

CONVENTION ON BIOLOGICAL DIVERSITY. RED BOOK PLANTS ARE UNDER A THREAT OF DESTRUCTION*

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On August 19, 1994, the Resolution No. 918 of the Cabinet of Ministers of the Republic of Kazakhstan approved the Convention on Biological Diversity (hereinafter—the Convention). Objectives of the Convention “are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.”¹

Development of normative legal acts concerning protection, conservation, and restoration of population and habitat of threatened species of animals and plants began in accordance with the Resolution.

It was planned to take measures to regulate economic activity in the habitats of rare and endangered species of fauna and flora. And also it was planned to implement “in the full extent the procedure for conducting environmental impact assessment of proposed projects that may have a significant adverse effects on biological diversity.”

This timely decision was made due to the fact that the ecological situation in the Republic of Kazakhstan was alarming. The impact on the natural environment of military ranges, the cosmodrome, large mining enterprises, and improper farming practices created a serious threat to the biological diversity of the country.

23 years have passed after the signing of the Convention. The laws “About Specially Protected Natural Territories” of 1997 and 2006, the Forestry Code of 2003, the law “About Protection, Reproduction, and Use of Wildlife” of 2004 were adopted. New specially protected areas, including national parks, appeared on the country map. A number of specially protected natural territories of Kazakhstan have been included in the Tentative List of UNESCO World Heritage sites.² In 1999, the Ministry of Natural Resources and Environmental Protection developed a “National Strategy and Action Plan for Conservation and Balanced Use of Biological Diversity of the Republic of Kazakhstan.”³ In 2008, the state nature reserves Naurzum and Korgalzhyn were included

in the World Heritage List as the “Saryarka—Steppe and Lakes of Northern Kazakhstan” site. In 2007, the Environmental Code was adopted.

However, in 2009, authors of the Fourth National Report on Biological Diversity stated: “The ecological situation in the RK [Republic of Kazakhstan] is characterized to a considerable extent by degradation of natural systems which leads to destabilization of the biosphere, loss of its ability to maintain quality of the environment necessary for vital functions of the society. The problem of desertification is acute. The crisis of biodiversity is caused by business operations, environmental pollution, and natural disasters, as well as insufficient area allocated to protected ecosystems. Depletion of biodiversity and degradation of ecosystem is noted on 66% of the republic’s lands, especially in desert and steppe zones, with plowing and overgrazing.”⁴

The reasons for non-observance of the Convention on Biological Diversity and the mechanism of violation of its norms can be illustrated by an example of the Ile-Alatau State National Natural Park (hereinafter—the Ile-Alatau National Park). The park was founded in 1996 on a territory equal to 164450 hectares “in order to preserve and restore the unique natural complexes of the Zailiysky Alatau, which have a special ecological, historical, scientific, aesthetic and recreational value.”⁵ Already in 2002, it was included in the Tentative List of UNESCO World Heritage sites.

Theoretically, great opportunities opened up for the national park, but being next to the Almaty urban agglomeration became a serious obstacle. The city authorities could not look indifferently at the vast unoccupied territories, which had a great recreational potential. This was a starting point for initiatives of the local authorities that led to gross violations of the Convention.

On March 27, 2007, development of a project of a resort and mountain-skiing base “Kokzhailau” on the territory of the Ile-Alatau National Park was initiated by an order of the akim of Almaty.⁶ The city authorities were not troubled by the fact that the national park is a specially protected territory of the countrywide level. At that time, the park was under control of the Ministry of Agriculture. Consequently, they had no right to engage in any activity on its territory. The construction was planned to be carried out in a zone of rich biological diversity. They decided to start by building an autoroad to the future resort.

When the Ecological Society Green Salvation (hereinafter—ES) found out about such plans of the akimat, the organization requested detailed information of the proposed activity. The akimat did not respond to either the first or the second request. In this regard, on October 22, 2007, the ES filed a lawsuit to the Specialized Inter-Regional Economic Court of the city of Almaty with a demand to oblige the akimat to provide the requested environmental information. Meanwhile, construction of the road in the park continued.

On November 14, 2007, the court ruled in absentia that the claim was satisfied, but the akimat did not provide the information on the planned

activity. In March 2008, the ES received a reply from the Forestry and Hunting Committee regarding construction of the road, which said that “the existing road to the Kokzhailau landmark was undergoing repairs for fire control and forestry purposes.”⁷

A serious obstacle to the construction in 2007, apparently, was a ban on transferring lands of specially protected natural territories into other categories of lands, as stipulated in the law “About Specially Protected Natural Territories.” The Article 23 stated:

“1. Lands of specially protected natural territories, as well as land plots of other categories of lands occupied by objects of the state natural reserve fund, are in the state ownership and are not subject to privatization.

2. Withdrawal of lands of specially protected natural territories, as well as their transfer to lands of other categories is not allowed.”⁸

Little by little, talks about construction of the ski resort “Kokzhailau” quieted down, but the city authorities did not abandon their plans. Since the beginning of 2008, they started to look for funds to develop design estimates.⁹ In the same year, the ban on transferring lands of specially protected natural territories into other categories was cancelled. Now, the Article 23 looked like this:

“1. Lands of specially protected natural territories, as well as land plots of other categories of lands occupied by objects of the state natural reserve fund, are in the state ownership and are not subject to alienation (отчуждение).

2. Withdrawal of lands of specially protected natural territories is not allowed.

The transfer of lands of specially protected natural territories is not allowed, except for cases of transfer into lands of reserve for construction and operation of tourism facilities planned by state programs, in the absence of other options for their possible placement and only those areas where procedures of limited economic activity are established, with an approval of the state environmental assessment, in the order established by the Government of the Republic of Kazakhstan.”¹⁰

Despite the fact that the content of the second part of the second paragraph completely contradicts the paragraph 1 and the first sentence of the second paragraph, the parliamentarians adopted the addition to the law. A loophole to manipulate lands of national parks was created.¹¹ None of the legislators even thought about that the territories which now can be transferred to the category of “lands of reserve,” could have been the habitats of the Red Book species of plants and animals.

In summer of 2011, officials started talking about the project again. At a governmental meeting, the akim of Almaty said “that it is planned to develop the ski resort “Kokzhailau” in Almaty.” According to him, development of feasibility studies and the project concept will require about 3 billion tenge.¹² As it was to be expected, at the very first public hearings about the mountain ski resort project,

a question came up: “Are there any Red Book species on the territory of the proposed construction?” Evasive responses of officials and project developers confirmed the concerns of environmentalists. The public started a campaign against construction of the resort. As it turned out, no systematic studies were conducted on the territory of the proposed mountain ski complex.

When the design and estimate documentation for construction of the autoroad to the resort became publicly available, the threat of destruction of the Red Book plants became obvious.

As in 2007, the initiator of the project, Almaty Administration of Autoroads, and the developer were not troubled by the fact that they plan the construction development on a territory of a national park which is in the republic’s subordination. Specialists traced the route of the future road on a grand scale, straightening it out or expanding where they deemed to be necessary. As for the plants growing along the road, there was no doubt they were to be cut or transplanted. Thus, 1967 transplantable trees were under threat. 1361 Tien-Shan spruce trees, 3283 deciduous trees, including 465 Sivers apple trees (*Málus sievérsii*), 12 coniferous shrubs, and 15855 shrubs were non-transplantable. All were in good and satisfactory condition. Additionally, 71 Sivers apple trees found in unsatisfactory conditions were subject to sanitary cutting.¹³

To prevent destruction of the rare plants, the Ecological Society Green Salvation filed a lawsuit to the Specialized Inter-Regional Economic Court of Almaty on April 17, 2015. The lawsuit was about acknowledging of the environmental impact assessment (hereinafter—EIA) of the project of construction of the road to the resort to be illegal and about its abolition.

Authors of the EIA mentioned the Sivers apple tree, but did not indicate that it is the Red Book plant. It is registered under No.114 in the “List of Rare and Endangered Species of Plants and Animal” approved by a decree of the government.¹⁴ Sivers apple tree is also included in the Red List of Endangered Species of the International Union for Conservation of Nature (hereinafter—IUCN).

Common apricot (*Armeniaca vulgaris*) is also mentioned in the EIA, but the authors did not indicate that it is registered in the “List ...” under No.117, and is also included in the IUCN Red List. The EIA does not specify how many apricot trees the project developers were planning to cut down. The EIA mentions nothing about herbaceous plants listed in the Red Book and present on the territory of the proposed construction.

In recent years, the number of Red Book plants in Kazakhstan is rapidly decreasing. In particular according to the IUCN data, natural habitats of Sivers apple tree decreased by 70% in the last 30 years.¹⁵ The main reasons for reduction in the number of common apricot trees are “construction and development of tourist resorts, cutting down for firewood, harvesting fruits.”¹⁶

The developers were not troubled by the fact that, in accordance with the

national legislation and the Convention on Biological Diversity, not only the threatened species are subject to protection, but also their habitats. The developers did not take into account that in accordance with the Article 339 of the Criminal Code,¹⁷ the following is considered to be a criminal offense: “Illegal collection, acquisition, storage, sale, import, export, shipping, transportation, or destruction of rare and endangered species of plants or animals, their parts or derivatives, ... as well as the destruction of their habitats.”

When reviewing this case, courts of all instances ignored the following rules of national and international law.

Competence of the government in the area of utilization and protection of the Red Book plants was interpreted by the courts in a rather strange manner.

Representatives of the defendant repeatedly claimed in court that the government can make decisions on cutting of Red Book plants. This statement does not correspond to the norms of the Forestry Code and the law “About Specially Protected Natural Territories.”

In accordance with the Article 12 of the Forestry Code:

“The Government of the Republic of Kazakhstan:

1) develops the main guidelines and ensures implementation of the state forest policy;

2) exercise the rights of ownership, use, and managing the state forest fund;

...

10) approves volumes of withdrawal (изъятие) of plants listed in the Red Book of the Republic of Kazakhstan.”¹⁸

According to the paragraph 18-15) of the Article 13 of the Code, the authorized body and its territorial subdivisions make “proposals to the Government of the Republic of Kazakhstan on the volume of withdrawal of plants listed in the Red Book of the Republic of Kazakhstan.”

In accordance with the Article 7 of the law “About Specially Protected Natural Territories,” the competence of the government includes:

“2) the right to own, use, and manage specially protected natural territories and objects of the state natural reserve fund of national importance; ...

3-1) making decisions about withdrawal of rare and endangered plant species;

4) approval of:

... a list of rare and endangered species of plants and animals.”

Paragraph 5 of the Article 32-1 of the law “About Specially Protected Natural Territories” provides an exhaustive list of cases in which rare plant species can be withdrawn from their natural habitat. “Withdrawal of rare and endangered plant species is carried out on the basis of a decision of the Government of the Republic of Kazakhstan for:

1 - reproduction in specially created conditions;

- 2 - scientific research;
- 3 - selection.”

In other words, not a single state body of the Republic of Kazakhstan has a right to issue permits to cut Red Book plants. The government has the authority to withdrawal species from their habitat which is not an eradication or cutting.

A representative of the Ile-Alatau National Park stated in a court that for the entire period of the park’s existence, the government has never adopted an order for withdrawal of any Red Book plants on its territory. In addition, there is no information in the official “Adilet” database that such a decision was ever made for any other national park of Kazakhstan.

The courts did not take into account that the EIA developers did not comply with a number of environmental requirements contained in laws, standards, norms, and regulations of the Republic of Kazakhstan. But at the same time, during preparation of the EIA, they used legal documents which are not related to protection of Red Book plants. Firstly, they referred to the “Rules of Maintenance and Protection of Green Vegetation in the City of Almaty” (hereinafter—the Rules). But according to the paragraph 55 of the Rules, their effect “does not extend ... to specially protected natural territories of the countrywide level,” which is the Ile-Alatau National Park. Secondly, the materials of the plants inventory and forest pathological survey that were used in the development of the EIA were carried out neither in accordance with the law “About Specially Protected Natural Territories,” nor with the Forestry Code, nor with the Sanitary Rules in the Forests.¹⁹ The author of the materials acted in accordance with the “Instruction on the Procedure for Conducting and Preparing of Inventory Materials and Forest Pathological Survey of Green Vegetations of the City of Almaty” of 2006. But as explained by the Ministry of Justice in a letter dated on July 1, 2015, this instruction was found neither “in the informational and legal system “Adilet,” nor in the State Register of Normative Legal Acts of the Republic of Kazakhstan. Therefore, this document has no legal force, in accordance with the Part 1 of the Article 38 of the Law of the Republic of Kazakhstan “On Normative Legal Acts.” The judges paid no attention to the fact that the defendants used inactive and unrelated legal acts.

The judges ignored the fact that during the court hearings, representatives of the defendant used concepts that did not apply to the legislation regulating the use and protection of the Red Book plants. In the Forestry Code and the law “About Specially Protected Natural Territories” there are no concepts of “cutting” or “pulling down” of the Red Book plants.²⁰ Moreover, paragraph 5 of the Article 42 of the Forestry Code states: “Collection and harvesting of wild plant and fungi species listed in the Red Book of the Republic of Kazakhstan ... are prohibited.”

The fact that the EIA developers did not even mention about requirements of international environmental conventions was not taken into account.

According to the paragraph 3, Article 4 of the Constitution: “International treaties ratified by the Republic have a priority over its laws and are applied directly.”

Paragraph 3 of the Article 1 of the Forestry Code states: “If an international agreement ratified by the Republic of Kazakhstan establishes rules that differ from those contained in this Code, then the rules of the international agreement are applied.”

According to the paragraph 4 of the Article 2 of the law “About Specially Protected Natural Territories”: “If an international agreement ratified by the Republic of Kazakhstan establishes rules that are different from those contained in this Law, then the rules of the international agreement are applied.”

According to the Article 8 of the Convention on Biological Diversity: “Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; ...

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; ...

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies.”

The Fourth National Report of the Republic of Kazakhstan on Biological Diversity, in particular, notes the following.

“Worldwide recognition was received by the orchard ABD [agro-biodiversity] and, above all, by the wild apple and common apricot.”²¹

Authors of the report believe that it is necessary to take measures “on assessing the condition and inventory of biodiversity objects, expanding the network of specially protected natural territories, and preserving the natural populations of rare species.” Inclusion of reserves and national parks into the UNESCO World Heritage List will also contribute to conservation of biodiversity.

“Many communities have very narrow ranges and for this reason accidental death can lead to their loss in nature. Preservation of these rare and endangered species can only be achieved through enhanced protection of their communities.”

“Reluctance of some governmental officials to carry out their duties on implementation of the CBD [Convention on Biological Diversity] influences decision-making in specific cases. It leads to loss of trust in state bodies by executive organs and consumers of natural resources. ...

Corruption among officials. A nationwide problem that leads to loss of trust in the state, and not only in this area. It causes slowdown in the processes of implementation of protection, restoration, and utilization of biological diversity.”²²

In the opinion of the authors of the Fifth National Report of the Republic of Kazakhstan on Biological Diversity, withdrawal of lands of specially protected natural territories for construction of tourism facilities represents

a serious threat to rare species habitats. “Thus, the imperfection of the legislative base allows practically any site necessary for privatization to be withdrawn in the similar manner from any national park.”²³

But these arguments, which were presented by the ES in the court, also did not have any effect.

Finally, the judges did not react in any way to the inaccurate information provided by the defendant-developer of the EIA. For example, in the section 10 of the EIA “Impact on the Objects of the Nature Reserve Fund,” it is not indicated at all that the construction of the road will affect the state natural reserve fund.

In the section 12 of the EIA “Assessment of Environmental Risks,” the paragraph 6 states that the construction of the road “has a positive social and economic value, since it positively affects the transportational, natural, social” ... situation in the city. The defendant does not mention the fact that according to the paragraph 6 of the Article 108 of the Land Code, “inclusion of land plots into city, town, or village limits does not entail termination of the right of ownership or the right of land use over these plots.” The defendant does not need extra mentioning that the national park does not obey the city authorities, and that the EIA is not agreed with the Ministry of Agriculture.

On the page 50 of the EIA, it suddenly turns out that “the removal (снос) of the plants” will be carried out “in accordance with the established permits for cutting down trees issued by the Department of Natural Resources and Environmental Management of the city of Almaty.” Again, the authors of the EIA chose not to say that they were going to remove Red Book plants on the territory of a national park. As noted above, no governmental agency has such powers in accordance with the law.

Paragraph 7 of the Section 12 of the EIA sounds like a cynical mockery of the national legislation and the international obligations of the Republic of Kazakhstan: “An integrated assessment ... showed that this impact [construction of a road in a national park and cutting down Red Book plants—author’s note] is not catastrophic.”

Courts of all instances rejected the claims of the Ecological Society Green Salvation. Prosecutors who attended the hearings also “did not notice” any violations. Our letters to the Prosecutor’s Office and the Ministry of Internal Affairs about the preparation of a criminal offense were left unanswered.

The Supreme Court’s regulatory resolution No.1 of January 15, 2016, states: “By implementing the indicated constitutional powers, the Supreme Court ensures a uniform interpretation and application of the law in the implementation of legal proceedings.”

In the paragraph 10 of the Supreme Court’s regulatory resolution No.1 of July 10, 2008, “On Application of the Norms of International Agreements of the Republic of Kazakhstan,” it is stated: “In the administration of justice, courts

should bear in mind that ... improper application of the norms of international agreements of the Republic of Kazakhstan by a court may constitute grounds for cancellation or change of a judicial act. Incorrect application of a norm of an international agreement can be concluded in the fact that the courts did not apply the norms of international agreements to be applied, or applied the norms of international agreements that are not applicable, or when the courts have misinterpreted the norms of international agreements.”

However, the practice of applying the conventions in the country demonstrates a huge gap between the declared observance of their requirements and the real state of affairs. A striking confirmation of this fact is that even the judges of the Supreme Court often ignore international conventions and regulatory resolutions of the Supreme Court when considering cases. This leads to adoption of absurd judicial acts, undermining the authority of judges, creating doubts about their competence.

The regulatory resolutions No.1 of July 10, 2008, and No.8 of November 25, 2016, “On Certain Aspects of Application of the Environmental Legislation of the Republic of Kazakhstan in Civil Cases by the Courts,” explains application of the norms of the Aarhus Convention by the courts.²⁴ But they do not mention application of the provisions of the following environmental conventions ratified by the Republic of Kazakhstan:

- on protection of the world cultural and natural heritage,
- on wetlands of international importance,
- on biological diversity.

Many norms of the conventions are not adapted to national legislation and are not applied by courts. This violates the legal status of the international agreements, which, according to the Constitution, take precedence over national laws and are applied directly.

The above described example demonstrates that no governmental body “wished” to stand up for protection of the Red Book plants and specially protected natural territory. The officials demonstrated their inability to comply with the international obligations adopted by the Republic of Kazakhstan in accordance with the Convention on Biological Diversity.

* The cited articles of the laws are set out in the editions that were in effect at the time of filing the lawsuit on April 17, 2015.

1 Convention on Biological Diversity, <https://www.cbd.int/>.

2 World Heritage Convention, <http://whc.unesco.org/en/tentativelists/1681>.

3 Fourth National Report of the Republic of Kazakhstan on Biological Diversity. Ministry of Environmental Protection. —Astana, 2009, p.33, <https://www.cbd.int/doc/world/kz/kz-nr-04-en.pdf>.

National Strategy and Action Plan for Conservation and Balanced Use of Biological Diversity of the Republic of Kazakhstan were not approved by the government.