What?s mine is mine

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In the light of recent changes to the law and moves to frackfor shale gas, Richard Lashmore explores the often complex issues aroundmineral ownership

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Not so long ago, an article on mineral ownership would havebeen a subject for dusty books, even dustier lawyers and half-rememberedlectures. In recent years, however, new commercial opportunities such as shalegas extraction, greater awareness of the potential value of mineral interestsand developments in the law have changed this.

In this article, I will cover 4 topics:

- manorial rights after October 2013;
- the relationship between surface development and separatemineral ownership, as well the conflicts that can ensue;
- the ownership of mine and quarry voids;
- mineral ownership and shale gas extraction.

Although I cannot provide all the answers, I should be ableto point the way to some of the right questions.

Manorial rights

Until 12 October 2013, manorial rights were overridinginterests in terms of land registration, and valid whether or not they werenoted in the title. Since then, on the 1st registration of previouslyunregistered land the freehold estate will be free of the manorial rights if nocaution is recorded. For registered land where no protective notice isregistered, a transferee for valuable consideration will take the landunencumbered by manorial rights.

Understanding a few concepts will help to clarify the natureof the manorial mineral rights protected and the effect that these have on theowner of the surface land.

A manor can be regarded in a number of ways: a title as in?lord of the manor?; freehold manorial lands associated with the manor; or anincorporeal hereditament ? an intangible or non-visible right ? and theassociated manorial rights. It is these manorial rights that have requiredprotection by registration since 2013. The incorporeal hereditamentconstituting a manor could be registered until 2003 but, while the registerstill exists, further entries are not possible.

It does not matter how long ago separation of rights occurred, it can still be valid: I have investigated titles going back to the 15th and 16th centuries that potentially have major current commercial implications

It was the lord of the manor rather than the Crown thatcould grant estates referred to as ?copyholds?. These were 1st created in theMiddle Ages, and subsequently by statute in Enclosure Acts. Under copyholds,any minerals in the land, which essentially include everything beneath thesurface, were owned by the lord of the manor, but the copyholder was entitledto the right of possession. This meant that neither the lord of the manor northe copyholder could exploit such minerals without the other?s cooperation, andany commercial royalty payment would conventionally be split between the 2 parties. This default position could be varied by local custom, but applied inthe vast majority of cases.

A copyhold could become a freehold by the process ofenfranchisement. This was originally done by conveyance of the latter by thelord of the manor to the copyholder, but in the 19th century, a series of CopyholdActs provided a statutory framework for enfranchisement.

These statutory enfranchisements retained the status quo inrelation to the lord of the manor?s ownership of the minerals and the formercopyholder?s right of possession, unless there was a specific agreement to thecontrary.

On 1 January 1926, all remaining copyholds were enfranchisedby the Law of PropertyAct 1922 , which, like its 19th-century predecessors, retained the separaterights of ownership and possession in minerals. The 1922 act and older copyholdacts also provide that the lord of the manor?s rights to minerals will notprevent the construction of roads, drains or buildings.

Surface development

When it comes to freehold land that has never been acopyhold or subject to enfranchisement, the law is different.

Freehold ownership effectively includes all substrata to thecentre of the earth, but separate ownership of minerals is commonplace. Wheresuch a separation of rights has occurred, it does not matter how long ago ittook place, it is still potentially valid; indeed, I have investigatedseparation of mineral titles going back to the 15th and 16th centuries thatpotentially has significant current commercial implications.

The law on registered land largely reflects Common Law, butalthough freehold mines and minerals are not subject to compulsoryregistration, they can be, and increasingly are, registered on a voluntarybasis. So while a note of a mineral reservation may appear in the propertyregister of title, that does not necessarily mean that a separate mineralfreehold ownership does not exist. The LandRegistry indemnity does not apply to mines and minerals unless there is aspecific note of their inclusion.

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> Any note in the property register is often quiteuninformative because the minerals included in any reservation are a matter ofinterpretation. *Earl of Lonsdale v Attorney General [1982] 1 WLR 887* included areview of all the previous authorities and confirmed the position that there isno single test of the meaning of ?mines and minerals?, but rather

a series oftests and pointers as follows.

- The expression ?mines and minerals? can have a wide meaning,signifying everything below the surface, though this is not the primarymeaning.
- ?Mines and minerals? is not a definite term.
- A vernacular test in which the commercial practices and usageof land and mineral agents at the time of the reservation is of significance.
- One of the questions in the case was whether the substancesin question were of exceptional use and value.
- Another was whether working rights were included in thereservation. Those reserved by underground methods only might indicate thatminerals that would be worked from the surface alone are excluded.
- A mineral reservation would not include the common soil ofthe district such that it would entirely swallow up the freehold.
- The tests of the intentions of the parties are objective.

Interference with 3rd-party mineral ownership is atrespass and can be restrained by an injunction, so the mineral owner may be ina position to ransom the developer. The developer may also face this issue inrelation to foundations, services or, perhaps most significantly, large-scalecut-and-fill operations.

Separate mineral ownership may not be apparent, or a mineralowner could be difficult to trace, and as a mineral reservation requires interpretationthere is inherent legal uncertainty; resolving disputes when the developmentand funding timetable is tight can thus be a serious issue for the developer.

The developer needs to consider:

- acting early and planning a strategy, as timing is a significantissue, and not dealing with matters until later can enhance a mineral owner?sransom position;
- researching the issues and being well informed on theengineering requirements and geology of the development, as well as the legaleffect of the particular reservation;
- if former copyhold land is involved, getting behind theregistration of the notice, checking who owns the manor and the terms ofenfranchisement and any enclosure award; the Land Registry may not have carriedout any analyses of the application for the notice and will have depended oninformation provided by the applicant;
- it is important to be commercial and review strategyregularly; keep the work commercially proportionate but do not ignore thepossibility of improving your negotiating position, for instance by taking theargument to an aggressive mineral owner;
- it is vital to remember that insurance is an option and nosteps should be taken that might prejudice the ability to obtain cover, such ascontacting 3rd-party mineral owners without proper consideration.

Where a mineral reservation includes working rights, it ispossible that the freehold mineral owner may also claim that surfacedevelopment would interfere with the exercise of those rights. This probablypresents another possibility for ransom.

The correct approach in such cases is for damages to be anadequate remedy, measured according to what a reasonable person would acceptrather than a ransom. That being said, specific legal advice and a strategicapproach to negotiation are also important.

Void ownership

One specific form of surface development in which mineralownership can be an issue is tipping into void spaces created by quarrying. Whoowns that space ? the owner of the minerals that have been extracted, or thesurface owners?

The position underground is well established by case law.Where there is reservation of ?mines and minerals? rather than just ?minerals?,then the containing chamber is included and belongs to the mineral owner. However,notwithstanding hundreds of years of case law, there is no legal authority onthe ownership of a void created by surface workings. The most sensible viewappears to be that this takes effect as a lowering of the surface and the voidbelongs to the surface owner. This is supported by some obiter or non-bindingcomments in a recent High Court judgment, McleanEstates v Earl of Aylesford [2009] EWHC 697 (Ch) .

Shale gas

The Supreme Court case BocardoSA v Star Energy UK Onshore ltd [2010] UKSC 35 involved a diagonallydrilled oil well at a depth of 800ft and confirmed that, at deep levels,unauthorised interference with freehold ownership is nonetheless an actionabletrespass.

In *Bocardo*, only nominal damages were awarded because it wasaccepted that the oil company would be entitled to compulsory rights under the Mines (WorkingFacilities and Support) Act 1966 . It was confirmed that compensation underthe act is based on compulsory purchase principles and would thereforerepresent the loss in value to the land or mineral owner rather than thebenefit obtained by the oil company.

Notwithstanding hundreds of years of case law, there is no legal authority on the ownership of a void that has been created by surface workings

It might appear that this provides a legal solution for theshale gas industry. Rights that can be obtained include exploration, workingand ancillary wayleaves. The grant must be expedient in the national interestbut given the potential economic significance of shale gas extraction thisshould not be an issue. The rights that can be acquired include rights tosearch, rights to work, removing restrictions on working, and the grounds forapplication include the persons unreasonably refusing to grant the necessaryrights or demanding unreasonable terms.

However, the application process is complex, lengthy,potentially expensive and rarely used. It starts with an initial application tothe appropriate Secretary of State to establish a prima facie case, and onlyafter that is the matter referred to the high court.

The 1966 act does provide a legal solution to the problem ofobtaining exploration and working rights for shale gas but this may not be atimely, economical or practical one, hence the provisions of sections 43 to 49 of the InfrastructureAct 2015 , which came into effect on 12 April 2015.

The 2015 act includes statutory rights to use deep-levelland at least 300m below the surface for the purpose of exploiting petroleum ordeep geothermal energy, in particular deep-level horizontal drilling. Trespassis prevented by statutory authorisation. For this purpose, petroleum includes?any mineral oil or relative hydrocarbon and natural gas existing in itsnatural condition in strata?, under section 1a of the Petroleum Act 1998 .

The rights are widely drawn and include passing substancesthrough, or putting any substance into, land, installing infrastructure and theability to leave deep-level land in a condition different to that before theexercise of the rights.

The Secretary of State has power to make regulationsrequiring companies to pay the owners of the land and others for the benefit ofthe areas in which the land is situated. Note there are statutory procedures asto notice.

There is, however, no effect above on surface interests orsubterranean interests down to 300m and so, while the 2015 act provides asolution for the widespread horizontal bores involved in shale gas extraction,other rights are a matter of negotiation or the use or threat of use of the1966 act.

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Further information

- Related competencies include Environmentalassessment , Groundengineering and subsidence , Legal/regulatorycompliance .
- Thisfeature is taken from the RICS *Land journal* (December2016/January 2017).