SPC Guiding Case No. 173: Friends of Nature Environmental Research Institute, Chaoyang District, Beijing v. China Hydropower Engineering Consulting Group Xinping Development Co., Ltd. and PowerChina Kunming Engineering Corporation Limited (Ecological Environmental Protection Civil Public Interest Litigation)

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Keywords

Civil / ecological environmental protection civil public interest litigation / harming the public interest / major risk / endangered wild animals and plants

Holding

When trying a case of environmental civil public interest litigation, a people's court shall implement the principle of giving priority to protection and putting prevention first. Where the plaintiff adduces evidence proving that the construction of a project will cause destructive and irreversible damage to the habitat of endangered wild animals and plants and to the ecosystem, the people's court shall comprehensively determine, from such aspects as the unique value of the protected object, the likelihood of the occurrence of the harmful result, and the seriousness and irreversibility of the harmful consequences, whether the defendant's conduct constitutes "a major risk of harming the public interest" as provided in Article 1 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Environmental Civil Public Interest Litigation Cases.

Basic Facts

The Jiasajiang Level I hydropower station project is developed and constructed by China Hydropower Engineering Consulting Group Xinping Development Co., Ltd. ("Xinping Company"), and PowerChina Kunming Engineering Corporation Limited ("Kunming Design Institute") is the general contractor of the project and the technical unit entrusted to prepare the Environmental Impact Report for the Jiasajiang Level I Hydropower Station on the main stream of the Honghe (Yuanjiang) River in Yunnan Province (the "Environmental Impact Report"). The dam site of the Jiasajiang Level I hydropower station is located within Xinping County, Yunnan Province, about 6.5 kilometers downstream from Shuitang Town, Xinping County. The station adopts dam-type development with a concrete-faced rockfill dam, a maximum dam height of 175.5 meters, and a normal pool level of 675 meters. The inundation area involves the Jiasajiang River and the Shiyang River in the upper reaches of the Honghe River and the tributaries Lüzhi River and Xiaojiang River. The reservoir inundation impact and construction land acquisition involve 8 townships (towns) in Xinping County and Shuangbai County. From 2011 to 2014, the Jiasajiang Level I hydropower station project successively obtained approvals and consents from the National Development and Reform Commission, the former Ministry of Land and Resources, the Ministry of Ecology and Environment, and other relevant competent authorities regarding land use, environmental impact assessment, and construction. On July 21, 2017, the General Office of the Ministry of Ecology and Environment issued to Xinping Company the Letter on Ordering the Conduct of Post-Environmental Impact Assessment for the Jiasajiang Level I Hydropower Station on the Main Stream of the Honghe (Yuanjiang) River in Yunnan Province (the "Order for

Post-Assessment"), ordering Xinping Company to conduct post-environmental impact assessment for the project, adopt improvement measures, and report to the Ministry of Ecology and Environment for filing. Impoundment and power generation were prohibited before the post-assessment work was completed. From August 2017 to the present, Xinping Company has voluntarily suspended construction of the Jiasajiang Level I hydropower station project. According to the project schedule, the Jiasajiang Level I hydropower station project has now completed the "three connections and one leveling" works and constructed the diversion tunnel.

The green peafowl is a typical tropical and subtropical forest-dwelling bird that mainly moves about in evergreen broad-leaved forests, deciduous broad-leaved forests, and mixed coniferous and broad-leaved forests in river valley areas; it is omnivorous, is a rare species, is a Class I State-protected animal, and is listed as an "endangered" species in China's Red Data Book of Endangered Animals. Regarding issues related to the green peafowl, the Kunming Intermediate People's Court sent a letter to the Yunnan Provincial Forestry and Grassland Bureau, and the Bureau replied by letter on April 4, 2019. Thereafter, the Kunming Intermediate People's Court obtained from the Bureau the Investigation Report on the Current Status of the Green Peafowl Population in the Middle and Upper Reaches of the Yuanjiang River prepared by the Bureau. The report stated that after the Jiasajiang Level I hydropower station is completed, the impounded reservoir will inundate the river valley areas below an altitude of 680 meters and will have a relatively large impact on suitable habitats such as the sand-bathing sites and riverbank courtship grounds currently used by the green peafowl. At the same time, due to the construction of the Jiasajiang Level I hydropower station, the roads in the inundation area will be reconstructed and rebuilt, which will also damage the suitable habitats of wild animals such as the green peafowl. With respect to the suspended Jiasajiang Level I hydropower station, the impact of the suspension should be assessed, and measures to protect and restore the green peafowl's habitat should be taken. On June 29, 2018, the Yunnan Provincial People's Government issued the Notice of the Yunnan Provincial People's Government on Issuing the Yunnan Provincial Ecological Protection Red Line, publicly releasing the Yunnan Provincial Ecological Protection Red Line. According to Annex 1 to the Yunnan Provincial Ecological Protection Red Line, the Distribution Map of the Yunnan Provincial Ecological Protection Red Line, most of the inundation area of the Jiasajiang Level I hydropower station was included in the red-line scope of the Honghe (Yuanjiang) dry-hot valley and the mountain-plain soil and water conservation ecological protection red line, within which the green peafowl is one of the key protected species.

Cycas chenii is a Class I State-protected plant. After 2015, it was included in the Yunnan Provincial Red List of Biological Species (2017 edition) as a critically endangered species. The plaintiff, the Friends of Nature Environmental Research Institute, Chaoyang District, Beijing ("Friends of Nature Institute"), submitted photographs of Cycas chenii that it had taken in the Lüzhi River and Shiyang River valleys and other inundation areas of the Jiasajiang Level I hydropower station. Witness Liu [X] (an assistant researcher of the Chinese Academy of Sciences) testified in court that Cycas chenii is distributed only in the Honghe River basin in China. According to the assessment standards of the International Union for Conservation of Nature, Cycas chenii should be considered endangered.

Friends of Nature Institute sued in the Kunming Intermediate People's Court, requesting an order that Xinping Company and Kunming Design Institute jointly eliminate the danger of harm to the green peafowl, Cycas chenii, and other precious and endangered wild animals and plants and to the tropical monsoon forests and tropical rainforests caused by the construction of the Jiasajiang Level I hydropower station, immediately stop the construction of the hydropower station, refrain from impounding water, and refrain from felling the vegetation within the inundation area of the hydropower station.

Judgment

The Intermediate People's Court of Kunming City, Yunnan Province rendered Civil Judgment (2017) Yun 01 Min Chu No. 2299 on March 16, 2020: 1. Xinping Company shall immediately stop the Jiasajiang Level I

hydropower station construction project under the existing environmental impact assessment, and shall not intercept or impound water or fell the vegetation within the inundation area of the hydropower station. With respect to the subsequent handling of the Jiasajiang Level I hydropower station, after Xinping Company completes the post-environmental impact assessment as required by the Ministry of Ecology and Environment, adopts improvement measures, and reports to the Ministry of Ecology and Environment for filing, the relevant administrative authorities shall decide in accordance with the law based on the specific circumstances; 2. Xinping Company shall, within 30 days after this judgment takes effect, pay Friends of Nature Institute reasonable expenses of RMB 80,000 incurred for the litigation; 3. The remaining claims of Friends of Nature Institute were dismissed. After the judgment was pronounced, Friends of Nature Institute appealed on the ground that the Jiasajiang Level I hydropower station should be permanently suspended, and Xinping Company appealed on the ground that the hydropower station had already been suspended and included in the ecological red line and that the claims of Friends of Nature Institute should be dismissed. The Higher People's Court of Yunnan Province rendered Civil Judgment (2020) Yun Min Zhong No. 824 on December 22, 2020: dismissing the appeal and affirming the original judgment.

Reasoning

The effective judgment held: this case satisfies the statutory circumstance of "having a major risk of harming the public interest" as provided in Article 1 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Environmental Civil Public Interest Litigation Cases, which provides for "bringing a lawsuit against acts of polluting the environment or damaging the ecology that have already harmed the public interest or that have a major risk of harming the public interest," and constitutes preventive environmental public interest litigation. Preventive environmental public interest litigation breaks through the litigation-remedy concept of "no harm, no remedy" and is the concrete implementation and embodiment of the Environmental Protection Law's principle of "giving priority to protection and putting prevention first" in environmental justice. The core element of preventive environmental public interest litigation is the existence of a major risk, which refers to a series of acts that may cause a major danger of harm to the "environment." In this case, Friends of Nature Institute has adduced evidence proving that if the Jiasajiang Level I hydropower station continues to be constructed, the inundation area of the project will inevitably cause the habitat of the Class I State-protected animal, the green peafowl, and the habitat of the Class I State-protected plant, Cycas chenii, to be inundated, and there is no doubt as to the possibility that the biological habitats face a major risk. In addition, from the perspective of the seriousness of the harmful consequences, the downstream inundation area of the Jiasajiang Level I hydropower station is rich in animal and plant species and has considerable biodiversity value and genetic resource value; the area is not only a habitat on which the survival of precious species such as the green peafowl and Cycas chenii depends, but also a complete ecosystem formed by various organisms and large areas of pristine rainforest and tropical rainforest fragments. If the hydropower station continues to be constructed, the resulting damage will be intuitively estimable, predictable, and irreversible. With respect to this realistic major risk, Xinping Company did not effectively substantiate its claim of non-existence, but merely rebutted it with the Environmental Impact Report, which lacked sufficient probative force. Therefore, combining the circumstances that the Ministry of Ecology and Environment ordered Xinping Company to conduct post-assessment of the project and that the Jiasajiang Level I hydropower station had not adopted any protection measures for the green peafowl, it can be found that the continued construction of the Jiasajiang Level I hydropower station will constitute a major risk to the green peafowl habitat, the Cycas chenii habitat, and the biodiversity and biosafety of the entire ecosystem.

According to Article 27 of the Environmental Impact Assessment Law, which provides that "where circumstances arise in the course of project construction or operation that are inconsistent with the approved environmental impact assessment document, the construction unit shall organize post-environmental impact assessment, adopt improvement measures, and report to the original approving authority of the environmental impact assessment document and the approving authority of the construction project for filing;

the original approving authority of the environmental impact assessment document may also order the construction unit to conduct post-environmental impact assessment and adopt improvement measures," the General Office of the Ministry of Ecology and Environment issued the Order for Post-Assessment to Xinping Company on July 21, 2017 in respect of the construction project in this case, ordering Xinping Company to conduct post-environmental impact assessment for the project, adopt improvement measures, and report to the Ministry of Ecology and Environment for filing, and prohibiting impoundment and power generation before the post-assessment is completed, which conforms to the above legal provisions. At present, the power station at issue is already in a suspended state, Xinping Company has applied to its superior competent authority to suspend the project at issue and has obtained approval, and the major risk facing the green peafowl's ecological habitat has been effectively brought under control. Where Xinping Company has applied to suspend the project at issue but has not filed with and obtained approval from the relevant administrative authorities, and in view of the fact that the Ministry of Ecology and Environment has already ordered Xinping Company to conduct post-environmental impact assessment, and that such issues as whether the hydropower station at issue should continue to be constructed, together with the degree of major risk of the not-yet-clear factual situation, can only be determined after approval, filing, and decision by the environmental protection authorities, the project at issue shall be decided by the administrative authorities in accordance with the law based on the specific circumstances after Xinping Company completes the post-environmental impact assessment.

Relevant Legal Provisions

Article 5 of the Environmental Protection Law of the People's Republic of China (as amended on April 24, 2014).

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