

Kayano and Others v. Hokkaido Expropriation Committee (Nibutani Dam Decision)

SAPPORO DISTRICT COURT, JAPAN
27 MARCH 1997
38 INTERNATIONAL LEGAL MATERIALS 394 (1999)

Author's Note: This is an edited version of a translated summary of the *Nibutani Dam Decision*, regarding the construction of the Nibutani and Biratori dams in Japan's Saru River system. The Hokkaido Development Bureau entered into land acquisition negotiations with owners of land on the proposed dam site. Certain land owners were dissatisfied with the offering price and demanded compensation for the Ainu people who inhabited the area.

After an administrative decision, the plaintiffs sued in the Sapporo court, seeking a reversal. They attacked the related governmental decisions, because of their failure to consider the impact of the dam construction on the Ainu people and their culture. The Minister of Construction, who was the responsible governmental minister, intervened into this suit on behalf of the Japanese government. He had authorized this project in 1986. There was no opposition within the limitation period. In 1989, the plaintiffs sought a review of the administrative rulings. The Minister of Construction rejected this request in 1994. The dam had been substantially completed during this five-year interval; the plaintiffs pursued their administrative remedies; and then initiated this law suit.

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Extract of Court's Opinion:

FORMAL RULING . . .

(b) Comparative balancing

The conditions prescribed by Land Expropriation Law Article 20(3) contemplate a comparative balance of the public benefits to be gained by the completion of a planned project with the project's detriment to public and private interests, and that the former benefits be found to be greater than the latter harms. As indicated above, we recognize the discretionary authority of the administrative entity to make this judgment.

However, there may be cases where, in making this judgment, the administrative entity unjustly and carelessly makes light of various factors and values which deserve the utmost regard from the start, with the result that where the greatest consideration is obviously due, it lacks instead. . . .

In the instant case, the former element, i.e. the public benefits to be gained by the completion of the planned project, are flood control, maintaining correct functioning of the river flow, supply water service for various uses, and electrical power generation, and clearly; there is little difference here from most other projects of this type carried out before. But on the other hand, in this case, the latter element, i.e. the project's detriment to public and private interests, involves the culture of the Ainu people who are a minority; and this has not been discussed previously.

. . .

(a) Nexus to the ICCPR

The United Nations General Assembly adopted the ICCPR [§11.2] International Covenant on Civil and Political Rights] in 1969, and after undergoing ratification by our country's parliament in 1979, it was promulgated as Treaty No.7 of the same year.

This treaty recognizes the inherent dignity of the individual and inviolable right to equality for all members of humankind as the foundation for freedom, justice, and peace worldwide. Following a preface text which confirms the inherent dignity of the individual as the source for these rights, there are fifty-three separate provisions, and Articles 2(1), 26, and 27 therein address the instant right of the Ainu people to enjoy their culture.

...
In 1991, the Government of Japan, [a] participating party herein, presented its third report to the UN Human Rights Committee based upon ICCPR Art. 40. The report states that because the Ainu people have their own religion and language, and because the uniqueness of their culture is being preserved, etc., they may be fairly described as a minority as defined by ICCPR Art. 27. In this action . . . , the Government accepts that the Ainu people are a minority within the scope of ICCPR Art 27.

It is proper to understand that the ICCPR . . . guarantees to individuals belonging to a minority the right to enjoy that minority's distinct culture. Together with this, there is an obligation imposed upon all contracting nations to exercise due care with regard to this guarantee when deciding upon, or executing, national policies which have the risk of adversely affecting a minority's culture, etc. Thus, the Ainu people, as a minority which has preserved the uniqueness of its culture, are guaranteed the right to enjoy their culture by ICCPR Art. 27, and accordingly, it must be said that, as set out in the provisions of Art. 98(2) of the Constitution, our nation has a duty to faithfully observe this guarantee.

Indeed, the rights arising under ICCPR Art. 27 are not unlimited. It is true that as the defendants correctly argue, those rights are subject to the limits for the public welfare included in Articles 12 and 13 of the Constitution. But in light of the aims of ICCPR Art. 27, any limits on the guarantee of rights must be kept to the narrowest degree necessary.

(b) Nexus to Art. 13 of the Constitution

Article 13 of the Constitution provides: 'All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.' In light of its wording and historical origin, this provision demands the highest regard for the individual in his or her relationship with the State. It manifests the principals we call individualism and democracy as the recognition of the particular worth of all citizens, who collectively constitute the State, in the State's exercise of governance.

Diversity exists in an unmistakable fashion as the respective differences in the particulars faced by each individual, e.g. gender, ability, age, wealth, etc. Premised upon this diversity and these differences, Article 13 demands meaningful, not superficial, respect for individuals and the differences arising between them. And when, in any given social setting, stronger persons take care of those weaker with humility and grace, a diverse society through which the entire community can prosper is established and preserved. There are no other means to pursue the likes of happiness.

If we look at these points in terms of the relationship between a dominant majority and a minority who do not belong to the majority, it often happens that the

majority people, being a majority, consequently tend to ignore or forget the interests of the minority. When the minority's interests relate to the minority's unique culture and are difficult to appreciate in the generally accepted values of the majority, those tendencies are likely to become all the more stronger.

The minority's distinct ethnic culture is an essential commodity to sustain its ethnicity without being assimilated into the majority. And thus, it must be said that for the individuals who belong to an ethnic group, the right to enjoy their distinct ethnic culture is a right that is needed for their self-survival as a person. We believe the guarantee of that right fulfils the basic tenets of democracy by meaningfully respecting the individual while striving for the majority's comprehension of and respect for circumstances faced by the socially weak.

Accordingly, we agree that Constitution Art. 13 guarantees to the plaintiffs the right to enjoy the distinct ethnic culture of the Ainu people, which is the minority to which the plaintiffs belong.

Of course, in speaking of this right, we understand it to be subject to the public welfare limitation included expressly within the provisions of Constitution Art. 13, but in consideration of the character of the human right involved, that limitation must be kept to the narrowest degree necessary.

(iii) The indigenous character of the Ainu people

This notion clearly follows with a growing international movement towards seeing indigenous peoples' culture, lifestyle, traditional ceremonies, customary practices, etc., as deserving respect regardless of whether or not such recognition goes so far as there being so-called indigenous rights, meaning indigenous peoples' right of self-determination with regard to land, resources, political control, etc.

Comprehensively viewing the evidence . . . , we regard an indigenous people as a social group who live and have lived in a region which historically existed outside of a State's rule and was brought within that State's rule as a minority group with a culture and identity which differed from the majority of the parent ruling State, and who have retained a unique culture and identity that originate and continue from the past, such that even while subject to the rule of the above-mentioned majority, that group has not since lost the unique culture and identity which derives and continues from the past.

(v) Contemplation and reflection

(a) The public benefits from the accomplishment of the instant Project Plan as recognized above show its public nature to be high. To wit,

- (1) controlling flood waters, to protect persons and property from flooding and to eliminate residents' anxiety with regards to flooding;
- (2) maintaining correct functioning of the river flow, to obtain a stable flow of water through the river course preventing the occurrence of water shortages and eliminating residents' anxiety with regards to water

shortages and furthermore, to prevent obstructions at the mouth of the river, which both forestall internal water flooding in the vicinity of the mouth of the river and make it easier for the upstream migrations of rainbow trout, smelt, and other fish;

(3) supplying irrigation water service, to provide a foundation for regional agricultural production offering greater security for farm management;

(4) supplying municipal water service, to distribute municipal water in keeping with the various municipal water plans for Biratori and Monbetsu Townships; .

(5) supplying industrial use water, to make possible Hokkaido's predicted 1995 industrial use water needs for the East Tomakomai Industrial Park, allowing the region's industrial production and economic activity to contribute of course to the economic and social development of all of Hokkaido; and,

(6) supplying water to an electric power generating station constructed with the Nibutani Dam, to make possible up to 3,000 kilowatts of electrical power to the Saru River area, which moreover, will address increasing needs for electrical power in that area.

On the other hand, as recognized above, among the losing interests and accompanying costs that may arise out of the execution of the project are:

- The vicinity of the Instant Confiscated Properties is said to be a holy place to Ainu people, and furthermore, an extremely high proportion of the residents in the vicinity are Ainu people. That proportion stands out as high even in comparison with other places in Hokkaido where many Ainu people live.
- In the Nibutani area, traditional Ainu spiritual and technological culture is preserved. And it is not just that many who hand down the folklore to future times have been from there, but many scholars from Japan and abroad have visited there, and it is known as the birthplace of Ainu cultural scholarship.
- The fundamental characteristics of Ainu culture are focused around hunting, gathering, and fishing, spending their lives together with nature. Because this culture was born from worshiping the bounty of nature together with their gods, nature bonds together an area's culture with the land cherished by that culture in a connection so extraordinarily close that it can never be severed.
- Historically, the Ainu culture in the Nibutani area also was forcibly changed after experiencing contact with wa-jin and suffered as a result. Nevertheless, the essence and/or spirit of Ainu culture's close connection with nature has continued even to the present.
- Specifically, the Chippusanke ceremony, today, has become a place for interaction between Ainu and wa-jin. It has taken on an importance not only in helping wa-jin better understand Ainu culture, but even for Ainu

people to achieve for themselves a renewed sense of ethnic belonging. Thus, in light of its original significance as well as its present day effects, it is easy to understand that the event's staging grounds are extremely important for handing down Ainu culture.

- The Yuoy Chashi and Poromoy Chashi located in the vicinity of the Instant Confiscated Properties are important remains for understanding the history of the Ainu people.
- The chinomishir located in three places in the vicinity of the Instant Confiscated Properties are holy places for Nibutani area Ainu people.

Because the Ainu people have no written language, the Chippusanke and similar ceremonies and the Chashi relicts which have been preserved through their forms are precious irreplaceable resources in the quest for understanding Ainu ethnic; culture. Without a doubt, their importance exists on a level that is incomparable with what would be for ethnic groups who have written languages. Furthermore, because the chinomishir are places which fulfill a religious meaning as sites of spiritual refuge for the Ainu people whose principals are found in the worship of nature, it deserve to be said that people from other ethnic groups need to humbly show due respect for these places without arguing about trifling points.

Continuing from there, it is manifest that the Ainu people in the vicinity of the Confiscated Properties hold many environmental, ethnic, cultural, historical, and religious values which are important to them. But the worth of these various elements also appertains to the broad reach of citizens who are not members of the Ainu people. This is because, in our country which is a physically isolated island it is inevitable that opportunities to contact the cultures of many ethnic groups are comparatively limited. This in turn causes a tendency to succumb to simplistic values. Facing those circumstances, we believe that the opportunity to contact a culture associated with the indigenous locale of an indigenous minority people in Japan greatly contributes to fostering more diverse values and a better understanding ethnic diversity overall.

Yet if the Project Plan is accomplished, the environment in the Nibutani area, which is known as an Ainu holy place, a place where Ainu culture is rooted, and the birthplace of Ainu ethnic scholarship, will undergo great change. Without a doubt, it will become markedly more difficult to keep for future generations the many ethnic, cultural, historical, and religious values of the Ainu people, who are an indigenous minority people closely associated with the area with a spiritual culture founded upon togetherness with nature.

Of course, it is conceivable that these various values may be compromised for the public interest. But in cases where such concessions are to be sought, there must also be the greatest degree of consideration that includes a sense of remorse concerning matters such as that described above of the historical background of the coerced deterioration of the Ainu people's unique ethnic culture caused by assimilationist policies.

It should also be noted that the Instant Confiscated Properties were properties originally issued pursuant to the Hokkaido Former Aborigines Protection Act. Thus, less than 100 years after issuing land to Ainu people to force them into an agricultural

lifestyle to which they were unaccustomed and representing a significant factor in the deterioration of their ethnicity, that land is now to be taken away. Of course, there is absolutely no bar on using land originally issued pursuant to the Hokkaido Former Aborigines Protection Act for the public interest, but here too, the greatest degree of consideration seems warranted. If such consideration is lacking, it reflects the majority's careless and selfish policymaking, and our judgment finding illegality cannot be avoided.

(c) Now we consider the question of whether or not sufficient consideration can be found in the instant case.

At least by the time of the application for the Project Authorization the enterprise authority/participating party realized that a majority of the residents in the planned enterprise area were members of the Ainu people, and that Ainu culture was being preserved and handed down there. Yet, prior to that application for the Project Authorization, there was not sufficient research or study of the degree of impact that the proposed project would have on Ainu culture. It is clear that, from the very beginning, there was meager understanding generally of Ainu culture as a culture of a minority group residing within Japan, and the details of that culture were similarly unknown. Accordingly, in such a case, the equivalent of a preliminary environmental assessment should have been carried out, i.e. a carefully conducted comparative balancing of investigative results found after unhurried study of the project's impact on Ainu culture.

Specifically, a decision of whether or not to permit construction of the Nibutani dam in the Nibutani area should have been based on results from an investigation as above. And even assuming that construction would be permitted, then a determination of the location of the construction site should not have been based merely on ground form, structure, and economic factors, as was done in the present case. A comparative balancing should have been carried out including the nexus with the concrete burdens imposed on Ainu culture, asking, for example, what construction locations might have been available to keep clear of the Chashi and Chipusanke locations, etc. The Project Plan should have been determined and the application for a Project Authorization should have been submitted pursuant to this process.

The authorizing entity, i.e. Minister of Construction, in making the Project Authorization, needed to sufficiently investigate whether this sort of careful comparative balancing etc. was indeed carried out. This was a legal obligation imposed upon the Minister of Construction. However, the consideration with regard to Ainu culture taken by the participating party by the time of the application for the Project Authorization was nothing more than taking steps pursuant to the Cultural Assets Protection Law for buried asset protection of the Chashi and contemplating an alternative location for the chipusanke. And even in the buried assets protection, the participating party's way of thinking was exactly the same as would be seen for buried assets protection of wa-ji cultural artifacts; there was not a scintilla of particular consideration for the Ainu per se. Moreover, in carrying out the buried assets protection measures, the participating party carried out the procedures by submitting its request to the involved government agencies taking the construction of the Nibutani dam at the planned location as a foregone conclusion. And the fact that the Construction Implementation Plan, the Fundamental Plan, and the Project Plan all completely lacked mention of Ainu culture causes us to

presume that at the time that the Project Plan was decided upon, Ainu culture had not been separately considered whatsoever.

Putting all of these contemplations together, we find no particular awareness of Ainu culture on the side of the enterprise authority/participating party in preparing the Project Plan. Subsequent requests from the Ainu plaintiffs' and local community councils, etc., sought consideration for Ainu culture and regional support. But because the enterprise authority/ participating party was seeking smooth execution of voluntary land acquisitions, it took a posture to ignore what could have been properly addressed. Consequently, things proceeded through to the Confiscatory Administrative Rulings without obtaining the plaintiffs' understanding.

Defendants have argued that their ignorance of the locations of chinomishir was unavoidable, not only because they were unknown to the general public, but because Plaintiff Kayano did not identify those locations until the time of his request for an examination of the Confiscatory Administrative Rulings. However, as explained above, had the participating party allowed sufficient time and properly investigated the impact of the Nibutani Dam construction on Ainu culture in advance, the possibility cannot be denied that their lack of awareness might have been avoided. For these reasons, a finding of impropriety is inescapable.

(d) Taking all that has been written above together, we find that the Minister of Construction, who was the authorizing agency and the agent for the enterprise authority in the instant matter, neglected the investigative and research procedures that were necessary to judge the priority of the competing interests accompanying the accomplishment of the Project Plan. He unreasonably made little of and ignored various factors and values that should have been given the highest regard. Furthermore, despite being unable to make a proper judgment, he recognized only the smallest possible impact on Ainu culture and left any damages thereupon unremedied.

After all of this, the Minister of Construction determined to give precedence the public benefits of the project over losing interests and associated values, and consequently issued the Project Authorization. Nothing more can be said except that such action exceeded the administrative discretion given to the authorizing agency pursuant to Land Expropriation Law Article 20(3) and was illegal.

Therefore, we conclude that the instant Project Authorization was in violation of Land Expropriation Law Article 20(3) and that such illegality succeeded to the Confiscatory Administrative Rulings.

As explained above, the Project Authorization was illegal. Subsequent circumstance did not cure that illegality. Thus, the Confiscatory Administrative Rulings which ensued directly thereafter succeeded to the above illegality. Nothing remains to be decided upon; the Confiscatory Administrative Rulings were illegal.

APPLICATION OF ADMINISTRATIVE LITIGATION LAW ARTICLE 31(I)

Because . . . the Confiscatory Administrative Rulings were illegal, ordinarily they would be reversed. And, while we can well understand the need for flood control owing to the many losses of lives and property caused by flooding in the Saru River area to date, to put things bluntly, couldn't flood waters have been controlled without building this 31.5 metre [*sic*] high, 580 metre long, gargantuan concrete dam in the beautiful nature of this mountain area? Wasn't there a way to go along with and appreciate the value of togetherness with nature so that the Ainu people would not lose that? One cannot help but to harbour these simple questions with deep emotions. And if we look from these points alone, we conclude that the Confiscatory Administrative Rulings should be reversed. . . .

However, according to evidence . . . , we find that the Nibutani Dam has already been completed with an enormous expenditure of tens of billions of yen and is filling with water. If our decision to reverse the Confiscatory Administrative Rulings is finalized, flooding of the Instant Confiscated Properties owned by the plaintiffs will be barred. And accordingly, it is clear that after releasing the water already collected, the Nibutani Dam's water reserves would never be filled. Then this dam which was built at such great expense would not only become a useless object, but because it is easy to imagine that an unfilled Nibutani dam will obstruct the proper flow of the Saru River, the danger from flooding etc. would actually increase.

Furthermore, because there is a need for flood control in the Saru River as recognized above, if the Nibutani Dam becomes unusable, then the need will arise for construction of further embankments, etc. for flood control purposes, and that construction will require expenses even beyond what was required for constructing the Nibutani Dam. Moreover, until that further construction will be completed, the residents of the Saru River area, despite having the completed Nibutani Dam right before their eyes, will have to go without its benefits and instead wind up in a position of greater danger than even before the Nibutani Dam was built.

And further still, to eliminate the danger from an unfilled Nibutani Dam, it will have to be removed. The enormity of that expense is also easy to imagine.

Thus, in accord with these facts, with the Nibutani Dam already complete and filling with water, we are forced to recognize the extraordinary harm to the public interest that would arise from reversing the Confiscatory Administrative Rulings.

Additionally, we find that the Poramoy Chashi has already been destroyed and the Pe-ure-pukka and Kankanrerekehe Chinomishir have each been demolished by the dam construction. Even if the Confiscatory Administrative Rulings are reversed, these sites cannot be restored.

Efforts to preserve the Chashi, albeit to limited degree, are underway and an alternative location for the Chipusanke is being studied. These are insufficient actions, but Ainu culture is being considered. Further concrete remedial measures for the plaintiffs' preservation and continuation of Ainu culture [is being considered] by all, including the national government who is the participating party, as well as the government of Hokkaido, and the local community council of Biratori Township. And we can hope that from this time forward the national government and these others will try to give sufficient consideration to the problems relating to the culture of the Ainu people. Taking these and all of the other circumstances of the instant matter into consideration, we find that reversal of the confiscatory Administrative Rulings would not correspond to the public welfare.

Accordingly, in the instant matter, we apply the provisions of Article 31(1) of the Administrative Litigation Law;

CONCLUSION

In accordance with the above circumstances, the Confiscatory Administrative Rulings were illegal. Applying the provisions of Article 31(1) of the Administrative Litigation Law; we proclaim the illegality of the Confiscatory Administrative Rulings while rejecting each of the plaintiffs' complaints in the instant matter,

Accordingly, we enter judgment as stated in our Formal Ruling.

Notes and Questions

1. A translation is also available in A. Palmer & C. Robb, 4 INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS 294 (Cambridge, Eng.: Cambridge Univ. Press, 2004).
2. What factors did the court balance, in its assessment of the respective interests of the Ainu and the Japanese government?
3. What did the local governing body fail to do, that would have properly accommodated the environmental interests of the Ainu? (Note the court's presumption that the administrator did not consider the relevant constitutional and treaty-based rights of this ethnic minority.)
4. What was the defense of the Minister of Construction?
5. The court concluded by stating that "we proclaim the illegality of the Confiscatory Administrative Rulings while rejecting each of the plaintiffs' complaints in the instant matter." Why did the court not reverse in favor of the Ainu? Was this decision a victory or a defeat for the Ainu? Did the court effectively rule that the plaintiffs filed a late claim, and thus were not entitled to a remedy?
6. What could the court have done to fashion a more complete remedy—given that the plaintiffs were upset with: (a) the taking of their cultural heritage; and (b) the amount that the Japanese government was willing to pay.