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The right to use subsoil as an object of civil rights: theory and practice

The article is devoted to the study of the legal nature of the right to use subsoil as a property right. The article concerned with a general legal problem of recognition of a property right as an object of civil rights and main positions of scientists on this issue. The author made an analysis of the signs of the right to use the subsoil and came to a conclusion that it should be recognized as object of civil rights in the legal relationship of its transition.

The article concludes that right to use subsoil has a real nature in absolute legal relations to unlimited circle of persons and liability nature in relative legal relationship with the state. The study of legal regulation on the transfer of the right to use subsoil and the analysis of judicial practice are conducted. The author designated a problem of withdrawal of basic capital - the right to use subsoil block from the bankruptcy estate of subsoil user and noted contradictions in the legislation. The recommendations to improve the RF Law «About subsoil» were made and also the contractual forms for law enforcement practice were proposed as a result of the research.

Keywords: right to use subsoil, mining of minerals, subsoil use, property right, succession.

Право пользования недрами как объект гражданских прав: теория и практика

Статья посвящена исследованию правовой природы права пользования недрами как имущественного права. В статье отмечается общеправовая проблема признания имущественного права как объекта гражданских прав и приводятся основные позиции ученых по данному вопросу. Автор провел анализ признаков права пользования недрами и пришел к выводу о признании его объектом гражданских прав в правоотношениях по его переходу.

В статье делается вывод о вещной природе права пользования недрами в абсолютных правоотношениях к неограниченному кругу лиц и обязательственной природе в относительных правоотношениях между недропользователем и государством. Проведено исследование правового регулирования отношений по переходу права пользования недрами и анализ судебной практики. Автором обозначена проблема вывода основного капитала – права пользования участком недр – из конкурсной массы недропользователей и отмечены противоречия в законодательстве. В

результате исследования сделаны рекомендации по совершенствованию Закона РФ «О недрах», а также предложены договорные формы для правоприменительной практики.

Ключевые слова: *право пользования недрами, добыча полезных ископаемых, недропользование, имущественное право, правопреемство*

The right to use subsoil on an equal basis with a subsoil block is one of the most valuable and key objects of legal relations in the subsoil use system. Despite the high demand from the practical point of view for the market relations the legal nature of subsoil use right very fragmentarily studied by the civil law science.

The right to use subsoil is a property right. However, the legal nature of the property rights as a special type of property considered in the literature are very contradictory.

Many (G.F. Shershenevich, D.I. Meyer, M.N. Malein, A.V. Goloviznin, V.A. Belov, A.O. Rybalov) deny unrealistic legal benefits and point out the absurdity of the construction of the overlay of the right to the right to the same object in the real life, which can be infinite.

However, the majority of jurists (D.V. Murzin, I.T. Gumarov, A.S. Jabaeva, etc.) recognize the subjective right as an independent object of civil rights in virtue of direct indication in law (the art. 128, 131, 132, 336, 358.1, 382-390, 454, 446, 447, 454, 572, 826, 1013 of Civil Code of the Russian Federation, etc.). The economic cycle and the value of property rights is an objective reality, legalized by judicial practice¹. The convenience of this construction of legal relations in practical application is certainly.

Experts disagree about the nature of such legal relationships and the nature of right as an object. According to K.N. Annenkov, incorporeal things are rights to demand of others anything [1; p.266]. K.D. Kavelin pointed out that subjective rights is an opportunity to perform an action which benefits the subject [2; p.3]. Real rights can not be independent objects of civil rights, because its inextricably linked with things, follow its and have no other legal form for transfer than forms of contracts for the transfer of things. A property right can be the object of civil rights in its pure form only when it acquires the ability to exist separately from other objects, represents self-worth and separateness from its host, which allows these objects to freely go in the civil turnover. Obligations and exclusive rights have above characteristics of the property.

The majority of jurists V. V. Vitryansky, Y. V. Romanets, A. N. Lysenko, E. J. Tuktarov, A. S. Yakovlev et al. admit only the emergence of relative, obligatory rights to rights as objects which are associated with the assignment (cession) of paid or free, as reflecting the character and content of relevant property rights [3; p.36]. Transactions to property rights can be: purchase and sale, exchange, gift,

¹See: the determination of the Supreme Arbitration Court of the Russian Federation of 25.02.2011 No. VAS-1181/11 [Electronic resource] // The document was not published. The access is from the LRS Consultant Plus. The date of last visit is June 28, 2017.

trust management, pledge. However, the very mechanism of the transition of law in these transactions should be based on the norms of cession.

Signs for the recognition of property rights as an object of civil rights, in addition to reference in the act, discreteness and systemic nature, are material value in terms of monetary valuation and transferability, i.e. isolation and independence from the subject [4, p.33]. The right to use subsoil has both attribute with the exception of the right to use subsurface resources for the production of common mineral resources, ground waters and the distribution of associated waters, arising from articles 19 and 19.1 of RF Law No. 2395-1 of February 21, 1992 "About Subsoil", because its can not be alienated by themselves, are a kind of limited proprietary rights to the subsoil that are inextricably linked with the rights to a land block or the basic right to use subsoil arising from another special factual composition.

According to the part 2 of the article 2.1 of the RF Law "About Subsoil", the right to use subsoil is the object limited in the civil turnover: "the right to use subsoil may be alienated or transferred from one person to another insofar as their turnover is permitted by federal laws"² (the direct indication in law). The article 17.1 of the RF Law "About Subsoil" defines cases of transfer of the right to use subsoil, supplementing in the part 7 the following: "The right to use a subsoil block can not be transferred to third person, including in the order of assignment of rights established by civil law, provided for by this Law or other federal laws"³. In other words, in cases of the concession (cession) provided for by law, the right to use subsoil is permissible. Note that the license for the right to use subsoil is not an object of civil rights, its turnover is expressly prohibited in the part 8, article 17.1 of the RF Law "About Subsoil", because it is an administrative document certifying the right to use subsoil.

The discreteness of the right to use subsoil consists of two aspects: 1) the separation from other legal constructions of property rights on grounds of origin, conditions of implementation and termination, and also the content; 2) the isolation from the personality of the subject.

The content of the right to use subsoil can be different. The art. 6 of the RF Law "About Subsoil" provides six types of subsoil use:

1) the regional geological study without significant disruption of the integrity of the subsoil;

2) the geological study, including the search and evaluation of mineral deposits, and geological study and assessment of the suitability of subsoil blocks for the construction and exploitation of underground structures not related to the extraction of minerals;

3) the exploration and extraction of minerals, including the use of waste from mining operations and associated of processing industries, also the placement in a strata associated water and water used by subsoil users for their own

² About subsoil: the law of the Russian Federation of February 21, 1992 No. 2395-1 (as amended on July 3, 2016) // The Russian Newspaper. № 52. 15.03.1995.

³ Ibid.

production and technological needs in the case of exploration and production of hydrocarbon raw materials;

4) the construction and exploitation of underground structures not related to the extraction of minerals;

5) the formation of specially protected geological objects that have scientific, cultural, aesthetic, sanitary and other significance (scientific and training grounds, geological reserves, nature reserves, nature monuments, caves and other underground cavities);

6) the collection of mineralogical, paleontological and other geological collection materials."⁴

All types of rights to use subsoil represent the possibility of extracting useful properties of a subsoil block: its resources, spatial capabilities, the geological information about it and other properties that have scientific, cultural or aesthetic value. The articles 10.1 and 20 of the RF Law "About Subsoil" exhaustively establish special legal facts that generate and terminate the right to use subsoil (and not the grounds for granting or withdrawing a license).

The material value of the right to use subsoil is obvious and consists in the possibility of consuming the beneficial properties of the subsoil block. The value of the right to use subsoil is usually calculated depending on the properties of the subsoil block, its location, etc. [5; p.64].

The independence of the right to use subsoil from the subject is the possibility of being alienable. The legislator completely limited the subsoil blocks in the turnover and directly permitted the turnover of the rights of use for them. Another issue is that the law restricts the circle of persons, making special demands on persons pretending to acquire the right to use subsoil, which are established in art. 9, 17.1 of the RF Law "About Subsoil".

Consistency of rights to use subsoil is expressed in its relevance to the object of civil rights - property law according to article 128 of the Civil Code of the RF.

According to D.G. Khramov the right to use subsoil has the proprietary character in legal relations arising from an act of state authorities, and the obligation character in legal relations arising from a production sharing agreement [6; P.14]. A.V. Sapozhnikov defines the right to use subsoil as a property right, which belongs to the category of limited proprietary rights and is the object of civil legal relationship [7; p. 25]. M.A. Yurlova assumes that the right to use subsoil more tends to the obligation right, therefore the change of persons in the obligation is entirely permissible [8; p. 212].

On the one hand, the right to use subsoil is an obligation right of the relative legal relationships between the subsoil user and the state arising from actual compositions specified in the article 10.1 of the RF Law "About Subsoil", articles 2 and 6 of the Federal Law of 30.12.1995 No. 225-FZ "About the Production Sharing Agreement", because both the license and the production sharing agreement fix the form of contractual relations in accordance to the article 12 of the RF Law "About Subsoil".

⁴ Ibid.

In some cases, the right to use subsoil is also a duty of the subsoil user, for the non-fulfillment of which the right to use subsoil can be terminated (eg, the non-use of the subsoil block during certain periods of work commencement).

On the other hand, in the absolute legal relationships between a subsoil user and an unlimited number of persons, the right to use subsoil acquires the features of a limited real right: the production from the right of ownership, the absoluteness of the right, the right of following (inextricably linked with the immovable property - the subsoil block), special ways of protecting real rights. So, for example, the court granted a claim to reclaim a subsoil block (vindication) from another's unlawful possession in favor of the subsoil user⁵. Another example, the court satisfied the claim of the subsoil user to reclaim property from someone else's illegal possession and force to release the mining allotment, stop work on his territory⁶.

The right to use subsoil is very close in nature to the right of lease. In this case, the right to lease can be the object of legal relations, for example, sale, pledge. The problem of differentiation of obligations and proprietary rights is currently relevant, including in disputed rental, pledge and hired relations.

On the basis of the above, the author comes to the conclusion that the nature of the right to use subsoil is an obligation right in the relative relations to the use of subsoil resources between the state and the subsoil user, which has a contractual form according to the article 12 of the RF Law "About Subsoil", that is not named in the Civil Code of the RF, and is a real right in the absolute legal relationship of a subsoil user with an unlimited number of persons. As an obligation right in relative legal relations, the right to use subsoil can be the limited object of civil rights in turnover in legal relations about the transfer of this right. The cases of transfer of the right to use subsoil provided for by the art. 17.1 of the RF Law "About Subsoil" can be divided into two groups: universal legal succession and singular legal succession.

The reorganization of a subsoil user in the form of transformation, merger and interconnection to a subsoil user of another person is a form of universal legal succession. At the merger, the right to use subsoil is transferred on the basis of the deed of transfer to the new person. The transformation implies the automatic transfer of rights and responsibilities. The interconnection in the marked case in itself can not be a legal relationship with respect to the transfer of the right to use subsoil from the subsoil user to himself, therefore, the indication of this case in the law is unreasonable.

The following cases should be recognized as a singular succession.

1. The transfer of subsoil use rights takes place on the basis of an act of transfer in cases of reorganization in these forms: an interconnection (a termination of a subsoil user by an interconnection to another person), a separation and an

⁵ See: the decision of the Federal Arbitration Court of the Urals District of 16.05.2007 № F09-3631 / 07-C6 in case No. A60-31577 / 06 [Electronic resource] / The document was not published. The access is from the LRS Consultant Plus. The date of last visit is June 28, 2017.

⁶ See: the decision of the Twentieth Arbitration Appeal Court of 10.08.2010 No. A62-8187 / 2009 [Electronic resource] // Electronic justice -URL: <http://ras.arbitr.ru/>. The date of the last visit is June 28, 2017.

division. Moreover, the law establishes additional conditions for the transfer of the right to use subsoil. Thus, the legislator provides that legal entity to which a subsoil user joins shall satisfy the requirements for subsoil users, and also have qualified professionals, necessary financial and technical resources for safe execution of works. The another additional condition, which is less burdensome, is established for the reorganization in the form of division and separation, this is only the will of the newly created legal entity to continue operations in accordance with the license for the right to use the subsoil block. However, the likelihood of a shortage of equipments, specialists and finances is greater in the cases of division and separation of legal entities than interconnection.

2. The acquisition of the property complex of a subsoil user-bankrupt in accordance with Federal Law No. 127-FL of October 26, 2002 "About insolvency (bankruptcy)". The contract form of sale of the enterprise is ideally suited for this case, however in practice very often only the property is sold, and the right to use the subsoil is "assumed" and not included in the bankruptcy estate.

3. The conclusion of a concession agreement, lease agreement and other contracts for centralized systems of hot water supply, cold water supply and (or) drainage, certain facilities of such systems provided for by the Federal Law "About Water Supply and Sanitation" is a special succession by law, therefore contractual grounds are not required.

4. The legal regulation of the transfer of the right to use subsoil given by the legislator with regard to production sharing agreements is most consistent with the norms of the Civil Code of the RF. "The investor has the right to transfer all or part of his rights and obligations under the agreement to any legal entity or any citizen (individual) only with the consent of the state provided that these persons have sufficient financial and technical resources and management experience necessary to perform work under the agreement. The investor can use his property and property rights as collateral to secure his obligations under contracts concluded in connection with the implementation of the agreement with the consent of the state and while observing the requirements of civil legislation"⁷.

5. The transfer of the right to use subsoil to a new legal entity with a share in the capital of not less than 50% of the subsoil user and established by it for continuing operations in the given subsoil block, and the transfer of rights between daughter companies of one parent company, between the parent and daughter companies, and vice versa. In these cases, the legislator specifies additional conditions for the transfer of rights – the simultaneous transfer of property necessary to carry out the activities specified in the license to use the subsoil block, including from the property of the facilities located within the subsoil block. For a newly established legal entity also stated requirement of the presence of the necessary permits (licenses) to carry out activities related to subsoil use. There is no mention of the transfer of the right to use as an action-legal facts for a new legal entity from which it may be concluded that the right moves on the basis of the

⁷ About production sharing agreements: feder. Law of 30.12.1995 No. 225-FZ (as amended on 05.04.2016) // The Russian Newspaper. № 5. 11.01.1996.

decision to establish a new legal entity and the transfer of property. The investigated cases are united by us into one subgroup because their economic essence is the redistribution of the subsoil user's capital to a specially established person to optimize the work, or between related persons forming in essence one economic entity - the holding. Due to the fact that the legislator does not specify the legal form of transferring the right to use subsoil for these cases, the choice of a suitable form should make practitioners.

Meanwhile, Article 66.1 of the Civil Code of the RF excludes the possibility of making property rights as a contribution. In practice, the right to use subsoil and property for work are transferred to a created person, a daughter or a parent company free of charge on the basis of a decision of the management bodies of a subsoil user to create a new legal entity, or a decision to transfer the right to use the subsoil and transfer acts of the necessary property. At the same time, the gratuitous transfer of assets between commercial entities - the daughter and parent companies - is legalized by the p.11 of the p. 1 of the art. 251 of the Tax Code of the RF and judicial practice⁸. Contracts of sale and lease with minimum payments are also distributed in relation to the property necessary for the work.

However, in most cases the subsoil user expresses his will to transfer the right to use the subsoil simply by submitting an application about consent to reissue the license to the licensing authority according to acts about re-issuing the license (eg. the order No. 315 of the Ministry of Natural Resources of Russia dated 29.09.2009). Some courts recognize such a statement of consent to reissue a license as "a deal to refuse civil right established by the articles 11, 12 of the Civil Code of the RF"⁹, others think that is an integral element of the actual composition of the transaction to change the license holder, i.e. re-registration of a license for the right to use subsoil¹⁰, the third categorically deny civil-law significance¹¹. The assignee must give consent to the authority to accept the rights and obligations of the previous subsoil user in addition to the consent of the subsoil user specified above. There is a very complicated factual composition, which is used by unscrupulous persons who withdraw basic capital from the assets of a person with signs of insolvency. Thus, decisions of the management bodies of the entity about transfer of the right to use subsoil and property are recognized as invalid as suspicious transactions in the suit of the arbitration administrator, however, the consequences of the invalidity of the transaction can not concern the authority which does not consent to this transaction to transfer rights and obligations, because this is not

⁸ See: the decision of the Presidium of the Supreme Arbitration Court of the Russian Federation of December 4, 2012 No. 8989/12 in case No. A28-5775 / 2011-223 / 12 [Electronic resource] // Electronic Justice -URL: <http://ras.arbitr.com/> The date of last visit is June 28, 2017.

⁹ See: the decision of the Seventeenth Arbitration Appeal Court of 16.12.2015 No. 17AP-6203/2015-GK in case No. A60-41580 / 2014. [Electronic resource] // Electronic justice -URL: <http://ras.arbitr.ru/>. The date of the last visit is June 28, 2017.

¹⁰ See: the decision of the Sixth Arbitration Appeal Court of 07.05.2010 No. 06AP-1463/2010 on the case No. A04-9106 / 2009 [Electronic resource] // Electronic justice -URL: <http://ras.arbitr.ru/>. The date of the last visit is June 28, 2017.

¹¹ See: the decision of the Federal Arbitration Court of the West Siberian District of 26.12.2012 in case No. A27-3978 / 2012 [Electronic resource] // Electronic Justice -URL: <http://ras.arbitr.ru/>. The date of last visit is 28.06.2017.

provided by the law. The authority has power only for reissuing the license, so the order to reissue the license remains legal and can not be canceled¹². Some courts do not consider the right to use subsoil as an asset and substitute the right for a license because the legislation is very intricate. As a result, the main asset of the subsoil user – the right to use the subsoil block won by the auction, freely passes to other persons without compensation and it does not get into the bankrupt estate¹³.

Thus, the existing practice does not take account the legal nature of the right to use subsoil as a property right and does not comply with civil law and the Law of the RF "About Subsoil", indicating the transfer and pass of the right to use subsoil as a legal relationship that generates a change in persons in the basic obligation. It should be recognized that such a situation arose because private and public regulatory foundations are unreasoned combined in the RF Law "About Subsoil", which doesn't compliance with the Civil Code of the RF and there is gap on the legal forms of transferring the right to use subsoil. The subordinate legislation have transformed the procedure for the re-registration of the license into a hybrid of the administrative procedure for a singular succession. However, the re-registration of a license is an administrative legal relationship for the certification of an already transferred property right in the framework of a civil legal relationship. These theses are based on the analysis of the content of the art. 17.1 and the clause 7 of the article 10.1 of the RF Law "About Subsoil", indicating as the basis for the emergence of the right to use subsoil - the transfer of the right to use subsoil, rather than reissuing the license. In addition, there are decisions in practice that recognize the right to use subsoil transferred before registration of the license¹⁴.

The elimination of this problem is necessary to supplement the article 17.1 of the RF Law "About Subsoil" with provisions based on the norms of the Civil Code of the RF regarding the indication of legal forms of transferring the right to use subsoil, for example, the purchase-sale of an enterprise (property complex), which includes the right to use subsoil and the necessary property for the use of a subsoil block (primarily underground facilities), or the transfer of a contract in accordance to the article 392.3 of the Civil Code of the RF and the simultaneous transfer of the necessary property under a contract of sale, lease or contribution. At the same time, it is necessary to provide for the form of expressing the consent of

¹² See: the decision of the Seventeenth Arbitration Appeal Court of 16.12.2015 No. 17AP-6203/2015-GK in case No. A60-41580 / 2014. [Electronic resource] // Electronic justice -URL: <http://ras.arbitr.ru/>. The date of the last visit is June 28, 2017.

¹³ See: the decision of the Third Arbitration Court of Appeal of 05.11.2013 in case No. A33-6472 / 2013 [Electronic resource] // Electronic justice -URL: <http://ras.arbitr.ru/>. The date of last visit is June 28, 2017. ; the decision of the Federal Arbitration Court of the East Siberian District of 14.10.2010 in case No. A58-6764 / 08 [Electronic resource] // Electronic justice -URL: <http://ras.arbitr.ru/>. The date of last visit is June 28, 2017.; the decision of the Federal Arbitration Court of the Far East District No. F03-6467 / 2010 on the case No. A37-1051 / 2009 [Electronic resource] // Electronic justice -URL: <http://ras.arbitr.ru/>. The date of last visit is 28.06 .2017; the decision of the Fifth Arbitration Appeal Court of 07.06.2016 No. 05AP-4103/2016 in case No. A51-3244 / 2010 [Electronic resource] // Electronic justice -URL: <http://ras.arbitr.ru/>. The date of the last visit is 28.06. 2017.

¹⁴ See: the decision of the Federal Arbitration Court of the Urals District No. F09-4921 / 05-C7 of 03.11.2005 in case No. A71-67 / 05 [Electronic resource] / The document was not published. The access is from the LRS Consultant Plus. The date of last visit is June 28, 2017.

the state as a creditor. Sale of the enterprise can be carried out as a result of foreclosure on the pledge of the enterprise. On the basis of these civil forms it is permissible to carry out an automatic re-registration of a license, if not to refuse licensing of subsoil use as an administrative barrier.

At the same time, the author allows these legal forms, taking into account the need to develop legislation on enterprises as objects of civil rights proposed in the literature (the recognition of movable property, the replacement of state registration for notarization of the transaction, the specification of characteristics and composition of the enterprise). Note that the pledge and turnover of the right to use subsoil in isolation from the property complex inextricably linked with the subsoil block, or the development of the fund market of licenses for the right to use subsoil is similar to the securities market, proposed by some authors [9; p.195–196], are inadmissible. Because it does not take into account the legal nature of the right to use subsoil, the problem of inseparable connection of an immovable complex and a subsoil block, the relationship between a former subsoil user and a new subsoil user, and the interests of the state as the owner of the subsoil.

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