

# MINING RIGHT CONFLICTS AND THE FUTURE MEASURES OF THE MINERAL RESOURCES LAW

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### *Abstract*

*The Mineral Resources Law under revision should be reformed to rebuild the legal order of mining rights in accordance with the Property Law. The revised Mineral Resources Law shall create a harmonious relation between the state ownership of natural resources and mining rights. Legislators should adopt the system of fee-based use and the "purchase for once paid in installments" mode, so that the creation of mining rights will conform to state expectations and realize the rights and interests of the state. At the same time, it is beneficial to resolve the mining right conflicts after "the priority over sapping galleries" and "the single mining rights system" are introduced. Moreover, basic farmland protection and urban and rural planning for construction should become factors in determining whether to prioritize mining rights when coordinating mining rights and land rights.*

Who controls resources dominates the world.<sup>1</sup> As the grain and blood for the development of industry, mineral resources impact the national economy and society increasingly with each passing day. But at the legal level, the Mineral Resource Law issued in 1986 and revised in 1996, which is the basic regulation for resource allocation and utilization, fails to sufficiently correlate with the Property Law issued in 2007.<sup>2</sup> As a result, it is prejudicial to enhance the readjustment and protection of the exploitation of resources. The novel Mineral Resources Law is under revision.<sup>3</sup> The revised Mineral Resources Law shall defer to the Property Law and emphasize the settlement of conflicts between mining rights and state ownership of natural resources, mining rights and land rights, and between different mining rights so as to build a favorable legal order.

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<sup>1</sup> Liu Runmo (柳润墨), *Ziyuan Yinmou* (资源阴谋) [Resource Conspiracy] 1 (2011).

<sup>2</sup> Suben Qiuyuan Ji: *Guotu Ziyuan Falü Guifan Xitong Zhi Minfa Siwei* (溯本求源集——国土资源法律规范系统之民法思维) [Origin: the thinking of civil law legal system of land and resources] 63 (Li Xiandong (李显东), et al. eds., 2012).

<sup>3</sup> *Guowuyuan Bangongting Guanyu Yinfa Guowuyuan 2012 Nian Lifa Jihua De Tongzhi* (国务院办公厅关于印发国务院2012年立法计划的通知) [The notice of General Office of the State Council of the People's Republic of China on the issuance of the 2012 legislative program of the State Council] (promulgated by the General Office of the ST. COUNCIL., Feb.1, 2012, effective Feb.1, 2012).

## I. THE CURRENT SYSTEM OF MINING RIGHTS & THE FUTURE MEASURES OF THE MINERAL RESOURCES LAW

### A. *The Mining Right System Established by the Property Law*

The Property Law has settled a long-debated problem in academia by clearly defining the categorization of mining right. Chinese theoretical research about the categorization of mining right started late, triggering many disputes. Early scholars held that mining rights should fall within the domain of creditor's rights.<sup>4</sup> In recent years, theoretical circles have agreed that mining rights fall within the scope of property rights and have categorized them as real rights. However, there is much argument over questions such as which sort of real right mining rights belongs to.<sup>5</sup> Based on the jurisprudence, this article holds the view that mining rights should be classified as usufructuary rights.

The reasons for this classification are as follows: first, property rights are only formulated and enacted by the law in accordance with Article 5 of the Property Law. Second, mining rights are enacted in the usufructuary rights section of the Property Law and perceived as contained within the usufructuary rights at the level of the construction of the legal system. Article 123 of Part 3 (usufructuary rights) of this Law states, "the mineral prospecting right, the mining right, the water intake right and the right to use water areas or tidal flats for breeding or fishery shall be under the protection of the law." Thus, mineral prospecting rights and mining rights belong to the usufructuary right under the Property Law. In addition, the acquisition of mining rights is through measures such as "bid invitations, auctions and public assignment" and other forms of administration by the state instead of measures based on party autonomy. Hence, mining rights are equivalent to the right to use land for construction due to the similar fashion in which the rights are acquired. Accordingly, mining rights shall be categorized as a chartered real right.

Since mining rights are considered usufructuary rights, the law safeguards the interests of mining right holders to exclusively enjoy their property, namely the exclusive possession, use and benefit of mineral resources. The law also endows usufructuary right holders the right to absolutely eliminate others' interference. Mining rights holders exercising their rights in accordance with the law can rule out

<sup>4</sup> Zhongguo Kuangyequan Falü Zhidu Yanjiu (中国矿业权法律制度研究) [Research on mining right system of China] 56 (Jiang Ping (江平), et al. eds., 2012).

<sup>5</sup> Cui Jianyuan (崔建远), Zhunwuquan Yanjiu (准物权研究) [Treatise on Quasi Real Rights] 237 (2012); Wang Liming (王利明), Wuquanfa Yanjiu (物权法研究) [Research on Property Law] 611 (2002); Chen Huabin (陈华彬), Wuquanfa Yuanli (物权法原理) [Theory of Property Law] 81 (1998).

the improper intervention from others, including the ownership of mineral resources ("Property Law" the Article 120) and the national public authority (the "Property Law" the Article 121). Any specific third party must respect the direct allocation by the mining rights holder of the particular mineral resources and, without permission, shall not infringe upon the owner's mining rights (the "Property Law" Article 34, 35).

*B. The Future Response Measures of the Mineral Resources Law*

The Civil Law, the norms of the Property Law in particular, is the basis for the legal norms of the Mineral Resources Law.<sup>6</sup> The basic rules of mining rights established by the Property Law provide such legal basis as related system construction. It is important to note that most of the provisions on the adjustment of mining rights in the Property Law are provisions of principle. The thought pattern of China's legislature determines the construction of a concrete system of mining right needs to be done by special law. "In the drafting of the Property Law... the law committee of the National People's Congress holds that exploration or mining rights, etc are important civil rights for natural and legal persons. At the same time, the relevant laws stipulate these rights in an all-round way. In order to further improve the situation of these rights, problems can be solved by modifying the relevant laws and by using the Property Law to interpret the provisions."<sup>7</sup> As a special law adjusting the legal role of mining rights, the Mineral Resources Law should improve the ownership of mineral resources and mining rights system in accordance with the Property Law.

The current Mineral Resources Law was first formulated and enacted in the 1980s. Although it was revised 10 years after its first implementation, it lacks the concrete structure of the real right system due to intensive administration by the state and the ignorance concerning the protection of private right at that time. The future revision of the law should center on mining and usufructuary rights, and adjust the legal relation more than what has been done between the equal civil subjects.

In general, the usufructuary right system is composed of four parts: the creation, exertion, alteration and elimination. There are problems in the Mineral Resources Law in terms of the acquisition and implementation of mining rights conflicting with related rights.

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<sup>6</sup> Suben Qiuyuan Ji: Guotu Ziyuan Falü Guifan Xitong Zhi Minfa Siwei (溯本求源集——国土资源法律规范系统之民法思维) [Origin: the thinking of civil law legal system of land and resources] 63 (Li Xiandong (李显东), et al. eds., 2012).

<sup>7</sup> 2 Wang Liming (王利明), Wuquanfa Yanjiu (物权法研究) [Research on Property Law], 8 (2007).

The definition of mining rights under the Mineral Resources Law is apt to cause a misconception that the mining rights infringe upon state ownership of natural resources. So the forthcoming Mineral Resources Law should clarify this misconception. Also, the current Mineral Resources Law fails to provide a way of resolving conflicts between mining rights and between mining rights and land-use rights. The new law should provide guidance for resolve these conflicts.

## II. ANALYSIS OF THE CREATION OF MINING RIGHTS AND REBUILDING THE HARMONIOUS RELATION BETWEEN THE MINING RIGHTS AND STATE OWNERSHIP OF NATURAL RESOURCES

Preservation of state-ownership of assets is the political mission of state policy regarding mineral resource development and management. Apart from the state ownership, mining rights derived from state ownership of natural resources are usufructuary rights. Theoretically it has long been erroneously believed that mining rights deprive the ownership of the state. This view holds that mining rights are not usufructuary rights and their implementation does not entail the continuous consumption of mineral resources.<sup>8</sup> For instance, a usufructuary right holder renting a house returns the intact house to the owner after living for a period of time. During the effective period of the usufructuary right, the owner still enjoys the ownership of the house and the usufructuary right holder has the right to use the house only. Now if a usufructuary right is created on bread, the result will be quite the opposite. For bread is made for eating and will inevitably be eaten if its owner leases the right to use the bread. The ownership will definitely be eliminated with the consumption of the bread. Hence, a usufructuary right on bread is an act of transferring instead of borrowing. Therefore, a majority of scholars consider the relation between mining rights and mineral resources is equivalent to renting out a piece of bread. When a usufructuary right is created for mineral resources, the mining right holder acts more like an owner in actual practice. This understanding must be viewed in light of a legal tradition that attaches great importance to the protection of publicly-owned property. The reason for this importance is that the state is the only main body of the ownership of mineral resources. In fact, Article 9, Item 1 of the Constitution states that state ownership of natural resources shall not be infringed or transferred. Does the definition of mining rights in the Property Law violate the theories of this law? Does it infringe the state ownership?

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<sup>8</sup> Xiao Guoxing (肖国兴); & Xiao Qiangang (肖乾刚), *Ziran Ziyuan Fa* (自然资源法)[Natural Resources Law], 323 (1998).

All of these questions require clarification that addresses the particular nuances of the Chinese legal context. It would be best if the upcoming Mineral Resources Law could provide proper and accurate answers.

I will attempt to show how the classification of mining rights as usufructuary rights can be shown to not violate real rights theories and that the stipulations of the Property Law are in conformity with legal theory. Under the theory of Property Law, mineral resources are consumer goods in that they are consumed once and then can no longer be used for the same purpose.<sup>9</sup> Chinese property law developed from France and Germany and has introduced no innovations to this consumer theory. France and Germany recognize that usufructuary rights can be created for consumer goods, i.e. ownership and the usufructuary rights can be divided for consumer goods. The French Civil Code (Article 587) stipulates, "if the usufructuary right is applied to objects that cannot be otherwise used unless consumed, such as money, cereals, beverages, etc, the usufructuary right holder is entitled to use the object. However, the holder shall pay the same amount and quality back, or the value calculated on the date when it was utilized before the termination of the usufructuary right." The German Civil Code also recognizes the legal effect of usufructuary rights on consumer goods. Meanwhile, German theory on property law also holds that though the characteristics of consumer goods is of unrepeatable use, a usufructuary right can be granted on consumer goods as long as they are utilized in a normal way. Hence, no contradiction exists between the characterization of mineral resources as consumer goods and their legal nature as usufructuary rights.<sup>10</sup>

State ownership of natural resources will be infringed if the usufructuary right on a consumer good goes beyond what would be expected of an owner. Assuming that consumer goods can be usufructuary rights, whether the consumption of the object of the real right is in conformity with the owner's expectations becomes the core of the problem. If the consumption violates the desires of the owner, the usufructuary right holder shall be liable for breach of contract or for violating lawful rights. If the owner anticipates the loss of the goods, his subsequent conduct setting up the usufructuary right is part of his free exercise of ownership. Article 118 of the Property Law states that an entity or individual may possess, use and seek proceeds from the natural resources are owned by the state, and

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<sup>9</sup> Wang Zejian (王泽鉴), *Minfa Zongze (民法总则)* [General Introduction to Civil Law] 211 (2002).

<sup>10</sup> 2 F. Baur & R. Stürner, *Deguo Wuquanfa* (德国物权法) [German Property Law] 534 (Shen Weixing (申卫星) & Wang Hongliang (王洪亮) eds., 2006).

usufructuary rights may be established on mineral resources by the state.

According to Article 119 of the Property Law, the state implements a system of fee-based use of natural resources. Any entity and individual must pay money for selling resources except in situations not prescribed in law. Thus, the state as the owner of mineral resources seems to have realized its objective of setting up usufructuary rights for consumer goods by implementing a system of fee-based use. But the current pattern of bid invitations, auctions and public assignment fails to fully realize the economic value of the mining rights because their value changes and may appreciate. Buyouts only consider present interests in lieu of long-term interests. Instead, "a purchase for once paid in installments" system could be used which would be paid every five years allowing the state to enjoy appreciation in value of mining resources.

In conclusion, the creation of the mining right conforms to the real right theory, which enhances the realization of the state ownership of natural resources. The conflict between mining rights and state ownership is a theoretical misunderstanding. The Mineral Resources Law under revision should acknowledge mining rights as a usufructuary right and accurately state that the rational utilization of consumer goods is granted by the state to avoid obstacles in understanding the creation of mining rights.

### III. ESTABLISHMENT OF A FAIR ORDER FOR THE EXERCISE OF RIGHTS, STRAIGHTENING OUT THE VALUE SEQUENCE OF THE MINING RIGHT AND RELATED RIGHTS

#### *A. Resolving Conflicts between Mining Rights*

Conflicts over mining rights often exist in adjacent mining areas. These conflicts can be divided into horizontal and longitudinal conflicts depending on how the mining areas are distributed. Horizontal conflicts usually involve mining across a land boundary into someone else's land..

Longitudinal conflicts are more complicated. Different mineral resources have different seam depths.. How to determine the mining order has become a key issue in dealing with the longitudinal mining right conflicts.

#### 1. Resolution of Horizontal Mining Right Conflicts—Priority Over Sapping Galleries

The rational resolution to horizontal mining right conflicts must conform to the basic principle of absolute protection of mining

rights.. This principle claims that the mining right holders of adjacent mining areas should clearly set out the boundaries of their rights.. Foreign legislations may adjust the allocation of mining rights, paying attention to changes in use and requiring that the distribution of horizontal rights should reflect efficiency. China should consider South Korea's "priority over sapping galleries" principle. Article 35 of the South Korea Mining Law provides, "(1)Under the circumstances that the target minerals in the other's adjacent mining area (hereinafter referred to as" adjacent mining area) are identical to the minerals in the deposit of one's registered minerals in his own mining area, one can obtain the acceptance of the adjacent mining area's mining right holder, right lessor, and mortgagor if it is more economical and rational to mine in his own area using former galleries, considering the location of the deposit and the condition of mineral storage; (2) the adjacent mining area's mining right holder, right lessor, and mortgagor shall not unreasonably refuse the acceptance."<sup>11</sup> To sum up, "priority over sapping galleries" provides that for adjacent mining areas, one party's mining right holder can ask to merge mining areas if productivity will be improved by production technology or locational advantage. This system entitles the mining right holder who makes the best use of location and technology to obtain the compulsory purchase right to bring the maximum benefits from effective production. The money paid for the merger guarantees the seller's property right.

## 2. The Resolution Mode of Longitudinal Mining Rights

In practice, longitudinal mining right conflicts are the most complicated. With the continuous development of mining technology, the ability to exploit minerals in deep zones has been realized. The lack of explicit guidance by the law leads to a lot of arbitrary practices and disputes. So the experiences of foreign countries is worthy of been learned and adopted.

### *(1) The Partitioned Mining Right System*

Partitioned mining right systems are mainly implemented in developed countries, like the United States and Canada. In this system, deposits at different depths can be allocated to different parties for exploitation. For example, in Alberta Canada, there are two ways of dividing mining rights. One way is to divide the sedimentary deposits in one mining area or exploitation area into superficial deposits and deep deposits which can be leased and exploited by different subjects. The other way is to divide one

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<sup>11</sup> Guo Tu Zi Yuan Bu (国土资源部)[Ministry of Land and Resources of the People's Republic of China], Geguo Kuangyefǎ Fa Xuanbian (各国矿业法选编)[Selected national mining laws], 85 (2005).



mining area into several sections which can be leased out to whoever is willing to exploit there.<sup>12</sup>

*(2) The Single Mining Right System*

The single mining right system provides that only one deposit can be exploited at a time when there are deposits at different depths in one mining area. This system has been adopted by Japan. The Article 66 of the Japan Mining Law provides: "1. Minerals lay in different deposits of which two overlap each other. If relevant persons have had the register of alteration for expansion of the mining area or establishment of the mining right concerning the overlap, they could exploit in this overlap part after getting permission of the previous registrant. However, the previous registrant shall not unreasonably refuse the permission."<sup>13</sup> What's more, Japanese law entitles mining rights in accordance with their registered order. A newly registered mining right holder may exploit an overlap part earlier if permitted by the previous registrants.

Which of the two systems should be selected depends a lot on production safety. The Partitioned Mining Right System demands strong awareness of regulations. They should strictly comply with regulations made with other mining right holders. For example, if one party violates a prior agreement to change a production schedule, the pressure of the entire mine and the change of the stratigraphic structure will exceed other subjects' expectations. The difficulty of tunnel construction will increase, increasing the danger of production. The Partitioned Mining Right System is not suitable for China because corporate technical strength varies and because of a weak awareness of regulations. Moreover, for the Single Mining Right System, an exploitation order starting with superficial deposits and then moving on to deep layers should be advised.. If the exploitation order is otherwise, there will be harm to the original earth structure, which is prejudicial to the protection and exploitation of resources and also violates the purpose of the Mineral Resources Law, which is to enhance sustainable development of society and economy.

*B. Resolving the Conflict between Mining Rights and the Land Rights*

The conflict between mining rights and land rights occurs when mining areas are constructed which must occupy urban or rural land. Article 20 of the Mineral Resources Law states that mining enterprises may not exploit mineral resources located near industrial

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<sup>12</sup> *Id.* at 1160.

<sup>13</sup> *Id.* at 120.

districts and municipal facilities of cities and towns. Hence, mining sites generally do not conflict with urban commercial and industrial sites and residential land. Conflicts between mining rights and land rights are more obvious in rural areas.

Previously, there has been a prioritization of mines, meaning that mining sites have taken priority over other land uses. This prioritization is the product of absolute resource-dominated thought and its basic starting point is the higher economic value and social utility of mineral resources.<sup>14</sup> This article suggests that whether the mining land should be given priority depends on the value of the mineral resources to the national economy and resources planning. The law shall prioritize mining for minerals designated by state planning or national regulation. Other mineral resources, especially ordinary building materials such as sands, stone and clay will not be prioritized. To use land for mining, one must obtain the land right holder's permission before the government can transfer the land. Especially when protecting basic farmland has become a major issue, the Mineral Resources Law shall fully consider the significance of exploitation of mineral resources for ensuring economic development and security and shall not occupy basic farmland arbitrarily.

The examination and approval of mining sites needs a full consideration of urban and rural planning. Urban and rural space for development is also an indispensable social resource. "An urban and rural planning approved according to law shall be the basis for urban and rural construction as well as planning administration, and shall not be modified without legal procedures." (Article 7 of the Urban and Rural Planning Law) As a result, even if mining right holders and land owners have reached an agreement, the government may not necessarily respect the parties' common will. Whether or not to expropriate land is based on land planning and administration as a whole. If the administrative organs judge that the land expropriation doesn't conform to town planning, they are entitled to overrule the land application.

Mining right holders can directly apply for land use grants from the Departments of Land and Resources without the consent of land holders in mining areas designated by state planning or for special minerals specified by the state. Under the requirements for the protection of basic farmland and urban and rural construction planning, the Departments of Land and Resources should prioritize to meet the needs of mining right holders for mining land. But the

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<sup>14</sup> Guo Hong (郭红), *Lun Caikuang Quan Yu Tudi Shiyong De Guanxi* (论采矿权与土地使用权的关系) [Discussion on the Relationship Between Mineral Exploitation Rights and Land Usage Rights], 6 *Zhongguo Fei Jinshu Kuanggong Ye Daokan* (中国非金属矿工业导刊) [China Non-Metallic Mining Industry Herald] 58, 60 (2006).

holders still need to negotiate with land owners over the amount of compensation.

#### IV. CONCLUSION

How to alleviate conflicts with mining rights is a major issue that will need to be addressed by the Mineral Resources Law. Legislators shall further clarify the priority of mining rights and related rights and . The state should first put forward a new system to compensate for use of natural resources. Second, the state should launch pilot projects such as "priority over sapping galleries" and "the Single Mining System" to achieve a high and stable yield of mineral exploitation. Lastly, the state should treasure arable land and urban-rural developmental space and achieve a sustainable and healthy development of mineral resources.