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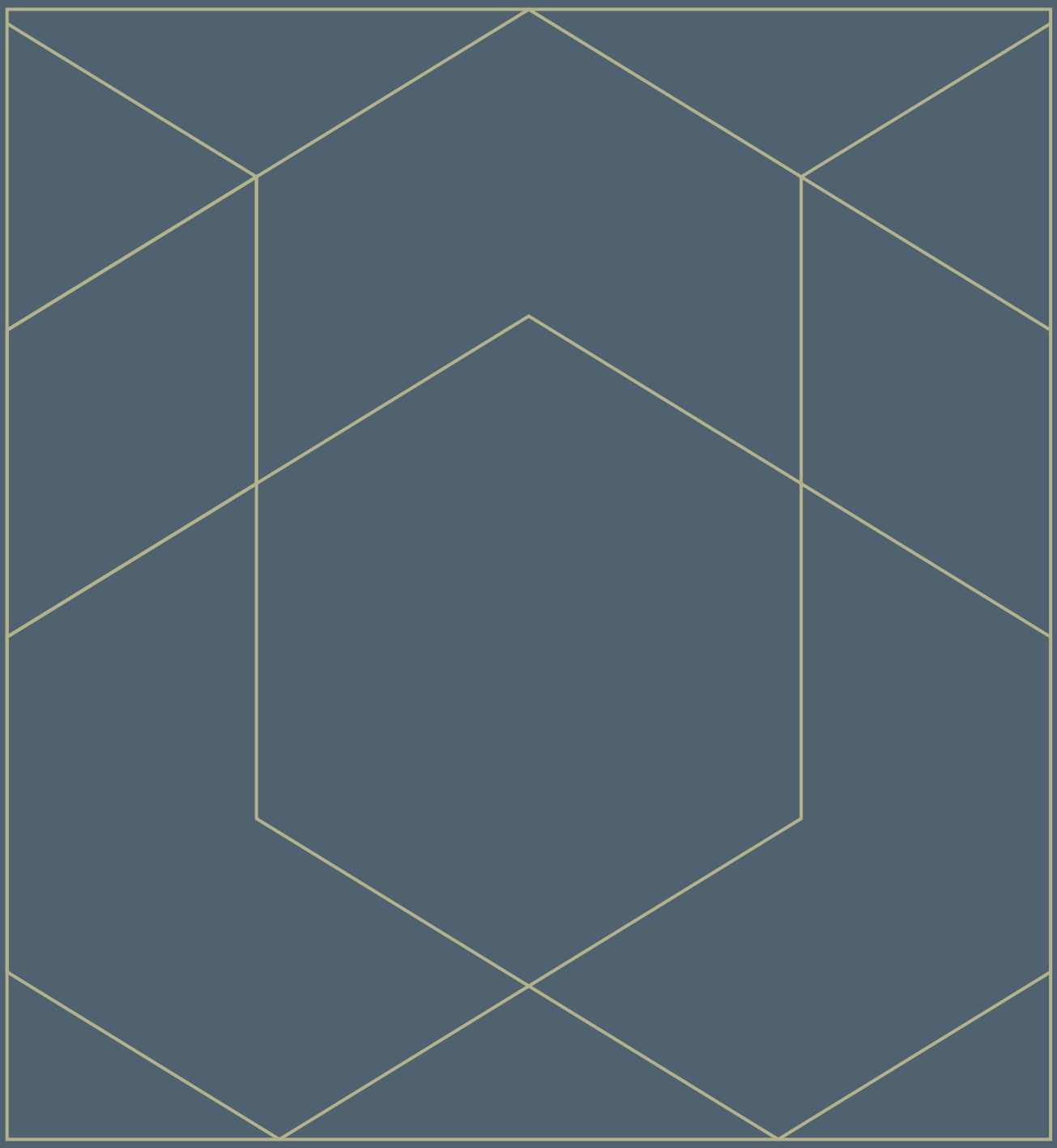

Review Of Mineral Rights And Associated Issues In Great Britain In Relation To The UK Government Publication ‘Resilience For The Future – The UK’s Critical Mineral Strategy’

04 May 2023

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CLAUSE

1. THE INSTRUCTION AND SCOPE OF THE REPORT

1.1 The Question to be Addressed

Knights Professional Services Limited (**Knights**) have been instructed by the British Geological Survey on behalf of UK Research and Innovation to provide a review to address the following overarching question:

"Are there mineral rights-related barriers to domestic exploration and extraction of critical minerals that prevent or hinder the delivery of the UK's Critical Mineral Strategy and, if so, what are they and how can they be overcome?"

The question is addressed in terms of mineral rights in England, Wales and Scotland.

1.2 Critical Minerals

The request arises out of the publication by the UK government in July 2022 of 'Resilience for the Future – The UK's Critical Mineral Strategy' which sets out a plan to secure supply chains by boosting domestic capability to generate new jobs and wealth attracting investment and playing a leading role in solving global challenges with international partners in relation to critical minerals.

The strategy identifies 18 minerals as critical and in addition 5 watch list minerals have been nominated by the UK Critical Minerals Expert Group.

The strategy highlights the UK government's aim to reduce barriers to domestic exploration of critical minerals which includes in particular a commitment to 'review mineral rights-related barriers to exploration and extraction of critical minerals and explore ways to improve the accessibility of mineral rights information to expedite critical mineral development.'

Following publication of the strategy the Critical Minerals Association provided an exploration and mining industry perspective on the issue in an article 'Mineral Rights England, Scotland, Wales: Unlocking Great Britain's Potential' published in July 2022 which concludes that 'the mineral rights system in England, Scotland and Wales is hampering the commercialisation of many critical mineral resources'. Recommendations were suggested but no evidence was presented as to the degree that the mineral rights system may be hampering the exploration for and extraction of critical minerals.

Knights has collaborated with the Scottish law firm Harper Macleod LLP (**Harper Macleod**) who have provided the parts of this report dealing with Scottish land and mineral rights law and where appropriate the application of statute-based law.

1.3 Summary of Title Issues in England and Wales

We will address six broad categories of legal context in England and Wales:

(a) Unregistered titles to land and minerals;

(b) Registered freehold mineral ownership;

(c) Registered surface freehold titles;

(d) Registered titles identifying mineral exceptions;

(e) Profits a prendre; and

(f) Manorial rights to minerals.

1.4 Summary of Title Issues in Scotland

In relation to the legal context in Scotland, we will address the open-ended nature of mineral title, and the issues that present in identifying the current mineral owner.

1.5 Other Considerations

We will also address recent proposals for reform of the land registration system in England and Wales, issues arising from the interpretation of mineral exceptions and reservations, the issues arising from the law of trespass and the rights that might be obtained by a mineral operator or developer pursuant to the Mines (Working Facilities and Support) Act 1966.

We will also consider if the use of standard form documents and centrally set rents and royalties may assist operators and land and mineral owners.

1.6 Consultation

Our instructions include engagement with and obtaining input from stakeholders and we have undertaken a consultation exercise with a wide range of organisations, businesses and professionals working in the critical minerals and more general minerals industry in Great Britain.

1.7 Glossary

We have included a glossary of legal terms included in this report.

1.8 Legal Disclaimer

This report is addressed to the British Geological Survey and UK Research and Innovation and is intended solely for their benefit in connection with the instruction mentioned in paragraph 1.1. It is not to be relied upon by any other person or used for any other purpose. This report shall not create any retainer with anyone other than the British Geological Survey and UK Research and Innovation.

2. FREEHOLD LAND AND MINERAL OWNERSHIP IN ENGLAND AND WALES

2.1 The General Law

In English and Welsh land law the prima facie position is that freehold ownership of the surface of land includes all strata to the centre of the Earth[1]. However, the separate ownership of the freehold surface and minerals is commonplace. This is usually referred to as a reservation of mineral ownership or rights, but more properly in legal terms it should be referred to as an exception, which is the keeping back of ownership of part where land is sold.

Where minerals are owned separately from the surface freehold this is freehold ownership of the physical substances, not just some form of right over the surface owner's freehold.

Profits a prendre, a right to take something from a third party's land, occur in relation to the right to take minerals. A profit a prendre may be a right associated with the ownership of a parcel of land known as a "profit a prendre appurtenant". Alternatively a profit a prendre may not be associated with ownership of land and may exist in its own right and is known as a "profit a prendre in gross". Profits a prendre in relation to minerals are relatively rare.

The separation of ownership of freehold surface and minerals may come about in a number of ways. The most common is probably an exception of the ownership of minerals when the freehold surface is sold. However, it is equally possible that the freehold minerals might be sold and the freehold surface retained or each element sold simultaneously, but to separate parties. Separation of freehold ownership may also occur by virtue of grants by the Crown and Acts of Parliament such as Inclosure Acts. No matter how long ago the separation of freehold surface and minerals occurred it is nonetheless legally valid.

It is common to come across exceptions well over a 100 years old and they were often included in the terms of sale when large, landed estates were sold in parcels in the early part of the last century. Retention of ownership would not necessarily include rights to work and dig the minerals, particularly by surface working in a quarry rather than by underground working in a mine, which might be implied. However, the express reservation of working rights both underground and from the surface is common.

2.2 Precious Metals Petroleum and Coal

The general position in law does not apply to precious metals (gold, silver and platinum) which belong to the Crown by virtue of the Crown's prerogative.

[1] Humphries v Brogden (1850) 12 QB 739; Star Energy UK Onshore Ltd (1) Star Energy Weald Basin Ltd (2) v Bocardo SA [2010] UKSC 35

By virtue of the Petroleum (Production) Act 1934 the Crown also owns all petroleum beneath Great Britain or its territorial seas[2], and the definition of petroleum includes any mineral, oil, hydrocarbon, or natural gas existing in its natural condition. Shale gas and coal bed methane will therefore also fall within the definition of petroleum as a form of natural gas.

Most coal is owned by the Coal Authority by virtue of the Coal Industry Act 1994.

Gold, silver, platinum, and petroleum including natural gas and coal therefore stand outside the general law as to land and mineral ownership in England and Wales.

2.3 Registration of Surface Freeholds

Registration of the ownership of land in England and Wales is a central government controlled register commenced following the coming into effect of the Land Registration Act 1862. However, it was not until 1926 following the Land Registration Act 1925 that some parts of England and Wales became subject to compulsory registration leading to a substantial increase in the area of land subject to registration. Over the years, progressively more areas became subject to compulsory registration and by 1990, compulsory registration applied to all of England and Wales. As of 2019, HM Land Registry (**Land Registry**) estimated that only 14% of surface land and properties in England and Wales remain unregistered. Generally, the events giving rise to the obligation to compulsorily register are; a transfer of the freehold for valuable consideration or by way of a gift, an assent by executors or personal representatives, or the creation of the first legal charge or mortgage.

Once land is registered any person who suffers loss because of an error or omission in or from the register or the need to correct the register will normally be compensated, the accuracy of the register of title thereby being guaranteed by the state.

2.4 Registration of Freehold Minerals

Whilst the Land Registration Acts largely follow the general law as to freehold mineral ownership[3], freehold minerals owned separately from the surface are not subject to compulsory registration that applies to all surface interests. However, voluntary registration of ownership is possible and has been undertaken by bodies such as The Crown Estate and the Church Commissioners as well as many private estates and mineral owners.

Whilst proving title and the process of registration of freehold minerals is largely similar to an application for the first registration of surface land, the title granted by the Land Registry to freehold mineral interests is commonly qualified in respect of estates of interests existing before a specified date. Qualification of title takes account of the possibility of historic mineral

[2] Now see section 2 Petroleum Act 1998

[3] Section 132(1) Land Registration Act 2002 and see also Land Registry Practice Guide 65 April 2012

ownership mentioned above and of a separation of surface and mineral freeholds before the date of any title deeds available and lodged as part of the registration application.

2.5 Minerals and Surface Titles

Where there has been an exception of mineral ownership, a note of it may appear in the Property Register of the registered title. However, even if no note is registered the freehold mineral title is valid against the surface owner and the Land Registry's indemnity of title will not apply. As the registration of ownership of freehold minerals owned separately from the surface is not compulsory, the freehold surface owner or any person seeking to explore or work minerals can be confronted with significant third-party ownership and rights affecting land without any prior knowledge or remedy if their land is as a result less valuable or restricted in its use.

2.6 Manorial Rights

In addition to separation of the freehold of minerals from the freehold surface interest, separate ownership of minerals may arise in respect of manorial rights. This is principally in relation to the land that was formerly of copyholder tenure, a form of land ownership deriving from the feudal system where the copyholder held title not directly from the Crown as in a freehold, but from the relevant Lord of the Manor.

Whilst sometimes varied by local custom, the position with regard to mineral rights in copyhold land was that the Lord of the Manor owned the minerals, but the copyholder was entitled to a right of possession and so neither could work the minerals without the consent of the other.[4]

Copyholds came into existence in the Middle Ages and later as a result of the Inclosure Acts. On inclosure of common land, copyholders who had rights over the common land being inclosed were awarded a parcel of copyhold land in the former common.

Copyholds could become freeholds by a process of enfranchisement. Originally this would be achieved by a conveyance of the freehold from the Lord of the Manor to the copyholder, however in the 19th century a succession of Copyhold Acts were passed to facilitate enfranchisement and ultimately all remaining copyholds were enfranchised and became freeholds by virtue of the Law of Property Act 1922, which came into effect on 1 January 1926.[5]

In all statutory enfranchisements of copyholds, the status quo was maintained with regard to the Lord of the Manor's ownership of the minerals in the relevant parcel of the land and the former copyholder’s, now freeholder’s right of possession of those minerals, although this could be varied by express agreement.

[4] Eardley v Granville (1876) 3 Ch. D. 826

[5] Reference to Copyhold Act 1894, Copyhold Act 1858, Copyhold Act 1887 and Copyhold Act 1946

When former copyhold, now freehold, land was subject to registration the Lord of the Manor's ownership of the minerals together with other manorial rights were overriding interests to which the registered title would be subject, even though they did not appear on the register.[6]

The Land Registration Act 2002 included in its objectives to reduce the number of overriding interests and replace as many of them as possible with register entries and designated certain overriding interests including manorial rights, which would lose their overriding status with effect from 12 October 2013[7]. However, the owner of the manorial rights (including ownership of minerals) would have the opportunity of noting their interests on the register of the relevant surface title, or registering a caution against first registration where land was unregistered.

Where any manorial rights were not protected by registration of a notice or caution before 13 October 2013, they would not automatically cease to exist, but after that date, a person who acquired the registered estate for valuable consideration would take it free of any manorial interests.[8]

The notice registered will give details of the person who submitted the notice and claims ownership of manorial rights and a summary of the rights claimed, although it should be noted that the Land Registry does not carry out due diligence as to the validity of the ownership of the manorial rights claimed or the nature of those rights.

2.7 Profits a Prendre

Profits a prendre appurtenant are not capable of separate registration but a profit a prendre in gross may be registered with its own title but is not subject to compulsory registration unless created out of an existing registered title since 13 October 2003.

2.8 Summary

The current position regarding ownership of minerals in England and Wales can be summarised as follows:

(a) An unregistered title to freehold land will prima facie include all sub strata to the centre of the Earth with the exception of gold, silver and platinum, petroleum gas and other hydrocarbons owned by the Crown and coal which is vested in the Coal Authority. However, even if there is no evidence immediately available of separation of freehold mineral ownership from the surface freehold interest or, registration of any freehold minerals interests in the land if evidence is produced to that effect, then separate ownership of freehold minerals will be valid and enforceable.

[6] Section 70(1)(j) Land Registrtaion Act 1925
[7] Section 117 of the Land Registration Act 2002
[8] Section 29 of the Land Registration Act 2002

(b) Whilst it is not compulsory to register freehold titles to minerals separated from the surface, voluntary registration is possible and many of the larger owners of freehold minerals separated from the surface have registered their titles. Title to freehold minerals registered by the Land Registry is likely to be qualified as to rights arising before a specific date.

(c) A registered title to freehold land will prima facie include all sub strata to the centre of the Earth with the same exceptions mentioned above for unregistered freeholds. However, the Land Registry's guarantee of title will not apply to any separate third party ownership of freehold minerals whether or not any note of that ownership appears on the register of title to the surface, or whether or not the freehold mineral ownership is itself registered.

(d) A registered surface title may identify that an exception of minerals exists, however, information contained in the register may be little more than a reference to the existence of separate mineral ownership with no particulars of how that occurred or reference to any particular document. Even if some particulars are included, they are unlikely to give any indication as to who the current owner of those freehold minerals might be.

(e) Profits a Prendre relating to taking minerals are comparatively rare but may be registered with their own title.

(f) In addition to the separate freehold ownership of minerals, they may be owned by the Lord of the Manor particularly in relation to land that was formerly of copyholder tenure, although the surface owner would usually be entitled to a right of possession and minerals could not be worked without their consent. Since October 2013, manorial rights in relation to minerals as well as all other manorial rights should have been protected by a notice. This notice should include details of the person registering the notice and the nature of the rights claimed in the relevant surface title. If no notice is registered and the surface title is transferred for valuable consideration the manorial rights including ownership of minerals will cease to have effect.

2.9 Proposals for Reform

In July 2018 the Law Commission published its report, "Updating the Land Registration Act 2002". Extensive consultation was carried out and amongst other key areas, recommendations were made for reform in relation to bringing freehold mines and minerals owned separately from the surface onto the register with the objective of promoting transparency in property ownership.

The Law Commission recommended that the dispositions of mines and minerals that indicated an intention to exploit those mines and minerals must be registered.

The trigger for compulsory registration would include a disposition of freehold mines and minerals held separately from the surface freehold for valuable consideration and the grant of a lease of mines and minerals for a term of more than 7 years. Where freehold minerals are separated from freehold surface ownership the same triggers would apply, but dispositions by way of gift would also comprise a trigger for compulsory registration. Consideration was given to the cost of registering estates falling on individual owners outweighing the advantages of registration, but it was considered that by limiting the triggers to transactions that were principally commercial in their nature an appropriate balance could be achieved.[9]

The Law Commission report also considered cautions against registration. The current law provides that registration of a caution is permitted where the ownership of freehold mines and minerals includes rights of working from the surface. The possibility of extending the ability to register cautions to where such working rights were not included was considered. Broadly speaking, the arguments in favour were that registering the caution would assist by bringing to light potential claims to mines and minerals ownership, but the arguments against were that they may complicate conveyancing and become a barrier to dealings with the surface interests. The arguments were regarded as finely balanced and no recommendation for changes were made.

It should be noted that the Land Registry opposed proposals for compulsory registration of minerals principally on the grounds of diversion of resources from other projects and the resource required to deal with mineral applications.

The UK government's response to the Law Commission's report published in March 2021[10] rejected the Law Commission's proposals in relation to compulsory registration of mines and minerals in the following terms:

The government acknowledges that the complex issue of mines and minerals should be explored. However, at the current time, it does not accept the recommendation to introduce compulsory triggers for registration of estates in mines and minerals, as proposed by the Law Commission. The registration of below-surface interests is not part of HM Land Registry's specific business strategy commitments. However, HM Land Registry will consider whether mines and minerals ownership should be brought within the compulsory requirements of registration as part of its wider policy development.

[9] Law Commission report "Updating the Land Registration Act 2002" paragraph 3.67

[10] The Land Registration Act 2002: Government full response updated 25 March 2021 paragraph 16

The status quo as to compulsory registration of freehold mineral interests therefore remains with no proposals for reform.

2.10 Interpretation of Mineral Exceptions

Where the owner of freehold minerals excepted from the surface is identified, that is not necessarily the end of the matter. The terms of the exception may include references to particular substances, e.g. ironstone, or classes of substances, e.g. metals. However, it is quite possible that the exception is simply refers to “minerals” or “mines and minerals”. Where these general terms are used, the substances included in the exception become a matter of interpretation. Although the legal systems north and south of the Scottish border are based on different principles, the approach taken by the courts in the two jurisdictions are very similar, and there are frequent references in each jurisdiction to the detail and outcomes of cases in the other.

Particularly in the 19th and early 20th centuries parties in England and Wales and in Scotland litigated over the ownership of valuable assets resulting in a considerable body of what sometimes might appear as contradictory or inconsistent precedent. The judgment in the 1982 High Court case, Earl of Lonsdale v Attorney General[11] included a review of all the previous authorities north and south of the border and confirmed the position that there is no single test of the meaning of “mines and minerals”, but rather a series of tests and pointers as follows:

(a) The expression “mines and minerals” can have a wide meaning, signifying everything below the surface, though this is not the primary meaning.

(b) “Mines and minerals” is not a definite term.

(c) A vernacular test in which the commercial practices and usage of land and mineral agents at the time of the exception are considered.

(d) Whether the substances in question were of exceptional use and value at the time of the exception.

(e) Are working rights included in the exception? For example, rights reserved for working by underground methods only might indicate that substances that would be worked from the surface alone are excluded.

(f) A mineral exception would not include the common soil of the district such that it would entirely swallow up the freehold surface.

(g) The tests of the intentions of the parties to the deed creating the exception are objective.

[11] Earl of Lonsdale v Attorney General [1982] 1 WLR 887

The tests and pointers set out in the judgment in Earl of Lonsdale v Attorney General have generally been followed in subsequent reported cases in relation to the ownership of mines and minerals.

What we have therefore is a guide to interpretation that requires account to be taken of historical commercial context and local geology. This may result in substances such as sand and gravel not being regarded as within an exception of mines and minerals in the 19th century (because they then had merely local significance and no great commercial use or value) being included if the same words are used in the late 20th century in the same neighbourhood when aggregates have now become a vital national resource.

This will equally apply to critical minerals. If the wording is not clear from a particular exception the significance of those minerals in the historical commercial context will need to be considered.

Some critical minerals such as lithium also occur as brines dissolved in water. There is, at least to some, uncertainty as to whether mineral brines come within the class of mines, which might be regarded as referring only to substances below the surface and recovered by underground working of some nature, and minerals, or whether they should be treated as subterranean water which may be abstracted by any party with the appropriate rights of access. The relevant case law is scant and based on the extraction of salt brines.

2.11 Ownership of Void Space

Where an exception is expressed to be in terms of "mines and minerals" the prima facie position in the absence of express drafting to the contrary is that the void created by the working of the minerals by underground mining belongs to the freehold mineral owner. If the exception just refers to "minerals" without any reference to mines or the containing chamber then the prima facie position in the absence of express drafting is that the void belongs to the surface owner and is within their freehold. [12]

There is no decided case law in relation to the ownership of a quarry void created by working freehold minerals from the surface. However, our view supported by other commentators is that the effect of quarrying is a lowering of the freehold surface ownership and the void created by quarrying in the absence of any express provision to the contrary belongs to the surface freehold owner. This view is also supported by obiter or non-binding comments in the judgment in the High Court case McLean Estates Ltd v Earl of Aylesford[13].

2.12 Mineral Working and Trespass

[12] Proud v Bates (1865) 6 NEWREP 92

[13] McLean Estates Ltd v Earl of Aylesford [2009] All ER (D) 164(Apr)

As minerals are land in legal terms, unauthorised interference with them will constitute a trespass and the owner of the minerals may seek an injunction from the courts to restrain the trespass and/or seek damages.

Trespass will occur not just by unauthorised working of the minerals, but also by disturbing them, for example by moving or removing them or boring through them. The Supreme Court case Bocardo v Star Energy referred to above confirmed trespass is actionable by the mineral owner “per se” or “of itself” and a mineral owner would not need to prove that it had suffered any loss or damage and the trespass is actionable even though it may have occurred at great depth.

For those seeking to explore for or work minerals the consequence is that if a substance is included in an exception, then unless winning and working rights are included, accessing or working those minerals will constitute a trespass on the ownership of the surface interest or the owners of other substances included in mineral exceptions that did not include the substance being explored for or worked. The same would apply to the working of Crown minerals if they intermingle with other minerals, as they often do, or when other minerals are disturbed to win or work them.

In Bocardo v Star Energy, it was the surface owner’s ownership that was trespassed on by a pipe sunk at depth to extract oil. However, a trespass would also occur if there is separate mineral ownership in a parcel of land that did not include the substance being worked, but where that substance could only be accessed by disturbing the minerals that were subject to the exception. In these circumstances, authority by way of a lease or licence would have to be obtained from both the surface owner and the owner of the mineral exception.

It is worth noting that trespass to minerals can occur by surface development if for example cut and fill operations, foundations or services interfere with third party mineral ownership. The issue is not just one for the minerals industry, but also for property development and developers.

3. MINERAL OWNERSHIP IN SCOTLAND

3.1 The General Law

Prior to any discussion regarding how mineral title is held in Scotland, it is useful to make four broad points for the benefit of readers with more familiarity with the position in other jurisdictions.

(a) Mineral title is essentially a title to property and the law relating to mineral rights is therefore a function of land law. It is a right to a particular interest in land which is just as capable of being held separately from as it is along with other interests in the same land.

(b) Scottish land law does not use the concepts of "freehold" and "leasehold" title. Land ownership in Scotland has been simplified over the last century with a program of land tenure reform that has resulted in a relatively simple, non-feudal structure for land ownership. Whilst there are a tiny number of exceptions, land in Scotland is now possessed by a landowner with a registered or recorded title (most akin to freehold title), albeit that possession can be exercised by permitting another to occupy the land as, for example, a tenant on the basis of a lease from that landowner for a period of less than 175 years. That means that there is no equivalent in Scotland to leasehold title or to copyhold title. Agricultural tenants and crofting tenants may enjoy special rights in relation to their specific types of lease, but the basis of ownership structure remains the same.

(c) Unlike in some jurisdictions, there is no presumption that where mineral ownership has been separated from surface ownership that the right to work minerals has precedence over the right of the surface owner to peaceful possession of the surface.

(d) The impact of the law of prescription and its application in relation to title must be taken account of. In relation to ownership of land, the effect of the Prescription and Limitation (Scotland) Act 1973 is, to state it in very general terms, that if a person (or a chain of people in succession) has a written title (excluding one that was forged) to an interest in land that was recorded in the General Register of Sasines or registered in the Land Register of Scotland and has possessed that interest in the land for a continuous period of ten years openly, peaceably and without any third party successfully challenging their right to possess it in court, that title becomes unchallengeable. This rule is a key one in ironing out shortcomings in relation to the title to many interests in land, and serves to make satisfying oneself that a title to an interest is a good one possible – without it, one could never be certain that there is no other person with a competing title to the same interest in the land, regardless of how much title searching or investigation into who had occupied the land historically one did.

This rule as it applies to land held on the basis of a title that has been registered in the Land Register rather than recorded in the General Register of Sasines has some nuances depending on when it was registered and the circumstances of that registration that are beyond the scope of this note.

However, there are two key difficulties in relation to the operation of that rule insofar as relating to title to minerals. The first is that the title must be capable of including the minerals in question, which will come down to how the words in the deed itself are properly to be interpreted. There is more detailed discussion about interpretation below. The second relates to the requirement to have 'possessed' the minerals openly and peaceably. Because the minerals will be located

below the soils, the ways in which they might be regarded as being possessed openly or otherwise are very limited. The principal mechanism that has been recognised by the courts is the active extraction of the minerals, although it seems possible that a mere grant of a lease of the minerals might be sufficient[14]. Nonetheless, the requirements of the law that the possession must be open, peaceable and for a continuous period of ten years mean that in many cases a mineral title cannot be regarded as unchallengeable.[15]

In Scotland, as has been stated in relation to freehold land and mineral ownership in England and Wales, the basic position is that if one owns the land, one owns everything beneath the surface all the way to the centre of the earth[16], unless at some point in history the owner of that 'whole' has subdivided the title by transferring either the minerals, or the land but reserving the minerals, to a third party. In any such subdivision, it is common for rights to work the minerals to be set out in the deed.

Like in England and Wales there are in addition a handful of statutory reservations the effect of which are to put particular minerals into the ownership of the Crown or Coal Authority. Other than in relation to precious metals, these reservations are the same in Scotland as they are in England and Wales. In Scotland the precious metals reserved to the Crown are mines of gold and silver[17]. They were originally reserved by an Act of the old Scottish Parliament in 1424[18] and rights to acquire and work them were set out in a second Act in 1592[19] which remains the relevant law today.

Although we were asked to consider four specific ownership scenarios,[20] in fact the main difficulty faced by a party wishing to exploit minerals located in Scotland applies in all cases except where the owner of the minerals has been able to evidence sufficient possession of them to meet the criteria set out in relation to prescription referred to above. In all other cases there is a risk, although one of varying degree depending on the specific title in relation to that land, that a third party with a claim that is on the face of it valid to those minerals might emerge and might be in a position to delay or prevent mining.

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[14] as Professor Rennie mentions as an aside in his book Minerals and the Law of Scotland p10 "… *possession could of course be civil as where the minerals are leased and the grant of a mineral lease itself may be strong evidence of possession"*

[15] The question of the sufficiently of possession in relation to minerals was discussed at some length in the case of Forbes v Livingstone

[16] This principle is expressed in Scottish law by the maxim "ownership extends a coelo usque ad centrum"

[17] And fine lead if found in certain quantities

[18] The Royal Mines Act 1424

[19] The Mines and Metals Act 1592. The purpose of the 1592 Act was to encourage the working of gold and silver for the benefit of the Scottish economy, and obliges the Crown to give a landowner a grant of the gold and silver within that land, when demanded, and only to third parties if the landowner fails to work the gold or silver after notice being given. See further, Earl of Hopetoun v Officers of State 4th May 1750 M13, 527 and Earl of Breadalbane v Jamieson (1875) 2R 826

[20] (i) Minerals held with the surface interest (no severance) – the freehold title is not severed, no mineral rights excepted other than Crown Minerals (gold, silver, uranium and hydrocarbons).
(ii) A registered interest in Mines & Minerals – where the excepted mineral interest is subject to a separate Title with clarity on who is the beneficiary.
(iii) Excepted Mines & Minerals identified in the surface Title – this would encompass Mines & Minerals reserved from a previous conveyance. The surface Title documents confirm a mineral exception, but it may not be clear who has the mineral title.
(iv) Non-registered mineral interests. These will be historic manorial (possibly Copyhold) rights not registered under the provisions of the Land Registration Act 2003. This Act gave mineral owners 10 years to register their mineral interests. Interests that were not registered are “not an overriding interest” and would fall away if the surface interest is sold.

3.2 Land Registration Practice in Scotland

From 1617 onwards, deeds creating or transferring interests in land were recorded either in local 'particular' registers of 'sasines' or in the General Register of Sasines, with the last particular register closing in 1963. Sasine is the historical term for a document setting out a transfer of ownership of land. This system of recording title by recording deeds has, since 1981, been undergoing a gradual replacement by a plan based system of land registration. Since the inception of Scotland's Land Register, a total of 50.9%[21] of Scotland's surface land mass has been land registered, with a further 5.8% currently being registered for the first time.[22] However, much of the land that has been registered reflects a minerals title severance in which the minerals title itself has not been separately land registered.

Unlike in England and Wales, in Scotland it has been the case since 1617, that any deed transferring title to minerals or transferring the surface land without those minerals had to be recorded in a sasines register or the Land Register in order for the right to be properly constituted. That means that there will be a written publicly available preserved record of the creation of a separate interest in minerals either in the Land Register or in a sasines register. Thanks to Herculean efforts by the staff at Registers of Scotland over the last few years, the indices listing the vast majority of the deeds recorded in the General Register of Sasines are now available in a text format for searching online, and copies of deeds are available for instant purchase and download. The Land Register itself is entirely electronic and with a tiny number of peculiar exceptions all the titles registered there and their associated plans are available to purchase online instantly. Some titles will, of course, nonetheless not appear on either the Land Register or the General Register of Sasines and record to them might languish in burgh registers.

A key distinction between the Land Register in Scotland and the Land Registry in England insofar as relating to title to minerals is that if the deeds constituting title at the time of the first registration of an interest in a plot of land show that if there had been any previous severance of the minerals from the title, the deed creating that severance will be referred to on the title sheet created for that land and will therefore be evident on the Land Register. That will not mean that the current owner of those minerals will be identifiable from the Land Register, but the reference made to the deed creating that separate title would be sufficient for a title searcher to trace that title through the sasines registers to identify the last recorded owner. There has therefore been no requirement to create a system of registering cautions of the sort referred to above in respect of Scottish titles.

[21] https://www.ros.gov.uk/performance/land-register-completion
[22] As at 22 February 2023

Any new deed transferring title to minerals is treated by the Keeper as a separate plot of land[23], and will be given its own title sheet[24].

Although by virtue of s73(2)(f) of the 2012 Act, there is an automatic exclusion from the Keeper's warranty in relation to a minerals title because of the difficulties in bringing the law of prescription to one's aid, if an applicant for registration of title to the minerals is able to provide the Keeper with sufficient evidence that they do indeed own the real right to the minerals, the Keeper may grant warranty under s75(1)(a) of the Act.

3.3 The Issues

Notwithstanding the fact that Scotland's system for recording title has been so longstanding, and that its approach to all relevant interests in land has been the same, issues in relation to the tracing of mineral ownership do arise. Prior to the requirement to register title in the Land Register, the manner in which title was normally transferred was for a disposition or other deed to be granted by the old owner to the new, with that deed describing everything that was being passed on and all that was being retained, or had been retained by a previous owner. Typically, a description of what had been retained by an earlier owner would take the form of a reference to the first deed that set out what was being retained. This has meant that anyone reviewing the most recent deed was to a degree reliant on every preceding deed accurately reflecting all of the earlier relevant deeds, and for a variety of reasons that might not always be the case.

A search of the sasines registers can also be challenging, in that indexes of the titles presented to the registers have been created in different ways at different times, and in respect of different counties and burghs. It ought in theory be possible to trace every interest in land created or transferred since 1617 but in some cases that could prove to be challenging and costly even today.

3.4 Summary

The current position regarding ownership of minerals in Scotland can be summarised as follows:

(a) An unregistered title to land will prima facie include all sub strata to the centre of the Earth with the exception of gold silver and fine lead if it is found in certain quantities, petroleum gas and other hydrocarbons owned by the Crown and coal which is vested in the Coal Authority. However even if there is no evidence immediately available of separation of mineral ownership from the surface interest or registration of any minerals interests in the land, if sufficient evidence is produced that separate ownership of minerals exists it will be valid and enforceable.

[23] Land Registration etc. (Scotland) Act 2012 s3(5).
[24] Land Registration etc. (Scotland) Act 2012 s3(1).

(b) The registration or recording of title to minerals separated from the surface is and has been necessary since title records began. Title to minerals registered by the Land Register is likely to be qualified because of the difficulty in evidencing possession of substances hidden below ground level.

(c) The Land Register's guarantee of title will not apply to any separate third party ownership of minerals whether or not any note of that ownership appears on the register of title to the surface.

(d) A registered surface title may identify that an exception of minerals exists but they will not give any indication as to who the current owner of those minerals might be.

3.5 Interpretation of Mineral Exceptions

As was noted above, courts north and south of the Scottish border have taken a very similar approach to interpreting the wording of deeds in relation to the creation of separate mineral interests.

3.6 Ownership of Void Space

The question of ownership of the void space left after seams have been worked out does not appear to have been dealt with by the courts in Scotland, but by extending the rules that apply in relation to the ownerships of other strata above ground it can be concluded that it would be likely that ownership would be retained by the mineral owner, despite the minerals themselves no longer being present. Professor Rennie likened this to the continued right of ownership of a flat owner of the airspace their flat occupied notwithstanding the demolition of the building[25].

3.7 Mineral Working and Trespass

Although the rules of trespass in Scotland differ from those in England, the general principles stated above in relation to England and Wales and the consequences for those wishing to explore for or work minerals are also true in Scotland. Unauthorised interference with them will constitute a trespass and the owner of the minerals may seek an interdict from the courts to restrain the trespass and/or seek damages.

4. THE MINES (WORKING FACILITIES AND SUPPORT) ACT 1966

The Mines (Working Facilities and Support) Act 1966 (**the 1966 Act**) allows mineral operators to compulsorily acquire comprehensive rights enabling the searching for and working of minerals. It applies to England, Wales and Scotland.

Rights that can be acquired include searching or prospecting rights, working rights, removing legal restrictions and letting down surface. It is a two-stage process, an initial application to the

[25] *Rennie, Minerals and the Law of Scotland 2.15*

Secretary of State to establish if there is a prima facie case and if successful the application is then referred to High Court or the Court of Session in Scotland where the issues will be decided.

The grant of rights must be expedient in the national interest and in addition one of four grounds must established:

(a) The persons being able to work them being too numerous or having conflicting interests;

(b) The persons able to grant the rights cannot be ascertained or cannot be found;

(c) The persons who can grant the rights do not have the necessary powers of disposition by defect in title, legal disability or otherwise; and

(d) The persons having the power to grant the rights unreasonably refuse to grant them or demand terms which having regard to the circumstances are unreasonable.

On the face of it, the 1966 Act appears to be a useful tool for those seeking to explore for and work critical minerals and deals with some of the uncertainties created by any lack of available information on mineral ownership. Given the background of the UK's Critical Mineral Strategy as public policy, the national interest in the exploitation of critical minerals would not appear too difficult to establish.

However, in reality applications for the grant of rights pursuant to the 1966 Act are far from straightforward, and are time-consuming and potentially expensive in terms of legal, surveyors and other professional costs. With the potential for applications to take up to 2 years or more from first steps to judgement, it is not a quick fix and particularly where early-stage exploration rights are being sought, slow and expensive.

Enquiries with the Department for Business and Trade indicate that since their records began in 2015 there have only been two applications, both of which were referred to the High Court. It would seem that the 1966 Act is little utilised.

Where there are disputes as to the terms of the grant of rights between operators and mineral or surface owners the 1966 Act does not provide a straightforward mechanism for dispute resolution. It is not necessary to merely show that the parties cannot agree terms financial or otherwise, but that the person who might grant the rights is being unreasonable.

Recent case law has added to the problems. The 2010 Supreme Court case Bocardo v Star Energy[26] considered similar legislation in relation to the exploitation of hydrocarbons. On a majority judgement, it ruled that compensation to the landowner for the grant of rights to access

[26] Bocardo SA v Star Energy UK Onshore Ltd [2010] UKSC 35

oil should be on a compulsory purchase basis and based on the loss to the land or mineral owner, which in this case was nominal, rather than a commercial wayleave payment reflecting their control over the access to the oil. There are those that argue that this judgement extends beyond oil and other hydrocarbons, all of which are nationalised and subject to a licence scheme from the Oil and Gas Authority, to all minerals in private ownership. The perceived uncertainty does not facilitate early agreement and potentially gives rise to unnecessary disputes.

Nonetheless this is a piece of legislation common to England, Wales and Scotland that specifically addresses the removal of barriers in connection with title issues which might prevent the winning and working of minerals. We will return to the 1966 Act in our conclusions.

5. CONSULTATION

5.1 The Form of Consultation and Consultees

We have sought engagement with and input from a wide variety of stakeholders including businesses involved in the exploration for critical minerals, the wider minerals industry in Great Britain including large national operators, institutional and private land and mineral owners including The Crown Estate, business and professional organisations such as the Critical Minerals Association, the Mineral Products Association, the CBI Minerals Group, the Royal Institution of Chartered Surveyors and the Country Landowners Association and professionals including specialist surveyors and lawyers involved in advising the minerals industry. In addition we approached the Land Registry in England and Wales and the Land Register in Scotland.

The consultation questionnaire and accompanying email sent with it to consultees is included at Appendix A.

50 invitations to participate in the consultation were sent out and 29 responses received. Those responding to the consultation were given the option of submitting their responses anonymously and, in addition, the option not to be identified in this report.

A list of consultees who were approached is included at Appendix B and those who replied and consented to be identified are listed at Appendix C.

Details of the consultation responses, save for those submitted by respondents requesting anonymity, are included at Appendix D.

The timescale for producing this report inevitably led to a relatively short consultation period with invitations to participate being sent out on 20 February 2023 and a deadline for responses

given of 15 March 2023, although we were able to allow some short extensions of time when requested.

In preparing this report and making our conclusions and recommendations, we have taken all consultee responses into account including those requesting anonymity.

In addition to the formal consultation, informal video conferences were held with the Land Registry, the Critical Minerals Association, the Royal Institution of Chartered Surveyors, and the Country Landowners Association. These calls were held on the Chatham House Rules basis to facilitate free and open discussion of the issues.

5.2 Sufficiency of Available Information

Whilst by no means universal, there is a recognition in the majority of responses to the consultation that publicly available information from the land registries and other sources is incomplete and could be improved. Two consultees, the Duchy of Cornwall and Tungsten West plc mention specific issues in Devon and Cornwall where some areas of mineral ownership have become particularly fragmented and records are difficult to locate. It appears that the historic mining in Devon and Cornwall may have contributed to this situation.

Respondents also commented that whilst larger estates and organisations may have good record keeping, smaller land and mineral owners may not know the extent of minerals they own or have no awareness of their mineral assets at all.

Where responses diverged significantly was in the perceived consequences of the lack of information and the extent to which it was a significant business issue. It is clear that many in the critical mineral sector do regard the issues as serious, resulting in cost, delay and difficulty in making investment decisions.

One respondee, who opted for anonymity, indicated that the issue was material in decisions not to invest and do business in Great Britain, when resources could be easily diverted to jurisdictions where the problems do not arise. However, many respondents were clear that with appropriate advice and expertise, the difficulties could be overcome or taken into account in a risk management exercise. In the aggregates sector national operator Aggregate Industries acknowledged problems but indicated those with knowledge of the industry could work around the issue. Critical minerals operator Cornish Lithium indicated that the current system of registration is workable albeit with a number of shortfalls, but whilst problems may not be insurmountable, they could lead to delays and additional cost.

Steps taken to mitigate the issues were suggested by many respondents. Several respondents indicated they did not perceive any particular problem and specific mitigation steps were not

necessary. Others indicated that they undertook, or if professional advisers advised that their clients undertook, suitable research and due diligence at the earliest possible stage, working with specialist surveyors and lawyers. References were made to available sources of information in local records offices, historic registries such as the Yorkshire Deeds Registry and the Coal Holdings Register.[27] The use of title insurance was referred to, albeit with limitations in that it would not necessarily always be available and would never provide a full business solution to any issues that subsequently arose.

There are frequent references to the protracted nature and cost of due diligence. There was however, a divergence between those who would regard it as a significant and unnecessary barrier and those who regarded investigations and due diligence as merely part of the process of doing business, the time and cost of which need to be factored into business appraisals. It was rare that the mineral owners could not ultimately be identified and negotiated with for suitable rights by way of license or lease or other practical solutions developed.

Whilst many respondents referred to an ultimate failure to identify a mineral owner as being rare, it is nonetheless clear that there are occasions when this does occur even after extensive research.

5.3 Respondents Proposals for Legislative Change

A number of respondents expressed the view that no legislative change was necessary. These included the Royal Institution of Chartered Surveyors, who, in addition, cautioned against possible unintended consequences of legislative change and the burdens financial and otherwise that might be placed on mineral owners in any extension of compulsory registration.

Some respondents were in favour of the nationalisation of critical minerals.

Several respondents commented on how any national ownership or licensing system would interfere with private rights and force land and mineral owners into the acceptance of mineral working on their land, without the choice of whether they would consent to mineral production at all or if they did the choice of party that would be operating on their land.

A number of respondents supported or referred to implementation of the proposals for the progressive registration of minerals in England and Wales, recommended by the Law Commission's 2018 report.

Others refer to or suggest compulsory registration of mineral titles presumably within a specified period and without any transaction triggering registration, notice procedures where title might

[27] https://www.gov.uk/guidance/coal-mining-records-data-deeds-and-documents , https://registerofdeeds.org.uk/about/

be lost and incorporated in the surface interest or ceded to the Crown if a mineral owner did not come forward.

The difficulty and cost of obtaining Land Registry information is mentioned by a number of respondents together with funding and resourcing of the Land Registry and the need for guidance, although we note the Land Registry in England and Wales already publish some 82 Practice Guides covering a wide variety of topics[28].

Several respondents referred to the potential of the 1966 Act in that it provides an apparent solution for all issues in relation to unidentifiable mineral owners, but the cost, complexity and time involved in an application result in it being little utilised. A reformed act could have potential across the minerals industry and not just the critical mineral sector.

The response from the Critical Minerals Association suggested a number of steps and reforms, many of which are echoed in responses from other operators in the critical minerals sector.

Suggestions include:

(a) Comprehensive registration of mineral ownership.

(b) Improved search functions on the Land Registry website.

(c) A system where operators and explorers for minerals, have made investigations into title, but no mineral ownership identified setting up a trust fund for royalties to be paid into and paid out should subsequently mineral owners be identified.

(d) Making the registration of mineral ownership more attractive, although no specifics were given.

(e) Considering how historic liabilities on mineral owners might be managed in an equitable manner to encourage registration.

(f) Details of mineral ownership and rights to be included on the register and reflected in surface titles.

(g) A requirement to lodge results of exploration and a central repository and legislation requiring geological data and core samples to be recorded and preserved.

(h) A certificate system where the government could acknowledge investment in mineral exploration to recognise an operator's prior claim to an area of land, subject to them securing appropriate rights.

(i) Central collection of geological data and updating the British Geological Survey data collection process.

[28] https://www.gov.uk/topic/land-registration/practice-guides

(j) The creation of a government mining agency to support mineral extraction responsible for identifying mineral rights owners and providing information.

The Critical Minerals Association response contains further details as to how these objectives may be achieved.

The use of standard documents is mentioned by some respondents.

5.4 When Should the Issues be Addressed

The majority of responses indicated that mineral ownership issues needed to be addressed at the early stages, for example desktop appraisal. However, the issues are relevant at all stages, from appraisal to exploration and working to restoration.

From the telephone conferences we gained an understanding that searching for critical minerals may be significantly different from searching for clay, aggregates, and industrial minerals. The baseline geological information is liable to be less helpful. Whilst the wider minerals industry is generally searching for large quantities of minerals over a relatively small area, for example an extension to an existing quarry or development in an area known for its geological structure, searching for critical minerals often involves looking for relatively small quantities of mineral over a wide area. This may lead to significantly more necessary due diligence as to mineral ownership in relation to critical minerals compared to that undertaken by the wider minerals industry and with a less certain outcome, whilst acknowledging that any geological investigation contains significant elements of uncertainty.

5.5 Mines (Working Facilities and Support) Act 1966

We have commented above on responses received in relation to the 1966 Act. Where there is awareness of the potential to use the 1966 Act, there is often a caveat that it is complex, slow, costly and time-consuming.

Respondents also indicated that the 1966 Act raised issues in relation to valuation (see para 4 above) which we shall comment on below.

Several respondents suggested that the 1966 Act should be reformed. Aaron & Partners LLP made a number of specific suggestions, including removing the requirement for initial application to the Secretary of State and moving jurisdiction from the High Court to the Upper Tribunal Lands Chamber.

5.6 Availability of Professional Advice

Generally, respondents indicated that there was sufficient availability of professional advice in relation to land and mineral ownership issues through specialist surveyors and solicitors,

although there were a number of comments at the cost and accessibility in obtaining this advice. A significant number of respondents indicated that whilst the situation was satisfactory at present, those with the necessary experience and expertise were moving towards the end of their careers and it was not clear whether there would be sufficient experience and expertise in the next and subsequent generations of professionals. Training and the attractiveness of a career in the mineral sector for both surveyors and lawyers may need to be addressed.

5.7 Other Issues and Ideas

Respondents pointed out that possibly planning and permitting issues may prove a greater challenge to the critical minerals industry than land ownership.

A significant number of respondents, including the Royal Institution of Chartered Surveyors, pointed out that there is an existing dual planning and land acquisition procedure in place for development projects that are considered to be in the national interest, namely the Nationally Significant Infrastructure Projects[29]. The government might consider extending the scope of this procedure to critical minerals meaning that planning and environmental, and social and property issues could all be considered together in a transparent and public arena.

The Critical Minerals Association points out that Great Britain is placed at a disadvantage putting it behind many countries including Ireland in reforming its mineral ownership system.

The Mineral Products Association refer to the wider context of all essential minerals in Great Britain and issues including the lack of government policy and strategy, the problems with the working and resourcing of the planning and permitting system and the lack of robust national data on mineral extraction.

The need for central recording of geological data was a frequent theme.

Public perception of the minerals sector was mentioned.

Some respondents have made adverse comments as to the consultation itself, in terms of its depth, scope and timing. The Royal Institution of Chartered Surveyors has suggested that consultees are from a narrow sector, not including mineral rights owners.

Given the timing of the instruction in January 2023 and the requirement to deliver a draft report before the end of March 2023, the consultation period was unavoidably relatively brief, and the nature of the consultation could never be comparable with, for example, that of the Law Commission in producing their 2018 report.

[29] Part 4 of the Planning Act 2008 and the Localism Act 2011

As will be seen from the potential respondents approached and those that replied, land and mineral owners and those representing them were included and have made valuable contributions to the consultation.

6. STANDARD DOCUMENTS RENTS AND ROYALTIES

Agreements in relation to the exploration for and working of minerals are essentially commercial property documents and there are some examples of attempts to standardise documents or produce model documents in the commercial property sector.

The Law Society Business Lease is a form suitable for use for the letting of small commercial premises and is essentially a standard document used on some occasions.

The Model Commercial Lease was originally commissioned by the British Property Federation and has been promoted and developed with the involvement of major law firms, clients and trade organisations.

What has been produced is a set of different versions of leases and associated documents available to suit different types of commercial buildings and uses and can then be customised to reflect particular requirements or text from them being incorporated into bespoke documents.

The stated objective is to *avoid much of the unnecessary negotiation on most routine letting transactions by representing a fair starting (and, in many cases, end) point for both parties*. [30]

The model commercial lease is more in the nature of set precedents rather than a standard form document.

It is very common for lawyers to use commercially published precedents by companies such as PLC and LEXIS-NEXIS available by subscription online as the basis for drafting. LEXIS-NEXIS publish a selection of documents including prospecting licences, options and leases specifically used for minerals related transactions together with commentary and background legal notes.

In other sectors such as the construction industry, standard terms are widely used but almost invariably subject to substantial amendment and addendum in all but the smallest and simplest projects.

[30] https://modelcommerciallease.co.uk/

Experienced lawyers and surveyors generally have a clear understanding of the fundamentals of what is required in each type of document. In reality, the greater part of any document will cover well understood issues such as working rights, alienation, repairing and restoration, insurance, environmental and planning compliance, and suitable indemnities. There will always be matters relating to the peculiarities of any individual site or operation, the nature of the minerals being worked or explored for and the way that minerals are handled and processed that will require specific negotiation and drafting.

If suitably qualified and experienced professionals are instructed on the basis of clear commercial terms, then whilst there may be a necessary period of negotiation and perhaps the clarification of some issues, there should be no reason why documents acceptable to all parties should not be produced. We do not consider that standardised documents would be any improvement over what is already available. In any event, they could never be treated as standard and will always require some degree of amendment to take into account, in particular the circumstances of the parties, planning and restoration considerations and the nature of working and processing of the minerals involved.

From our own perspective, having been involved with the delivery of hundreds of mineral related transactions, including exploration agreements, options, leases, wayleave agreements and easements as well as freehold disposals, and from discussions with other lawyers, specialist surveyors and operators, we do not consider that the use of standard documents will be of any great assistance.

It is difficult to see how a set of rents and royalties set by central government would be workable or indeed equitable. The appropriate rents and royalties will vary considerably, both in their level and the way in which they should be ascertained, calculated, and reviewed according to the nature of the working handling and processing involved with the individual minerals. One size is most unlikely to fit all.

Centralised setting of rents and royalties might also negate a significant element of competition between operators negotiating with land and mineral owners.

7. CONCLUSIONS AND RECOMMENDATIONS

7.1 Is There a Barrier or Hindrance

In England and Wales, whilst many owners of excepted minerals and mineral estates have voluntarily registered their freehold mineral titles, and the reforms in relation to overriding interests contained in the Land Registration Act 2002 have ensured that claims to ownership of manorial rights to minerals are apparent, it cannot be said that the register provides an accurate and complete reflection of property rights affecting any parcel of land.

In Scotland whilst the system of land ownership and registration of title may be significantly different the result is much the same in so far as it relates to the ownership of minerals.

There are gaps in important information that is of significance to those searching for and working minerals of all sorts.

Additional research and engagement with lawyers, surveyors and specialist researchers may assist in completing the picture but inevitably at some expense, effort and commitment of time. Interpretation issues may need to be addressed.

Does this amount to a barrier or hindrance to searching for and extracting critical minerals in Great Britain?

It is clear that many businesses in the critical mineral sector find the situation frustrating, costly and a cause of delay. It would appear that some may look elsewhere to take their investment and do business. However, it is equally clear that lawyers, surveyors, mineral owners, established operators in the more general minerals sector and some within the critical mineral sector are able to deal with the issues and adopt strategies to deal with them in the ordinary course of their business.

It is also worth noting that surface developers regularly encounter issues relating to mineral ownership and trespass particularly in relation to cut and fill operations, foundations and services. The situations are managed by obtaining title insurance to cover claims by unidentified mineral owners or minerals or appropriate rights are obtained by negotiation, albeit that contentious situations and litigation may arise.

It is difficult to conclude therefore that mineral registration and ownership issues constitute a barrier to the exploration and extraction of critical minerals.

In terms of hindrance, there are consequences in terms of the potential for delay, cost, and additional work both in terms of due diligence and the need to negotiate with mineral owners.

Any proposal for reform will inevitably have its own consequences in terms of time spent, cost of the work carried out, as well as other significant intended and, no doubt, unintended consequences beyond the critical minerals sector and the mineral industry as a whole and potentially effecting surface ownership and development.

The compulsory registration of mineral ownership will inevitably create costs for mineral owners, in many cases with no discernible benefit in the short or medium term. If compulsion

were combined with the threat of loss of title if an application to register was not made, then issues may well arise in relation to deprivation of ownership without compensation.

The creation of a national agency for the control of exploration for and working of critical minerals or nationalisation of ownership would seem problematic. Either would have the potential to remove control over the use of land and minerals by their owners, have impacts on working of other minerals intermingled with critical minerals or disturbed by working critical minerals, and prevent land and mineral owners who are minded to permit mineral extraction from seeking and negotiating with an operator of their choice. This is a legal report, but it is not difficult to see that there may be adverse public perception and considerable national and local political resistance to such a proposal.

If the current system is workable then it seems difficult to justify the creation of new agencies, radical steps such as nationalisation or substantial changes in the law and the cost for funding them, particularly when there may be useful developments in existing legislation that would further mitigate any current issues.

Inclusion of development of critical mineral working within the scope of Nationally Significant Infrastructure Projects could be considered but we have some doubts how much this may assist. The procedure has its own time and cost implications and we wonder to what extent the size and scale of many individual critical minerals projects would justify its use.

For the reasons discussed above, the production of standard form documents would have little merit and the central setting of rents and royalties seems highly problematic in practice and would remove the ability to negotiate from both operator and land or mineral owner alike.

There are some proposals by way of reforming existing laws that in our view would further mitigate any hindrance.

7.2 Proposal for Land Registry Reform

The Law Commission's 2018 report in relation to compulsory registration of minerals should be revisited including the proposal to enable cautions against first registration to be registered where no surface working rights exist. The report was produced after considerable work and extensive consultation with a broad spectrum of consultees involved in all aspects of property transactions and implications considered far beyond what is possible in the timescales and resource possible for this report. In our view, the compulsory registration of minerals where they are subject to a transaction that attributes value to them is a sensible step that should not prove unduly onerous to mineral owners. If value is attributed, then presumably title would have been investigated either at the time of the relevant transaction or before.

The ability to register cautions against registration where freehold minerals are owned but without surface working rights would provide a way for mineral owners to put their ownership of minerals in the public domain without the necessity of proving title at the time of registration, although sufficient investigation must be carried out to make the appropriate statement of truth in the application form.

It is appreciated that if the Land Registry is to work effectively in relation to the registration of mineral interests, then it must be appropriately resourced.

This would produce a similar situation in England and Wales to that in Scotland where minerals disposed of must be registered in the Land Register.

7.3 Mines (Working Facilities and Support) Act 1966

On the face of it this Act provides a solution for the mineral operator in relation to identified or unidentifiable mineral owners. However, it is little used and we know from first-hand experience of two applications the time, cost and work involved. The consultation has confirmed some interesting ideas for reform, and we consider there may also be a minor extension and modification Act that would be of use at the early respecting stages of development. As stated above, the 1966 Act apples to Scotland, England and Wales.

We suggest that an amendment should be considered in relation to investigative or prospecting licences and rights which would assist in the exploration for critical minerals where searching may take place over a wide area.

It should be assumed that searching for identified critical minerals would be in the national interest and that if an operator could produce evidence of a licence or agreement with the surface owner where there is also evidence of third-party but unidentified mineral ownership, then an application could be submitted to the Secretary of State. Once granted, this would permit the rights granted by the surface owner to be exercised in respect of any minerals owned by an unidentified third party subject to appropriate protections for the public benefit as to the exercise of those rights. There would be no compulsion to make the application, but it may provide a useful tool to those exploring for critical minerals.

As to the 1966 Act as a whole, we suggest that consideration should be given to simplification by removing the preliminary step of an application to the Secretary of State for referral to the High Court or Court of Session. With such a low level of applications, even if the Act were more usable it seems unlikely there would be an unmanageable increase in the number of applications.

Where there is disagreement on the terms of any agreement in relation to searching for or working minerals as the 1966 Act stands at present it would appear that there is only jurisdiction on the basis that the land or mineral owner is acting unreasonably. We would suggest that consideration is given to allowing jurisdiction where negotiations have been continuing for a period of time, six months may be appropriate, without agreement being reached, irrespective of unreasonableness.

Consideration should also be given to changing jurisdiction for applications, in England and Wales, from the High Court to the Upper Tribunal (Land Chamber) and, in Scotland, from the Court of Session to the Lands Tribunal for Scotland or an expanded Scottish Land Court, hopefully reducing complexity and cost in the application and making use of the specialist knowledge available from the legal and surveyor members of the respective Tribunals/Court.

It would also be helpful if it were made clear that the 1966 Act applies to mineral brines and that compensation should be ascertained on an open market, rather than on a compulsory purchase basis.

We appreciate these are outline proposals only and any amendment to the 1966 Act would require greater consideration and consultation.

8. EXECUTIVE SUMMARY

8.1 The Overarching Question

"Are there mineral rights-related barriers to domestic exploration and extraction of critical minerals that prevent or hinder the delivery of the UK's Critical Mineral Strategy and, if so, what are they and how can they be overcome?".

To be addressed in terms of the law in England, Wales and Scotland.

8.2 Points Common to England, Wales and Scotland

The default position is that freehold surface ownership includes all strata to the centre of the Earth however separate ownership of minerals from the surface is common and often of a historic nature.

Gold, silver, (and in England and Wales only, platinum), petroleum and natural gas are owned by the Crown. Coal is owned by the Coal Authority. These substances stand outside the general law on mineral ownership.

Where general words such as "mines and minerals" are used in documents creating separate mineral ownership rather than references to specific substances, interpretation is required that will include account to be taken of historical commercial context and local geology. Whilst therefore there is established legal guidance and interpretation, terms used are not definite and the meaning of the same words may be different according to the time and circumstances when they were used.

Where mines and minerals are referred to rather than just minerals, that is an indication that the void space created by underground workings is included within the mineral ownership rather than the surface ownership. The law on the ownership of space created by surface quarrying is uncertain but our view is it is more likely to belong to the surface owner rather than the mineral owner.

A trespass will occur and give rise to an action for damages and/or an injunction where minerals are worked without permission of the owner or are disturbed without permission in order to access and work minerals in separate ownership.

8.3 English and Welsh Law

Registration of freehold surface titles is compulsory on occurrence of certain trigger events such as transfer of ownership and at least 86% of surface land is now registered.

Registration of freehold minerals held separately from the surface title is not compulsory but titles may be voluntarily registered.

A note of separate mineral ownership may appear on the surface title although it may give little or no information as to the owner and the substances owned.

Whether or not freehold minerals held separately from the surface are registered or a note appears on the surface title surface title is subject to separate ownership and the Land Registry's indemnity of title will not extend third-party mineral ownership.

Third-party rights to minerals may include historic manorial rights but a note of these must be made against the relevant surface title.

Rights to take minerals from another person's land exist known as profits a prendre but are comparatively rare.

In 2018 the Law Commission produced a report recommending the compulsory registration of freehold minerals held separately from the surface and on the occurrence of certain trigger events including disposals for value. The government rejected the proposals in 2021.

8.4 Scottish Law

Registration or recording of minerals titles has been required since 1617 onwards. In most cases, deeds that created a severance of a minerals title from the surface title will be referred to on the title sheet held by the Land Register in respect of the surface title.

Due to the issues in relying on the law of Prescription, any title to minerals may be susceptible to challenge if it does not satisfy a two-step criterion. Firstly, the wording of the recorded or registered title must be interpretable to include the title to minerals. Secondly, the minerals must be possessed openly, peaceably and without judicial interruption for a period of ten years.

8.5 The Mines (Working Facilities and Support) Act 1966

Where working of minerals is expedient in the national interest, the 1966 Act, which applies to England, Wales and Scotland, enables working and ancillary rights to be obtained where those with working rights are too numerous or have conflicting interests, where those able to grant

rights cannot be found, where there are doubts on legal title or rights disposition and where rights cannot be granted by agreement as a result of unreasonable refusal or demand.

Whilst the 1966 Act appears to provide a total solution where mineral owners cannot be ascertained as well as dealing with other issues that may prevent the working of minerals, in reality its procedures are lengthy and costly and it is little utilised.

8.6 Consultation

50 prospective consultees were approached and responses received from 29. Those approached included businesses in the critical minerals industry, the wider minerals industry, institutional and private land and mineral owners, business and professional organisations and professionals and consultants as well as land registries in England, Wales and Scotland.

Consultees were asked to respond to questions relating to the sufficiency of title information available from the land registries and other sources, the effects on their business, proposals for legislative change to mitigate any perceived problems, when issues relating to mineral ownership need to be addressed, other steps taken to mitigate the problems, the use of the 1966 Act, access to appropriate professional advice and an invitation to make other relevant comments.

Whilst there was a general acknowledgement that the available information from land registries is incomplete and failure to identify mineral owners might cause problems at any stage from desk top study through to working, there were significantly different views on the extent of problems caused and how they may be dealt with or mitigated. Many, but not all within the critical mineral sector perceived a significant problem, whilst others including land and mineral owners the wider minerals sector and some in the critical mineral sector acknowledged there were problems but that the current system was workable.

Issues such as compulsory registration of mineral ownership, creation of a national agency for licensing of critical minerals extraction, nationalisation of critical minerals were raised and suggested whilst some respondents considered no changes were necessary. Several consultees suggested to the implementation of the Law Commission 2018 report.

Other issues such as accessibility and cost of land registry information and central collection of geological data were raised as were issues of planning and permitting. Suitable professional advice was considered to be available albeit at a cost, but issues relating to the future availability of appropriate expertise and the need for training were raised.

8.7 Standard Documents Rents and Royalties

In the commercial property sector as a whole there have been attempts to create standard documents although these are more in the nature of the sets of standard clauses that can be adapted and customised for particular situations.

It is common for lawyers to make use of commercially available precedents which include documents specifically drafted for the mineral sector.

Where standardised documents are used in other sectors such as construction they are often heavily amended and modified.

Where parties are properly advised and suitably experienced and qualified surveyors and lawyers instructed producing appropriate transaction documents within reasonable timescales is not considered an issue. There seems little need for standardised documents which in any event are likely to require amendment to suit specific circumstances.

It is doubtful that the central setting of rents and royalties would be workable or equitable and might remove competition between operators and the ability to negotiate with operators by land and mineral owners. Account may not be taken of the individual aspects transactions including geology, the nature of the minerals being worked and processed, and the nature and extent of processing.

8.8 Conclusions and Recommendations

It is clear that information available from the land registries does not provide a comprehensive picture of mineral ownership in England Wales and Scotland and that there are gaps in important information that is of key significance to those searching for and working minerals of all sorts.

Information may be available from other sources and steps taken to mitigate problems by additional due diligence and insurance but the implications in terms of cost, time and uncertainty may be off putting to some operating or considering operating in the critical mineral sector.

Professional consultants and operators in the wider sector as well as some operating in the critical mineral sector deal with the issues as part of their everyday business. It cannot be concluded that mineral ownership related issues constitute a barrier to the critical mineral sector.

Improvements could be made including revisiting the Law Commission’s 2018 report and implementing its suggestion, providing a mechanism to the 1966 Act to permit disturbance of minerals with unidentified owners where permission of surface owners has been obtained and simplifying the operation of the 1966 Act with a view to cost and time savings and providing a workable tool for the entire minerals sector.

GLOSSARY

Assent	A document transferring the legal title of land to a beneficiary of a deceased's estate.
Burgh	A settlement in Scotland that was run by a town council and had certain privileges conferred by charter.
Burgh Register	A register held by Royal Burghs that held records of lands within the Royal Burgh's boundaries. These were created in 1681 and gradually incorporated into the National Records of Scotland after 1926.
Caution	A caution against first registration may be registered as a Caution Title where a property is unregistered and where a person other than the owner claims an interest in the property.
Coal Holdings Register	A paper archive held at the Mining Heritage Centre that dealt with the transfer in ownership of coal and other minerals prior to the nationalisation of the Coal Industry and contains a considerable amount of information on mineral ownership in former coal mining areas.
Copyhold	In English and Welsh law a form of land ownership, now abolished, created in the Middle Ages and held under the Lord of the Manor grant of the Crown.
Court of Session	The supreme civil court of Scotland.
Croft	A landholding in one of the former counties of Argyll, Caithness, Inverness, Orkney, Ross and Cromarty, Sutherland and Zetland in respect of which specific legislation and case law exists to ensure fair rent, security of tenure and compensation for permanent improvements.
Crofting Tenant	The tenant of a croft.

Crown	The legal embodiment of all government and state institutions that are derived from and in the name of The Sovereign.
Deed	A written document that instigates a transfer in, or outlines a specific interest in a property.
Disposition	A type of Deed that transfer's ownership of land.
Enfranchisement	The process by which land owned as a copyhold became a freehold.
Exception	Keeping back of ownership of part land on disposal (e.g. minerals on a sale of the surface).
Freehold	A form of land ownership in perpetuity in England and Wales held directly from the Crown.
General Register of Sasines	The oldest national public land register Scotland, founded in 1617. It is a register of deeds and is being replaced by the Land Register of Scotland.
Inclosure Act	An Act of Parliament enabling the enclosure of open fields and common land in England and Wales creating individual legal ownership of land previously held in common and subject to individual rights (e.g. grazing).
Indexes	Historical search records that allow the user to trace a result on the General Register of Sasines.
Judicial Interruption/Intervention	A court decision of any nature in favour of a third party which legally inhibits the exercise of a purported right.
Keeper	The public official that is the head of the Registers of Scotland. All decisions related to the public registers within the Registers of Scotland are made in the name of the Keeper.

Keeper's Warranty	A legal assurance by the Keeper that the registered information in relation to a title is accurate at the stated time of registration.
Land Register of Scotland	The Public Register that is replacing the General Register of Sasines as the sole public record of land ownership in Scotland. The Land Register is an electronic, map based register that is based on the Ordnance Survey Map.
Land Tenure	The rules surrounding the use of, possession, ownership and transfer of land.
Lease	A contract in terms of which the owner or occupier of land grants a right of exclusive possession of it to a tenant in return for rent (whether money or in kind) for an agreed period.
Lord of the Manor	The person who was granted a Manor by the monarch and their successors to ownership of the Manor.
Manor	In English law an area of land granted by the monarch to an individual who became Lord of the Manor and which would include the freeholds occupied by the Lord, freeholds granted to others, copyholds granted by the Lord and areas of common usage of such as pasture and roads.
Mineral Title	A real right of ownership to property where the property in question is a mineral or multiple minerals.
Nationally Significant Infrastructure Projects	Large scale developments in England and Wales (relating to energy, transport, water, or waste) which are not subject to the usual local planning procedures but are subject to Development Control Orders which combine elements of planning and compulsory purchase law.
Notice	A notice in the register of title of a property of an encumbrance or third party rights over that property.

Obiter	More fully “obiter dictum” which is a remark or opinion expressed by a judge which is not part of the judgment and which is not a precedent for other cases.
Peaceably	Without any third party attempting to impede the action in any way.
Possession	The positive intention to possess alongside the physical control of the entity being possessed.
Prescription	The extinguishing or creation of rights and obligations after a certain period of time.
Profit a Prendre	A legal right to take something (e.g. minerals, timber, game) from someone else’s land.
Profit a Prendre Appurtenant	A profit a prendre associated with the ownership of a parcel of land.
Profit a Prendre in Gross	A profit a prendre not associated with ownership of land and that exists in its own right.
Property Register	A part of the register of title describing the property and rights that benefit it and that is subject to.
Real Right	A right held directly over a thing that is capable of being owned, which is enforceable against ‘the world’ rather than only particular individuals.
Register of Title	In England and Wales a register showing information about the property, such as the names of the legal owners and whether there are any mortgages, third party rights or other legal matters that affect it.
Reservation	Creation and retention of a right or interest in or over land on disposal (e.g. sale) of it.

The Law Commission	A statutory independent body which aims to ensure that the law is as fair, modern, simple and as cost-effective as possible, and which conducts research and consultations in order to make systematic recommendations for consideration by Parliament to codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes.
Title	A legal construct that represents a real right of ownership to property.
Title Insurance	A form of indemnity insurance which covers financial losses incurred as result of defects in title to property or third party rights over it.
Trespass	Occupation of or interference with land or property belonging to someone else without their permission.
Valuable Consideration	Payment or a promise to pay more than nominal money or money's worth (e.g. releasing a debt or providing goods and services)
Void Space	The containing chamber left when minerals have been worked in an underground mine or the space left by the working of minerals from the surface in a quarry.
Yorkshire Deeds Register	Records of transfers of freehold and leasehold properties in Yorkshire compiled from the early part of the 18th century.

APPENDIX A - CONSULTATION QUESTIONNAIRE

Copy of Consultation email:

View this email in your browser

Knights

Good morning,

In July 2022 the UK Government published 'Resilience for the Future – The UK's Critical Mineral Strategy' addressing issues relating to minerals of both high economic importance and high risk of supply disruption and sets out a plan to secure supply chains by boosting domestic capability to generate new jobs and wealth attracting investment and playing a leading role in solving global challenges with international partners in relation to critical minerals. Click here to view the report.

The strategy identifies 18 minerals as critical, including for example Lithium, Cobalt, Tungsten and Silicon and in addition five watch list minerals have been nominated by the UK Critical Minerals Expert Group, highlighting the UK government's aim to reduce barriers to domestic exploration of critical minerals which includes in particular a commitment to 'Review mineral rights-related barriers to exploration and extraction of critical minerals and explore ways to improve the accessibility of mineral rights information to expedite critical mineral mine development.'

Knights, working with Scottish solicitors Harper Macleod, has been instructed by the British Geological Survey on behalf of UK Research and Innovation to address the question:

"Are there mineral rights-related barriers to domestic exploration and extraction of critical minerals that prevent or hinder the delivery of the UK's Critical Mineral Strategy and, if so, what are they and how can they be overcome?"

An important part of our instruction is to consult with key stakeholders including private land and mineral landowners, national institutions and organisations with significant land and mineral ownership, the Land Registries in England and Wales and Scotland, trade associations representing both critical minerals other mineral operators and professional bodies. In addition, we are consulting with professionals such as solicitors and surveyors who advise land and mineral owners and both the critical minerals industry and other mineral operators.

We would like to invite you to join in this consultation.

We have made some suggestions as to specific issues we would like to address through the consultation, but we would welcome your views on the question you are being asked to deal with generally. We appreciate that we are approaching a very wide range of consultees and that the knowledge and experience of you, your business or your organisation may not cover all of the specific issues. However, we have approached you because we believe you have been involved with at least some aspects of the question and that you could make a valuable contribution.

Please click here to complete the consultation online

Alternatively, please click here to download a word document version to complete and return to us via emailing bgsconsultation@knightsplc.com no later than Wednesday 15th March 2023.

Yours sincerely,

Richard Lashmore
Partner

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Data protection

By choosing to participate in this consultation and providing your responses to the questions asked we may include some detail of your response within the report produced following the consultation. This report will be shared with the British Geological Survey, and the UK Government and may be published externally. No personal information which can identify you, such as your name or email address, will be used in producing the report, unless you have provided your express permission to be identified and you have the option to provide your responses anonymously to the consultation. If you do not wish to participate in the consultation, you have the option to unsubscribe by following the link below. Further detail about Knights' data protection policies can be found on our website here. If you have any other queries about how your personal data will be used, please contact us at dataprotection@knightsplc.com.

Copy of consultation questionnaire:

Your views please: British Geological Survey Consultation on the UK's Critical Mineral Strategy

“Are there mineral rights-related barriers to domestic exploration and extraction of critical minerals that prevent or hinder the delivery of the UK’s Critical Mineral Strategy and, if so, what are they and how can they be overcome?”

Please complete the below questionnaire and return to bgsconsultation@knightsplc.com no later than Wednesday 15th March 2023

1. Please provide your name (optional)

2. Do you provide your consent to be named in the report?
☐ Yes
☐ No

3. It has been suggested that insufficient information is available via the Land Registry (or in Scotland, the Land Register of Scotland and General Register of Sasines) and other sources to enable the ownership of minerals and those controlling the rights to survey for and work minerals within individual parcels of land to be readily identified. Has that proved to be an issue in relation to your business or work?

4. If this is the case how does this affect your business or work and how do you seek to address or mitigate the problem?

5. Are there changes in law, procedure, or practice that you consider would address or mitigate the problem?

6. At what stage in prospecting for or working minerals does this issue arise? For example, initial desktop assessment, surveys, negotiating leases and licences.

7. Do you consider the use of The Mines (Working Facilities and Support) Act 1996 to obtain the right to prospect for or work minerals or obtain ancillary rights an effective way to acquire the rights in relation to minerals where there are issues relating to ownership?

8. Are there other ways in which you would consider issues relating to any inability to identify those who control the rights to survey for and work minerals might be addressed?

9. Do you consider there is sufficient availability and access to professionals with knowledge of the issues relating to mineral ownership and working rights to assist in resolving these issues?

10. Are there any other relevant comments you would like to make?

APPENDIX B - LIST OF CONSULTEES WHO WERE APPROACHED

APPENDIX C - CONSULTEES WHO REPLIED AND CONSENTED TO BE IDENTIFIED

HM Land Registry
Forestry England
National Trust
CBI Minerals Group
Mineral Products Association
British Aggregates Association
Critical Minerals Association
Country Landowners Association
The Crown Estate
The Church Commissioners
The Duchy of Cornwall
The Lonsdale Estate
Savills
Carter Jonas
Coke Turner
Matthews & Sons
Sibelco
Aberdeen Minerals
Geo Consulting Engineering Ltd
Grid Surveys
Peak Minerals Ltd
Tungsten West
SRK Consulting (UK) Ltd
Grosvenor Estate
Welbeck Estate
RICS
Aggregate Industries
Hanson
Tarmac
Imerys
Weardale Lithium Limited
Cornish Lithium Limited
British Lithium Limited
Wardell Armstrong
Mineral Surveying Associates
Jonathan Gaunt KC
Richard Kimblin KC
Farrers
Stephens Scown
Brian Wake
Cemex
Northern Lithium
Muckle LLP
Registers of Scotland
Forestry and Land Scotland
Scottish Land and Estates
Stuart Gale KC
Prof. Roddy Paisley
Dalgleish Associates
Johnson Poole and Bloomer

APPENDIX D - DETAILS OF CONSULTATION RESPONSES

Knights

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