



TU Clausthal

# Legal Framework for the Coordination of Competing Uses of the Underground in Germany

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# Legal Framework for the Coordination of Competing Uses of the Underground in Germany

## Outline

- **Introduction**
- Coordination by means of regional planning
- Coordination by means of exclusive rights
- Coordination in the absence of exclusive rights
- Résumé



## Introduction

- Competing uses of the underground
  - E.g. mining, geothermal energy, storage of natural gas, oil, compressed air or CO<sub>2</sub>
  - Need for a selection decision → increasing relevance
- Instruments for coordination
  - Regional planning (seldom for underground uses)
  - Exclusive rights (concerns mainly projects for the same purpose)
    - Relevant for mining of free (i.e. so far ownerless) minerals, geothermal energy, CO<sub>2</sub> storage
  - Authorization decisions (most important)
    - Relevant for all underground uses
- Different legal sources
  - Regional planning → Federal Regional Planning Act (ROG)
  - Mining, geothermal energy → Federal Mining Act (BBergG)
  - CO<sub>2</sub> storage → Federal CO<sub>2</sub> Storage Act (KSpG)
  - Other underground storage → parts of the Federal Mining Act (BBergG)



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## Coordination by means of regional planning

- Regional planning serves to develop, organize and secure the use of the territory of Germany and its regions, in particular:
  - Co-ordination of different uses
  - Providing for specific uses and functions of the space
  
- Regional planning until now is applied mainly to the surface, but regional planning of the underground is not excluded
  
- Certain guiding rules (Grundsätze der Raumordnung) apply to underground uses:
  - Mining (§ 4 (2) no 4 clause 4 ROG)
  - Climate protection, e.g. CO<sub>2</sub> storage (§ 4 (2) no 6 clause 8 ROG)
  - ➔ But not sufficient for a selection decision: not very precise and moreover to be balanced with other concerns



## Coordination by means of regional planning









- Mandatory provisions (Ziele der Raumordnung) possible in plans and programs of the German States and Regions, in particular:
  - Priority areas for certain uses (Vorranggebiete, § 8 (7) no 1 ROG) → excludes other uses in the area that are incompatible with the priority use or function
    - e.g. priority areas for the production of raw materials (but seldom)
  - Concentration areas for certain uses (Eignungsgebiete, § 8 (7) no 3 ROG) → excludes this use outside the concentration area
    - but not applicable to underground uses
  
- Mandatory provisions on CO<sub>2</sub> storage possible by the German States (§ 2 (5) KSpG)
  - CCS Directive allows Member States to exclude CCS storage on their territory in general (Art. 4 (1) CCS Directive)
  - Germany took a limited approach: CO<sub>2</sub> storage can be excluded outside designated areas or within designated areas
    - State competence in order to gain consent to the Federal CO<sub>2</sub> Storage Act

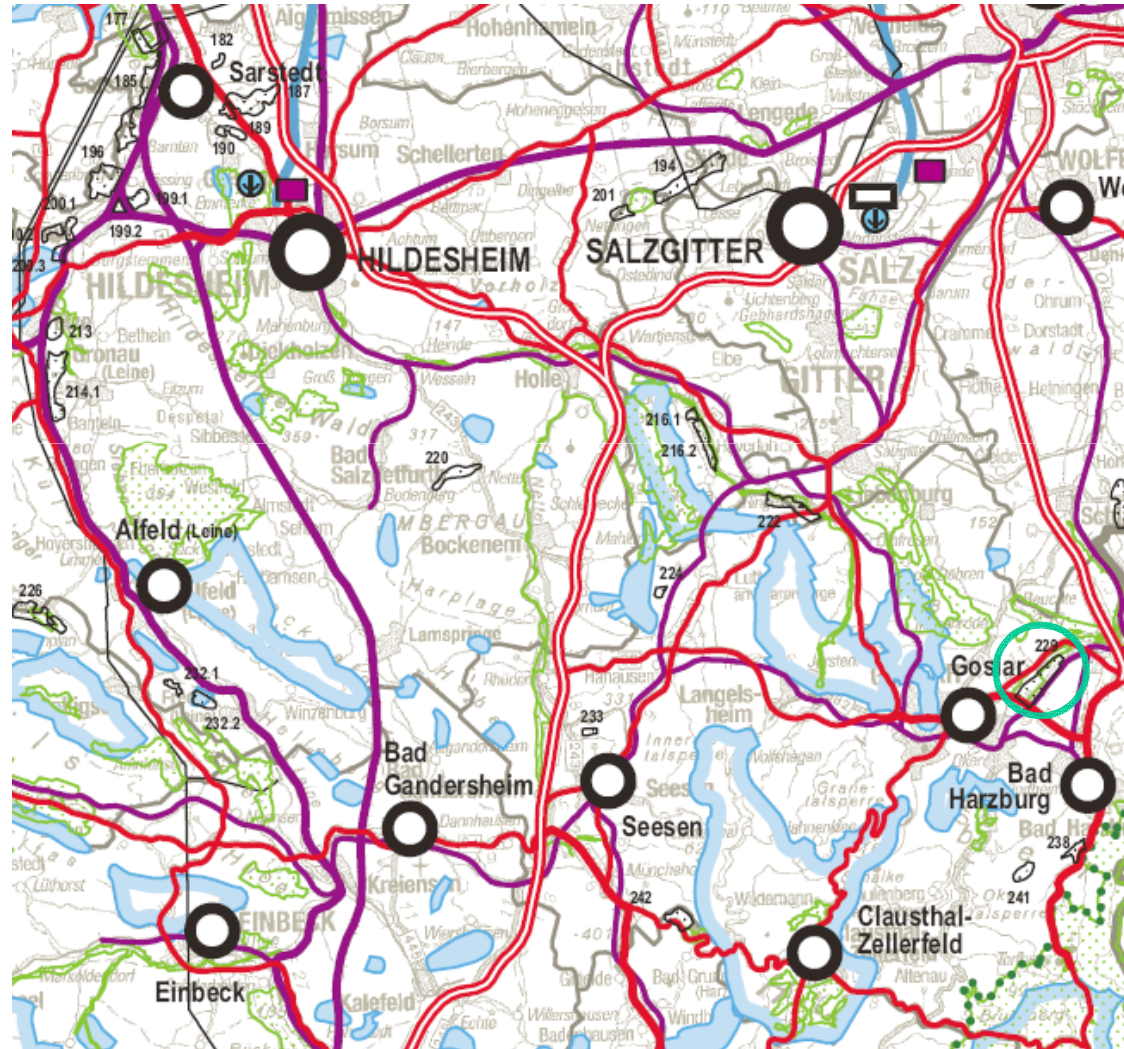


# Coordination by means of regional planning

- Extract from the Regional Planning Program for Lower Saxony (2008)

### Ziele der Raumordnung


-  Oberzentrum
-  Mittelzentrum mit oberzentralen Teilfunktionen
-  Mittelzentrum
-  Vorranggebiet
  - hafenorientierte wirtschaftliche Anlagen
-  - Natura 2000
-  - Rohstoffgewinnung (nachrichtlich: Gebietsnummer)
-  - Trinkwassergewinnung
-  - Güterverkehrszentrum

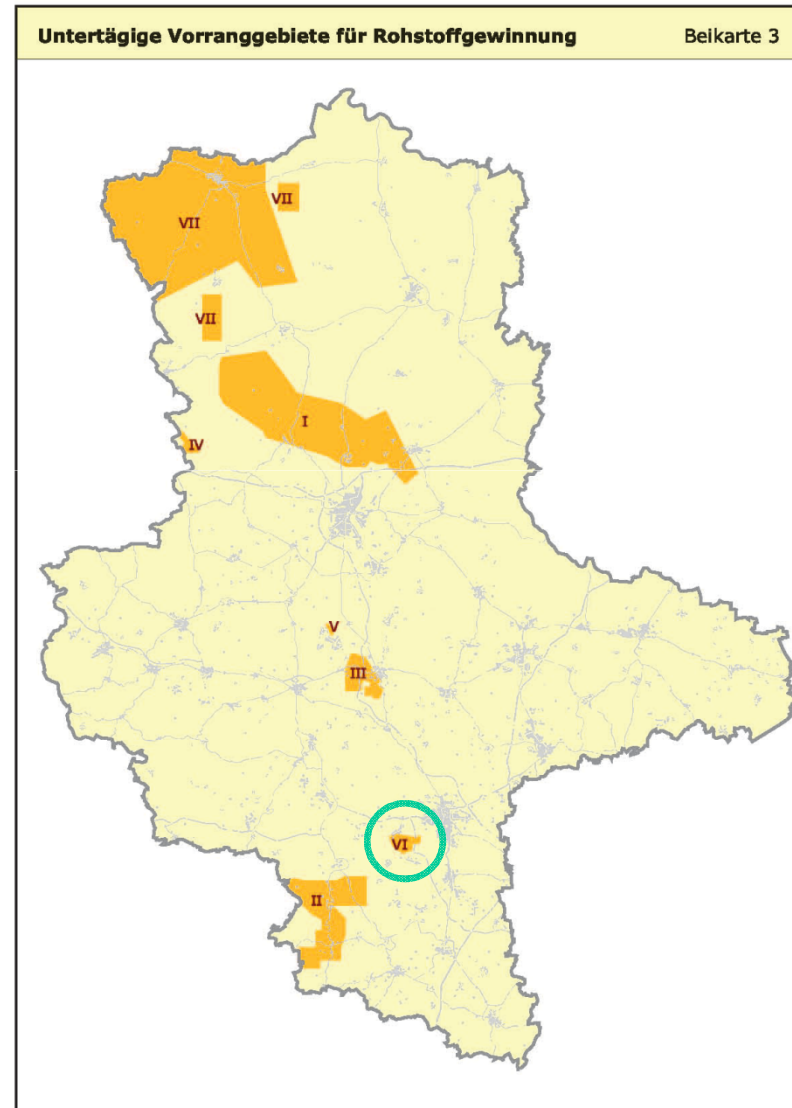




## Coordination by means of regional planning

- State plan for Saxony-Anhalt (2010):  
Underground priority areas for the  
production of raw materials

	Vorranggebiete für Rohstoffgewinnung
<b>I</b>	Kalialzlagertstätte Zieplitz
<b>II</b>	Kalialzlagertstätte Roßleben
<b>III</b>	Steinsalzlagertstätte und Sol- und Speicherfeld Bernburg
<b>IV</b>	Steinsalzlagertstätte Braunschweig-Lüneburg
<b>V</b>	Sol- und Speicherfeld Staßfurt
<b>VI</b>	Speicherfeld Teutschenthal-Bad Lauchstädt
<b>VII</b>	Erdgasfelder Altmark







## Coordination by means of regional planning

### **Selection decision by means of the State plan for Saxony-Anhalt**

- Priority areas for the production of raw materials are mandatory provisions (Ziele der Raumordnung)
  - Other uses in the area are excluded if they inhibit or seriously impede the production of the raw materials
  - It is not excluded that in part of the priority area other concerns are opposed to the production of the raw materials
  - Certain priority areas for the production of raw materials also secure storage facilities for natural gas or other gases
  
- Geographical scope of protection
  - Only the surface area is depicted in the map
  - No explicit statement as to the limits of the area in depth



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## Coordination by means of exclusive rights

### Free minerals and geothermal energy

- Exploration / production license (Erlaubnis/Bewilligung/Bergwerkseigentum)
  - Permit to seek / use the resource
    - Confers rights regarding a (so far) ownerless resource
    - But not yet for the technical realization of the exploration / production project (which needs an additional approval of the „operations plan“ (Betriebsplanzulassung))
  - For a geographically limited exploration / production field
    - Field not limited in depth (no „floor ownership“)
    - Special rule for minerals and geothermal energy produced on specific premises in the context of buildings (§ 4 (2) BBergG)
  - For a limited period of time
    - possibly renewable



## Coordination by means of exclusive rights

### Free minerals and geothermal energy

- Exploration / production license confers an exclusive right to seek / use the resource
  - Excludes any other exploration / production project for the same mineral / geothermal energy
  - selection decision between competing applicants:
    - Production license → priority given to the holder of an exploration license
    - In other cases → applicant best fit for a useful and systematic exploration / production, considering his work program and financial means
  - Also excludes any exploration / storage of CO<sub>2</sub> (§ 7 (1) no 3, § 13 (1) clause 2 KSpG)?
    - According to the reasoning of the German legislator (BT-Drs. 17/5750 p. 40)
    - But doubtful whether compatible with the primary goal of exploration / production licenses to decide about the rights regarding a (so far) ownerless resource



## Coordination by means of exclusive rights

### CO<sub>2</sub>

- Exploration / storage license for CO<sub>2</sub>
  - Permit to seek / use a CO<sub>2</sub> storage site (concerns the technical realization)
  - For a limited geographical area
    - Exploration field limited in depth
    - Exploration / storage fields limited to (parts of) specified geological formations
  - For a limited period of time or quantity of CO<sub>2</sub>
- Exclusive right to explore / use the (potential) CO<sub>2</sub> storage site
  - Exclusive right for exploration; less clear for storage
  - Excludes any other exploration / storage project for CO<sub>2</sub>; selection decision between competing applicants:
    - Storage license: priority given to the holder of an exploration license
    - Exploration license: applicant whose work program best (first) fulfills the legal requirements (§ 8 (1) clause 4 and § 7 (1) KSpG)
  - Excludes any conflicting use of the geological formations used for CO<sub>2</sub> storage: decision by EU law (Art. 6 (1) CCS Directive)



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## Coordination in the absence of exclusive rights

- Authority decides upon application whether to grant a permit for a certain use of the underground
  - All relevant uses of the underground require a permit by the competent authority
  - Authority is legally required to consider other uses of the underground before granting a permit
  - But little guidance on the question how different projects are to be weighed in comparison
    - regional planning: guiding rules very general and only to be used if authority has discretion (generally not in mining law), priority areas for underground uses seldom
    - exclusive rights: mainly limited to competing projects for the same purpose; further-reaching provisions only in the context of exploration / storage of CO<sub>2</sub>
- ➔ Outside the few clear cases the selection decision has to be taken by the authority on a case-by-case basis



## Coordination in the absence of exclusive rights

### Legal basis

- Free minerals, geothermal energy
  - First stage: exploration / production license (§ 11 no 8-10, § 12 (1) BBergG)
  - Second stage: authorization of the operations plan (Betriebsplanzulassung) (§ 55 (1) no 4, § 48 (2) clause 1 BBergG)
- Other minerals (grundeigene Bodenschätze)
  - Authorization of the operations plan (§ 55 (1) no 4, § 48 (2) clause 1 BBergG)
- CO<sub>2</sub> storage
  - Exploration / storage license (§ 7 (1) no 3, 8; § 13 (1) no 1, 8 and clause 2 KSpG)
    - Weighing of different uses despite unclear wording of § 7 (1) no 3 KSpG
- Other storage
  - Authorization of the operations plan (§ 55 (1) no 4, § 48 (2) clause 1 BBergG)





## Coordination in the absence of exclusive rights

- Elements for the decision
  - Weight attached to the specific use of the underground
    - Certain guidance in regional planning laws
    - KSpG: depending on the importance for the public good, special weight attached to the aim of climate protection (e.g. CO<sub>2</sub> and compressed air storage, geothermal energy)
  - Relevance of the project for the aims pursued
  - Negative impact of the project
  
- Possibility to give general guidance?
  - Difficult to give guidance on the level of law making
    - Detailed analysis of the competing projects needed
    - In particular environmental impact assessment only possible within the authorization procedure
  - More guidance by law as to the weight attached to specific uses might be possible
    - might require more information as to the extend to which the different underground uses are needed



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## Résumé

- Regional planning
  - So far limited application to underground uses
  - Delimitation in depth unclear
  - Binding effect limited
- Exclusive rights
  - Mainly exclude competing projects for the same purpose → insofar clarity at an early stage
  - Approach extended in the context of CO<sub>2</sub> storage
    - exploration / storage permits: priority established by EU law
    - exploration / production permit: reasoning of the German legislator doubtful
- Case-by-case decision of the authority
  - So far little guidance given by rules of regional planning law
  - Difficult to give guidance on the level of law making
  - More guidance by law can be imagined as to the weight attached to certain uses of the underground

**Thank you for your attention!**

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