

# **Administrative environmental public interest litigation by the People's Procuratorate of Wanshan District, Tongren City against Forestry Bureau of Tongren City for omission to perform the duties of forestry administration**

## **Adjudication Rules**

1. In cases where the same act of the offender is subject to both administrative punishment for violating administrative law and criminal punishment for violating criminal law, the administrative organ should not revoke the administrative punishment already imposed when the case is transferred to the public security organ as a result of the transfer. In matters of administrative punishment not covered by the criminal verdict, if the administrative organ issues an administrative punishment decision after the criminal judgment has taken effect, the people's court shall support it.

2. If the offender does not assume responsibility for ecology and environment restoration in the criminal verdict, the forestry and other administrative authorities shall promptly order him to fulfil his restoration obligations in accordance with the law, and if the offender does not fulfil them or does not fulfil obligations completely, the authorities shall organise to fulfil on behalf. If the administrative department in charge of forestry or other administrative departments fails to perform its statutory duties of supervision and management of ecological restoration, the people's court shall support the request of the plaintiff of the administrative public interest litigation to perform its duties in accordance with the law.

3. If the ecology and environment of a special functional area are damaged, in principle, it should be restored in situ. The people's court shall not support any claim by the person liable for restoration or the person acting on behalf of the performer applying for off-site restoration, while cannot prove that in-situ restoration is no longer possible or necessary.

## **Basic Facts**

In April 2014, the defendant Shen Xiang invested in the establishment of a one-person company Tongren City Wanshan District Farming Wood Production and Development Limited Company (hereinafter referred to as the Farming Wood Company) and served as the legal representative. From May to July 2014, the company hired a construction team to use excavation machinery to strip the surface vegetation of forest land in a village in Tongren City, Guizhou Province, such as Ma'anshan, on the pretext of constructing planting and breeding farms, without going through forest land use permit procedures, resulting in the destruction of the surface vegetation and the exposure of rocks. After identification, 276.17 mu of forest land was destroyed, including 49.38 mu of key public welfare forest, 72.91 mu of general public welfare forest, 108.93 mu of key commercial forest and 44.95 mu of general commercial forest. At the time of the first instance of this case, the newly planted horsetail pine seedlings were low and yellow, and the ecology and environment has not been effectively restored.

In January 2015, the Forestry Bureau of Tongren City (hereinafter referred to as the Forestry Bureau) was transferred to the Wanshan Branch of the Tongren Municipal Public Security Bureau on suspicion of the above-mentioned acts constituting illegal occupation of agricultural land, but the public security organs filed a case for investigation and then withdrew it. The Forestry Bureau then made an administrative penalty decision against Shen Xiang and the Farming Wood Company: ordering the restoration of the original state of affairs within a certain period of time (no period was specified) and imposing a fine of RMB 1,841,134, but the penalties were not fulfilled. On January 20, 2016, the Wanshan Branch of the Tongren Municipal Public Security Bureau refiled the case for investigation. The following

day, the Forestry Bureau revoked the above administrative penalty decision. In December 2016, the Primary People's Court of Wanshan District of Tongren City found the defendant Shen Xiang guilty of illegally occupying agricultural land and sentenced him to two years' imprisonment and a fine of RMB 50,000 in the judgment [2016, Guizhou, 0603, Criminal First Trial, No.67]. After the judgment came into effect, the People's Procuratorate of Wanshan District of Tongren City issued a procuratorial proposal to the Forestry Bureau, suggesting that it should perform its duty of supervising the protection of forest resources in accordance with the law, and ordered Shen Xiang to restore the original state of affairs for a limited period of time, at a rate of RMB 10 to RMB 30 per square metre and impose a fine. The Forestry Bureau replied in writing that because Shen Xiang was serving a prison sentence, the Farming Wood Company closed down, and personnel were dissolved, the afforestation was unable to be implemented. The Forestry Bureau intended to partially reforest the land, conducting reforestation in other places to compensate for lands that are difficult to reforest; according to the principle of ne bis in dem, there is no further penalty.

The procuratorate filed an administrative public interest lawsuit on the grounds that the Forestry Bureau had neither imposed an administrative penalty on Shen Xiang, nor taken effective measures to replant and restore the greenery, and had not fulfilled its duty to supervise the ecology environment, resulting in the continued destruction of the forest land and damage to the local ecology and environment, requesting that the Forestry Bureau be recognized as having failed to fulfil its supervisory duties in accordance with the law and ordered to fulfil its duty to supervise environmental protection in accordance with the law.

### **Adjudication Result**

On September 29, 2017, the Primary People's Court of Bozhou District of Zunyi City, Guizhou Province made the administrative judgment [2017, Guizhou, 0321, Administrative First Trial, No.97]: the defendant, the Forestry Bureau in accordance with the law to perform supervision and management of statutory duties on Shen Xiang in the name of the Farming Wood Company destroyed forest land replanting and restoration of the original state, and a deadline was set for the completion of the re-greening works for acceptance. After the judgment, both sides did not appeal, the judgment took legal effect.

### **Adjudication Reasoning**

The judgment which has taken legal effect held that:

1. The Forestry Bureau failed to perform its duties in accordance with the law. The Forestry Bureau is responsible for the supervision and management of the protection, utilization and renewal of forest resources within its jurisdiction in accordance with Article 10 of the Forest Law of the People's Republic of China (2009 Amendments). The Forestry Bureau shall perform its duties in accordance with the law and investigate and punish acts of occupying or destroying forest resources or changing the use of forest land in violation of forestry management laws and regulations. In accordance with Article 44 of the Forest Law of the People's Republic of China (2009 Amendments), the offender is ordered to stop the illegal act and replant the trees in accordance with the provisions of the law; if the offender refuses to replant the trees or if the replanting does not comply with the relevant state regulations, the forestry authorities shall replant the trees on behalf of the offender, and the costs required shall be recovered from the offender. But the Forestry Bureau failed to perform its duties in accordance with the law.

2. After the investigation of the public security organ, the decision of the Forestry Bureau on revoking administrative punishment was illegal. In cases where the same act of the offender is subject to administrative penalties for violations of administrative law and criminal

penalties for violations of criminal law, the administrative penalties already imposed by the administrative enforcement authorities prior to the referral of the case to the judicial authorities are offset against the penalties for the same function. In accordance with Article 28 of the Law of the People's Republic of China on Administrative Penalty (2009 Amendments), "when the violation constitutes a crime and the people's court has imposed a sentence of detention or fixed-term imprisonment, and an administrative organ has already given the person concerned administrative detention, the corresponding sentence shall be offset in accordance with the law. If the administrative organ has already given the person concerned a fine when the people's court sentences him to a fine for an offence, the corresponding fine shall be set off against the fine." Article 11(3) of the Provisions on Transferring Suspected Criminal Cases by Administrative Organs for Law Enforcement provides that where a fine has been imposed by an administrative law enforcement organ on a person before the transfer of a suspected criminal case to a public security organ, the corresponding fine shall be set off against the fine imposed by the people's court in accordance with the law." This offset is in terms of enforcement, not in terms of the penalty decision itself, and only for penalties of the same function; penalties of different functions cannot be offset. Therefore, administrative penalties already imposed before the criminal investigation was filed should not be revoked. The Forestry Bureau, after referring the administrative offence suspected of being a crime to the public security authorities and the public security authorities' filing of the case, revoked the administrative penalty decision it had already made earlier, not only revoking the penalty of a fine, which had the same function as the penalty of a fine that might be imposed by a criminal judge, but also revoking the administrative penalty of ordering the offender to replant and restore the greenery in order to restore the original state of affairs, which did not belong to the function of a criminal penalty. This revocation by the Forestry Bureau was in violation of the law.

3. After the criminal judgment came into effect, the Forestry Bureau did not order the offender to restore the destroyed forest land, which was in violation of the law. In matters of punishment not covered by the criminal judgment, the administrative organ shall issue a decision on administrative punishment after the criminal judgment has taken effect. Ordering the offender to replant and restore the environment does not fall within the scope of penal punishment, but rather falls within the administrative power conferred by law on the competent administrative organ, and falls within the scope of administrative punishment. Where a criminal judgment comes into effect and no administrative penalty has been imposed earlier, the administrative organ may not impose an administrative penalty based on the same conduct that functions as a criminal penalty after the criminal judgment comes into effect. After criminal liability has been imposed on the offender, the penal penalty does not involve responsibility for environmental restoration, the administrative organ shall issue a decision in accordance with the law, ordering the offender to plant trees and restore the environment in accordance with the requirements of the Forestry Law. Therefore, the Forestry Bureau should make an administrative penalty decision ordering the offender to perform the replanting and re-greening obligation and supervise the offender's performance after the criminal judgment comes into effect. And if the offender refuses to perform or fails to perform, it should replant and re-green on behalf of the offender and order the offender to bear the cost. The Forestry Bureau failed to make an order to Shen Xiang and the Farming Wood to replant and restore the original state and supervise the implementation, which was illegal.

4. The Forestry Bureau failed to fulfill the responsibility of replanting and re-greening on behalf. If the ecology and environment of a special functional area is damaged, in principle, it should be restored in situ. If the person obliged to repair or the person acting on behalf of the performer claims to repair off-site, but cannot prove that in-situ repair is no longer possible or

necessary, the people's court shall not support the claim. In the absence of a decision to order the offender to restore the environment, the Forestry Bureau, together with other related departments, planted some saplings on the destroyed forest land, but did not achieve the purpose of environmental restoration. The land damaged has not been treated and replanted. In view of the nature of the destroyed forest land and trees as public welfare forests and the function of water conservation and soil preservation, replanting and re-greening should be carried out in situ and should not be replaced off-site. The Forestry Bureau's replanting of trees on its behalf, although it has partially performed its duties, has not yet been performed correctly and fully and should continue to be performed.