

Who owns the Pore Space? Surface Estate vs Mineral Estate

It is our assertion that the pore space rights belong to the surface owner in situations where the land has been severed into a surface estate and a mineral estate. A very thorough and exhaustive discussion on this matter can be found in “The Law of Energy Underground” Oxford University Press 2014

In particular, Barry Barton in Part I Chapter 2 titled “Property Rights in Underground Resources” offers a detailed legal analysis on the topic including a historical review of landmark cases.

The following provides some of the more relevant excerpts from his chapter.

“*Bocardo v Star Energy* was therefore a strong reaffirmation of the general common law principle that the proprietorship and possession of the surface of land extend downwards.”

“This analysis may have been lengthy, but it may be enough to explode the fallacy of a general rule of common law in England or anywhere else that a mineral owner has control of a mineral formation for purposes other than extracting minerals.”

“The key characteristic of the common law is that the ownership of the land owner includes everything downwards indefinitely, subject only to those rights, such as to minerals, that are vested in someone else. The generality of the soil and rock is in the hands of the land owner.”

“In particular, the cases do not justify any proposition that pore space has a legal status different from any other attribute of subsurface material, or of land ownership generally. If I have two sheds on my land with a gap between them, that space does not have any special legal status. Nor should the spaces between individual grains of rock. Pore space is generally owned and possessed by the land owner, not the mineral owner. “

“...One of the contentious problems is the principle that the rights of the owner of land extend downwards vertically, with no definite limit. That principle has been shown to continue to be an accurate statement of the law. The mere fact that something is underground does not make it the province of a mineral owner. Nor is it *res nullius*.”

“The second contentious point is the rights of a mineral owner – where mineral ownership exists separately from surface ownership – to workings, pore space, or other features associated with minerals. It has been shown that, generally, the mineral owner has no claim on such features except for the exploration and extraction of the minerals.”

Barton’s work reinforces the notion that the default position “*Cuius est solum, eius est usque ad coelum et ad inferos*” is as relevant today as it was in ancient times. Indeed the Supreme Court of the United Kingdom in *Bocardo SA v Star Energy UK Onshore Ltd* stated “that the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of them by a conveyance, at common law or by statute to someone else”

More importantly as it relates to this Application, Barton emphatically concludes that the pore spaces do not belong to the owner of the minerals but instead to the surface owner.