Solicitor's Opinions

Solicitor's Opinions are an important source for determining the Department's interpretation of particular laws. The Solicitor is granted authority by Congress over DOI's legal work.[1] The Departmental manual grants to the Solicitor "all of the authority of the Secretary" over "[a]ll the legal work of the Department" and authority:

> To issue final legal interpretations, in the form of M-Opinions published in Decisions of the United States Department of the Interior, on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary.[2]

This makes Solicitor's M-Opinions binding on DOI as a whole.[3] When the Secretary or other DOI officials seek advice regarding an interpretation of a law which DOI administers, the

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[1] From 1871 to 1913, the Assistant Attorney-General for the Interior Department handled the Department's legal work. The position was renamed Solicitor in 1913. The President began to appoint the Solicitor, with the advice and consent of the Senate, in 1946. 43 U.S.C. § 1455 (1994).

[2] 209 DM §§ 3.1 & 3.2A (11) (1992).

[3] The Interior Board of Land Appeals (IBLA) in a recent case indicated a willingness to conclude that a Solicitor's Opinion might not be binding on it if the opinion were not signed by the Secretary and not published. United States v. Willsie, 152 IBLA 241 (2000). Aside from the fact that DOI has not published the "Decisions of the United States Department of the Interior" since 1994, it would appear that IBLA is bound by Solicitor's Opinions, whether they are signed by the Secretary or not. The Departmental Manual is clear that Solicitor's Opinions bind DOI as a whole and may be overruled in only three specific ways, none of which includes IBLA decisions. The Solicitor recently issued an opinion, which was concurred in by the Secretary, concluding that M-Opinions are binding on the Office of Hearings and Appeals. *Binding Nature of Solicitor's M-Opinions on the Office of Hearings and Appeals*, M-37003 (Jan. 18, 2001).

Solicitor's Office only occasionally responds with an M-Opinion.[4] The Secretary often concurs in M-Opinions. After an M-Opinion is completed, DOI will take action consistent with the legal interpretation explained by the Solicitor.

The Department's use of Solicitor's Opinions as an administrative tool has fluctuated through its history. Early editions of the Land Decisions do not contain legal opinions.[5] From 1901 on, the number of Solicitor's Opinions varies each year, increasing dramatically in the 1930s.[6] Often, but not always, an Assistant Secretary, Under Secretary or Secretary approved the Solicitor's Opinions. In the 1950s, the number of Solicitor's Opinions drop suddenly and remains low through the present.[7]

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[4] The Solicitor's Office also issues legal opinions which are not M-Opinions. For purposes of this paper, we are focusing on M-Opinions.

[5] The early volumes are made up almost entirely of adjudicatory decisions, circulars and instructions. Each volume notes that the decisions of the Secretary "are prepared in the office of the Assistant Attorney-General for the Interior Department, under the supervision of that officer, and submitted to the Secretary for his adoption." *See* 20 Pub. Lands Dec. at *v* (1895). In 1901, the Land Decisions begin to include a separate opinion section in the table of contents. 30 Pub. Lands Dec. at *xi* (1901)(noting 16 opinions mostly related to Indian affairs).

[6] *See generally,* 54 Interior Dec. (1932-34). During the years of Secretaries Harold L. Ickes and J.A. Krug, the number of legal opinions in the volumes of the Decisions of the Department of the Interior balloon, approaching or exceeding the number of adjudicatory decisions. *See generally,* 58 Interior Dec. (1942-44); 59 Interior Dec. at *ix-xiii* (1945-47)(listing 94 adjudicatory decisions and 130 legal opinions); and 60 Interior Dec. at *x-xii* (1947-1951)(listing 151 adjudicatory decisions and 124 legal opinions).

[7] *See* 61 Interior Dec. at *ix* (1952-54) (listing 15 legal opinions); 62 Interior Dec. at *ix* (1955) (listing 15 legal opinions); and 63 Interior Dec. at *xi* (1956) (listing 13 legal opinions). After 1950, the number fluctuates between zero and twenty-five per year. Until 1994, DOI published Solicitor's M-opinions in the Decisions of the United States Department of the Interior. However, it suspended that publication in 1995.

Until recently, a Solicitor's Opinion had never been challenged directly.[8] The simple reason Solicitor's Opinions are not challenged directly is that they are not themselves final agency actions. They are internal documents which interpret the law and give legal advice to the Secretary or DOI officials before those officials decide on a final agency action. Only the final agency action creates a ripe case in controversy which may be challenged.

Courts have recently begun to consider the deference due to Solicitor's Opinions. In *Southern Ute Indian Tribe v. Amoco Produc. Co.*, the Southern Ute Indian Tribe (Tribe) claimed ownership of coalbed methane on the Southern Ute Indian Reservation in southwestern Colorado.[9] The United States had conveyed certain lands within the reservation boundaries to private parties in the early part of the twentieth century under the 1909 and 1910 Coal Lands Acts, reserving the coal estate. The United States later restored the ownership of the federally-reserved coal estate to the Tribe. A 1981 Solicitor's Opinion concluded that when the United States reserved the coal estate on 1909 and 1910 Act lands, it did not retain ownership of the coalbed methane.[10] The opinion, in effect, stated that the United States would not claim an

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[8] *See* Glamis Imperial Corp. v. Babbitt, No. 00-0196 (D. Nev. (Apr. 14, 2000)). In this case, Glamis Imperial Corporation challenged a Solicitor's Opinion dated January 3, 2000. The complaint characterized the opinion as a directive, though the Solicitor's Opinion did not direct a specific action. It merely advised BLM that it has the authority to deny the proposed plan of operations at issue and states that "[w]hether the BLM may deny the Glamis plan approval under section 601(f) depends upon the particular facts, including the significance of the resources to be protected." *Regulation of Hardrock Mining*, M-36999 at 18 (Dec. 27, 1999). After the case was transferred to the U.S. District Court for the Southern District of California, that court dismissed the case for lack of ripeness.

[9] Amoco Produc. Co. v. Southern Ute Indian Tribe, 526 U.S. 865, 872 (1999).

[10] *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits*, M-36935, 88 Interior Dec. 538 (May 12, 1981).

interest in the coalbed methane where it owned only the coal estate.

The U.S. District Court for the District of Colorado recognized that the Solicitor's Opinion did not specifically address minerals on Tribal lands.[11] Nevertheless, the court accorded to the opinion the same level of deference usually reserved for regulations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[12] in large part because the court had independently reached the same conclusion drawn by the Solicitor's Opinion.[13]

The U.S. Court of Appeals for the Tenth Circuit, on the other hand, noted that the Solicitor had not addressed the impact of the opinion on private parties' interests nor had the Solicitor recognized that the opinion would have a retroactive impact on private property rights which were created seventy years before the Solicitor wrote the opinion.[14] The Tenth Circuit reasoned that this particular opinion was not so much an authoritative construction of the law as it was a public policy pronouncement, and as such, without having gone through notice and comment, warranted no *Chevron*-style deference.[15] The Tenth Circuit then considered the Solicitor's Opinion under the *Skidmore* deference standard but concluded that this particular

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[11] Southern Ute Indian Tribe v. Amoco Produc. Co., 874 F. Supp. 1142, 1160 (D. Colo. 1995).

[12] 467 U.S. 837, 842-43 (1984).

[13] *Id.*

[14] Southern Ute Indian Tribe v. Amoco Produc. Co., 119 F.3d 816, 829 (10th Cir. 1997). The question of deference for the Solicitor's Opinion was not reconsidered on rehearing. *See* Southern Ute Indian Tribe v. Amoco Produc. Co., 151 F.3d 1251, 1255 (10th Cir. 1998).

[15] 119 F.3d at 833.

opinion did not have the "power to persuade."[16] The Court noted it would not grant deference to the opinion only insofar as it related to private property rights,[17] choosing not to address "the degree of deference due the opinion as applied to ownership of federal land interests, to regulation and use of mineral assets on federal lands, or to interpretation of federal lease forms."[18] Given this language, the Tenth Circuit decision is of limited significance and not the last word on the level of deference courts will accord Solicitor's Opinions in the future.[19]

Other cases have addressed the level of deference to accord various types of other administrative pronouncements of an agency's interpretation of the law, such as enforcement guidelines, agency manuals, opinion letters or policy statements. Such case law has been quite

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[16] *Id.* at 834.

[17] *Id.* at 836, n. 26.

[18] *Id.*

[19] When the *Southern Ute* case went to the Supreme Court, the Court did not reach the question of whether the 1981 Solicitor's Opinion was due any deference because, by then, the Solicitor had withdrawn the 1981 opinion. Amoco Produc. Co. v. Southern Ute Indian Tribe, 526 U.S. 865, 872 (1999). We note that in some past cases, the Supreme Court has encountered other Solicitor's Opinions but has cited to them only as factual background or as support for the Court's own conclusions and has failed to address the level of deference due to Solicitor's Opinions. *See e.g.*, United States v. Alaska, 503 U.S. 569 (1992) (referring to a DOI Solicitor's Opinion as support for conclusion that the Secretary of the Army had acted within his discretion in conditioning approval of the Nome port facilities on a disclaimer by Alaska of a change in the federal-state boundary that the project might cause); Duro v. Reina, 495 U.S. 676, 690-92 (1990) (citing Solicitor's Opinions as support for Court's conclusions regarding extent of tribal court authority); Watt v. Western Nuclear, 462 U.S. 36 (1983) (citing Solicitor's Opinion as support for Court's conclusion that gravel is a mineral reserved under Stock-Raising Homestead Act).

unsettled.[20] A recent Supreme Court case, *Christensen v. Harris County*,[21] involved an opinion letter[22] of the Department of Labor, stating:

> [W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters–like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the "power to persuade[.]"[23]

This language indicates that, hereafter, the Supreme Court may not give *Chevron*-style deference to any governmental agency interpretation of the law that is created without formal adjudication or notice-and-comment rulemaking. However, not surprisingly, the facts of the case played a

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[20] *See* Britt E. Ide, Note, To Defer or not to Defer? The Circuit Split Over Chevron Deference to Agency Interpretations: Southern Ute Indian Tribe v. Amoco Production Co., 1998 Utah L. Rev. 397.

[21] 120 S. Ct. 1655 (2000).

[22] The opinion letter was signed by the Acting Administrator of Wage and Hour Division. The amicus brief filed by the Solicitor General and cosigned by the Secretary of Labor represented that the position in the opinion letter was the position of the Secretary of Labor. 120 S. Ct. at 1665.

[23] *Id.* at 1662-63.

significant role in the outcome. The Court noted that the Department of Labor's opinion letter was seeking to overcome a regulation's obvious meaning.[24] The Court also noted its own earlier decision which concluded that an agency's interpretation of its own regulation is entitled to deference when the language of the regulation is ambiguous, thus leaving open the possibility that it might rule in a different way in the future if given different facts.[25] Finally, it is noteworthy that in a concurring opinion, Justice Scalia explained that the court has accorded *Chevron*-style deference to "authoritative agency positions set forth in a variety of other formats" and that *Chevron*-style deference should apply to an agency's interpretation of governing statutes.[26]

Despite the Supreme Court's ruling in *Christensen*, the existing case law fails to establish a general rule regarding the level of deference to be granted Solicitor's Opinions. We expect that DOI will continue to argue that Solicitor's Opinions are due *Chevron*-style deference, especially in circumstances wholly-related to the public lands.

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[24] *Id.*

[25] *Id.* (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

[26] *Id.* at 1665; *see also id.* at 1667 (Breyer & Ginsburg, JJ., dissenting).