

TOPICAL ISSUES OF THE IMPROVEMENT OF LEGAL REGULATION IN THE SPHERE OF SUBSOIL USE

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This article examines issues pertaining to the improvement of the legal regulation of subsoil use relations in the Russian Federation. It contains specific proposals on the improvement of subsoil use law. The purpose of the legal regulation of subsoil use relations shall be enshrined in the Russian Law “On Subsoil” according to the objectives of the state energy policy for subsoil use and state subsoil fund management. The Law “On Subsoil” needs to reflect the subsoil use goals of the state described in Russia’s Energy Strategy until 2035. It seems reasonable to include a section containing basic terms and definitions used in the subsoil legislation into the Law “On Subsoil”. It is important to make sure the Law “On Subsoil” contains a rule stating that a license agreement is an integral and mandatory part of a license to help streamline the legal regulation of subsoil use licensing. It is advisable to reinforce the Russian Law “On Subsoil” and codify state control and regulation principles.

Keywords: energy law, extraction of energy resources; legal regulation of subsoil use, state regulation of subsoil use, licensing.

As aptly noted in legal literature on energy law, relations arising in the course of the exploration and extraction of energy resources are within the scope of energy law. It was pointed out by A.G. Lisitsin-Svetlanov, P.G. Lakhno, O.A. Gorodov, V.V. Romanova, R.N. Salieva [1]. At the same time, as correctly stated by A.G. Lisitsin-Svetlanov, the sphere of regulation begins with energy resource exploration and extraction relations [2].

It should be noted that social relations in subsoil use are a complex, multi-faceted phenomenon [3], these relations include those associated with subsoil site allocation, field development, and mining operations, in particular, the extraction of primary energy sources (oil, gas, coal). As aptly noted by V.V. Romanova, “natural specifics of energy resources are responsible for the special legal regime established for the energy facilities used for exploration, extraction, processing,

production, transportation, storage of various types of energy resources” [4].

The energy law doctrine also correctly states that the relations covered by the energy law include both private law and public law relations.[5]

The current Russian Law “On Subsoil” contains an entire section called *State Regulation of Subsoil Use Relations*. As per Article 35 of this law, the primary objective of the state regulation of subsoil use relations is to ensure mineral reserves replacement, efficient use, and subsoil protection for the present and future generations of the peoples of the Russian Federation. Key instruments and goals of state regulation have also been established. The state regulation of subsoil use relations is affected by control, licensing, metering, and state supervision. The goals of state regulation are as follows:

- Determining extraction volumes of main types of minerals for the current and future periods for the Russian Federation and its specific regions,
- Ensuring the development of mineral reserves and the preparation of reserve subsoil sites used for construction of underground structures not related to mineral extraction,
- Ensuring geological surveys of the territory of the Russian Federation, its continental shelf, the Antarctica and the World Ocean floor,
- Establishing quotas for supply of produced crude minerals,
- Introduction of subsoil use related payments, as well as controlled pricing of specific minerals,
- Development of rules and regulations for subsoil use and protection.

As aptly noted in literature, there have been very significant changes both in Russia and globally in the years since adoption of this law (despite multiple amendments and clarifications) [6]. Under the existing social and economic conditions, both the instruments and the goals of state regulation obviously need to be updated.

In the setting of economy modernization, issues of efficient control in all aspects of

society are more important than ever. Control in the field of subsoil use is highly specific due to numerous social and economic factors, including government ownership of the subsoil and subsoil resources (until they are extracted from the subsoil), the fact that many natural resources are exhaustible (oil, gas, solid minerals), specific nature of metering and assessment of subsoil resources (mineral reserves), the need to consider the interests of the present and future generations while using subsoil resources (primary energy resources, including oil, gas), etc.

To determine the main areas of control improvement and identify issues of subsoil use legal regulation, we shall consult strategic and program documents: Russia’s Energy Strategy until 2035, Geology Industry Development Strategy until 2035; Fundamental State Policy of Environmental Development of the Russian Federation until 2030; Fundamental State Policy of Crude Minerals and Subsoil Use; Russian Long-Term State Program for the Exploration of Subsoil and Mineral Reserves Replacement Based on Minerals Consumption and Replacement Balance; Energy Security Doctrine.

It seems that the purpose of the legal regulation of subsoil use relations shall be enshrined in the Russian Law “On Subsoil” according to the objectives of the state energy policy for subsoil use and state subsoil fund management.

Energy Strategy until 2035 also specifies subsoil use objectives of the state. They are as follows:

- To create conditions for sustainable, effective, and environmentally friendly mineral reserves replacement with an average annual (for five years) balance reserves gain to average annual extraction ratio for primary fuels of at least 1,
- To expand exploration, geological survey, and other activities aimed at the extraction of hard-to-recover reserves and unconventional crude hydrocarbons, including the development of the Arctic shelf fields,
- To develop the Russian independent subsoil use service and engineering market.

Therefore, it seems reasonable to include the subsoil use objectives of the state from the Energy Strategy in the Law “On Subsoil”.

The implementation of the objectives stated in programs and strategies shall have corresponding legal coverage, and it would be helpful if the key implementation mechanisms were enshrined in legislation. The need to improve the subsoil laws was stated in Resolution of the Federation Council of the Federal Assembly of the Russian Federation No. 546-CФ “On the Implementation of Measures for Mineral Reserves Replacement and Geological Survey of Russian Subsoil” dated November 23, 2018. The specified areas of the improvement of the subsoil laws included:

Narrowing down the regulations pertaining to subsoil geological survey and mineral reserves replacement in the Russian Federation,

Establishing uniform criteria for decisions on the transfer of subsoil site use rights to another subsoil user, etc.

Let us specify the key provisions that shall be enshrined in legislation. For instance, in order to improve control, promote the implementation of advanced extraction technologies, and intensify prospecting and exploration operations, legal regulation can be performed at the level of state regulation by adopting relevant regulatory acts, as well as at the level of corporate regulations. To implement the principles of end-to-end control of fuel and energy resource deposits at all stages, from prospecting to termination of production and decommissioning of the field, the Russian Law “On Subsoil” shall contain a rule stating that production activities (technological process) aimed at oil recovery rate increase are subsoil use related activities (technological process). We believe that such a rule will create an opportunity to establish tax benefits for application of new technologies aimed at oil recovery rate increase while carrying out subsoil use related activities (technological process). The preparation of engineering designs and other design documents related to the use of subsoil play an important role in companies’ business activities involving field development. On May 31, 2020, amendments

were introduced to Article 23.2 Part 1 of the Law “On Subsoil” (Federal Law No. 396-ФЗ dated December 2, 2019) providing a legislative framework for the development of technologies for geological survey and extraction of hard-to-recover minerals. As per the current revision of the Law “On Subsoil”, the scope and content of mineral deposits development engineering designs are defined by the regulations on the preparation of mineral deposits development engineering designs depending on the type of minerals established by the federal authority for state subsoil fund management subject to approval of the executive bodies authorized by the Government of the Russian Federation. Order of the Ministry of Natural Resources and Environment of Russia No. 639 dated September 20, 2019 approved the Regulations on the Preparation of Hydrocarbon Deposits Development Engineering Designs. The regulations establish requirements for the scope and content of engineering designs for hydrocarbons deposits development. A content review of the Regulations showed that the mineral extraction process needs to be defined by law.

A special focus should be put on the issues of the legal regulation of such part of subsoil use relations as the development of deposits containing shale formation hydrocarbons, superviscous oils, and naturally occurring asphalts, as well as deposits of hard-to-recover reserves. As for the issues pertaining to regulation of relations pertaining to the development of deposits containing shale formation hydrocarbons, superviscous oils, and naturally occurring asphalts, first, we need to consider the meaning of the corresponding terms: *shale formation hydrocarbons; superviscous oils; naturally occurring asphalts; hard-to-recover and unconventional hydrocarbon reserves*, and determine what kind of subject matter of legal relations they describe. In general, literature and certain regulatory sources tend to consider hydrocarbons to be a type of minerals. For instance, Article 8 of the Model Subsoil and Subsoil Use Code for the CIS Member States says that mineral resources

are minerals, hydrocarbons, and subsurface water contained in the subsoil which, due to their chemical composition and physical properties, can be used for material production and consumption directly or after processing [7]. The same definition is used in Article 1 on the main concepts of the Law of the Republic of Kazakhstan “On Subsoil and Subsoil Use” [8]. Unfortunately, the Russian Law “On Subsoil” does not contain basic terms and definitions to be used for regulation of subsoil use relations. Some of the terms used for the purposes of regulation of relations associated with mineral tax imposition and collection are defined by the Tax Code of the Russian Federation. First, *crude hydrocarbon* is defined as a type of extracted mineral. The Tax Code of Russia also defines the term *hydrocarbon accumulation* as a reserves accounting item of one of the types of minerals specified in Article 337 Clause 2 Paragraph 3 of the Tax Code of the Russian Federation (except for associated gas) for the state balance of mineral reserves at a certain subsoil site that cannot be broken down into further accounting items. The above examples suggest that it would be useful to define such terms as *hydrocarbons*, *minerals*, *crude hydrocarbons* for the purposes of the regulation of the relations associated with subsoil use activities, and to outline the technological processes of crude hydrocarbons extraction from the subsoil and conditioning in the Russian subsoil laws.

Another area of the state regulation of subsoil use is licensing. Here, we can draw attention to a number of issues that require legal regulation improvement. The sphere of subsoil use belongs to a real economy sector.

The Russian subsoil use system is permit-based, since subsoil use rights are granted under specific documents issued by an authorized state body. Practice has shown that the existing subsoil use licensing system is not perfect. In practice, questions arise related to, among other things, determination of the legal nature of a license and license agreements attached thereto, establishment of rights and obligations of subsoil users, material license terms, liability of the parties to licensing relations, as well as determination of the rights of state bodies

adopting decisions to terminate the license. The law does not define the capacity and conditions of entering into, scope, material terms, rights and obligations, liability of the parties to licensing relations. The existing subsoil site use licenses (license agreements) can hardly be considered civil law agreements, because subsoil use relations in general are beyond the scope of civil law regulation. As quite rightly stated in literature, “apart from a license confirming its holder’s right to use a subsoil site, the authorized state body and the subsoil user may enter into an agreement establishing the terms and conditions of such use and the parties’ obligations under the agreement (Article 11 of the Law “On Subsoil”). However, as such an agreement is optional, it failed to gain substantial value in the legal regulation mechanism” [9].

Model legislation of the CIS member states also contains provisions on execution of a license agreement. For instance, Article 58 of the Model Subsoil Code [10] stipulates that the authorized government bodies and the license holder may enter into an agreement establishing the terms and conditions of subsoil site usage, as well as the parties’ obligations under the agreement. This agreement forms an integral part of the license. It makes sense to supplement the Law “On Subsoil” with a rule stating that a license agreement is an integral and mandatory part of the license to help streamline the legal regulation of subsoil use licensing.

Subsoil use law provisions on state accounting and supervision need to be updated as well. An analysis of the regulatory enactments and case law showed that this area lacks a uniform set of terms and definitions (e.g., regional regulations still contain such terms as *state environmental monitoring*, although in fact state environmental supervision is regulated in accordance with the federal laws); there is no detailed list of types of regional state environmental supervision; rules are scattered: they are provided in different articles of the same enactment or in different enactments. As the problem of efficient management of natural resources and environmental protection become increasingly urgent and significant, the government shall address it adequately and adopt, first

of all, the directly applicable Federal Law “On the State Policy for the Management of Natural Resources and Environmental Protection”.

The experience of subsoil use legal regulation in the CIS states could help solve the problem of creating an effective control system. For instance, the Law of the Republic of Kazakhstan “On Subsoil and Subsoil Use” [11] contains Chapter 2 *State Regulation of Subsoil Use* where the mandate of the Kazakhstan Government and powers of the competent bodies are established. In particular, it describes the mandate of the authorized body for oil and gas, the authorized body for state support of industry and innovation, the authorized body for subsoil exploration and use and other specialized authorities. Notably, the mandate of the authorized body for state support of production and innovation includes: the approval of the provision on transregional committees for the exploration and extraction of common minerals; the development and approval of technical procedures, technical reference documents in the field of subsoil exploration and usage, as well as in the sphere of subsoil use within its mandate; the development and approval of provisions on the State Committee for Reserves; the development and approval of standardized

rules on efficient and comprehensive subsoil usage during the exploration and extraction of minerals jointly with the authorized body for oil and gas; the development and approval of the procedure for the procurement of goods, services, and works for subsoil use operations jointly with the authorized body for oil and gas; the development and approval of the subsoil state monitoring procedure; the establishment of the procedure for qualifying production activities (technological process) of the entities performing industrial and innovation activities (technological process) as subsoil use related activities, etc.

In order to improve the subsoil use control system, we shall capitalize on the experience of creating a specialized authorized body for state support of industry and innovation.

Overall, in addition to the issues of the development of a standardized set of terms and definitions in the subsoil laws for effective state regulation of relations, the regulation of the technological process of mineral extraction from the subsoil, the development of criteria for the categorization of subsoil sites as hard-to-recover, etc., it is also advisable to enhance the Russian Law “On Subsoil” and codify state control and regulation principles. ■

References

1. A.G. Lisitsin-Svetlanov. Energy Law: Objectives of Further Development of the Sector / A.G. Lisitsin-Svetlanov // Legal Regulation in the Spheres of Electric Power and Heat Supply : materials of an international scientific and practical conference (Moscow, December 13, 2013) : collection of scientific articles. Moscow : Yurist Publishing House, 2013. P. 10–15 ; Lakhno P.G. Energy Law of the Russian Federation: Establishment and Development : monograph / P.G. Lakhno. Moscow : Publishing House of the Moscow University, 2014. P. 477 ; Gorodov O.A. Introduction to Energy Law : textbook / O.A. Gorodov. 2nd edition, revised and updated. Moscow : Prospekt, 2018. P. 222 ; Legal Regulation in the Energy Sector : Textbook / R.N. Salieva, I.R. Saliev, A.A. Popov, Z.M. Fatkudinov, Y.N. Chizhikov. Kazan : Publishing House of the Tatarstan Republic Academy of Sciences, 2015 ; Energy Law. General Part. Special Part : textbook / edited by V.V. Romanova. 2nd edition, revised and updated, Moscow : Yurist Publishing House, 2015. P. 655.
2. A.G. Lisitsin-Svetlanov. Energy Law: Objectives of Further Development of the Sector / A.G. Lisitsin-Svetlanov // Legal Regulation in the Spheres of Electric Power and Heat Supply : materials of an international scientific and practical conference (Moscow, December 13, 2013) : collection of scientific articles. Moscow : Yurist Publishing House, 2013. P. 10–15.
3. Salieva R.N. The State Control of Subsoil Use Relations in the Russian Federation / R.N. Salieva // Energy Law. 2014. No. 2. P. 16–19.

4. Romanova V.V. Introduction / V.V. Romanova // Energy Law. General Part. Special Part : textbook / edited by V.V. Romanova. 2nd edition, revised and updated, Moscow : Yurist Publishing House, 2015. P. 655.
5. A.G. Lisitsin-Svetlanov. Energy Law: Objectives of Further Development of the Sector / A.G. Lisitsin-Svetlanov // Legal Regulation in the Spheres of Electric Power and Heat Supply : materials of an international scientific and practical conference (Moscow, December 13, 2013) : collection of scientific articles. Moscow : Yurist Publishing House, 2013. P. 10–15.
6. Kryukov V.A. Subsoil Use in the Changing World / V.A. Kryukov // Environmental Law. 2016. No. 2. P. 33–39.
7. Model Subsoil and Subsoil Use Code for the CIS Member States (adopted in St. Petersburg on December 7, 2002, by Resolution 20-8 at the 20th plenary session of the Interparliamentary Assembly of the CIS Member States) // Newsletter. Interparliamentary Assembly of the Commonwealth of Independent States Member States. 2003. No. 30 (Part 2). P. 5–218.
8. The Law of the Republic of Kazakhstan “On Subsoil and Subsoil Use” (as amended and supplemented on April 11, 2014). URL: www.spinform.ru
9. Vinnitskiy A.V. Public Property / A.V. Vinnitskiy. Moscow : Statute, 2013. P. 730.
10. Model Subsoil and Subsoil Use Code for the CIS Member States (adopted in St. Petersburg on December 7, 2002, by Resolution 20-8 at the 20th plenary session of the Interparliamentary Assembly of the CIS Member States) // ConsultantPlus Reference Legal System.
11. The Law of the Republic of Kazakhstan “On Subsoil and Subsoil Use”. URL: <http://online.zakon.kz>.