



Mining Mining Licenses

ABOUT THE AUTHOR

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1.

Two years ago, developments in case law on local autonomy and the environment were very encouraging.¹ At that time, I presented four Supreme Court decisions that promoted both local autonomy and environmental protection; the Court consistently recognized the role of local governments as a partner in protecting the environment. It was probably the first time in history that the Philippine Supreme Court decided consistently for the environment.²

This trend, fortunately, continues today.

There is a spate of Supreme Court cases that give us reasons to celebrate. These cases suggest the use of national laws as a way to protect local communities from the effects of resource extraction. These cases show a Supreme Court easily striking down mining licenses when there are violations of the Constitution or national laws. They suggest that civil society actors might want to consider litigation as another option in the quest to protect the local interests.

2.

The first case is *SR Metals, Inc. v. Secretary Reyes*.³

On March 9, 2006, petitioner mining companies were awarded a 2-year Small-Scale Mining Permit (SSMP) by the Provincial Mining Regulatory Board of Agusan del Norte and were allowed to extract Nickel and Cobalt (Ni-Co) in a 20-hectare mining site in Sitio Bugnang, Brgy. La Fraternidad, Tubay, Agusan del Norte. These permits were granted after the Environmental Management Bureau (EMB), Region XIII of the Department of Environment and Natural Resources (DENR) issued Environmental Compliance Certificates (ECCs) with a validity period of one year on March 2, 2006.

The ECCs limited the amount of Ni-Co ore they are allowed to extract annually to not exceeding 50,000 MTs as required by Section 1 of Presidential Decree No. 1899.

Subsequently, the Governor of Agusan del Norte questioned the quantity of ore that had been mined and shipped by the mining corporations. The mining corporations denied having exceeded the extraction limit of 50,000 MTs and explained that an extracted mass contains only a limited amount/percentage of Ni-Co as the latter is lumped with gangue (which is the commercially valueless material in which ore is found). They argued that only after the Ni-Co is separated from the gangue should the amount of the Ni-Co be measured and considered as 'ore.' Following their argument the mining corporations claimed that the volume of Ni-Co ore they

¹ Dante Gatmaytan, *An Autonomy Friendly Court*, Bantay Kita Policy Note 2014-001 (2014).

² I made earlier analyses of Supreme Court decisions which showed that trend in case law with one exception is one consistently against the environment. Dante Gatmaytan-Magno, *Artificial Judicial Environmental Activism: Oposa v. Factoran as Aberration*, 17(1) IND. INT'L. & COMP. L. REV. 1 (2007).

³ G.R. No. 179669, June 4, 2014.

had extracted from the time they started shipping the same in August 2006 until they filed their Petition before the Court of Appeals in December 2006 was at 1,699.66 MTs of Ni-Co ore only.

The Governor sought the opinion of the Department of Justice (DOJ) on the matter.

Meanwhile, the EMB sent the mining corporations a Notice of Violation informing them that they had exceeded the allowed annual volume of 150,000 MTs combined production as their stockpile inventory of Nickeliferous ore had already totalled 177,297 dry metric tons (DMT). This was based on the August 10, 2006 Inspection Report of the MGB Monitoring Team which conducted an inspection after the DENR received complaints of violations of small-scale mining laws and policies by the mining corporations. A technical conference was then held to hear the side of the mining corporations regarding their alleged over-extraction.

On November 26, 2004, the DENR Secretary issued a Cease and Desist Order against the mining corporations suspending their operations.⁴

Days later DOJ Secretary Raul M. Gonzalez replied to Governor Amante citing DOJ Opinion No. 74, Series of 2006. By comparing Presidential Decree No. 1899 to Republic Act No. 7076, the DOJ opined that Section 1 of the older law was impliedly repealed by Republic Act No. 7076 because there was nothing in the latter law that mentions anything pertaining to an annual production quota for small-scale mining.

Even assuming that the 50,000-MT ore limit in Presidential Decree No. 1899 is still in force, the DOJ categorically concluded that the term 'ore' should be confined only to Ni-Co, that is, excluding soil and other materials that are of no economic value to the mining corporations.

On the strength of the DOJ Opinion, the mining corporations went to the Court of Appeals to challenge the validity of the CDO.

The Court of Appeals denied the mining corporations' Petition, not only because the ECCs have been mooted by their expiration, but also due to its recognition of the power of the DENR to issue the CDO as the agency reposed with the duty of managing and conserving the country's resources. On whether the imposed limit under Presidential Decree No. 1899 should be upheld and whether there was over extraction, the Court said:

We agree with the OSG's argument that the 50,000[-]metric ton limit pertains to the mined ore in its unprocessed form, including the soil and dirt.

⁴ The EMB cited the following reasons:

1. The excess in 1) annual production of SR Metals, Inc., 2) maximum capitalization, and, 3) labor cost to equipment utilization of 1:1 is, by itself, a violation of existing laws.
2. The ECCs issued in favor of San R Construction Corporation and Galeo Equipment Corporation have no legal basis and [are] therefore considered null and void from the beginning. Similarly, the small scale mining permits that were issued by reason of such ECCs are likewise null and void.

The OSG argued that the DOJ Opinion is not binding upon the court and that the agency which is tasked to implement the mining laws is the DENR. Citing the MGB letter-reply, the OSG contended that the limit provided in RA 1899 subsists and RA 7076 did not impliedly repeal the latter. The provisions in both laws are not inconsistent with each other, both recognizing the DENR's authority to promulgate rules and regulations for the implementation of mining laws.⁵

The mining corporations moved for partial reconsideration of the decision but were rebuffed. The Court of Appeals stressed that the DENR is the primary government agency responsible for the conservation, management, development, and proper use of the country's mineral resources.

The companies brought their cases to the Supreme Court.

Issues

Two questions were raised before the Supreme Court. The first is the constitutionality of Section 1, Presidential Decree No. 1899. The mining corporations argued that it violated the equal protection clause because there is no substantial distinction between the miners covered under Republic Act No. 7076, who can extract as much ore as they can, and those covered under Presidential Decree No. 1899 who were imposed an extraction limit.⁶

The second issue concerns the correct interpretation of the 50,000-MT limit. The mining corporations insist that the computation of Ni-Co ore should be confined strictly to Ni-Co component from which they derive economic value.

The Supreme Court ruled against the mining companies.

First it explained that there were now two different laws governing small-scale mining. The Presidential Decree defines small-scale mining as follows:

⁵ The court also gave credence to the MGB's April 30, 2007 opinion on the definition of the 50,000-MT limit. Rejecting the claims of the mining corporations, it said that the MAO buttressed the OSG's arguments as to what the extraction limit pertains to and also contravenes [the mining corporations'] assertion that the extraction limit no longer exists and that, even if the limit subsists, they [had] not exceeded the same because they [had] only extracted around 1,600 metric tons.

⁶ Petitioners construe the omission of the annual production limit in the later law in the sense that small-scale miners granted mining contracts under Republic Act No. 7076 can now conduct mineral extraction as much as they can while the benefit of unlimited extraction is denied to those granted permits under Presidential Decree No. 1899. According to them, such situation creates an invalid classification of small-scale miners under the two laws and it violated the equal protection clause of the Constitution.

Small-scale mining refers to any single unit mining operation having an annual production of not more than 50,000 metric tons of ore and satisfying the following requisites:

1. The working is artisanal, whether open cast or shallow underground mining, without the use of sophisticated mining equipment;
2. Minimal investment on infrastructures and processing plant;
3. Heavy reliance on manual labor; and
4. Owned, managed or controlled by an individual or entity qualified under existing mining laws, rules and regulations.

On the other hand, Section 3 (b) of Republic Act No. 7076, small-scale mining refers to 'mining activities which rely heavily on manual labor using simple implements and methods and do not use explosives or heavy mining equipment.' Significantly, this definition does not provide for an annual extraction limit unlike in older laws.

The Court could not agree with the DOJ in Opinion No. 74, Series of 2006 that there was an implied repeal of the Presidential Decree. The Court held that the two laws have different objectives: the Decree applies to individuals, partnerships and corporations while Republic Act No. 7076 applies to cooperatives. Both laws may stand together and, therefore, there was no implied repeal of the Decree.

The Court also disagreed with the mining corporations' claim that the 50,000-MTs production limit does not apply to small-scale miners under Republic Act No. 7076. Recognizing the DENR's mandate to regulate the country's natural resources under Executive Order No. 192, both Presidential Decree No. 1899 and Republic Act No. 7076 delegated to the DENR the power to promulgate the necessary implementing rules and regulations to give effect to the said laws.

The DENR in the exercise of such power recently resolved the question on the production limit in small-scale mining. On July 5, 2007, it issued DMC 2007-07 or "Clarificatory Guidelines in the Implementation of the Small-Scale Mining Laws." By imposing the annual production limit of 50,000 DMT to both SSMPs issued under Presidential Decree No. 1899 and Small-Scale Mining Contracts (SSMCs) under Republic Act No. 7076, the DENR harmonized the two laws.⁷

⁷ The pertinent portion of the Department Memorandum Circular provides:

V. Maximum Annual Production

For metallic minerals, the maximum annual production under an SSMP/SSMC shall be 50,000 dry metric tons (DMT[s]) of ore, while for nonmetallic minerals, the maximum annual production shall be 50,000 DMT[s] of the material itself, *e.g.*, 50,000 DMT[s] of limestone, 50,000 DMT[s] of silica, or 50,000 DMT[s] of perlite.

The Court then concluded that there was no violation of the “equal protection” clause of the Constitution and held that:

With the 50,000-MT limit likewise imposed on small-scale miners under RA 7076, the issue raised on the violation of the equal protection clause is moot. The fact is, the DENR treats all small-scale miners equally as the production limit applies to all of them. There is therefore no more reason for the mining corporations to not recognize and comply with the said limitation. It must be stressed that the DENR is the government agency tasked with the duty of managing and conserving the country’s resources; it is also the agency vested with the authority to promulgate rules and regulations for the implementation of mining laws.

The DENR, being the agency mandated to protect the environment and the country’s natural resources, is the authority on interpreting the 50,000- MT limit.

Besides, said the Court, this definition is consistent with The Philippine Mining Act of 1995.⁸ That law defines “ore” as “naturally occurring substance or material from which a mineral or element can be mined and/or processed for profit.” Clearly, the law refers to ore in its unprocessed form, *i.e.*, before the valuable mineral is separated from the ore itself.

3.

The Second case is more widely known but for the wrong reasons. The case is *Resident Marine Mammals of the Protected Seascape Tañon Strait v. Secretary Reyes*.⁹

The first set of Petitioners in this case is collectively referred to as the “Resident Marine Mammals.” They are the toothed whales, dolphins, porpoises, and other cetacean species, which inhabit the waters in and around the Tañon Strait. They are joined by human beings who empathize with, and seek the protection of the marine species.

The Petitioner in the second case is the Central Visayas Fisherfolk Development Center (FIDEC), a non-stock, non-profit, non-governmental organization, established for the welfare of the marginal fisherfolk in Region VII; and a representative of the subsistence fisherfolk of the municipalities of Aloguinsan and Pinamungajan, Cebu.

This case started when on June 13, 2002, the Government of the Philippines entered into a Geophysical Survey and Exploration Contract-102 (GSEC-102) with Japan Petroleum Exploration

“The maximum annual production above shall include low-grade and/or marginal ore, and/or minerals or rocks that are intended for sampling and/or metallurgical testing purpose/s.”

⁸ Republic Act No. 7942 (1995).

⁹ G.R. No. 180771, April 21, 2015.

Co., Ltd. (JAPEX). This contract involved geological and geophysical studies of the Tañon Strait. The studies included surface geology, sample analysis, and reprocessing of seismic and magnetic data. JAPEX, assisted by DOE, also conducted geophysical and satellite surveys, as well as oil and gas sampling in Tañon Strait.

On December 21, 2004, DOE and JAPEX formally converted GSEC-102 into SC-46 for the exploration, development, and production of petroleum resources in a block covering approximately 2,850 square kilometers offshore the Tañon Strait.

From May 9 to 18, 2005, JAPEX conducted seismic surveys in and around the Tañon Strait. A multi-channel sub-bottom profiling covering approximately 751 kilometers was also done to determine the area's underwater composition.

JAPEX committed to drill one exploration well during the second sub-phase of the project. Since the well was to be drilled in the marine waters of Aloguinsan and Pinamungajan, where the Tañon Strait was declared a protected seascape in 1988, JAPEX agreed to comply with the Environmental Impact Assessment requirements pursuant to Presidential Decree No. 1586, entitled "Establishing an Environmental Impact Statement System, Including Other Environmental Management Related Measures and for Other Purposes."

On January 31, 2007, the Protected Area Management Board of the Tañon Strait (PAMB-Tañon Strait) issued Resolution No. 2007-001, wherein it adopted the Initial Environmental Examination (IEE) commissioned by JAPEX, and favorably recommended the approval of JAPEX's application for an ECC.

On March 6, 2007, the EMB of DENR Region VII granted an ECC to the DOE and JAPEX for the offshore oil and gas exploration project in Tañon Strait. Months later, on November 16, 2007, JAPEX began to drill an exploratory well, with a depth of 3,150 meters, near Pinamungajan town in the western Cebu Province. This drilling lasted until February 8, 2008.

Petitioners applied to this Court for redress *via* two separate original petitions both dated December 17, 2007, wherein they commonly seek that respondents be enjoined from implementing SC-46 for, among others, violation of the 1987 Constitution.

JAPEX's oil exploration activities in the Tañon Strait, allegedly reduced fish catch by 50 to 70 percent. The Petitioners claimed that before the seismic survey, the average harvest per day would be from 15 to 20 kilos; but after the activity, the fisherfolk could only catch an average of 1 to 2 kilos a day. They attribute this "reduced fish catch" to the destruction of the "*payao*," also known as the "fish aggregating device" or "artificial reef." Petitioners also impute the incidences of "fish kill" observed by some of the local fisherfolk to the seismic survey. They also alleged that the ECC obtained by private respondent JAPEX is invalid because public consultations and discussions with the affected stakeholders, a pre-requisite to the issuance of the ECC, were not held prior to the ECC's issuance.

FIDEC made similar allegations about reduced fish catch and lack of public consultations or discussions with the fisherfolk and other stakeholders prior to the issuance of the ECC. It alleged that during the seismic surveys and drilling, it was barred from entering and fishing within a 7-

kilometer radius from the point where the oil rig was located, an area greater than the 1.5-kilometer radius “exclusion zone” stated in the IEE. It further claims that despite several requests for copies of all the documents pertaining to the project in Tañon Strait, only copies of the PAMB-Tañon Strait Resolution and the ECC were given to the fisherfolk.

This Supreme Court determined that the various issues raised by the petitioners may be condensed into two primary issues:

1. *Locus Standi* of the Resident Marine Mammals and Stewards, petitioners in G.R. No. 180771; and
2. Legality of Service Contract No. 46.

Locus Standi of Petitioners Resident Marine Mammals and Stewards

The Resident Marine Mammals, through the Stewards, claim that they have the legal standing to file this action since they stand to be benefited or injured by the judgment in this suit. Citing *Oposa v. Factoran, Jr.*, they also assert their right to sue for the faithful performance of international and municipal environmental laws created in their favor and for their benefit. In this regard, they argue that they have the right to demand that they be accorded the benefits granted to them in multilateral international instruments that the Philippine Government had signed, under the concept of stipulation *pour autrui*.

The Stewards contend that there should be no question of their right to represent the Resident Marine Mammals as they have stakes in the case as forerunners of a campaign to build awareness among the affected residents of Tañon Strait and as stewards of the environment since the primary steward, the Government, had failed in its duty to protect the environment pursuant to the public trust doctrine.

The primary reason animal rights advocates and environmentalists seek to give animals and inanimate objects standing is due to the need to comply with the strict requirements in bringing a suit to court. The Philippines’ 1997 Rules of Court require that parties to a suit be either natural or juridical persons, or entities authorized by law.¹⁰

¹⁰ It further necessitates the action to be brought in the name of the real party-in-interest, even if filed by a representative, *viz.*:

Rule 3

Parties to Civil Actions

Section 1. *Who may be parties; plaintiff and defendant.* — Only natural or juridical persons, or entities authorized by law may be parties in a civil action. The term “plaintiff” may refer to the claiming party, the counter-claimant, the cross-claimant, or the third (fourth, etc.)-party plaintiff. The term “defendant” may refer to the original defending

Recently, the Court promulgated the landmark Rules of Procedure for Environmental Cases, which allow for a “citizen suit,” and permit any Filipino citizen to file an action before our courts for violations of our environmental laws:

SEC. 5. *Citizen suit.* — Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws. Upon the filing of a citizen suit, the court shall issue an order which shall contain a brief description of the cause of action and the reliefs prayed for, requiring all interested parties to manifest their interest to intervene in the case within fifteen (15) days from notice thereof. The plaintiff may publish the order once in a newspaper of a general circulation in the Philippines or furnish all affected *barangays* copies of said order.

Citizen suits filed under R.A. No. 8749 and R.A. No. 9003 shall be governed by their respective provisions.

The Court, in the Annotations to the Rules of Procedure for Environmental Cases, explained:

Citizen suit. To further encourage the protection of the environment, the Rules enable litigants enforcing environmental rights to file their cases as citizen suits. This provision liberalizes standing for all cases filed enforcing environmental laws and collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature. The terminology of the text reflects the doctrine first enunciated in *Oposa v. Factoran*, insofar as it refers to minors and generations yet unborn.

According to the Court, the need to give the Resident Marine Mammals legal standing has been eliminated by the Rules, which allow any Filipino citizen, as a steward of nature, to bring a suit to

party, the defendant in a counterclaim, the cross-defendant, or the third (fourth, etc.)-party defendant.

Sec. 2. *Parties in interest.* — A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest.

Sec. 3. *Representatives as parties.* — Where the action is allowed to be prosecuted or defended by a representative or someone acting in a fiduciary capacity, the beneficiary shall be included in the title of the case and shall be deemed to be the real party in interest. A representative may be a trustee of an express trust, a guardian, an executor or administrator, or a party authorized by law or these Rules. An agent acting in his own name and for the benefit of an undisclosed principal may sue or be sued without joining the principal except when the contract involves things belonging to the principal.

enforce our environmental laws. The Court added that the Stewards are joined as real parties in the Petition and not just in representation of the named cetacean species. The Stewards, having shown in their petition that there may be possible violations of laws concerning the habitat of the Resident Marine Mammals, were declared to possess the legal standing to file this petition.

Legality of Service Contract No. 46

*Ruling of the Court on the legality of Service Contract No. 46
vis-à-vis Section 2, Article XII of the 1987 Constitution*

The petitioners argue that SC-46 is void for having violated Section 2, Article XII of the 1987 Constitution, which reads as follows:

Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

In *La Bugal*, the Supreme Court held that the deletion of the words “service contracts” in the 1987 Constitution did not amount to a ban on them *per se*. It held that Agreements Involving Technical or Financial Assistance are Service Contracts with Safeguards:

From the foregoing, we are impelled to conclude that the phrase *agreements involving either technical or financial assistance*, referred to in paragraph 4, are in fact *service contracts*. But unlike those of the 1973 variety, the new ones are between foreign corporations acting as contractors on the one hand; and on the other, the government as principal or “owner” of the works. In the new service contracts, the foreign contractors provide capital, technology and technical know-how, and managerial expertise in the creation and operation of large-scale mining/extractive enterprises; and the government, through its agencies (DENR, MGB), actively exercises control and supervision over the entire operation.

The following are the safeguards the Court enumerated in *La Bugal*:

Such service contracts may be entered into only with respect to minerals, petroleum and other mineral oils. The grant thereof is subject to several safeguards, among which are these requirements:

- (1) The service contract shall be crafted in accordance with a general law that will set standard or uniform terms, conditions and requirements, presumably to attain a certain uniformity in provisions and avoid the possible insertion of terms disadvantageous to the country.
- (2) The President shall be the signatory for the government because, supposedly before an agreement is presented to the President for signature, it will have been vetted several times over at different levels to ensure that it conforms to law and can withstand public scrutiny.
- (3) Within thirty days of the executed agreement, the President shall report it to Congress to give that branch of government an opportunity to look over the agreement and interpose timely objections, if any.

Adhering to the aforementioned guidelines, the Supreme Court found that SC-46 is void for noncompliance with the requirements of the 1987 Constitution.

The General Law on Oil Exploration

The disposition, exploration, development, exploitation, and utilization of indigenous petroleum in the Philippines are governed by Presidential Decree No. 87 or the Oil Exploration and Development Act of 1972. Contrary to the petitioners’ argument, Presidential Decree No. 87, although enacted in 1972, before the adoption of the 1987 Constitution, remains to be a valid law unless otherwise repealed.

This Court could not simply assume that while Presidential Decree No. 87 had not yet been expressly repealed, it had been impliedly repealed.

Moreover, in cases where the statute seems to be in conflict with the Constitution, but a construction that it is in harmony with the Constitution is also possible, that construction should be preferred.

Consequently, the Court disagreed with the petitioners' contention that SC-46 is prohibited on the ground that there is no general law prescribing the standard or uniform terms, conditions, and requirements for service contracts involving oil exploration and extraction.

But while Presidential Decree No. 87 may serve as the general law upon which a service contract for petroleum exploration and extraction may be authorized, as will be discussed below, the exploitation and utilization of this energy resource in the present case may be allowed only through a law passed by Congress, since the Tañon Strait is a NIPAS area.

President was not the signatory to SC-46 and the same was not submitted to Congress

While the Court finds that Presidential Decree No. 87 is sufficient to satisfy the requirement of a general law, the absence of the two other conditions, that the President be a signatory to SC-46, and that Congress be notified of such contract, renders it null and void.

Paragraph 4, Section 2, Article XII of the 1987 Constitution requires that the President himself enter into any service contract for the exploration of petroleum. SC-46 appeared to have been entered into and signed only by the DOE Secretary, contrary to the said constitutional requirement. There has been no showing that Congress was subsequently notified of the execution of such contract.

Secretary Perez's signature is not enough. The "alter ego principle," that provides that the President's secretaries acts are also those of then President Macapagal-Arroyo's, cannot apply in this case.

The requirements in executing service contracts in paragraph 4, Section 2 of Article XII of the 1987 Constitution are not mere formalities. They are the safeguards placed by the framers of the Constitution to "eliminate or minimize the abuses prevalent during the martial law regime." They are requirements placed, not just in an ordinary statute, but in the fundamental law, the non-observance of which will nullify the contract.

The Court explained that these service contracts involving the exploitation, development, and utilization of our natural resources are of paramount interest to the present and future generations. Safeguards were put in place to insure that the guidelines set by law are meticulously observed and likewise to eradicate the corruption that may easily penetrate departments and agencies by ensuring that the President has authorized or approved of these service contracts herself.

Ruling of the Court on the Legality of Service Contract No. 46 vis-à-vis Other Laws

SC No. 46 also violated other laws. The Tañon Strait, pursuant to Proclamation No. 1234, was set aside and declared a protected area under the category of Protected Seascape. The NIPAS Act defines a Protected Seascape to be an area of national significance characterized by the harmonious interaction of man and land while providing opportunities for public enjoyment through

recreation and tourism within the normal lifestyle and economic activity of this areas; thus, a management plan for each area must be designed to protect and enhance the permanent preservation of its natural conditions. Consistent with this endeavor is the requirement that an Environmental Impact Assessment (EIA) be made prior to undertaking any activity outside the scope of the management plan. Unless an ECC under the EIA system is obtained, no activity inconsistent with the goals of the NIPAS Act shall be implemented.

The Environmental Impact Statement System (EISS) was established in 1978 under Presidential Decree No. 1586. It prohibits any person, partnership, or corporation from undertaking or operating any declared environmentally critical project or areas without first securing an ECC issued by the President or his duly authorized representative. Pursuant to the EISS, which called for the proper management of environmentally critical areas, Proclamation No. 2146 was enacted, identifying the areas and types of projects to be considered as environmentally critical and within the scope of the EISS, while DENR Administrative Order No. 2003-30 provided for its Implementing Rules and Regulations (IRR).

DENR Administrative Order No. 2003-30 defines an *environmentally critical area* as “an area delineated as environmentally sensitive such that significant environmental impacts are expected if certain types of proposed projects or programs are located, developed, or implemented in it”; thus, before a *project*, which is “any activity, regardless of scale or magnitude, which may have significant impact on the environment,” is undertaken in it, such project must undergo an EIA to evaluate and predict the likely impacts of all its stages on the environment. An EIA is described in detail as follows:

h. Environmental Impact Assessment (EIA) — process that involves evaluating and predicting the likely impacts of a project (including cumulative impacts) on the environment during construction, commissioning, operation and abandonment. It also includes designing appropriate preventive, mitigating and enhancement measures addressing these consequences to protect the environment and the community’s welfare. The process is undertaken by, among others, the project proponent and/or EIA Consultant, EMB, a Review Committee, affected communities and other stakeholders.

Under Proclamation No. 2146, the Tañon Strait is an environmentally critical area, having been declared as a protected area in 1998; therefore, any activity outside the scope of its management plan may only be implemented pursuant to an ECC secured after undergoing an EIA to determine the effects of such activity on its ecological system.

Sections 12 and 14 of the NIPAS Act read:

SECTION 12. *Environmental Impact Assessment.* — Proposals for activities which are outside the scope of the management plan for protected areas shall be subject to an environmental impact assessment as required by law before they are adopted, and the results thereof shall be taken into consideration in the decision-making process.

No actual implementation of such activities shall be allowed without the required Environmental Compliance Certificate (ECC) under the Philippine Environmental Impact Assessment (EIA) system. In instances where such activities are allowed to be undertaken, the proponent shall plan and carry them out in such manner as will minimize any adverse effects and take preventive and remedial action when appropriate. The proponent shall be liable for any damage due to lack of caution or indiscretion.

SECTION 14. *Survey for Energy Resources.* — Consistent with the policies declared in Section 2 hereof, protected areas, except strict nature reserves and natural parks, may be subjected to exploration only for the purpose of gathering information on energy resources and only if such activity is carried out with the least damage to surrounding areas. Surveys shall be conducted only in accordance with a program approved by the DENR, and the result of such surveys shall be made available to the public and submitted to the President for recommendation to Congress. Any exploitation and utilization of energy resources found within NIPAS areas shall be allowed only through a law passed by Congress.

It is true that the restrictions found under the NIPAS Act are not without exceptions. However, while an exploration done for the purpose of surveying for energy resources is allowed under Section 14 of the NIPAS Act, this does *not* mean that it is exempt from the requirement to undergo an EIA under Section 12.

Surveying for energy resources under Section 14 is not an exemption from complying with the EIA requirement in Section 12; instead, Section 14 provides for *additional* requisites before any exploration for energy resources may be done in protected areas.

JAPEX only started to secure an ECC prior to the second sub-phase of SC-46, which required the drilling of an oil exploration well. This means that when the seismic surveys were done in the Tañon Strait, no such environmental impact evaluation was done. Unless seismic surveys are part of the management plan of the Tañon Strait, such surveys were done in violation of Section 12 of the NIPAS Act and Section 4 of Presidential Decree No. 1586.¹¹

¹¹ Section 4 of Presidential Decree No. 1586 provides:

Section 4. *Presidential Proclamation of Environmentally Critical Areas and Projects.* — The President of the Philippines may, on his own initiative or upon recommendation of the National Environmental Protection Council, by proclamation declare certain projects, undertakings or areas in the country as environmentally critical. No person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an Environmental Compliance Certificate issued by the President or his duly authorized representative. For the proper management of said critical project or area, the President may by his proclamation reorganize such government offices, agencies,

The respondents' subsequent compliance with the EISS for the second sub-phase of SC-46 cannot and will not cure this violation.¹²

institutions, corporations or instrumentalities including the re-alignment of government personnel, and their specific functions and responsibilities.

For the same purpose as above, the Ministry of Human Settlements shall: (a) prepare the proper land or water use pattern for said critical project(s) or area(s); (b) establish ambient environmental quality standards; (c) develop a program of environmental enhancement or protective measures against calamitous factors such as earthquakes, floods, water erosion and others, and (d) perform such other functions as may be directed by the President from time to time.

¹² The following penalties are provided for under Presidential Decree No. 1586 and the NIPAS Act. Section 9 of Presidential Decree No. 1586 provides for the penalty involving violations of the ECC requirement:

Section 9. *Penalty for Violation.* — Any person, corporation or partnership found violating Section 4 of this Decree, or the terms and conditions in the issuance of the Environmental Compliance Certificate, or of the standards, rules and regulations issued by the National Environmental Protection Council pursuant to this Decree shall be punished by the suspension or cancellation of his/its certificates and/or a fine in an amount not to exceed Fifty Thousand Pesos (P50,000.00) for every violation thereof, at the discretion of the National Environmental Protection Council.

On the other hand, violations of the NIPAS Act entails the following fines and/or imprisonment under Section 21:

SECTION 21. *Penalties.* — Whoever violates this Act or any rules and regulations issued by the Department pursuant to this Act or whoever is found guilty by a competent court of justice of any of the offenses in the preceding section shall be fined in the amount of not less than Five thousand pesos (P5,000) nor more than Five hundred thousand pesos (P500,000), exclusive of the value of the thing damaged or imprisonment for not less than one (1) year but not more than six (6) years, or both, as determined by the court: Provided, that, if the area requires rehabilitation or restoration as determined by the court, the offender shall be required to restore or compensate for the restoration to the damages: Provided, further, that court shall order the eviction of the offender from the land and the forfeiture in favor of the Government of all minerals, timber or any species collected or removed including all equipment, devices and firearms used in connection therewith, and any construction or improvement made thereon by the offender. If the offender is an association or corporation, the president or manager shall be directly responsible for the act of his employees and laborers: Provided, finally, that the DENR may impose administrative fines and penalties consistent with this Act.

SC-46 was not executed for the mere purpose of gathering information on the possible energy resources in the Tañon Strait as it also provides for the parties' rights and obligations relating to extraction and petroleum production should oil in commercial quantities be found to exist in the area. While Presidential Decree No. 87 may serve as the general law upon which a service contract for petroleum exploration and extraction may be authorized, the exploitation and utilization of this energy resource in the present case may be allowed only through a law passed by Congress, as the Tañon Strait is a NIPAS area. Since there is no such law specifically allowing oil exploration and/or extraction in the Tañon Strait, no energy resource exploitation and utilization may be done in said protected seascape.

The Supreme Court granted the Petitions in G.R. Nos. 180771 and 181527, and Service Contract No. 46 was declared null and void for violating the 1987 Constitution, Republic Act No. 7586, and Presidential Decree No. 1586.

4.

The last decision is *Narra Nickel Mining and Development Corporation v. Redmont Consolidated Mines Corp.*¹³

Redmont Consolidated Mining Corporation alleged that at least 60% of the capital stock of three other firms, McArthur, Tesoro and Narra are owned and controlled by MBMI Resources, Inc. (MBMI), a 100% Canadian corporation. Redmont argued that since MBMI is a considerable stockholder of petitioners, it was the driving force behind petitioners' filing of the MPSAs over the areas covered by applications since it knows that it can only participate in mining activities through corporations which are deemed Filipino citizens. Redmont argued that given that petitioners' capital stocks were mostly owned by MBMI, they were likewise disqualified from engaging in mining activities through MPSAs, which are reserved only for Filipino citizens.

The Court held that petitioners, being foreign corporations, are not entitled to Mineral Production Sharing Agreements (MPSAs). In reaching its conclusion, the Court upheld with approval the appellate court's finding that there was doubt as to petitioners' nationality since a 100% Canadian-owned firm, MBMI Resources, Inc. (MBMI), effectively owns 60% of the common stocks of the petitioners by owning equity interest of petitioners' other majority corporate shareholders.

The Supreme Court affirmed its ruling on January 28, 2015.

5.

¹³ G.R. No. 195580, April 21, 2014.

These cases are exciting because the Supreme Court's environmental record show that it is reluctant to stop alleged violations of the environment laws, occasionally crafting decisions that defy common sense.¹⁴

These cases, all recently decided, present an opportunity for advocates of environmental protection. They show that traditional litigation may be used to stop illegal forms of mining. These cases may require sleuthing in libraries among reams of paper work such as service contracts. Those of us who are dedicated to protecting the interests of the marginalized may want to sharpen our sleuthing skills.

Many of us oppose the applications for licenses to exploit resources. Many times government agencies grant these licenses despite defects in the application.

These cases tell us that the battle to stop irresponsible mining continues after the grant of the permits. Cases may be filed either because there were inherent defects in the licenses (or in the issuance of these licenses) or subsequent violations committed by mining companies.

The cases tell us that monitoring of mining activities, as difficult as it is, can lead to information that can cripple or end mining activities. Examining the facts surrounding an application as well as the terms of licenses in relation to the requirements of the law can provide the bases for challenging the validity of these licenses, even after they have been issued.

I need to stress two points.

The first is that this new theater of battle requires new skills. Examination of legal documents may require new training. This may require investment in legal and paralegal training. We need to train ourselves in studying contracts and the basic rules of interpreting these documents. And when we master the legalese, other questions will follow.

Do these violations constitute crimes or offenses?

Who do we turn to when we uncover violations of the law? Can we invoke the aid of the Ombudsman? May we bring our cases straight to court? Which court?

How do we go about asking government to terminate a license? What do we do if government agencies ignore our correspondence?

Taking on this avenue may also require us to imagine new arrangements or alliances for the provision of legal services. How do we ensure the availability of competent legal services?

¹⁴ See for example *Technology Developers, Inc. v. Court of Appeals*, 193 SCRA 147 (1991), *Technology Developers, Inc. v. Court of Appeals*, 201 SCRA 11 (1991), and *Bangus Fry Fisherfolk v. Lanzanas*, 405 SCRA 530 (2003). The worst in my opinion is *La Bugal-Blaan Tribal Association, Inc. v. Ramos*, G.R. No. 127882, December 1, 2004 which reversed the Supreme Court's earlier ruling on the constitutionality of the Mining Act of 1995. The December decision did not cite any legal bases for the interpretation of the Constitution.

We should never completely disregard the legal remedies that are available under our system of government. When courts rule that large mining corporations and the government can be held to account for their illegal actions, it suggests that courts may be playing less politics and paying more attention to the rule of law. It may be time to study traditional legal options in the environmental protection enterprise.

The second point that I wanted to make was that I hesitate in making these recommendations because of our own bad experiences with litigation. Legal remedies are only one theater of battle. They take time and are rarely guarantee success.

When we use the legal remedies it cannot be done at the expense of community action at the ground level. Those of us who practiced in this field are wary about the recourse to litigation as a solution to social and even legal problems. When courts rule incorrectly, these decisions reify the injustices that we seek to address. Ideally the men and women who don black robes and sit in our courts are learned and fair. In our experience, unfortunately, they can be inept, careless, or can decide to play politics. The approach to environmental protection has been to augment legal remedies with grassroots organization and training in the hopes that marginalized communities can learn to fight these battles on their own. Law is only one tool that can be found in the communities' arsenal.

Using the legal system may lull communities into a false sense of security. Communities may slacken at the local level while cases are pending in court.

6.

Despite my apprehensions about the reliability of the legal system, I have to stress that these cases are significant not only because the extractors lost but also because the actions were filed to cancel the instruments which were the bases for the extraction of resources.

If the mining licenses were issued in violation of the law or the licensees are clearly violating the provisions of their licenses, then communities should have a system in place that allows them to avail of legal services. Communities have to be trained to detect these violations.

The issuance of a mining contract should not be regarded as a final act of the State. These licenses should follow procedures in the Constitution and other laws, and carry conditions that bind miners. As these cases show, they can be fatal to a mining company.



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