LOOK ACADEMIC PUBLISHERS
OPEN ACCESS

INTERNATIONAL JOURNAL OF ENVIRONMENTAL & SCIENCE EDUCATION
2016, VOL. 11, NO. 18, 12471-12485

Legal Regulation of Subsurface Use - in Russia: Actual Problems

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ABSTRACT

The article is devoted to analysis of actual problems of subsurface use rights in Russia with relation to doctrine and practice We can also observe an upward trend in the quantity of litigation processes in regard to the subsoil use rights. Thus, the issues of understanding this phenomenon acquire particular importance. The purpose of the work is to carry out a legal scientific comparative analysis of the subsoil use rights in Russia basing on scientific works and court practice material. Methods: empirical methods of comparison, interpretation; general methods of analysis, formal logic; specific scientific methods: legal dogmatic method, legal comparison and method of legal norm interpretation. Results: the analysis of legislation, including the Law of the Russian Federation № 2395-1 "On Subsoil" (Law on sub-soil) and practice in the application of it, its scientific interpretation shows that the subsurface use right is in the nature of a right in rem. It has its own unique characteristics and exceptional nature. Its special features are being reflected at power of sequence resembling "droit de suite", exclusivity and perpetuity. The author reveals the secondary power, which is intrinsic to the subsurface use rights, and criticizes the provisions of the Law on Subsoil to deal with subsoil block turnover. Besides, the author analyses the problem of using consumable property during mining (quasi-usufruct), the problem of specifying the bearers of public interests and also considers antitrust paradox. Additionally, the author puts forward a thesis that mining licenses are given, in terms of civil law, for the gratuitous use of property. Conclusions: It is necessary to suspend the mineral right from the number of subsoil use rights in order to individualize it as a distinct mineral title. It has also been concluded that the title of subsurface use is being based on special concession act. It is recommended that the appropriated provisions of the Law on subsoil need to be amended.

KEYWORDS

subsoil use right, state, secondary power, right in rem, subsurface, subsoil block, surface mining operations, mining concession, fructus, mining license

ARTICLE HISTORY

Received 10 August 2016
Revised 18 September 2016
Accepted 04 December 2016

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Introduction

The mining industry is one of the most profitable spheres of the Russian economy. The activities of mining companies have a significant impact on the basic sectors of economy, affecting almost all strategic fields. It is a special form of partnership between the Russian Federation as a State and private industry.

More detailed study of the subsoil use right forces us to look at public property in a different light. Moreover, the courts interpret the nature of the subsoil use rights in different ways. Thus, these particular problems are complex enough to be interesting for further study.

The problem of the centre of the real estate

Current Russian legislation recognizes subsoil block as a three-dimensional space, which causes the necessity of more precise definition of borders between subsurface and surface so that subsoil users as the subjects of legal relations can determine the object of their right. In case of the existing lacuna in current legislation concerning a soil layer defini-tion, Russian courts do not always have reliable tools for resolving the conflicts. Therefore, one of the problems remains in the field of elaboration of an effective law on land uses for mining.

It is generally agreed that the special role of the land plot in the Russian system of the real estate is caused by the physical impossibility of exploitation of other real estate objects without the land plot.

It has caused certain "priority" of the land plot before the other absolutely unmovable real estate object – the subsoil block. But it is difficult to agree with this point of view. We must take into account essential interconnection between the objects: any operation with real estate is technically and physically connected with deepening under the Earth's surface, and in such cases the priority must be given to the subsoil block, not the land plot.

In this regard, the dominant in the Russian theory point of view about the land plot as the systemically important center of the real estate needs further development, namely: the specified "center" has another additional object in the form of subsoil block. In this regard, we criticize common approach to the land plot as the exclusive, singular and systemically important center of the real estate. It seems that the basis for the concept "real property" is not the surface but the subsoil. We observe a strong connection with the Earth and non-portability as the main and typical characteristics of the real property owing to strong contact only with the subsoil. But according to normative definitions, any deepening under the surface means the subsoil use.

Therefore, it is not enough to discover in what way and for what kind of purposes the elements of the Earth's crust are used (as the subsoil or as the surface). It must also be kept in mind that the subsoil use right does not forfeit the right to the related neighboring land plot. In other words, we shall not find in legislation any prerequisites for their recognition as a single indivisible thing. The legislator provides a different legal regime for each of them.

In each case it is necessary to proceed from system connection between subsoil block and land plot within sys-tem of the real estate. The existence of a system

priority of one of the objects (subsoil or surface plot) depends on fea-tures of legal relationship interconnection concerning the land plot and the subsoil block.

As a rule, in subsoil relationships, such priority is given to the subsoil block for the public importance of the sub-soil and for the system interconnection of the legal relationship.

The problem of subsurface facilities and the complex thing

The peculiarity of the subsurface use right for construction and operation of subsurface facilities not related to the mineral resource extraction lies in making new objects and following changing the essential characteristics of the subsoil block.

The special-purpose character of the right leaves a mark on its stability. By the general rule, it has termless cha-racter. Its specificity is evident not only in a stable, constant, long-term nature of use, but in strong, sustainable connec-tion with the built objects – underground constructions.

Construction and operation of subsurface facilities not related to the mineral resource extraction as a separate type of subsoil use includes authority for building subway, pipe-laying operations, construction of tunnels, oil storage and irrigation object.

The subsurface facilities also include bunkers, warehouses, underground passages, garages and parking lots. At the same time facility accommodation, above ground or subsurface in the massif of rocks under which minerals are extracted, is permitted only after the completion of the displacement of the Earth's surface process.

The duration of the process may be calculated by the protection rules on the basis of absence of soaking cham-bers. The construction of a new thing in the form of subsurface facility and emergence in this regard of two and more objects of civil rights causes the necessity to correlate them with the civil category "complex thing". Under Article 134 of the Russian Civil Code if various kinds of things form a single whole which implies the use thereof for a common purpose, they shall be considered one thing (complex thing). The effect of a transaction concluded with regard to a complex thing shall extend to all of its constituent parts unless otherwise provided by an agreement.

So, as you can see, the norm provides a possibility of interconnection of several different-type objects, used for a common purpose, in the thing considered as a single object of the right. "Universitates rerum cohaerentium" ("com-pound body") (Novitskiy 2004) which later, in the nineteenth century was already designated by classics (Dernburg 1884) as the sets consisting of separate and independent objects forming "a uniform corporal thing" acted as a proto-type for a complex thing.

Taking into account different aspects of Russian court practice on complex things matters, especially in relation to the concept "compound real estate" (Opredelenije 2005), the author of this work, without going into all intricacies of such broad problem, considers that it is necessary to focus attention only on

those characteristics which directly reveal the core of the relationships in the subsoil use sphere.

Within the meaning of Article 134 of the Civil Code of the Russian Federation, first of all, we are talking about only two or more objects of civil rights. Secondly, these objects must be different-type, and each of them has to fall under the legal concept "thing". Thirdly, the specified single whole implies the use thereof for a common purpose. Fourthly, the combination of these features leads to a single result: the law considers this set of diverse things as one thing.

Fifthly, the diversity of things raises the question: "Is it necessary to distribute the requirements of the registra-tion of deeds to all set of objects as a single thing or not?", for at least two of them are already the real estate (the sub-soil block and the land plot). In other words, if we talk about a complex immovable thing (real estate), then we encoun-ter the registration of deeds issues, and also issues on necessity of location on a single land plot (Allanina 2011).

Surface right issues

We need to distinguish the ownership right to the subsoil and the subsoil use right as a subjective legal authority of the license holder.

The first one appears to be a kind of legal fiction which like "quo minus", as we know, were the earliest means of brining the law into compliance with public needs, for example in the medieval England (Baker 2002).

Firstly, the necessity in such fiction in subsoil use is caused by the fact the State does not exercise mineral rights itself. Secondly, subsoil use right is enjoyable only in connection with the specified subsoil blocks having their own identified parameters, not with the subsoil in general as a state fund of the subsoil (state-owned property).

At present legal relationships between the subsoil users and the land owners are not regulated properly. Article 25.1 of the Law on Subsoil as a reference rule does not solve the problem. It indicates that the surface rights, which are required for subsoil use, may be granted in accordance with the provisions of the Russian Land Code. However, neither the Russian Land Code, nor other norms contain such provisions.

There is need to amend legislation with appropriate rules on agreements about using and recultivating land plots, which are required for subsoil use. At the same time, it is necessary to fix a priority of the legal regime of the subsoil block before the legal regime of the land plot required for subsoil use. For example, if the land owner intends to change the irrigational and other systems and such changes may affect the mining operations, he is obliged to coordinate it with the subsoil user.

Land plots should be granted for the license duration period. The subsoil user must be obliged to deliver to the land owner an application as integral part of mineral license with coordinates of corner points of land plot so that the delineation can be made after adoption of the technical project.

The problem of right in rem

On one side, subsurface resources management, is regulated by rules of general effect. On the other side, the subsoil use right corresponds to a measure of person's possible behavior. We can also define it as a vested estate, possession at law. In this connection, the subsoil use right is being considered in two aspects. The first is a body of legal rules of human conduct (objective mining law). The second is a distinctive power (estate) of mining license holder (subjective subsoil use right). In part, the term "subjective right" has been originated from R. Iering theory of subjective interests (Ihering 1896). So, according to official Russian legislatian all users of mineral resources acquire rights and incur obligations "pro domo sua", pursuing own benefit.

In accordance with article 7 of the Law of the Russian Federation № 2395-1 "On Subsoil", 1992 (Law on sub-soil), any activity within the borders of a subsoil block may be carry out only with the consent of the mining license holder, so that all third parties must refrain from violation of the right and hindering its implementation. Therefore, the subsoil use right has its own unique exclusive features and absolute nature. The mineral exclusivity can be disclosed in the fact that only State as a singular public owner has its own exceptional authority to assign the mineral title. Conse-quently, in any way, the term "exclusivity" is not connected with intellectual property and, being conditional, not de-termined under the current legislation. In many respects, the "exclusivity" of some title is dependent to property and its absolute nature. Within this framework, the position of K. I. Sklovskiy explaining genesis of exclusivity by civil turno-ver within territory of the Russian Federation, appears to be true (Sklovskiy 2014).

Mineral resources are of major importance to all peoples living on the territory, and valuable for their rights. This predetermines the fundamental difference between the subsoil use rights and other proprietary interests. If transfer of exclusive rights under the contract means owner's self-restraint, then granting mineral title by the State means public authority self-restraint.

The subsoil use right is more than just a legal right to use and derive profit from another's property provided that the property itself is not injured in any way (usufruct). It is a whole title which includes both physical possession (fact) and specific occupation (tenancy).

Often, obtaining a mining licence is possible only for certain types of subsoil use in a single package, because each one of them is a component of a single technological complex, not at random. The State serves a much higher public purpose by granting prerogative mineral title. It includes rational, efficient and profitable mining. Absoluteness of right to exclude others means that mining license holder's title is always protected against all infringements which can be caused not only by third parties, but by the public State. It corresponds with Articles 2 and 23 of the Federal law of the Russian Federation "On Production sharing agreements".

According to mentioned articles, production sharing agreement is a contract between the State and a private investor granting an exclusive concession for the exercise of mining rights, under which disputes between an investor and the state should be settled subject to the agreement provisions by judicial procedure.

Agreements may provide for the Russian Federation's waiver of judicial immunity and execution of judgment. Thus, the forms of protection mineral rights have an absolute nature. The subsoil use right is also aimed at effective administration of public property. As consequence, this raises well-known understandable problem, whether the subsoil use right is proprietary (right in rem), or not. We suppose so.

As to numerus clausus of rights in rem, so in conformity with Article 216 of the Civil Code of the Russian Federation the list of rights in rem is open and is not limited. In this regard, there are not any restrictions to include the specified subsoil use right in that list, despite the fact that it is defined in the Law on subsoil of the Russian Federation, and not in the Civil Code.

It is more effective that the subsoil use right is regulated by the Law on subsoil as the legislative instrument of higher level rather than subordinate legislation. The law regulates almost all issues related to use and protection of sub-soil in the interests of the present and future generations. Civil relations, associated with the subsoil use right, are regu-lated by the norms of the Civil Code, unless regulated by the norms of the Law.

The normative content of the title is like of a thing in possession. The subsoil use right has the nature of a property right because all subsoil blocks themselves are the real estate of high monetary value. In this regard in accor-dance with Article 11.8 of the Regulation on subsoil licensing of the Russian Federation, after tender the applicant rece-ives all necessary information for the calculation on the analysis of the economic viability of the project. Under that article it is obvious that each claimant is aware of the economic viability of the subsoil block including geological re-serves.

In any case, mining license holder receives a certain property value, as consequence, the subsoil use right is of property nature. There could be no better illustration than the Resolution of Federal Arbitration Court of West-Siberian District N F04/2496-538/A70-99 dated December 02, 1999 confirming that the subsoil use right has the nature of a property right. The Federal Arbitration Court of West-Siberian District noted that under article 1102 of the Civil Code of the Russian Federation the unjust enrichment which includes property right, should be returned, and the subsoil use right has also the nature of a property right. It appears, the court has made that conclusion from the perspective of its property and real estate affiliation. We also agree with this position because the object of the right is substantial, material and can be estimated. Besides, all objects of rights in rem are things in specie, nonfungible things with their own discretization. If we address to current legislation, there is no doubt that all subsoil blocks are of that kind.

In conformity with Article 7 of the Law on Subsoil, the subsoil block is defined as a claim (an ascertained strip of ground and subsurface with its own metes and bounds that could be legally mined by the license holder). Only such characteristic as power of sequence, resembling "droit de suite", can raise some questions. Despite the fact that it is not mentioned in the Law on subsoil, nevertheless, it exists and could be explained by the provisions of the Law on subsoil which provide that the Russian State is the sole owner of the subsurface and its ownership right to the subsoil is inalien-able.

The power of sequence merges with the absoluteness, as following from it, loses any legal meaning under Ar-ticle 1.2 of the Law on subsoil under which ownership right to the subsoil is the state ownership, also called public ownership, or state property. It is reasonable to presume, that if ownership right to the subsoil blocks is alienable (which is unlikely), then the transfer of ownership would not forfeit the subsoil use right, as we can see the same things in civil relations, such as land-lease. This conclusion follows from well-known assumption of the legislator's interest to regulate similar relations in a similar manner. Accordingly, the power of sequence has indirect feature through impossibility of its realization in practice. The need of recognizing the power of sequence is now missing in view of principle of the priority of the State's ownership right to the subsoil.

As for the perpetuity as the feature of the subsurface use right in rem (Ostanina 2016), the subsoil blocks can be granted by the Russian State for a certain period (for geological studying, for mining or for ground waters extraction) or indefinitely (for landfill, for building underground construction not related to mining, for oil storage running, for cul-tivating specially protected geological features, etc.). It appears, the perpetuity highlights the sustained legal nature of the most subsoil use rights. It shall ensure the opportunity of steady and direct use of the real estate. The length of time, required for the subsoil use, depends on peculiarities of the objects for analysis.

The problem of transferability

One of the most important features of the subsoil use rights is their transferability – the state of being transfer-able. The subsoil use right is the only legal construction to the extent permitted by applicable law, to integrate indirectly the subsoil blocks into a civil circulation.

In this regard, the formulation of Article 1.2 of the Law on subsoil is incorrect, because it separates the subsoil use right from its object – the subsoil block. Paragraph 2 of Article 1.2 of the Law stipulates that the subsoil blocks could not be the subject of purchase, sale, gift, inheritance, contribution or the subject of pledge or any transfer. So, the next formulation of the norm logically contradicts the touched upon paragraph: the subsoil use rights can be transferred to the maximum extent allowed by law. Within this framework, the legislator needs to decide: either to specify that the subsoil blocks and the subsoil use rights have limited transferability, or not. In the latter case, paragraph 2 of Article 1.2 of the Law is to be amended as follows: the subsoil blocks as well as subsoil use rights could not be the subject of purchase, sale, gift, inheritance, contribution or the subject of pledge or any transfer. In first case, it is necessary to add the Civil Code of the Russian Federation by a separate chapter, containing appropriate norms, regulating civil relations associated with the subsoil use right, including the matters of enjoyment and disposal.

De lege lata, analysis of third part of Article 129 of the Civil Code of the Russian Federation, leads us, howev-er, to the conclusion of existing of the subsoil blocks civil turnover, which represents a set of dispositive transactions in

the form of constitutive succession by transferring the subsoil blocks for "use" and universal legal succession in the form of transferring the subsurface rights pursuant to Article 17.1 of the Law on subsoil. The constitutive succession matters have been thoroughly formulated by B.B. Cherepahin (Cherepahin 1962), and later, by D.V. Dobrachev (Do-brachev 2016).

The problem of secondary power

The next problem – the problem of secondary power – stays unsolved yet. At the appropriate time, B. Wind-scheid individualized a specific category of legal freedoms, the specificity of which is that "the will of the entitled per-son is crucial for emergence, modification or termination of the subjective rights"(Windscheid 1887). Later, such legal freedom was called a secondary power (Weilinger 2016).

Neither the legislation, no the doctrine has paid any attention to the secondary power with regard to the subsur-face rights. However, the current legislation lodges the subsoil user with some unilateral powers while exercising of a right.

First of all, title to any extracted product (minerals, hydrocarbons or other resources) passes to the license holder from the moment it is extracted. And the title to any product and income, accruer, does not correspond to any-one's obligation or duty, so it could not be violated by anyone. But we can observe a certain enmeshment, relatedness between the right-holders involved, indicating that the secondary power exists. We are willing to accept E. Seckel theory, who in the past century emphasized that the secondary power content was the ability of right-holder to establish a subjective right by the unilateral transaction (Seckel 1903).

Bearing in mind that any secondary power, as well as any subjective right, gives the possibility of a certain positive conduct, but does not oppose the obligation of another person or third party to commit or refrain from committing certain acts, we can observe in these legal relationships the enmeshment between parties mentioned above. From the moment of license registration (the moment of the subsurface right arising), the Russian State, being a passive party, suffers a legally provided enmeshment: the need to undergo the results of subsurface user meaningful actions which involves the extracting products and other properties. The secondary power is intrinsic to the subsurface use rights. Its realization has the nature of a one-side dispositive transaction which leads to the termination of the State rights (ius fruendi, accruer, etc.). The exercise of the subsurface right can be recognized as the ground for the emergence of the ownership right to products (minerals or other resources).

In addition, for a legally provided enmeshment severability of the passive owner's conduct from its legal ef-fects is more typical. The main purpose of the secondary power is being a ground for the emergence of the user's own-ership right to minerals and other resources. But its particular nature reveals itself in covering both public interests and interests of private sector.

The secondary power is to be considered an exception to the rule according to which the owner is entitled to receive all income of an estate and enjoys all benefits of ownership.

Gratuitousness, profit a prendre and other issues

Not the right to use, but profit a prendre, accruer and right to appropriate income are the major elements of any subsurface right.

As derived from Article 136 of the Civil Code of the Russian Federation, the user's ownership right to minerals and other resources is included in the content of the subsoil use right. In this case, all income and products are being appropriated by the license holder, not by the owner. The exercise of the subsurface right temporary tails the public owner.

Meanwhile, the user's possession of “the property of another” actually turns out to be more careless. The li-cense holder's negligence can cause many ruinous consequences for the owner. This fact again highlights the main dif-ference between owner's and non-owner's possession. In conformity with Article 136 of the Civil Code of the Russian Federation, proceeds received as a result of the use of property (fruits, products, revenues) shall belong to the person lawfully using this property unless otherwise provided by a law or other legal acts or by the contract concerning the use of this property. According to the current legislation, the category "proceeds" covers "fruits, products, revenues" in equal parts, without any distinction.

In any way, only separate objects of law could be called "fruits" or "products" or "revenues". The term "fructus civiles" can be also used to describe products which originate from legal transactions (rents, profits, recompenses, etc.).

Originally, bonanza, collecting basin, mineral deposits are a component part of the subsoil. However, all tradi-tional statements about the fruit as a type of a product are not applicable to the mineral resources. The fruits, products or revenues are components of the property, which forms return-bearing assets, in other words, the income that returns regularly. This fact of regularly income is important. All proceeds without periodicity properties are not the fruits in the legal sense. In due time, N.L. Duvernois had reached the same conclusion (Duvernois 2004). In case of the subsurface we cannot always observe the periodicity properties, because the return is possible only under that kind of the subsur-face use which is not the mining and is not connected with the resources extraction.

Essentially, the extraction of mineral resources has a single basis nature, not a constant (long-term) by virtue of exhaustibility of the natural resources. Therefore, it is not advantageous to see in the subsoil blocks the same kind of fruits.

And we need to consider these significant aspects of the subsurface use. That is why we cannot classify the minerals, separated from the subsurface, as the appurtenant. This confirms the results of Grimm's theory of relativity of the term "fructus (fruit)", in accordance with which any classification of the thing as a fruit did not depend on some objective properties of the thing (Grimm 2003).

Finally, we must not forget the money, which is always considered as "expendable things" for the money is intended for the next transfer. Then the transfer for the owner is equal to the con-sumption. By analogy with it, the usefulness of the extracted mineral resources is predefined by their exchange value. Nevertheless, from the standpoint of civil law, the gratuitousness appears to be one of the main features of the subjec-tive subsurface use right.

A.A. Simolin, when analyzing the compensatory nature concept, pointed out that for recognizing compensatory nature of the legal relationship, it was necessary that one person's activity, arising from this relationship, was to be in synallagmatic, conditional or causal dependence on the other counterparty (Simolin 2005). Surely, we would not delve into the intricacies of subjective and objective equivalence theories. But we believe that it is necessary to define a gratuitous legal relationship from that premises. So, if you take interest-free loan agreement, the borrower's obligations to protect the received thing (while enjoying it) and to return it after a period of time are not equal to using it.

These obligations can be estimated as "donation sub modo" when existence of anyone's duties, including pub-lic duties, does not turn a deal into a cost recharge ("on a paid-for basis") one. Pre-revolutionary scientist Franz Hay-mann cited a number of examples, calling them "donation", among which was the transfer of the plot with imposing duty to mine minerals so that the plot after their extraction was to be restored to its original state (Haymann 1905). Such obligations, e.g. "to return after a while" or "to restore to its original state" type, cannot be considered as the equivalent for assignment for temporary use. A deal of that kind remains, unquestionably, gratuitous.

The specificity of the performance of such transaction, which distinguishes it from the equivalent actions, is that there is a reduction of property or restriction on the right of ownership (in this case – ownership right to the subsoil), exclusively at the expense of the property, which was granted to the right-holder (user). Otherwise, if the user is obliged to return not the same thing but another one, then we are dealing with a contract of exchange. The subsoil man-agement implies the achievement of socially useful purposes that causes a gratuitous basis in the relations between the license holders and the Russian State.

The useful effect of the subsoil management is socially meaningful. This feature predetermines the unique character of the subsoil use right. The fact of having public liabilities for a tax does not provide grounds to consider the subsoil use right as a compensated one. The license holder does not perform any civil payments directly to the subsoil owner. All proceeds come fully into holder's property, and by public payments the user performs only public duties.

The powers of the subsurface users are most closely approximate the absolute ownership, that is why they re-semble the trust, well-known in the countries of common law (Pettit 2012). This is the explanation why superficies and emphyteusis were called hemi-ownership (Sinitsyn 2015).

It seems that all license-holder authority intensively endeavours to the full ownership, and often, as practice shows, in fact, coincides with it. However, the modern Russian civil law is not receptive to the idea of a pluralism of ownership

rights, and the existing legislative structure of state ownership right to the subsoil does not allow any dualiza-tion, but this is not the case with the restrictions of the powers. It seems that the title to any proceeds and products, which passes to the license holder, represents a certain restriction of the public state ownership.

The problem of using consumable property during mining (quasi-usufruct)

The temporariness, caused by the consumable characteristics of the object, highlights one of the peculiarities of the subsoil use right for exploration and exploitation of minerals (the mineral right). The mineral right is provided by Article 6 of the Law on subsoil.

The consumable characteristics of the object are predetermined by the fact that the mining production is not reproducible, and the mineral resources are exhaustible and consumable.

However, the power of "use" with respect to any consumable thing is impossible. So, the provisions on this phenomenon in the Russian legislation need to be amended. Such construction of "use" with reference to the subsurface and the mineral resources seems to be hardly suitable. For example, when we use the well, it is not a secret that the value of such "use" is the ability to extract water (consumable thing), located in it, rather than the well itself (inconsumable thing). It is not difficult to imagine a situation, when all the water in the well would be exhausted, then the well would not be of anyone's interest as the object by virtue of losing its necessary properties. When we talk about using the well, actually, we have in mind the water, or rather, the right of ownership on the water. Then, quite rightly, the owner of the well should be justly compensated. However, under normal circumstances, nobody will charge you for the water drawn from the well, because the water is "God's gift", which should belong to all. In many ways, this is our Russian mentality; – we must share it with anyone. But, if the mineral resources are exhaustible and consumable, this approach may not be out of the question.

Therefore, in case of the subsurface management, we deal with the consumption, not the "use". And such kind of "consumption" is equal to the deed of settlement, to the legal control. So, in fact, the right to "use" subsoil means the right to dispose of a thing, right of legal control.

With respect to mining, the problem logically arises of the maintenance of ownership's elasticity (“ius recaden-tiae”). After the mine has closed down, the “ius recadentiae” in relation to the subsoil block still remains. Despite the fact that the subsoil user always returns the same subsoil block but with another, different characteristics, the right of the public ownership remains the same. During mineral extraction a substantial part of capital in the form of minerals is always separated off. However, the principle "salva rerum substantia " does not change ownership's elasticity. Using the terms of Roman law in a broader sense, one may say that any subsurface use in the form of mining can be intended to mean “quasi-usufruct” because of consumption. However, we can find out here an autonomous legal authority, depending on extracting and succeeding

appropriation of the minerals, which are movable things, fungible things, in strictly legal sense. But, all extracted minerals are not ordinary, trivial things, because of the ability of the subsoil to serve as a national endow, which is the feature that distinguishes the mineral resources from all other fungible things.

On the basis of ownership right to the subsoil through the construction of "the subsoil use" there is a transfor-mation of the public property into the private mineral right to the part of a national endow, which is subject to the subsequent consumption. So, the mineral right is always intended to appropriate all minerals (fruits), and such appropria-tion is equal to the consumption. In this regard, all subsoil blocks, granted for mining, must be considered as the consumable things de lege ferenda.

The economic properties of such subsoil blocks with their deposits of mineral resources must exert an influence on the formation of their legal regime. Therefore, the legal construction of the mineral right should reflect such properties too. It is necessary to suspend a mineral right from the number of subsoil use rights in order to individualize it as a distinct mineral title, and the Law on subsoil should be amended in such way. So, the mineral right should be granted by the State not for "subsoil use", but "for exploitation" because term "use" is good only for the inconsumable objects. So, the right of exploitation should be granted for a special purpose: for transferring the ownership right to the consumable component of the subsoil in the form of the extracted minerals from the State to the license holder. Thus, we shall have a new presumption of the State' ownership right to the extracted minerals. This transformation entails important legal consequence: the license holder's obligation to provide an adequate equivalent to the State.

The problem of specifying the bearers of public interests and antitrust paradox

Subsurface use relations include the State represented by the state bodies, on the one hand, and entrepreneurs, on the other hand. Subsurface management should not be understood as a delegation of public authority, because all license holders remain private commercial party.

The title of subsurface use is based on special concessionary act. Currently, the concession is widely used in all countries in the various legal forms: "permission" (Permit), "license", "rent" (World Petroleum Arrangements 1991). This is nothing but a specific form of expression of the State's will to grant a right, which reflects the level of the coun-try's legal system development.

In Russia the concessionary act can be understood in a broad sense as a special type of State's permission in the form of granting an exclusive authority (the constitutive succession by transferring subsoil blocks for "use") under certain conditions for purposes of receiving profit and realization of socially important functions arising from the con-tent of such exclusive authority.

In this field with its merging public and private interests and resources, first of all, decentralized legal means are demanded, which legislate for the needs and interests of each person, each indigenous group living in the areas involved.

In view of a global world tendency of "privatization of the state functions"(Schoch 1994), it is difficult to im-agine the government authorities acting in this sphere as a single unitary subject: economic laws objectively require a great number of independent legal entities, instead of single public body. But instead of distributing unallocated subsoil reserve fund between separate economic entities, the state creates a particular legal regime for the civil subsurface block turnover.

On the other hand, most of the license holders are carrying out their business activity on the basis of risk (Alla-nina, Khairullina 2016). Therefore, an appropriate insurance mechanism should be included in the conditions of the mining license agreements.

For the purposes of risk distribution and for synergy effect many mining companies may also integrate. The synergy effect is achieved by the joint action of elements of the system. So, further study of the subsoil legal relation-ships should take into account the role of synergy effect in subsurface right realization with forming on its basis the mining capital. Now it is the most interesting sphere where real and obligatory elements meet.

However, a proper implementation of the principle of the liberty of economic activity, which assumes the right to associations, should be performed with respect for the “principle of equality before the law” under paragraph 1 of Article 19 of the Constitution of the Russian Federation.

Equality assumes, first of all, an identical legal regime for the functioning to ensure efficient business operation and growth. At the same time, as R. Bork notes in "An antitrust paradox", it is impossible to substitute equality for factual equality (Bork 1993). In his opinion, the anti-monopoly activity of the State is paradoxical: if the legally com-pliant, economic activity of a certain subject results in outstanding success so that all his competitors go bankrupt, then this too "successful" activity is forbidden by law. R. Bork illustrates socio-political meaning of the paradox as a glaring injustice and senselessness, by comparison with a sports competition, in which it is forbidden to win (Epstein 2014). Therefore, in his opinion, this partial substitution of formal equality for the factual equality is a refusal of market econ-omy in general (Hovenkamp 2014).

Now, we also can observe a problem of specifying the bearers of public interests in connection with the subsur-face use (Dudikov 2016). At present, they are not concretized in the relevant agreements signed with the subsoil users, and also they are not concretized normatively. Meanwhile, the State must be interested not only in receiving tax and other revenues from the subsurface management, but also in realization of public interest in the form of area develop-ment and taking into account the interests of the population. In view of vital importance and multipurpose role of the subsoil as a public property of the multiethnic Russian people, the bearers of public interest have to change the status of passive observers to the status of active legal persons.

Conclusion

In summary, we can say, that all kinds of subsoil use right have a property nature, the nature of the right in rem, except for the mineral right. Legal regulation, as a type of the State's impact on subsoil relations by the means of the law, should be undertaken on the basis of separate complex legal institution, and on the optimal correlation of the private and public interests.

The mineral rights are the "rights to value", so the granted capital in the form of the subsoil block means a cer-tain resource of a rarity. We deal with a special type of valuable property, the effect of which should concern each citi-zen in the territory involved. In this regard, we need further improvement of subsurface management system, including specially empowered State Agency controlling private mountain enterprises. De lege ferenda we need the legal deter-mination of a list of entitled persons whose rights and interests can be affected by the mining project, and the citizens living on the engaged area must be added in that list. The forms of consulting interests of persons, whose rights and legitimate interests are affected by mineral rights, could be expressed in various ways, up to payments from the subsoil users and development of a social infrastructure. So, the appropriated provisions of the Law on subsoil need to be amended.

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