acts as persuasive authority. The degree of persuasiveness is dependent upon various factors, including, first, the nature of the other jurisdiction. Is the other jurisdiction a Canadian one, and if so, is it one of the nine common law jurisdictions in Canada? If the other jurisdiction is non-domestic, is it a Commonwealth jurisdiction? In short, one must determine whether there is a common legal tradition between a given jurisdiction and a foreign jurisdiction in order to determine the degree of persuasiveness to be attached to decisions rendered in that foreign jurisdiction. Second, the degree of persuasiveness is dependent upon the level of court which decided the precedent case in the other jurisdiction. The decision of the highest court that has already dealt with the particular matter would be the most persuasive. Other factors include the date of the precedent case, on the assumption that the more recent the case, the more reliable it will be as authority for a given proposition, although this is not necessarily so. Also, on some occa-