

## Legal Regulation of the Relationships Between Indigenous Small-Numbered Peoples of the North and Subsoil Users in the Russian Federation

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**Abstract:** This paper analyzes issues of the legal regulation of relations between Indigenous small-numbered peoples of the North and subsoil resource users (e.g., mining or oil and gas companies). The article outlines the international standards and Russian legislation in this field, and identifies deficiencies in the legal regulation of the relations in question. Finally, this paper presents recommendations for improvement of the state of relations and the law. The paper is part of a special collection of brief discussion papers presented at the 2014 Walleye Seminar, held in Northern Saskatchewan, which explored consultation and engagement with northern communities and stakeholders in resource development.

The livelihood of Indigenous small-numbered peoples of the Russian North, Siberia, and Far East<sup>1</sup> is practised alongside and in interaction with users of subsoil (subsurface) resources such as mining or oil and gas companies.<sup>2</sup> This is the modern reality. Acknowledging this reality requires the need to build constructive and mutually beneficial relationships between these entities, which have different ways—traditional and industrial—of using the natural environment, and which have divergent and often antagonistic interests.

This article analyzes issues of the legal regulation of relations between subsoil resource users in the Russian Federation and the Indigenous small-numbered peoples of the Russian North, Siberia, and Far East. The article outlines the international standards and Russian legislation—at the constitutional, federal, and regional levels—in this field, and identifies deficiencies in the

legal regulation of the relations in question. Finally, this article presents recommendations for improving the state of relations and the law.

### **Constitutional Provisions as a Framework for Relations Between Subsoil Users and Indigenous Small-Numbered Peoples of the North**

The common direction for building relationships between the small-numbered peoples of the North and the subsoil resource industry is provided in the Constitution of the Russian Federation (2001). The relevant clauses of the constitution together form the core constitutional and legal regime regarding the use and protection of natural resources by Indigenous peoples and subsoil users. These provisions are intended to guide the general direction of the legal regulation of relations in the Russian Federation (RF), with the understanding that the extraction of resources should be undertaken without damage to the environment, while taking into consideration the interests of the society, the state, and other public and territorial communities. The opinions and rights of Indigenous small-numbered peoples should also be taken into consideration in the case of mineral resource development on their ancestral territories.<sup>3</sup>

These common directions are laid out in the following articles of the Constitution, as follows:

Article 2. Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of human and citizen shall be the obligation of the State.

Article 9.1. Land and other natural resources shall be utilized and protected in the Russian Federation as the basis of life and activity of the people living in corresponding territories.

Article 17.1. In the Russian Federation recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law and according to the present Constitution.

Article 36.2. Possession, utilization and disposal of land and other natural resources shall be exercised by the owners freely, if it is not detrimental to the environment and does not violate the rights and lawful interests of other people.

Article 42. Everyone shall have the right to favourable environment, reliable information about its state and for a restitution of damage inflicted on his health and property by ecological transgressions.

Article 58. Everyone shall be obliged to preserve nature and the environment, and to carefully treat the natural wealth.

Article 69. The Russian Federation shall guarantee the rights of the indigenous small peoples according to the universally recognized principles and norms of international law and international treaties and agreements of the Russian Federation.

### **Relevant International Provisions and Their Binding Force for the Russian Federation**

When examining international documents, issues of interaction between Indigenous peoples and industry are also given special attention and status. In particular, the International Labour Organization (ILO) Convention 169 concerning Indigenous and tribal peoples in independent countries (5 September 1991) recognizes the rights of Indigenous ownership and possession of the lands that they traditionally occupy (Art. 14). The convention also confirms the right of Indigenous peoples to natural resources associated with their lands, including participation in the use, management, and conservation of these resources. These rights are implemented by Indigenous and Tribal peoples through opportunities to express their opinion about proposed industrial projects, and they can also receive fair compensation for any damage caused by industrial activity (Art. 15). According to the norms of the convention, eviction of Indigenous peoples from their lands is prohibited unless there is a recognized need—in this case, however, the Indigenous people must give free and conscious consent, and the eviction must be according to procedures established by law. In this scenario, Indigenous peoples would also retain the right to return to traditional lands or receive equivalent lands. Furthermore, financial compensation for the loss of lands is guaranteed (Art. 16). Laws enacted by nation-states also need to establish sanctions for illegal invasion and illegal use of Indigenous peoples' ancestral lands (Art. 18).

The United Nations (UN) Declaration on the Rights of Indigenous People (2007) confirms and develops the ILO Convention 169 provisions, including the rights for Indigenous peoples to their ancestral lands and other natural resources; the right to express opinions on legislative and administrative measures that affect their rights and interests; and the right to express opinions about industrial development on the territories of their traditional occupation. In the latter case, the principle of full, preliminary, and conscious consent of Indigenous people is proclaimed. The declaration also provides for the right to preservation and protection of the environment and the productive capacity of ancestral lands (territories) and resources, and the right to fair compensation in connection with industrial activity with the purpose of mitigating adverse consequences for environment, economy, social, cultural, and spiritual development (Arts. 10, 18, 19, 26, 28, 29, 32).

The UN Convention on Biological Diversity (1992), which was ratified by the Russian Federal Law on 17 February 1995,<sup>4</sup> affirms states' commitment to the preservation of traditional ways of life for Indigenous people; the necessity to guarantee that traditional lifestyles can be practised alongside non-traditional economic activity; and the creation of conditions for the reproduction and use of traditional knowledge for the purpose of preserving the sustainable use of biological diversity, including the involvement of Indigenous peoples in decision making about natural resource development on lands of their traditional occupation and economic activity.

These named provisions underscore the rights of Indigenous people internationally, and the necessity for states to consult with them in cases of industrial development on territories of their traditional residence. Simultaneously, there is the process of increasing international requirements that are oriented directly to companies and industrial enterprises. For example, the UN Global Compact (2014) calls for business groups to support and respect human rights that have been proclaimed by the international community (Principle 1); to support the precautionary approach regarding negative impacts to the environment (Principle 7); take initiatives to increase responsibility for the environment (Principle 8); and promote the development and distribution of environmentally friendly technologies (Principle 9).

Similar values, connected to the increased responsibilities of the state to protect human rights and increase corporate responsibility for compliance, are contained in the Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in Resolution 17/4 on human rights and transnational corporations and other business enterprises (16 June 2011).

It should be noted that, in the Russian Federation, what is considered to be legally binding belongs only to those international documents that have been properly introduced into the Russian legal system (i.e., if ratified by the RF and have come into force, they are considered officially published and do not require publishing in domestic legislation). Other international norms on the rights of Indigenous peoples (such as the ILO Convention 169, which Russia has not ratified), while officially optional, are still reflected in the expectations of the international community, and they impose recommendations and requirements on nation-states. States and corporations should also become familiar with these norms of customary international law, and should also look at decisions made on issues about protecting Indigenous peoples' rights. There are no restrictions against Russian courts, public authorities, or mining companies relying on such norms—for example, the Constitutional

Court of the RF is able to cite not only legally binding international law in its decisions. It is obvious that declarations, resolutions, and other similar international documents are aimed at improving public relations, though more often they are also used—and this should be encouraged—with the aim that the norms in these documents will gain the status of customary international law and public obligation.

### **Distribution of Law-Making Powers in Russia Regarding Relations Between Indigenous Peoples and Subsoil Users**

The next questions belong to the topic of joint jurisdiction of the Russian Federation and its subjects—the republics, territories, regions, cities of federal importance, and autonomous areas, which are equal subjects of the Russian Federation and which can make their own legislation.<sup>5</sup> These include issues of ownership and use of land; subsoil resources legislation; nature use; specially protected territories; land, water, and forest legislation; environmental protection legislation; and the protection of the environment and traditional way of life of small-numbered Indigenous communities (Part 1, Art. 72, Constitution of the Russian Federation). This implies that issues of interaction between Indigenous peoples and subsoil resource users are among the topics of joint jurisdiction. When matters fall under joint jurisdiction, the federal laws are issued, and other normative and legal acts of RF regional subjects are also passed. These laws should not contradict the federal laws (para. 2 and 5, Art. 76, Constitution). The Constitutional Court of the RF specifies that federal legislation authorities must allow for the subjects of RF to enact their own legal regulations.<sup>6</sup>

### **Federal Regulation of the Relations Between Indigenous Peoples and Subsoil Users**

The federal legislation takes into consideration the constitutional, international, and legal frameworks, and sets out some parameters for the relationships between Indigenous peoples and the mining and oil/gas industries. In particular, federal law guarantees Indigenous peoples' rights to use the land; to participate in the implementation of control over land use in ensuring compliance with environment protection legislation, and in decisions about protecting their traditional lands and way of life, economy, and activities through conducting ecological and ethnological expertise (expert review and impact assessments); and to be compensated for damages to their traditional lands resulting from industrial and economic activity ("On Guarantees of Rights," 1999, Art. 8).

This law enables, at the initiative of Indigenous peoples, the creation of federal, regional, and local territories of traditional nature use (TTNU) as specially protected territories. The Indigenous peoples have a special legal regime for using the environment, which excludes arbitrary seizure of land areas and other natural objects (these include objects Indigenous peoples gather and use for subsistence, such as wood or berries). This law further acknowledges the rights of Indigenous peoples to be compensated for losses. It permits the use of natural resources on these territories without violation of the regime, and it provides for the preservation of objects of historical and cultural heritage within territorial borders (“On Territories,” 2001).<sup>7</sup> Russian Federation legislation also obliges investors to take measures to protect the natural environment and traditional way of life of small-numbered Indigenous peoples. It provides for the payment of corresponding compensation in specific cases and in accordance with the Government of RF (“On Production Sharing Agreements,” 1995, Art. 7).<sup>8</sup>

Next, federal legislation establishes a system for the provision of lands in places of traditional habitat and economic activity of Indigenous peoples for purposes that are not connected with their traditional economic activities. The law provides for the possibility of conducting meetings and referendums on issues such as seizing lands for state and municipal needs, and provision of lands for the construction of objects, such as bridges, roads, and buildings when their placement affects the legitimate interests of the named peoples. The state executive authorities or authorities of self-government make decisions about the preliminary approval of infrastructure placement, taking into consideration the results of such meetings and referendums (Land Code of the RF, Art. 31, para. 3).<sup>9</sup> In the context of costs to the taxpayer from natural resources development, other legislation provides for agreements between subsoil resource users and RF subject authorities, local self-government authorities, and/or tribal and family communities of Indigenous peoples (Tax Code of the RF, Art. 261, Part 2).<sup>10</sup>

### **Regional Regulation of the Relations Between Small-Numbered Peoples of the North and Subsoil Users**

The subjects of the Russian Federation (predominantly those districts and regions with intensive mining) complement and concretize, within established authority, the federal legislation that regulates the relations between Indigenous peoples and subsoil resource users. There are various models of this regional legal regulation. Here, I present the legal regulations for the Nenets Autonomous District, Khanty-Mansi Autonomous District

– Yugra, Yamalo-Nenets Autonomous District, Sakhalin Oblast, and the Republic of Sakha (Yakutia).

First, for the **Nenets Autonomous District**, the district’s charter sets out that payments for the use of subsoil resources are intended for the socio-economic development of small-numbered Indigenous people (Art. 18). Granting and seizing land and other natural resources in the traditional territories of Indigenous people for purposes that are not connected with their traditional activity must be implemented from agreements with local self-governments or based on a local referendum (Art. 57). The Nenets regional law “On regulation of land relations in the territory of Nenets Autonomous District” (2005) confirms the requirement for consent from small-numbered Indigenous peoples of the North, communities of these peoples, or their authorized representatives, with respect to any proposed land seizures for industrial purposes (Art. 19 and 21). Such consent may include conducting meetings and referendums (Art. 29, para. 3). Provision of lands can be refused if the proposed use creates a direct threat to the health and safety of the population and environment; to the preservation and development of a traditional way of life; to the economy of small-numbered Indigenous peoples of the North; or if it causes considerable damages to state interests (Art. 22).

In the case of provision of lands for industrial needs in the places of traditional residence and economic activity of Indigenous peoples, compensation for losses is guaranteed to the peoples involved and to their associations, based on corresponding agreements with subsoil resource users (Art. 29, para. 4, 5). The regional law “On subsoil use” (2012) sets out that agreement can be entered into between users of subsoil resources and the administration of the Nenets Autonomous District about the participation of subsoil resource users in the socio-economic development of the territory (Art 10, para. 5).<sup>11</sup>

Second, in the **Khanty-Mansi Autonomous District – Yugra (KMAD)**, the district’s charter guarantees to Indigenous people: the development of their traditional economy; benefits from land and nature use; the creation of territories of traditional (priority) nature use (Art. 63); and the use of natural resources on the territory of the autonomous district, taking into consideration the interests of these peoples (Art. 64).

In accordance with the law “On subsoil resource use” (1996), the government of Khanty-Mansi Autonomous District – Yugra (KMAD) is obligated to submit proposals about the conditions of competition, auctions, and licences for using subsoil resources to the federal department for management of public subsoil funds. The proposal must contain information

about the location of traditional nature use on the area of subsoil resources and provision for the protection of the native habitat and the traditional way of life, economy, and activity of Indigenous peoples, including information on the compensation of losses to Indigenous peoples caused by the use and development of subsoil resources in connection with impacts to, or the limits of, the traditional economy of Indigenous peoples (Art. 27 and 28). In turn, the users of subsoil resources have an obligation to coordinate with Indigenous peoples' representatives on the layout of industrial objects (infrastructure) within the borders of traditional territories. Disputes arising from these matters are considered by the Committee on Questions of Territories of Traditional Nature Use (Art. 42).

Similar conditions, aimed at protecting the rights of Indigenous peoples in relation with users of subsoil resources, are contained in the law "On the participation of KMAD in agreements" (2005, Arts. 3 and 5), and the law "On the use of subsoil resources in KMAD" (2005, Art. 9, 13, and 17). The law "On territories of traditional nature use in KMAD" (2006) regulates in detail the implementation of activity within borders of traditional nature use by entities that are not subjects of the right of traditional nature use. Such entities (e.g., mining or oil and gas companies) have an obligation to coordinate layouts of industrial objects; to construct transport ways with regards to the requirements of nature protection legislation; to exclude flights over reindeer calving and herding habitat; to set fences around industrial and related objects; to present plans of nature protection arrangements and information about its use; to pay compensation for losses caused to the environment and to peoples with rights of traditional nature use; and to make other payments in accordance with legislation and agreements (Art. 12). A bylaw of the KMAD – Yugra government, "On the approval of model agreements" (2009)<sup>12</sup> is additional to the district legislation.

Third, in the **Yamalo-Nenets Autonomous District**, the district charter guarantees the rights of Indigenous peoples to the protection of their traditional environment and lands; their traditional way of life, economy, and activities; and to the preservation and development of their original culture (Art. 8). The charter connects the socio-economic development of the autonomous district with the protection of their rights. The law "On protection in Yamalo-Nenets" (2006) stipulates that executive authorities will facilitate the compensation of losses to Indigenous peoples caused from damage due to economic activity (Art. 6). In addition, a special law sets out the method for assessing damages to native lands, the environment, and traditional ways of life of Indigenous small-numbered peoples (Art. 9). The law "On TTNU in Yamalo-Nenets" (2010) guarantees compensation

to Indigenous peoples for damages caused by land seizure within borders considered to be lands of traditional nature use (Art. 10). Support for Indigenous small-numbered peoples is also provided through co-operation agreements, such as with natural gas company JSC Gazprom, and with state authorities of Yamalo-Nenets Autonomous District and with authorities of local self-governments.<sup>13</sup>

Fourth, the charter of the **Sakhalin Oblast** specifies that state authorities need to provide protection to the homeland and traditional way of life of Indigenous communities, and need to make decisions on the creation of territories of traditional nature use and on benefits from the use of natural resources (Art. 12 and 73). The law “On guarantees of protection in Sakhalin Oblast” (2006) proclaims principles of this protection, including admissions of potential danger of any planned economic or other activity for the traditional lands and way of life of Indigenous peoples; responsibility for ecological, social, economic, and other negative consequences from economic and managerial decisions in cases of activity connected with the use of nature resources; achievement of conscious and voluntary consent from Indigenous peoples for the use of lands of traditional habitat and traditional economic activity; the obligation to conduct impact assessment and corresponding assessment of compensation for losses to the native homeland and traditional way of life of Indigenous peoples; the provision of state support for recovery, preservation, and development of traditional way of life and economy, traditions, customs, cultures, and languages of Indigenous peoples; and the creation of conditions for the study of native languages in education institutions (Art. 4).

Industrial development on the traditional lands of Indigenous peoples is permitted in cases where impact assessments and ethnological expertise (expert reviews) on the traditional lands have been conducted, and where final agreements have been reached with Indigenous peoples about appropriate compensation and provision of participation from Indigenous representatives in the monitoring of the industrial activity. These agreements can contain conditions to pay a certain portion of the profits from the development to Indigenous peoples (Art. 8)—for instance, see the decree of Sakhalin Oblast “On approval of the regulations for ethnological expertise” (2007) and, also, the “Agreement about collaboration between the Sakhalin Energy Investment Company Ltd. and the Regional Council of authorized representatives of Indigenous peoples (2006<sup>14</sup> and 2010). Here, the last agreement specifies the facilitation of development through collaboration with Indigenous small-numbered peoples of the North of Sakhalin region for 2011–2015.<sup>15</sup>

Finally, in the **Republic of Sakha (Yakutia)**, the constitution of the republic guarantees the collective rights of Indigenous peoples regarding natural resources (Art. 5); possession and the use of lands and natural resources; protection from encroachment to ethnic identity, historical and sacred places, and the heritage of spiritual and physical culture (Art. 42); and compensation from damages caused to the environment and traditional ways of life from the use of natural resources located on the territories of their traditional nature use (Art. 103). These provisions have been developed in the republic's present legislation, which provides special rules of protection for reindeer pastures associated with the use of heavy transport, utilization, and disposal of industrial waste ("On northern reindeer herding," 1997, Art. 23); payments for socio-economic development, from the use of subsoil resources in regions of Indigenous peoples' occupation ("On subsoil resources," 1998, Art. 39 & 40); the rights for communities of Indigenous peoples to participate in control over implementing environmental protection legislation, conducting ecological and ethnological expertise, and compensating losses caused to lands ("On tribal, family, and nomadic community," 2003, Art. 16 & 17); creation of territories of traditional nature use of Indigenous peoples with a special law regime, in accordance with which land seizure in these territories is permitted only in cases of special need and with consent from these people, paired with the provision of other territories that are suitable for the preservation of their traditional way of life, and payment to compensate for inevitable damages.

Industrial use of lands and natural resources on the territories of traditional nature use (areas of traditional residence and traditional economic activity of Indigenous small-numbered peoples of the North) is permitted in cases where ecological and ethnological expertise (expert reviews) are conducted, with agreements between industrial participants and local authorities and communities, and with compensation of losses to corresponding entities (individuals); industrial activity can be stopped or prohibited if it harms the regime of these territories—see "On legal status," 2005, Art. 22 & 23; "On territories of traditional nature use in Republic Sakha (Yakutia)," 2006, Art. 13 & 15; the order to conduct ethnological expertise in the law "On ethnological expertise," 2010; and the resolution of the Government of Republic of Sakha (Yakutia) "On the order of organizing and conducting ethnological expertise," 2011.<sup>16</sup>

Similar to the legislation in Sakhalin Oblast, the main principles include protecting the native habitat and traditional way of life, economy, and activity of small-numbered peoples ("On protection of native habitat, 2011, Art. 4).

## **Flaws in the Regulation of Relations Between Small-Numbered Peoples of the North and Subsoil Users**

The listed norms of federal and regional legislation address various aspects of the relations between Indigenous small-numbered peoples and subsoil resource users. However, there is an impression that these norms exist in isolation from each other and, often, they are not perceived in their entirety, nor perceived to be binding. This situation is compounded by defects within the regulations of this field, including a lack of clarity in understanding the rights of small-numbered peoples, and individuals related to them, regarding their territories, and the de-facto refusal of the right for them to create federal territories of traditional nature use.

Another flaw is the incoherence of legislation. For example, provisions of the federal law “On guarantees of the rights” and “On territories of traditional nature use” (2001) are not practically transformable into the sphere of the RF law “On subsoil resources”; in other words, there are no universals. The same relations are regulated from different perspectives. For example, the aforementioned federal law “On production sharing agreements” specifies that, in relation to the areas of subsoil resources that are located on the traditional territories of Indigenous peoples, the conditions of auction must include the payment of appropriate compensation for violation of the traditional nature use (Art. 6, para. 1). However, the RF law “On subsoil resources” does not mention this provision, and it does not spread to other cases in granting subsoil resource areas for appropriate development. There are the same “inconsistencies” in the RF Land Code, which introduces the requirement for consultation with small-numbered peoples, but only in the context of granting lands for construction in the places of traditional residence (Art. 31).

Next, there is insufficient regulation of relations amongst the stakeholders in the field of rights for small-numbered peoples, which, as previously mentioned, lack normative and legal mechanisms that provide for their realization, including in cases when the law obliges the government of the RF (the authorized federal department of executive power) to define the appropriate order—for example, concerning payment to small-numbered peoples for compensation, according to the law “On production sharing agreements” (Art. 7, para 3,), or about the legal regime of the territories of traditional nature use, according to the law about these territories (Art. 11).

Another defect is the non-concreteness of the legislation. For example, on the one hand, the legislation calls for ethnological expertise, compensation, and relationship agreements between resource users and Indigenous

peoples and their communities, entitling state authorities of RF subjects to participate in defining the conditions of use and to direct appropriate proposals to the state federal authorities. On the other hand, these norms have insufficient regulatory potential, as they are not concrete enough to have sufficient authority, don't receive legislative development, and domestic legislators and companies may not be receptive to the international and law norms that define the standards of relations between Indigenous peoples and industrial entities. This relates to, for example, the principles of achieving conscious and voluntary consent from Indigenous peoples for the use of places of traditional residence and traditional economic activity, development of mechanisms for reconciliation of the interests of Indigenous peoples and industry, and the imposition of sanctions for invasions of ancestral lands. Moreover, there has been restraint in the creation of norms by RF subjects (the regional governments) to regulate these relations due to different understandings by their own authorities in this field and of the overall mission to be a "defender of the weak" — i.e., Indigenous peoples and their associations in the case of interaction with industry.<sup>17</sup> The relations are subsequently left ignored (by most regional jurisdictions in the territories where Indigenous peoples live), or authorities granted are realized by the regional state authorities selectively — for example, there are almost no norms that set limits for industrial participants in places of traditional residence and economic activity of Indigenous peoples, or that establish procedures and mechanisms for dispute resolution arising between these peoples and industry.

Instead of strengthening legislation to overcome these defects, what has been observed is a phenomenon that has led to the weakening of Indigenous peoples' rights protection in interactions with industrial participants. In particular, there has been evidence of exemptions to the law of norms, such as the obligations to assess possible negative impacts of projects on the traditional way of life and nature use of Indigenous peoples; to grant to RF regional subjects part of the payment from the use of subsoil resources for the socio-economic development of small-numbered peoples; and to define territories of traditional nature use of Indigenous peoples as a kind of specially protected nature territories. The federal law "On amendments to the federal law 'On specially protected nature territories,'" (2013, Art. 5 and 6)<sup>18</sup> was approved without public discussion, despite the positions from lawyers and ecologists.<sup>19</sup> The TTNUs are excluded from the list of specially protected conservation areas and are named simply as "specially protected areas." The entire gamut of negative consequences due to this change is not quite understood, but some of the visible effects include that, now, territories

of traditional nature use do not have any protection in the distribution of land, and projects of economic activity on them will stop being matters for state ecological expertise. Moreover, the level of court protection for these territories is decreasing, too.<sup>20</sup> In other words, prerequisites have been created for the expansion of industry in places of traditional residence of Indigenous peoples.

### **Key Paths to Creating a Single Legal Mechanism to Regulate the Relations Between Small-Numbered Peoples and Subsoil Users**

The legal regulation of relations between small-numbered Indigenous peoples and subsoil users, under consideration here because of the above-noted deficiencies, has become one of the reasons for the emergence of conflicts on all levels: between Indigenous peoples and subsoil resource users, between these peoples and public authorities, and also within ethnic communities and in the system of power.<sup>21</sup> Given this, it would be more reasonable to, rather than stop conflicts by one-off decisions, develop a single mechanism for interactions between traditional and industrial nature users, including through particularization of the existing legislation and passing additional legislation.<sup>22</sup> This proposed mechanism could cover the following six elements.

The first element comprises mandatory ethnological expert reviews regarding industrial developments on traditional lands, with participation from representatives of Indigenous peoples, and with the purpose of researching the impact of changes on the traditional residence of small-numbered peoples and the impacts of the socio-cultural situation on the development of their culture. This mechanism could allow for every case to define compliance of the planned activity with requirements of the law about the protection of Indigenous peoples' rights; identify scales of the projected impacts on the territory of traditional habitat, culture, and customs of these people; assess the sufficiency of compensation measures in the provision of ecological, social, and economic sustainability of development; make proposals to minimize losses from non-traditional economic activity; and justify the amount of payments for losses caused to the traditional lands and way of life of small-numbered peoples, as a result of such activity. Currently, the possibility for conducting ethnological expert reviews is not excluded, if one follows provisions of the federal law "On guarantees of the rights of Indigenous small-numbered peoples" (Art. 1, para 6; Art. 8, Part 1, para 6). However, it is obvious that this will become a reality and an obligation only when the appropriate federal law, similar to the federal law "On

ethnological expertise," (1995) is passed<sup>23</sup> (taking into account experience of the legal regulation of ethnological expertise in Yakutia and Sakhalin oblast).

The second element follows, that the conditions for tenders (auctions) for the rights to use subsoil resources in places of traditional residence and economic activity of small-numbered peoples, as well as the conditions for licencing, should include requiring obligatory compensation. In this case, these conditions must come from the small-numbered peoples and their organizations, and the conditions need to be coordinated with these peoples and with the municipal authorities. In accordance with this, the established procedures and conditions must be presented by the regional authorities of state power—who, in this case, acquire the status of a trustee, designated to operate in the interests of ethnic community—to the authorized federal body of regulation. Moreover, following the established procedures, the authorized federal body of regulation would be called upon to consider proposals on the above conditions of tenders (auctions) and licences, and to make an appropriate decision, either agreeing with them or rejecting them, in accordance with clearly defined grounds. I consider that the existing legislation, in cases where there is a lack of provisions, could be interpreted and applied in this way as explained above.

The third element follows that, on the basis of ecological and ethnological expertise, and accepted obligations reflected in the licences, when resource users start activity on the traditional territories of small-numbered peoples, they should set out to specify their own obligations with respect to the Indigenous peoples. This is possible in the form of agreements, which should be developed through engaging with communities and individuals from Indigenous peoples, and also with the whole ethnic community within the territory of the relevant RF subject. This arrangement assumes that such agreements must be concluded as a result of resource users engaging with members of the upper level, or with regional bodies of state power and with authorized associations of Indigenous peoples; with the medium level, or with municipal bodies and the representatives of communities and other organizations of small-numbered peoples; and with the lower level, or with communities and individuals from small-numbered peoples, within the borders of the traditional nature use area where the non-traditional, industrial economic activity will be carried out. These agreements must be consistent with the results of the ethnological expert reviews and they must complement each other, but, in any case, they should proceed in accordance with these levels to cover matters such as compensation, education, employment, entrepreneurial development, environmental protection, and support of social and cultural issues.<sup>24</sup> In specific agreements, there should

be a provision related to the objectives for using the lands within the borders of the territory of traditional nature use; the terms of use; the borders of location and legal framework of use pertaining to industrial infrastructure; the regime of use pertaining to water and other natural resources; remediation and other restoration works; and the conditions of resettlement of small-numbered peoples from their occupied territories.<sup>25</sup> If we acknowledge that these agreements are legally admissible, then it would be more rational to incorporate the regional legislation directly into federal legislation, and also to design general federal recommendations (rules) for such agreements.

The fourth element proposes that the compensation payments to small-numbered peoples, their organizations, and the individuals associated with them, must be differentiated—in particular, damage to natural resources that contribute to the traditional economy, which is caused by companies in the oil and gas sector, even if this activity does not have ecological consequences. In terms of the existing norms, these consequences would be considered as ecological impacts; but compensation for this type of damage cannot be a condition of agreements, it should be legislated. The compensation from this source should be appropriately distributed for the development of the traditional economy as a whole.<sup>26</sup>

In cases that are connected to ecological impacts, land seizures, and the limitations to exercise rights on traditional nature use, compensation must be transferred to specified communities and individuals in accordance with agreements between them and subsoil resource users. In this case, it is necessary to take into consideration the losses, including lost profit and other limitations on the traditional way of life, and the costs for the Indigenous entity's development of new lands (given in compensation). The named compensations are not only rights of small-numbered peoples and individuals relating to them; the RF Civil Code (2009, Art. 151, 1099-1101) provides for the payment of compensation for non-pecuniary damages. Compensation can also be for the purpose of providing for long-term interests, and there are possibilities of creating a special territorial fund that can be paid to Indigenous peoples.

Questions related to compensation for Indigenous peoples and their representatives for the losses caused by companies in the past, and the consequences produced, has become obvious, and currently this needs further discussion. Also, there is a need to discuss questions about the compensation for losses to the ethno-cultural and social elements of livelihood resulting from non-traditional economic activity in the places of northern Indigenous peoples' settlement.

These ideas can be taken into consideration during the development of legislation regarding the compensation for losses to the lands and the traditional way of life and culture of Indigenous peoples caused by industrial economic activity. The current method of calculating damage, as a result of economic activity, caused to the *associations* of Indigenous peoples and to all forms of property and individuals in places of traditional residence (as approved by the order of the ministry of regional development of the RF<sup>27</sup>) is the first step towards addressing the issue on compensation payments to *communities* of Indigenous peoples in the case of industrial development on their native territories.<sup>28</sup>

The fifth element proposes that the relationships between Indigenous peoples and resource users should be based on principles of openness and trust. This implies the establishment of standards and real possibilities to elicit participation from representatives of these peoples in discussions and development of natural resource projects, and in monitoring the realization of legislation and decisions that have been made in the field, including issues of compensating losses and fulfilling other obligations of subsoil resource users.

Lastly, the sixth element advocates that the practice of companies developing internal policies be encouraged (for example, social codes, rules of behaviour), with the inclusion of norms that define their relations to Indigenous small-numbered peoples from a position of respect for the culture and way of life of these peoples; and to assist these communities physically, financially, and by other means necessary to ensure the sustainability of their lifestyle.<sup>29</sup> Environmental protection measures should also be developed by these companies, including preservation of the traditional homelands of Indigenous small-numbered peoples.<sup>30</sup> This can be formulated as communicating the message that in the field of business, one of the important characteristics of a company with a good reputation is evidence of its respect for human rights.

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#### **Notes**

1. In this paper, the terms “Indigenous small-numbered peoples of the North,” “Indigenous small-numbered peoples of the North, Siberia, and Far

East," "Indigenous small-numbered peoples," "small-numbered peoples," "Indigenous peoples," "northern peoples" are used as synonyms. There are forty peoples in Russia who are classified as Indigenous small-numbered peoples (Nenets, Khanty, Mansi, Chukchi, Evenki, Sami, etc.)—they have fewer than 50,000 members, maintain a traditional way of life, inhabit certain remote regions, and identify as a distinct ethnic community. There are about 280,000 individuals living in the Arctic on their traditional lands, in twenty-eight constituent entities in Russia (ranging from the Kola peninsula in the west to Chukotka in the east). The list of the given peoples was approved by Decree of the Government of the RF dated April 17, 2006 No.536-p (See *Collection of the Laws of the RF. 2006. № 17. P.2. Art. 1905*). These peoples are referred to as Indigenous small-numbered peoples in Russia; however, their main characteristics correspond to the definition of Indigenous peoples in Article 1 of the ILO Convention 169. So they present themselves, and the same meaning is implied, in the Constitution of the Russian Federation, which identifies them as a special subject of the legal constitutional relations (Art. 69).

2. Subsoil users, in the sense of the Law of the Russian Federation No. 2395-1 of February 21, 1992 "On Subsoil Resources" (*Collection of Laws of the RF. 1995. №10. Art. 823*) are commercial entities vested with rights to use subsurface resources, which includes carrying out research or mining.
3. See Mechetny B.C. about the role of legal provisions on natural resources, project of the Constitutional Committee in the modern law activity // *Constitutional and Municipal Law. 2013. #4. p. 28, 29*; Brinchuk M. M. The nature is the public good // *The state and law 2013. #8. p. 22–26*; Bogolyubov C. A. "The realization of ecological provisions of the Constitution of Russian Federation" // *The law. Journal of SSE. 2013. #4. p. 4–14*.
4. *Collection of Laws of the RF. 1996, #19, Art. 2254*
5. See Article 5(1) of the Constitution of the Russian Federation: "The Russian Federation consists of Republics, territories, regions, cities of federal importance, an autonomous region and autonomous areas — equal subjects of the Russian Federation"; and Article 5(2): "The Republic (State) shall have its own constitution and legislation. The territory, region, city of federal importance, autonomous region and autonomous area shall have its charter and legislation."
6. Resolution of 15 November 2012, #26-P. *Collection of Laws of the RF. 2012, #48, art. 6744*
7. *Collection of Laws of the RF. 2001. #20. Art 1972*
8. *Collection of Laws of the RF. 1996. #1. Art 18*
9. *Collection of Laws of the RF. 2001. #44. Art 4147*
10. *Collection of Laws of the RF. 2001. #1 (par. 2). Art 18*
11. About the practice of interactions between small-numbered Indigenous peoples with oil companies in Nenets autonomous district, see Tsyachnyuk

- M., Tulaeva S., Landonio D. *Oil and People: Self-organization in Local Communities and Negotiations with Companies*. St. Petersburg, 2012. C. 39–58
12. About the practice of interaction of Indigenous peoples and subsoil resource users in Khanty-Mansy autonomous district, including the agreement between them, look at Grishkin D. I. *Problems of interaction, subsoil users with owners of tribal lands (territories of traditional nature use)* // International norms and legislation of the Russian Federation in the field of preservation of language and culture, traditional way of life, nature use of indigenous peoples. Norms. Theory. Practice. Documentation of International seminar (25-27 of November, 2008). Petrozavodsk, 2008. 104–108
  13. About this practice see: Vasiljeva T. N., Yevay E. P., Martynova E. P., Novikova N. I. “Indigenous small-numbered peoples and mining development of the Arctic (Ethnological monitoring in Yamalo-Nenets autonomous district)”. – M. – Shadrinsk, 2001, p. 161–196
  14. See ‘Ethnological expertise’ in Russia and international standards of assessments of projects’ impact on indigenous peoples,” edited by O. Murashko, 2006, p. 98–100.
  15. About specifications of this agreement and its meaning, see: Koroleva E. A. *New stage of development of partner relations / The modern state and ways of development of indigenous small-numbered peoples of the North, Siberia and the Far East of the Russian Federation / Under the general edition of V. A. Shtyrov*. 2<sup>nd</sup> edition, revised and enlarged. M., 2013, p. 154–157.
  16. About features of this legislation and practice of its realization, see: *Sleptsov A. N. About law aspects of interaction of industrial companies and peoples of the North during industrial development of territories of traditional nature use* // Law and social economic problems of development of peoples of the Arctic. Materials of scientific and practical conference (Yakutsk, 2011) / Edited by Ivanova A. A. Issue 9. Yakutsk, 2012. P. 24-31; Shadrin B. I. *Ethnological expertise as an instrument of protection of indigenous small-numbered peoples of the North: practice, problems, perspectives* (on the example of Republic Sakha (Yakutia))// The Arctic zone of the Russian Federation: the North-Eastern development vector. Collection of materials of the International scientific and practical conference, devoted to 380 anniversary of entering of Yakutia in the Russian state. 28–30 November, Saint Petersburg. Part 2. / Scientific editor O. A. Lazenbnik. St. P., 2013. p. 406–413.
  17. Some researchers unfortunately argue the opposite: merger in the regions of oil business and authorities, emergence of the situation of “the power without power,” in which the most important questions for Indigenous peoples are considered from the point of view of the protection of oil companies’ interests (see Novikova N. I. *Cultural, value and law interactions of indigenous small-numbered peoples of the North and oil and gas corporations in the Russian Federation (1990-2000)*. Abstract dissertation of PhD in history. M., 2011. p. 35). The similar case is the special case, which reflects dangerous processes

of merging political and economic power, the reasons of which, according to the opinion of the judge of the Constitutional Court of the RF, N. S. Bondar, are rooted in defects of norm and law regulation of socio-economic relations, and uncertainty of subjects of the constitutional law from the point of view of relating them to legal entities, and participation of these subjects in civil law relations (see Bondar N. I. *The Value of the Constitution of Russia as of legal act and of the sociocultural phenomenon (20th anniversary)* // Journal of constitutional justice. 2013. # 6(36). P. 18).

18. See the Russian newspaper. 2013. 30 December.
19. They proceeded from integrating concepts of traditional nature use (TNU) and specially protected nature territories (SPNT) is possible; that for the Russian North, forms of the SPNT are adequate, which combine protection of biological diversity with compliance of interests and rights of the Indigenous population (see Tranin A.A. *Questions of ecological safety of economic activity in the Arctic zone of Russia and traditional nature use of indigenous small-numbered peoples* // State and Law. 2011. #2. P. 59; Zhukova E. V. *Right of indigenous small-numbered peoples of Russia on traditional nature use in the system of ecological rights*. Abstract dissertation of the candidate of law sciences. M. 2010. P. 22).
20. According to the provisions of the para. 27 of the Resolution of the Plenum of the Supreme Court of the RF #21 'About utilization of courts of legislation about responsibility for violence in the field of protection of environment and nature use' of 18 October 2012 (see Russian newspaper, 2012. 31 October), according to which courts should take into consideration all circumstances to identify damage that was caused by violation of the regime, exclusively regarding specially protected nature territories.
21. About the issues of this kind see: Novikova N. I. *Index of works* P. 33–35; Tarasov A. *Sacred land for "Gazprom"* // New newspaper 2011. 2<sup>nd</sup> of November P. 18, 19; Overview of interactions of JSC "Mining and Metallurgical Company Norilskiy Nickel" and Indigenous small-numbered peoples of Taymyr // The world of Indigenous peoples. Living Arctic. 2012. # 2012. #28. P. 105–108; The reputation of "Gazprom" was weakened by disrespecting the way of life of reindeer herders // Newsru.com/Экономика. 2012. 14 December; Reindeer herders vs Lukoil. Khanty rebelled against oil miners // Neftegaz.ru/Новости/ 2013. 6 December; Public ecological expertise rejected the project of Exxon // Ecological watch of Sakhalin. 2013. 22 December.
22. Note that development of such mechanism was provided by the plan of the socio-economic development of the North (approved by order of the Government of the RF from 21 February 2005 #185-p) (see the Collection of Laws of the RF, 2005 @9 art. 736). However, unfortunately, the specified mechanism never came to reality.
23. See the Collection of Laws of the RF. 1995. #48. Art. 4556. About the initiatives connected with development of the federal law about the ethnological expertise, look at Murashko O. A. *Consideration of cultural, ecological and social*

*consequences of industrial development in the places of traditional economic activity of indigenous small-numbered peoples of the North // The modern state and ways of development of indigenous small-numbered peoples of the North, Siberia, and the Far East of the Russian Federation, p. 158–168.*

24. The said elements are typical for such agreements, concluding in Russia and Canada (look up Maksimov A. A. *The rights of Indigenous peoples of the North on the land and natural resources: effective use and co-administration*. M., 2005, p. 24–28, 74–77).
25. See Litvyakova A.B. *Law regulation of livelihood of Indigenous small-numbered peoples of Russia (on the example of Krasnoyarskiy Krai)*. Abstract dissertation of candidate of law science. Krasnoyarsk, 2004, 21.
26. See Markhinin V. V., Udalov I. V. *The traditional economy of peoples of the North and oil and gas complex (Case study in KMAD)*. Novosibirsk, 2002, 203.
27. 9 December 2009, #565
28. Notable that this method is not being published and it is not a legally obligatory law act. As a consequence, experience of its implementation is not significant (see Murashko O. A. *The index of works*, P. 163–165). Together, according to named Resolution of Plenum of the Supreme Court of the RF of 18 October 2012 # 21, the above method can be used by the courts; the situation of defining of amount of losses (damages) caused to environment is possible. The same applies to cases of absence of other methods, based on actual costs of restoration of disturbed state of environment in view of the losses incurred, including possible profits and also in accordance with projects of remediation and other restoration works (par. 37).
29. For examples of this kind, see Drankina E. *The northern forecast // Kommersant*. Thematic pages “Business and indigenous peoples of the North”. 2006. 24 January, 28–29; Vasilkova T. N. Evay A. V., Martynova E. P., Novikova N. I. *The index of works*, 191–192.
30. About experience of companies in this regards look at: Markovich N. *Ecology does not contradict with economy // Izvestiya*. Thematic application “Ecology”. 2002. 14 June; Malyshkina L. *The production of responsibility // Russian newspaper*. 2007. 5 December; Serafimov A. *Large business will support small-numbered peoples // The same source*. 2007. 3 December.

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### **List of Legislation**

- Agreement about collaboration between Sakhalin oblast Sakhalin Energy Investment Company Ltd. and the Regional Council of authorized representatives of Indigenous small-numbered peoples of the North of Sakhalin oblast, 25 May 2006 and 14 December 2010.
- On amendments to the Federal law 'About specially protected conservation areas' and various legislative acts of the Russian Federation, 28 December 2013.
- On the approval of model agreements. 2009. "On the approval of model agreements of subsoil resource users with subjects of the right of traditional nature use on use of lands for purposes of natural resource use within borders of territories of traditional nature use of small-numbered Indigenous peoples of the North," KMAD - Yugra, 5 October 2009.
- On approval of the regulations for ethnological expertise. 2007. "On approval of the regulations in order for the organization and conducting of ethnological expertise on the territories of traditional habitat of Indigenous small-numbered peoples of the North of Sakhalin region," 14 March 2007.
- On ethnological expertise. 1995. "On ethnological expertise," Laws of RF, 23 November 1995.
- On ethnological expertise. 2010. "On ethnological expertise in the places of traditional habitat and traditional economic activity of Indigenous small-numbered peoples of the North of Republic Sakha (Yakutia), 14 April 2010.
- On guarantees of protection in Sakhalin Oblast. 2006. "On guarantees of protection of native habitat, traditional way of life, economy, and activities of Indigenous small-numbered peoples of the North of Sakhalin Oblast," 4 July 2006.
- On guarantees of rights. 1999. "On guarantees of the rights of small-numbered Indigenous peoples of the Russian Federation," Law of the Russian Federation, 30 April 1999.
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- On northern reindeer herding, Republic of Sakha (Yakutia), 25 June 1997
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- On protection in Yamalo-Nenets. 2006. "On protection of native lands and the traditional way of life of small-numbered peoples of the North in Yamalo-Nenets Autonomous District," 6 October 2006.
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- On subsoil resource use. 1996. "On subsoil resource use, the Government of Khanty-Mansi Autonomous District – Yugra," 18 April 1996.
- On subsoil resources, Republic of Sakha (Yakutia), 2 July 1998.
- On subsoil use. 2012. "On subsoil use," Law of the Nenets Autonomous District, 30 October 2012.
- On territories of traditional nature use. 2001. "On territories of traditional nature use of small-numbered indigenous peoples of the North, Siberia and the Far East of the Russian Federation," 7 May 2001.
- On TTNU in Yakutia. 2006. "On territories of traditional nature use and traditional economic activity of Indigenous small-numbered peoples of the North of Republic Sakha (Yakutia) of 13 July 2006.
- On the use of subsoil resources in KMAD. 2005. "On the use of subsoil resources in the territory of Khanty-Mansy autonomous district – Yugra for the purposes of developing fields of common minerals, and also construction and exploitation of underground structures of local meaning, which are not connected with mining of minerals," 17 October 2005 (Art. 9, 13, and 17).
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