

## CLIENT UPDATE

# DECREE OF THE RUSSIAN GOVERNMENT ON EXPROPRIATION OF LAND PLOTS REQUIRED FOR ACTIVITIES IN CONNECTION WITH SUBSOIL USE COMES INTO EFFECT

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The Decree of the Government of the Russian Federation approving the **Regulations on the Submission, Consideration and Approval of Applications for the Expropriation of Land Plots Required for Activities in Connection with Subsoil Use** (the “Regulations”)<sup>1</sup> came into effect on **April 14, 2013**.

Below, we briefly summarize:

- the reasons for issuing the Decree;
- the anticipated scope of the Decree and its limitations in addressing the issues that the majority of subsoil users have to deal with in the course of acquiring rights to land plots required for subsoil use; and
- the procedure for the submission and consideration of applications for the expropriation for state or municipal needs of land plots required for subsoil use, and the subsequent approval thereof as prescribed by the Decree.

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<sup>1</sup> Decree of the Government of the Russian Federation No. 294 on the Submission, Consideration and Approval of Applications for the Expropriation of Land Plots Required for Activities in Connection with Subsoil Use, dated April 3, 2013 (published on April 6, 2013 on the official law web portal: <http://www.pravo.gov.ru>) (the “Decree”).

## REASONS FOR ISSUING THE DECREE

At present, it is often the case that subsoil users are unable to start work on a subsoil site under a License<sup>2</sup> issued to them because they do not have rights to the land plot on which they should be undertaking such work, as it is owned by other legal entities or individuals. This issue arose after the following provisions were **deleted** from Russian legislation in 2007-2009, which had envisaged that a License is granted:

- **after** the consent of the land management regulatory authority or the owner is obtained for allocation of the land plot for subsoil use purposes;<sup>3</sup>
- **after** the consent of the owner of the land plot and that of any land users, tenants or lessees of the land plot ("Rightholders") is obtained to make the land plot available to carry out work related to geological survey and other subsoil use;<sup>4</sup>
- **simultaneously** with the granting of the right to use such land plots.<sup>5</sup>

In accordance with current legislation:

- the issuing of a License is not linked to the provision to a subsoil user of the land plot required for subsoil use, and does not guarantee that the subsoil user will subsequently be granted rights to such land plot;
- there is no obligation on the part of a Rightholder to make a land plot required for subsoil use under a License available to the subsoil user.

Therefore, a Rightholder may either provide a subsoil user with the land plot that it needs to undertake subsoil use under a License, or it may not. The courts do not rule in favor of petitions by subsoil users to compel Rightholders to make land plots available for subsoil use, since Rightholders are under no such obligation.<sup>6</sup> In the opinion of the courts,<sup>7</sup> to

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<sup>2</sup> Subsoil use license ("License").

<sup>3</sup> In accordance with Art. 11.6 of Law of the Russian Federation No. 2395-1 on Subsoil dated February 21, 1992 (the "Subsoil Law") in the version current until July 2, 2007.

<sup>4</sup> In accordance with Art. 11.6 of the Subsoil Law in the version current until January 10, 2009.

<sup>5</sup> Pursuant to paragraph 4.1 of Decree of the Supreme Soviet of the Russian Federation No. 3314-1 on the Procedure for the Implementation of Regulations on the Licensing of Subsoil Use dated July 15, 1992 (in the version current until July 2, 2007).

<sup>6</sup> The absence of an obligation on the part of a Rightholder to provide a subsoil user with the land plot that it needs to undertake subsoil use under a License is demonstrated by court practice (*see, e.g.*, Ruling of the Federal *Arbitrazh* Court ("FAC") of the Volga District dated August 11, 2011 in Case No. A55-22660/2010 and November 29, 2011 in Case No. A55-5407/2011).

<sup>7</sup> *See, e.g.*, Ruling of FAC of the Volga District dated August 11, 2011 in Case No. A55-22660/2010 and November 29, 2011 in Case No. A55-5407/2011.

acquire rights to a land plot required for subsoil use, but owned by other private entities or individuals (who do not wish to provide such rights for the purposes of subsoil use), subsoil users must first commence the process of expropriation of this land plot for state or municipal needs in accordance with Art. 25.1 of the Subsoil Law.<sup>8</sup>

In accordance with Art. 25.1 (6) and (7) of the Subsoil Law in its current version:<sup>9</sup>

- a land plot is expropriated from Rightholders for state or municipal needs **after an application from a subsoil user for the expropriation thereof is approved;**
- the procedure for the submission and consideration of applications and approval of the expropriation of land plots required for activities in connection with subsoil use **must be laid down by the Russian Government.**

The previous version of Art. 25.1 of the Subsoil Law<sup>10</sup> provided for the expropriation for state or municipal needs of land plots required for work related to geological survey and other subsoil use in the manner laid down in Russian legislation (land law and civil law).<sup>11</sup> However, there were no provisions in either land law or civil law specifying the procedure for the expropriation of land plots for state or municipal needs with respect to subsoil use, which made its practical application extremely difficult.

The adoption of the current version of Art. 25.1 of the Subsoil Law merely established the foundation for the subsequent laying down of regulations governing the procedure for approving the expropriation for state or municipal needs of land plots required for subsoil use, in order to make them available to subsoil users. In the opinion of some courts and

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<sup>8</sup> It is possible that, in the event that the Civil Code of the Russian Federation (the “Civil Code”) is amended to include provisions on mining easement (in the wording proposed in Draft Law No. 47538-6), subsoil users will also be able to use the institution of mining easement to acquire rights to such land plots. At present, the Land Code of the Russian Federation (Art. 23) contains provisions on public easement permitting the right of restricted use of another’s land plot without expropriation if it serves the public interest. However, using the institution of public easement to obtain rights to a land plot required for subsoil use could be problematic because of the circumscribed nature of the list of grounds for establishing public easement and the fact that it may only be established if so required in the service of the public interest (the interests of the state, local government or the local community). If the Civil Code is amended to include the above provisions on mining easement, subsoil users will acquire statutory grounds to acquire rights to the restricted use of a land plot specifically for subsoil use purposes without the need to prove that this is in the service of the public interest.

<sup>9</sup> The current version of Art. 25.1 of the Subsoil Law came into effect on January 19, 2012 (in accordance with Federal Law No. 222-FZ on Amendments to the Law of the Russian Federation on Subsoil and to Article 8.2 of the Federal Law on Implementation of the Forest Code of the Russian Federation dated July 18, 2011).

<sup>10</sup> Current until January 18, 2012.

<sup>11</sup> Furthermore, there was a provision for the expropriation of a land plot for state needs as a penalty for the refusal by a landowner to make the land plot available to a subsoil user for use of a subsoil site in the draft Federal Law on Subsoil (Draft Law No. 187513-4), which was tabled to the State Duma in June 2005, but was never enacted into law (withdrawn from consideration in March 2011). See: <http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=187513-4>.

regulatory authorities with which subsoil users had filed applications after the current version of Art. 25.1 of the Subsoil Law took effect, land plots could not be expropriated for state or municipal needs pursuant to Art. 25.1 (6) and (7) of the Subsoil Law because the mechanism/procedure for the consideration and approval of applications for the expropriation of land plots required for subsoil use that was to be established by the Russian Government as stipulated therein did not exist.<sup>12</sup>

The MNR<sup>13</sup> drafted, and the Russian Government issued, the Decree pursuant to Art. 25.1 (6) and (7) of the Subsoil Law. However, given its limited scope (*see below*), it is not clear, at the present time, in what cases the expropriation for state or municipal needs of land plots required for subsoil use will be allowed in practice.

### LIMITED SCOPE OF THE DECREE

As noted in the MNR announcement, the Decree “will make it possible to address issues related to performing activities necessary for subsoil use that have been impeded by an inability to acquire rights to the required land plots”.<sup>14</sup> However, despite this statement, it would appear that, for the reasons set out below, the Decree will not resolve all of the issues faced by subsoil users in the course of obtaining rights to land plots required for subsoil use.

First of all, the Decree provides for expropriation approval only in respect of land plots the use of **which is simultaneously required for subsoil use and connected with satisfaction of state or municipal needs**,<sup>15</sup> but not for land plots that will not be used by subsoil users to meet the needs of the state and municipal bodies. The Decree states that, for the purposes of expropriation, a land plot may be treated as being used to meet state or municipal needs if, for example, such land plot is necessary for the subsoil user to perform work for a geological survey of subsoil (including a regional geological survey) under a state contract signed with Rosnedra<sup>16</sup>, for the performance of international obligations of

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<sup>12</sup> See, e.g., Ruling of the 11th *Arbitrazh* Appeals Court dated December 24, 2012 in Case No. A55-21318/2012, Judgment of the *Arbitrazh* Court of the Chelyabinsk Region dated April 19, 2013 in Case No. A76-20693/2012.

<sup>13</sup> For the relevant drafts by the Ministry of Natural Resources and Environment (the “MNR”), see our Client Update dated February 1, 2013.

<sup>14</sup> See: <http://www.mnr.gov.ru/news/detail.php?ID=129858>.

<sup>15</sup> Pursuant to paragraph 1 of the Regulations, for the purposes of expropriating land plots required for subsoil use, “state or municipal needs” are defined in accordance with Art. 3 of Federal Law No. 94-FZ on Placement of Orders for the Procurement of Goods, Work and Services for State and Municipal Needs dated July 21, 2005.

<sup>16</sup> Federal Agency for Subsoil Use (“Rosnedra”).

the Russian Federation, or for the implementation of federal or regional special-purpose programs.<sup>17</sup>

At this time, it is also **unclear how the Decree will be applied in practice**. For example, the following questions remain unresolved:

- will expropriation be approved under the Decree for land plots on which subsoil users do not intend to perform work for a geological survey of subsoil under state contracts, perform international obligations of the Russian Federation, implement federal or regional special-purpose programs, or to otherwise meet state or municipal needs?
- how broadly will the construction “to meet state or municipal needs” be interpreted in practice (*e.g.*, will it be deemed for the purposes of the expropriation of a land plot under the Decree that state or municipal needs may be met if additional revenues are received by the federal and regional budgets from the subsoil user that acquired such land plot in the form of lease payments, payments for subsoil use and other taxes and levies)?

Furthermore, the Decree could effectively limit the practical scope of Art. 25.1 of the Subsoil Law which, in conjunction with the provisions of land legislation on expropriation of land plots for state or municipal needs, permitted a broad interpretation of state or municipal needs allowing for the expropriation of land plots for subsoil use.

Secondly, the Decree governs the provision of land plots to subsoil users **only up until their expropriation for state or municipal needs is approved**. Therefore, the expropriation and provision per se of land plots to subsoil users, and coordination with Rightholders on this matter continue to be regulated only by the general provisions of land law and civil law on expropriation of land plots for state or municipal needs, which:

- do not expressly provide as a ground for the expropriation of land plots for state or municipal needs the need to carry out activities on such land plots in connection with subsoil use;
- primarily accommodate the interests of Rightholders, making the process of the expropriation of a land plot for state or municipal needs and its subsequent provision to a subsoil user **very time-consuming for such subsoil user<sup>18</sup> and expensive for the state to perform the expropriation.**<sup>19</sup>

<sup>17</sup> Pursuant to paragraph 3 (b) and (r) of the Regulations.

<sup>18</sup> In accordance with Art. 279.3 of the Civil Code, the owner of a land plot must be given written notice of the expropriation of the land plot **not less than one year** prior to the impending expropriation by the agency that has approved the expropriation (the enforced purchase of the land plot before the expiration of one year from receipt by the

## SUBMISSION AND CONSIDERATION OF APPLICATIONS FOR THE EXPROPRIATION FOR STATE OR MUNICIPAL NEEDS OF LAND PLOTS REQUIRED FOR SUBSOIL USE, AND THE SUBSEQUENT APPROVAL THEREOF AS PRESCRIBED BY THE DECREE

In accordance with the Regulations, to acquire rights to a land plot required for activities in connection with subsoil use, a subsoil user may file an application for the expropriation of such land plot from the Rightholder for state or municipal needs (“Application”)<sup>20</sup> with the following governmental agencies:

- the competent governmental authority of the relevant constituent entity of the Russian Federation (for land plots required for use of subsoil sites of local importance); or
- Rosnedra (for land plots required for use of other subsoil sites).<sup>21</sup>

A subsoil user may only file an Application if:

- it does not have rights to the respective land plot or any opportunity to acquire such rights any other way (other than by expropriation); and
- it has a duly approved technical design for field development (or other design documentation for the performance of work in connection with the use of a subsoil site).<sup>22</sup>

Following consideration of the Application and the documents appended thereto the Competent Authority approves the expropriation or rejects the application for expropriation of the land plot. If the expropriation is approved the land plot is transferred to the ownership of the state (federal or of a constituent entity of the Russian Federation)

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landowner of such notice shall only be permitted with the consent of the owner). The decision approving the expropriation must also be registered with the agency responsible for the registration of rights to the land plot (Art. 279.4 of the Civil Code).

<sup>19</sup> Pursuant to Art. 281.2 of the Civil Code the purchase price of the land plot is made up of the market value of the land plot and the immovable property located on it, as well as all losses suffered by the owner by the expropriation of the land plot, including losses borne in connection with the premature termination of his obligations to third parties, including lost profit.

<sup>20</sup> Pursuant to paragraph 3 of the Regulations, the form of the Application is approved by the MNR (not currently approved).

<sup>21</sup> Rosnedra and the competent governmental authorities of constituent entities of the Russian Federation that consider the Applications and approve the expropriation of land plots for subsoil use purposes are hereinafter referred to as the “Competent Authorities”.

<sup>22</sup> Other than work for a regional geological survey of subsoil.

subject to compliance with the requirements of civil law and land law, and then made available to the subsoil user by lease in the manner prescribed by Russian legislation.<sup>23</sup>

The Decree and the Regulations contained therein set forth:

- how the Application is to be filled out and what documents are to be appended thereto;
- the procedure for consideration of Applications and issuing of expropriation approvals/rejections for land plots by the Competent Authorities;
- grounds for (i) not accepting an Application, and (ii) refusing to expropriate a land plot (pursuant to paragraph 8 of the Regulations, **one of the grounds for refusing to expropriate a land plot is the absence of a connection between its proposed use and the satisfaction of state or municipal needs**);
- the time periods within which the Competent Authorities must (i) return the Application to the subsoil user if it is not accepted, (ii) inform the subsoil user of the approval/rejection of the Application for expropriation of the land plot, and (iii) notify the Rightholder that his land plot is to be expropriated; and
- the powers of Rosimuschestvo<sup>24</sup> in arranging for the expropriation (including enforced purchase) and provision of land plots to subsoil users,<sup>25</sup> as well as their reservation for state needs for the purposes of performing activities in connection with subsoil use.<sup>26</sup>

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We would be happy to answer any questions you may have regarding the above.

May 24, 2013

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<sup>23</sup> See: <http://www.mnr.gov.ru/news/detail.php?ID=129858>. Pursuant to Art. 25.1(2) of the Subsoil Law, land plots required for activities in connection with subsoil use that are classified as land held in title by the state are made available to subsoil users under lease without conducting a tender or auction.

<sup>24</sup> Federal Agency for State Property Management.

<sup>25</sup> The relevant provisions of the Decree and the Regulations relate solely to land plots required for use of subsoil sites that are not subsoil sites of local importance.

<sup>26</sup> In accordance with paragraph 12 of the Regulations, Rosimuschestvo proceeds with these arrangements after receiving Rosnedra's approval of the expropriation of the land plots.