

**JUDICIAL REVIEW ON THE VALIDITY OF  
CONTRACT CONCERNING NATURAL  
RESOURCES EXPLOITATION AND UTILIZATION  
IN SPECIAL REGIONS**

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## INTRODUCTION

When the idea of ecological civilization<sup>2</sup> and green development<sup>3</sup> became part of China's national strategy, the issue of illegal exploitation and utilization of natural resources in nature reserves and other special regions also became a public concern. In China, natural resources exploitation and utilization is subject to administrative examination and approval.<sup>4</sup> However, sometimes illegal development activities are not deterred or corrected because the local government wants to protect the regional economy.<sup>5</sup> This problem has given rise to operations of illegal mines in ecologically sensitive areas that are under strict protection, especially in western remote parts of China, where mineral resources are rich. In some cases, the mines have obtained permits duly issued by the relevant government agencies even though they are prohibited in the protected areas by law.

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2. Ecological civilization is a concept of building a civilization based on an industrial structure with a growth and consumption pattern that conserves energy resources and protects the environment. In November 2012, the 18th National Congress of the Chinese Communist Party promoted the construction of ecological civilization to the same strategic height as economic construction, political construction, cultural construction, and social construction. In September 2015, China issued Shengtai Wenming Tizhi Gaige Zongti Fangan (生态文明体制改革总体方案) [The Overall Plan for the Reform of Ecological Civilization System], stipulating the goal, ideas, and measures of China's ecological civilization system reform. *Zhongguo Gongbu Shengtai Wenming Tizhi Gaige Zongti Fangan* (中国公布生态文明体制改革总体方案) [China Announces the Overall Plan for the Reform of Ecological Civilization System], XINHUA NEWS (Sep. 21, 2015), [http://www.xinhuanet.com/politics/2015-09/21/c\\_1116632281.htm](http://www.xinhuanet.com/politics/2015-09/21/c_1116632281.htm).

3. Green development is a new model of development based on the restriction of ecological and resource carrying capacity, which takes environmental protection as an important pillar of sustainable development. In March 2016, the National People's Congress (NPC) approved the Outline of the 13th Five-year Plan for National Economic and Social Development of China (2016-2020), which included green development as one of the five major development ideas, along with innovative development, coordinated development, open development and shared development. *Zhonghua Renmin Gonghe Guo Guomin Jingji he Shehui Fanzhan di Shisan ge Wu Nian Guihua Gangyao* (中华人民共和国国民经济和社会发展第十三个五年规划纲要) [13<sup>th</sup> Five-year Plan for Nat'l Econ. & Social Dev.] (approved by the NPC Mar. 16, 2016).

4. See Admin. Licensing Law (行政许可法) (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 27, 2003, effective Jul. 1, 2004).

5. LI Biao (李彪), *Huanbao Buzhang: Duli Jinxing Huanjing Jianguan he Xingzheng Zhifa* (环保部长: 独立进行环境监管和行政执法) [Independent Env't Supervision and Admin. Law Enforcement to Break Local Protection], NAT'L BUS. DAILY (Feb. 11, 2014), <http://www.nbd.com.cn/articles/2014-02-11/808058.html>.

One such case made its way to the Supreme People's Court (SPC), raising questions of first impression—whether an environmental regulation prohibiting mining activities in a nature reserve in the Xinjiang Uygur Autonomous Region (Xinjiang) can serve as a basis to invalidate a contract to conduct mining activities within the reserve and whether the contract can be invalidated if it is found to contravene the public interest in environmental and resource protection.<sup>6</sup> In the *Sichuan Jinhe Mining Co. Ltd. v. Xinjiang Lingang Res. Inv. Co. Ltd.* case, the SPC held for the first time that, indeed, the violation of a mandatory prohibition of an environmental regulation could invalidate the contract, and that violation of environmental public interest likewise could also be cause to invalidate the contract.<sup>7</sup> As a result of this case, the SPC promulgated a Judicial Interpretation, which serves as a source of law,<sup>8</sup> stating that in the narrow context where a contract to explore and exploit mineral resources in specific protection regions violates a mandatory provision of law or regulation or environmental public interest, it is deemed null and void.<sup>9</sup>

While the interpretation was narrowly worded, this article argues that the *Jinhe* holding and SPC Judicial Interpretation have made environmental public interest an important interest, the violation of which would render a civil act of entering into a contract invalid. This elevation of environmental public interest was influenced by the promulgation of the General Principles of Civil Law, which for the first time require that civil subjects engaging in civil acts under the law must do so contributing to the principles of environmental protection and conservation.

In Chinese civil law theory, not every violation of a mandatory provision of law renders a civil act or a contract invalid. Only mandatory provisions affecting the validity of the civil act or the contract may render it invalid if they were violated. Scholars have argued that environmental law as a public law is not the type of law that affects the validity of a civil act. Under the reasoning in the *Jinhe* case, this article argues that mandatory provisions of

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6. Sichuan Jinhe Kuangye Youxian Gongsi Su Xinjiang Lingang Ziyuan Touzi Gufen Youxian Gongsi (四川金核矿业有限公司诉新疆临钢资源投资股份有限公司) [Sichuan Jinhe Mining Co. Ltd. v. Xinjiang Lingang Res. Inv. Co. Ltd.], 2017 SUP. PEOPLE'S CT. GAZ. 34 (Sup. People's Ct. 2017) (China).

7. *Id.* at 41.

8. Cases in China do not have “‘stare decisis-like’ authority.” Mark Jia, Note, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2214 (2016); cf. SPC Provisions on Judicial Interpretation, *infra* note 66 (noting that judicial interpretations are a formal source of law).

9. Zuigao Renmin Fayuan Guanyu Shenli Kuangye Jiufen Anjian Shiyong Falu Ruogan Wenti de Jieshi (最高人民法院关于审理矿业纠纷案件适用法律若干问题的解释) [SPC Judicial Interpretation on Application of Law in Mining Right Disputes] (promulgated by the Trial Comm. of Sup. People's Ct. Feb. 20, 2107, effective Jul. 27, 2017) art. 18.

environmental law can affect the validity or effectiveness of a civil act in such a way that a violation of the provisions could render the act invalid.

The *Jinhe* case highlighted the problem of illegal mines in nature reserves and ecologically sensitive areas where the local governments have failed to enforce the law or have given permission to such illegal activities. The *Jinhe* holding and the subsequent Judicial Interpretation have provided courts with the legal basis to address the problem by invalidating exploitation and utilization contracts. They give the judiciary an important role to play in correcting the lack of administrative enforcement of environmental laws.

Parts 0 and 0 of this article discuss the background of the nature reserve at issue and the litigation before the Xinjiang High People's Court. Part 0 discusses the SPC decision and Part 0 analyzes the General Principles of Civil Law and the Green Principle that they establish, requiring civil subjects to engage in civil actions that would contribute to natural resources conservation and environmental protection. The Green Principle has made environmental public interest relevant and, indeed, a required consideration in reviewing the validity of one's civil acts.

Part 0 explains the type of mandatory provisions of laws and administrative regulations,<sup>10</sup> the violation of which may serve as a basis for invalidating a civil act or a contract. Under Chinese civil law theory, mandatory provisions of law are categorized as mandatory provisions of effectiveness—affecting the effectiveness or validity of an act—or mandatory provisions of management—regulating the act but not affecting its effectiveness or validity. This Part analyzes and argues that compulsory prohibitions in environmental laws and regulations can be categorized as mandatory provisions of effectiveness. Part 0 discusses the elevation of environmental public interest as an important interest the violation of which could have an impact on the validity of contracts. Part 0 discusses the correcting function of environmental and natural resources judicial bodies. It first describes the dilemma between economic development and environmental protection and limitation of administrative law enforcement mechanisms to correct violations of environmental laws in cases involving resource exploration and exploitation in special regions. It then demonstrates how the judiciary can play an important role in reviewing resource-development contracts in such cases and in correcting any limitation in the administrative enforcement of environmental laws.

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10. Laws and administrative regulations are both formal sources of law in China. Laws are legislated and adopted by the National People's Congress, while administrative regulations are legislated and adopted by the State Council. See SUN GUOHUA & ZHU JINGWEN (孙国华&朱景文), FALI XUE (法理学) [JURISPRUDENCE] 231–32 (3d ed. 2009).

## I. BACKGROUND

In December 2010, China's State Council, its highest governmental organ, issued the National Main Functional Area Plan, directing all provinces and autonomous regions to survey and categorize land within their borders as optimized development regions, key development regions, restricted development regions, or prohibited development regions according to their resource carrying capacity, ecological functions, existing development strength, and development potential.<sup>11</sup> Under the Plan, national nature reserves, world cultural or natural heritage sites, national scenic areas, and national forests and parks are designated as national-level prohibited development regions.<sup>12</sup> On the provincial level and lower, natural and cultural resource protection areas and important water sources are also categorized as prohibited development regions.<sup>13</sup> These "special regions," which include nature reserves, scenic areas, key ecological function areas, environmentally sensitive areas, and ecologically vulnerable areas, are subject to protection and have special restrictions on their development and utilization. National and provincial governments were required to adopt and implement policies, laws, and regulations to protect these special regions. Specifically, for nature reserves, the State Council promulgated the Nature Reserves Regulations prohibiting the mining, grazing, hunting, fishing, gathering medicinal herbs, burning, and other activities in nature reserves.<sup>14</sup>

The Taxkorgan Nature Reserve, which spans about 15,000 square kilometers, is located in the Taxkorgan Tajik Autonomous County in southwest Xinjiang.<sup>15</sup> The nature reserve is located on the high Pamir Plateau, bordering Afghanistan, Tajikistan, and Pakistan.<sup>16</sup> It is home to many species of plants and animals.<sup>17</sup> The Xinjiang government established

11. Quanguo Zhuti Gongneng Qu Guihua (全国主体功能区规划) [Nat'l Main Function Areas Plan] (promulgated by the State Council Dec. 21, 2010), chs. 2, 13.

12. *Id.* ch. 2.

13. *Id.*

14. Ziran Baohu Qu Tiaoli (自然保护区条例) [Nature Reserves Regulations] (promulgated by the St. Council, Sept. 2, 1994, revised Jan. 1, 2011 and Oct. 7, 2017), art. 26.

15. BAI Jiali & LI Jing (白佳丽&李京), *Xinjiang: Feifa Jue Kuang Tuichu Pamir (新疆:非法煤矿退出帕米尔)* [*Xinjiang: Illegal Mines Pushed Out of Pamir*], XINHUA NEWS (Jul. 15, 2019), [http://m.xinhuanet.com/2019-07/15/c\\_1124755833.htm](http://m.xinhuanet.com/2019-07/15/c_1124755833.htm).

16. *Id.*; see also CHEN Qiangqiang (陈强强), et al., *Xinjiang Taxkorgan Yesheng Dongwu Ziran Baohuqu Makeboluo Panyang Qiangzai Shengtai Langdao Shibie (新疆塔什库尔干野生动物自然保护区马可波罗盘羊潜在生态廊道识别)* [*Identification of Potential Ecological Corridors for Marco Polo Sheep in Taxkorgan Wildlife Nature Reserve, Xinjiang, China*], 27 BIODIVERSITY SCI. 186, 188 (2017).

17. CHEN, et al., *supra* note 16.

it to protect the habitat of the state-protected Marco Polo sheep, which is a subspecies of the argali sheep, in 1984, long before the National Main Functional Area Plan was issued.<sup>18</sup>

The Xinjiang government promulgated the Xinjiang Environmental Protection Regulations in 1996 that prohibited the construction of pollution generating industrial production facilities in nature reserves, scenic areas, cultural relic protection areas, and other areas that have been designated for protection.<sup>19</sup> In 2011, subsequent to the issuance of the National Main Functional Area Plan, Xinjiang amended the regulations to explicitly prohibit any resource exploration and development in nature reserves, scenic areas, and drinking water sources, among others.<sup>20</sup>

China's western region where the Taxkorgan Nature Reserve is located has a rich reserve of minerals.<sup>21</sup> Because of this and the poor economy in the region, local authorities once permitted the development of mines to power local economic growth and issued some mining permits in the region, including in the Taxkorgan Nature Reserve,<sup>22</sup> even though the national Nature Reserves Regulations and the Xinjiang Environmental Protection Regulations specially prohibit mining in nature reserves.

Despite this prohibition, the plaintiff in the case, *Sichuan Jinhe Mining Co. Ltd. v. Xinjiang Lingang Res. Inv. Co. Ltd.*, had obtained a mining permit

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18. *Id.*; *China Strengthens Efforts to Protect Marco Polo Sheep*, XINHUA NEWS (Jul. 1, 2019), [http://www.xinhuanet.com/english/2019-07/01/c\\_138189210.htm](http://www.xinhuanet.com/english/2019-07/01/c_138189210.htm). State-protected animals are designated under the Wildlife Protection Law for protection. The hunting, catching, or killing of such wild animals, except in certain circumstances and only if the necessary license is obtained, is prohibited. *Yesheng Dongwu Baohu Fa (Wildlife Protection Law)* [Wildlife Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 8, 1988, revised Jul. 2, 2016, effective Jan. 1, 2017), art. 21.

19. Xinjiang Weiwuer Zizhiqu Huanjing Baohu Tiaoli (新疆维吾尔自治区环境保护条例) [Xinjiang Environmental Protection Regulations] (promulgated by the Xinjiang People's Cong. Jul. 26, 1996), art. 24.

20. Xinjiang Weiwuer Zizhiqu Huanjing Baohu Tiaoli (新疆维吾尔自治区环境保护条例) [Xinjiang Environmental Protection Regulations] (revised by Xinjiang People's Cong. Dec. 1, 2011, effective Feb. 1, 2012), art. 23. Xinjiang also has promulgated regulations for the management of nature reserves. Xinjiang Weiwuer Zizhiqu Ziran Baohu Qu Guanli Tiaoli (新疆维吾尔自治区自然保护区管理条例) [Xinjiang Nature Reserves Management Regulations] (promulgated by the Xinjiang People's Cong., Jan. 22, 1997), art. 12 (dividing nature reserves into core areas, buffer zones and experimental areas for management purposes). In 2018, the Xinjiang government amended these regulations to include a provision that all nature reserves must be regulated and managed in compliance with the national Nature Reserves Regulations, *supra* note 14, thus incorporating the prohibition on mining in nature reserves. Xinjiang Nature Reserves Management Regulations (revised and effective Sept. 21, 2018), art. 12.

21. *Illegal Mines Phased Out in Nature Reserve on Pamir Plateau* (Jul. 15, 2019), <http://www.chinadaily.com.cn/a/201907/15/WS5d2c27f3a3105895c2e7d817.html>; MINISTRY OF LAND AND RESOURCES, CHINA MINERAL RESOURCES 14–15 (2016); MINISTRY OF LAND AND RESOURCES, CHINA MINERAL RESOURCES 7–12 (2018).

22. *Illegal Mines Phased Out in Nature Reserve on Pamir Plateau*, *supra* note 21; BAI, *supra* note 15.

in December 2008 from the Xinjiang Department of Land and Resources for a polymetallic mine measuring approximately 31.28 square kilometers (the Uruke mine) located within the Taxkorgan Nature Reserve.<sup>23</sup> This case raised the issue of whether a contract to explore and exploit mineral resources at a mine pursuant to a duly issued permit is valid at its inception and, therefore, enforceable.

## II. THE LITIGATION

In October 2011, the plaintiff, Sichuan Jinhe Mining Co. Ltd. (Jinhe), and the defendant, Lingang Resources Investment Co. Ltd. (Lingang), entered into a contract to jointly establish a company to cooperatively explore and exploit mineral resources at the Uruke mine.<sup>24</sup> Under the contract, Jinhe agreed to transfer its mineral mining rights at the Uruke mine to the company while Lingang agreed to pay Jinhe CNY 35 million and to provide the capital in conducting the exploration and exploitation of minerals at the mine.<sup>25</sup>

In entering into the contract, Jinhe represented that it had duly obtained a mining permit to engage in mineral exploration and exploitation and surveying operations in the Uruke mine.<sup>26</sup> Jinhe agreed to maintain the validity of the mining rights, including obtaining the necessary permit extensions and complying with permit requirements.<sup>27</sup> Jinhe also guaranteed that the Uruke mine was not located within any glaciers, nature reserves, scenic areas, or other areas, which would negatively affect mining development.<sup>28</sup>

After the execution of the contract, Lingang paid Jinhe CNY 35 million.<sup>29</sup> In April 2012, Lingang entered into a contract with a third party to begin exploration work at the mine.<sup>30</sup> In April 2013, Jinhe obtained an extension of the mining permit to enable the exploration work to continue.<sup>31</sup> The exploration work appeared to have been ongoing throughout this time

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23. Sichuan Jinhe Kuangye Youxian Gongsi Su Xinjiang Lingang Ziyuan Touzi Gufen Youxian Gongsi (四川金核矿业有限公司诉新疆临钢资源投资股份有限公司) [Sichuan Jinhe Mining Co. Ltd. v. Xinjiang Lingang Res. Inv. Co. Ltd.], 2017 SUP. PEOPLE'S CT. GAZ. 35 (Sup. People's Ct. 2017) (China).

24. *Id.* at 34–35.

25. *Id.* at 35.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 35–36.

31. *Id.* at 36.

period.<sup>32</sup> The mining company that the parties agreed to set up was formally established in July 2013.<sup>33</sup>

In November 2013, Lingang sent a letter to Jinhe to terminate the contract, claiming that it had recently learned that the Uruke mine was located within the Xinjiang Taxkorgan Nature Reserve.<sup>34</sup> It claimed that Jinhe's failure to inform Lingang of this fact was a breach of the contract and was cause for its termination.<sup>35</sup> In December 2013, the Xinjiang Taxkorgan Nature Reserve Administration issued a certificate confirming that, based on the information provided by Jinhe, the Uruke mine was indeed located in the nature reserve.<sup>36</sup> In response, Jinhe acknowledged that the Taxkorgan Nature Reserve had been established long before Jinhe obtained its mining permit in December 2008.<sup>37</sup> However, it claimed that it had no knowledge that the Uruke mine was located within the reserve.<sup>38</sup> It further claimed that, since it had obtained the permit, the Department of Land and Resources had conducted annual inspections of the mining area; Jinhe had obtained extensions of the permit on two separate occasions; and, during this entire period, neither the Department of Land and Resources nor any of the other relevant departments or agencies had ever informed Jinhe that the mine was located within the nature reserve.<sup>39</sup> Jinhe argued that there was no breach of contract and the parties should continue to perform under the contract because the permit was duly issued by the relevant government agency, no government agencies had banned any of the work specified under the contract, and both parties had been performing diligently under the contract for more than two years.<sup>40</sup>

Jinhe subsequently filed suit in Xinjiang People's High Court to seek a judgment declaring that Lingang may not terminate the contract and seek specific performance of the contract.<sup>41</sup> Lingang countersued, claiming that Jinhe had misrepresented that the mine was not located in "glacier protection area, nature reserve, or scenic area" and that such misrepresentation constituted a breach of the contract.<sup>42</sup> Lingang sought to terminate the contract and recoup the CNY 35 million it had paid Jinhe under the contract,

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 36–37.

40. *Id.*

41. *Id.* at 37.

42. *Id.*

as well as expenses that it had incurred in conducting the exploration and survey work at the mine.<sup>43</sup>

The Xinjiang High People's Court ruled in favor of Jinhe. It held that the contract was legal and binding between the parties as it expressed the genuine intention of the parties—to collaborate to explore and exploit mineral resources at the Uruke mine.<sup>44</sup> Even though mining was not permitted in the Taxkorgan Nature Reserve under both the national and local regulations in effect, the Xinjiang High People's Court held that the contract did not violate any mandatory prohibitions of laws or regulations.<sup>45</sup> Specifically, the court cited to the Mineral Resource Law, which regulates the mining industry requiring that all mines obtain the necessary approvals.<sup>46</sup> Since Jinhe had obtained a mining permit, the court found that there was no violation of a mandatory provision of law.<sup>47</sup> Turning to the question of whether Lingang could terminate the contract, the court found that since the fact that the mine was located in a nature reserve was public information, both parties knew or should have known this fact.<sup>48</sup> The court further found that Lingang had not objected and had in fact performed its obligations for two and one half years and concluded that there was no serious breach warranting termination of the contract.<sup>49</sup> Lingang appealed. On November 14, 2015, the SPC reversed the Xinjiang High People's Court and ruled in Lingang's favor.<sup>50</sup>

### III. THE SPC INVALIDATES A CONTRACT THAT VIOLATES ENVIRONMENTAL REGULATIONS AND PUBLIC INTEREST.

The issues on appeal were (1) whether Lingang could terminate the contract; and (2) whether Lingang was entitled to recoup the contract price of CNY 35 million and the expenses it had incurred in performing the contract.<sup>51</sup> The SPC affirmed the findings of the fact of the Xinjiang High People's Court, but held that the lower court erred in the application of law.<sup>52</sup> The SPC ruled that the contract was not valid at its inception, which obviated

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43. *Id.*

44. *Id.* at 38.

45. *Id.*

46. *Id.* (referencing *Kuangchan Ziyuan Fa* (矿产资源法) [Mineral Resource Law] (promulgated by the Standing Comm., Nat'l People's Cong., Mar. 19, 1986, revised and effective Aug. 27, 2009)).

47. *Id.*

48. *Id.* at 38–39.

49. *Id.*

50. *Id.* at 39–42.

51. *Id.* at 41.

52. *Id.* at 42.

the need to determine whether Lingang could terminate the contract based on the alleged breach.<sup>53</sup>

In invalidating the contract, the SPC pointed to Article 52 of China's Contract Law, which provides that a contract "shall be deemed null and void if it . . . damages the public interest [or] violates a mandatory provision of law or administrative regulation."<sup>54</sup> It found that because mining in a nature reserve is explicitly prohibited under Article 26 of the national Nature Reserves Regulations, the contract, the purpose of which was to explore and exploit mineral resources in the Taxkorgan Nature Reserve, violated a compulsory prohibition under the regulations promulgated by the State Council and should be deemed null and void.<sup>55</sup> The SPC further found that "[i]f the contract were deemed valid and its performance permitted to continue, it would cause serious damage to the environment and ecology of the nature reserve and would damage the environmental public interest."<sup>56</sup> Therefore, the SPC held that the contract was invalid.<sup>57</sup> It ordered Jinhe to refund Lingang the contract price of CNY 35 million and CNY 2.5 million in expenses, which Lingang had incurred in building a road in the mining area as part of the exploration work.<sup>58</sup>

The *Jinhe* holding established for the first time that a contract to explore and exploit mineral resources in a special region may be voided if its performance would violate an environmental regulation and that the interest to protect the environment and natural resources is a public interest, the violation of which warrants the invalidation of a contract under China's Contract Law.<sup>59</sup> Although cases in China, which is a civil law country, do not have precedential value,<sup>60</sup> the holding in the *Jinhe* case took on more significance when, in July 2016, the SPC identified it as one of ten model or typical cases addressing civil disputes involving mining rights.<sup>61</sup>

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53. *Id.* at 41.

54. *Id.* (citing *Hetong Fa* (合同法) [Contract Law] (promulgated by the Nat'l People's Cong. Mar. 15, 1999, effective Oct. 1, 1999), art. 52(4)–(5)).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* The SPC denied Lingang's claims for other expenses and interests. *Id.* at 41–42.

59. *Id.* at 34.

60. Jia, *supra* note 8, at 2214.

61. *Zuigao Renmin Fayuan Fabu Shi Qi Shenli Kuangye Quan Minshi Jiufen Anjian Dianxing Anli* (最高人民法院发布十起审理矿业权民事纠纷案件典型案例) [SPC Ten Model Cases on Mining Rights Disputes] (Jul. 12, 2016), [http://pkulaw.cn/case\\_es/pal\\_a3ecfd5d734f711d79b3cc12d9bef407160f05e14be63a1fbdfb.html?match=Exact](http://pkulaw.cn/case_es/pal_a3ecfd5d734f711d79b3cc12d9bef407160f05e14be63a1fbdfb.html?match=Exact) (announcing the selection of the *Jinhe* case as a typical case). Since 1985, the SPC has a practice of issuing model or typical cases to provide nonbinding guidance to lower court judges on "the correct application of well-established doctrine." Jia, *supra* note 8, at 2216–17.

As a typical case, the *Jinhe* holding provides lower courts with an indication of how certain legal issues should be resolved in similar cases.<sup>62</sup> In designating *Jinhe* as a typical case, the SPC recognized that conflicts often arise between the need for development and the need to protect the environment and natural resources, particularly in special regions that are rich in resources but are designated for protection because of their biodiversity and ecological importance.<sup>63</sup> In disputes involving the development of special regions, such as nature reserves, scenic spots, key ecological function areas, and other ecologically sensitive areas, the SPC stresses that courts must take into consideration the ecological functions of these regions in accordance with the development plans established by the national government or relevant provincial governments.<sup>64</sup> Courts should consider these issues in reviewing the validity of the contract to determine whether it violates any mandatory provisions of law or whether it harms the public interest, even if the parties have obtained approvals from the relevant governmental agencies to proceed with the contracted work.<sup>65</sup>

The significance of the *Jinhe* holding was solidified seven months later when the SPC issued a Judicial Interpretation on the Application of Law in Mining Rights Disputes (Judicial Interpretation on Mining Rights Disputes), establishing the standard of judicial review in such cases.<sup>66</sup> Absorbing the rules established by the *Jinhe* case, the SPC Judicial Interpretation provides as follows:

A contract signed by the parties to explore and exploit mineral resources in special regions, such as nature reserves, scenic areas,

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62. Even though typical cases do not provide binding authority, one scholar observes that, in practice, these cases have become a “type of soft precedent” that legal professionals, including judges, prosecutors and lawyers, have made use of in support of their positions and arguments in court. Susan Finder, *China’s Evolving Case Law System in Practice*, 9 *TSINGHUA CHINA L. REV.* 245, 246, 247–55 (2017).

63. *SPC Ten Model Cases on Mining Rights Disputes*, *supra* note 61.

64. *Id.*

65. *Id.*

66. Judicial Interpretations are a formal source of law in China. See *Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding* (最高人民法院关于司法解释工作的规定) [SPC Provisions on Judicial Interpretation] (promulgated by the Trial Comm. of the Sup. People’s Ct. Mar. 9, 2007, effective Apr. 1, 2007) (establishing the procedures for the SPC to issue judicial interpretations governing the application of law in adjudication by the people’s courts). Article 5 gives the interpretations duly issued pursuant to these procedures the full force of law, and Article 27 requires courts to cite to where in its ruling the interpretation serves as basis for a ruling. The procedures for promulgating a judicial interpretation are quite involved, requiring a detailed planning process, research and investigation, and coordination and comments from other relevant departments, including the National People’s Congress, China’s national legislature. Thus, judicial interpretations are not in the form of case law and are not based on facts in individual cases, but rather are a set of written law abstracted from judicial practice and which govern how cases are adjudicated. See SUN, *supra* note 10, at 239.

key ecological function areas, environmentally sensitive areas and vulnerable ecological areas, shall be deemed null and void if it violates mandatory provisions of the law and administrative regulation, or if it injures the environmental public interest.<sup>67</sup>

The importance of the *Jinhe* case and the subsequent Judicial Interpretation must be understood in light of the Green Principle of the Civil Code, which had been under consideration during the *Jinhe* litigation and was finally adopted at around the same time the SPC issued the Judicial Interpretation on Mining Rights Disputes.

IV. THE ELEVATION OF ENVIRONMENTAL PUBLIC INTEREST IN THE REVIEW OF VALIDITY OF CONTRACT EMBODIED IN THE JUDICIAL INTERPRETATION ON MINING RIGHTS DISPUTES WAS SIGNIFICANTLY INFLUENCED BY THE GREEN PRINCIPLE OF CHINA'S CIVIL CODE.

Before China adopted the Green Principle of the Civil Code, judges generally did not consider or apply environmental laws in hearing cases under civil law governing private actions, because environmental laws have public law attributes.<sup>68</sup> Contracts that violate environmental laws may still be protected by the court even though the performance of these contracts might damage ecology and the environment simply because they are genuinely agreed to by the parties.<sup>69</sup> With the promulgation of the Green Principle of the Civil Code, which would govern all civil activity, including entering into a contract, judges are required to apply laws in a systematic and complete way in order to ensure private actions comply with the requirements of green development.<sup>70</sup>

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67. SPC Judicial Interpretations on Mining Rights Disputes, *supra* note 9, art. 18.

68. SPC ENVIRONMENT AND RESOURCES DIVISION, ZUIGAO RENMIN FAYUAN KUANGYE QUAN SIFA JIESHI LUJIE YU SHIYONG (最高人民法院矿业权司法解释理解与适用) [UNDERSTANDING AND APPLICATION OF SPC JUDICIAL INTERPRETATION ON MINING RIGHTS] 234–35 (2018).

69. *Id.*

70. SUN Jie (孙洁), *LV Zhongmei: Minfa Zongze Ying Tixian Lv se Fazhan Linian* (吕忠梅: 民法总则应体现绿色发展理念) [*LV Zhongmei: The General Principles of Civil Law Should Embody the Idea of Green Development*], DEMOCRACY AND LEGISLATION J. (Mar. 20, 2017), <https://chuansongme.com/n/1688267752917>.

*A. The Establishment of the Green Principle of the Civil Code*

After 40 years of the market economy reform and opening practice to the outside world, China has formed a relatively complete and mature civil law system.<sup>71</sup> However, China still lacks a uniform civil code, resulting in difficulties in understanding and applying all the specific civil laws, and resolving conflicts between them in some occasions.<sup>72</sup> The Xi Jinping Government has made considerable progress in creating this civil code since 2014.<sup>73</sup> In March 2017, the National People's Congress adopted the General Principles of Civil Law.<sup>74</sup>

Scholars refer to the General Principles of Civil Law as the "Green Civil Code."<sup>75</sup> Article 9 of the General Principles, which establishes the Green Principle, prominently manifests concern over the environment by providing that "parties to civil relations shall conduct civil activities contributing to the conservation of resources and the protection of the environment."<sup>76</sup> Natural resources conservation and ecological environmental protection is henceforth not only the task of environmental law, but also a fundamental principle of civil law.<sup>77</sup>

This Principle not only inherits the Chinese traditional cultural idea of harmony among heaven and earth, and man and nature, but also has the distinctive characteristics of the time in which it was written.<sup>78</sup> The Green

71. LI SHISHI (李适时), *ZHONGHUA RENMIN GONGHE GUO MINFA ZONGZE SHIYI* (中华人民共和国民法总则释义) [PARAPHRASE OF THE GENERAL PRINCIPLES OF CIVIL LAW] 1 (2017).

72. WANG LIMING (王利明), *MINFA DIAN TIXI YANJIU* (民法典体系研究) [STUDIES ON CIVIL CODE SYSTEM] 21–24 (2d ed. 2012).

73. YANG Weihuan (杨维汉) et al., *Wei Shixiang Zhongguo Meng Dianding Jianshi de Fazhi Jishi* (为实现中国梦奠定坚实的法治基石) [Laying a Solid Foundation for Developing the Rule of Law to Fulfill the Chinese Dream], *XINHUA NEWS* (Mar. 16, 2017), [http://www.xinhuanet.com/politics/2017lh/2017-03/16/c\\_1120635182.htm](http://www.xinhuanet.com/politics/2017lh/2017-03/16/c_1120635182.htm).

74. *MINFA ZONGZE* (民法总则) [GENERAL PRINCIPLES OF CIVIL LAW] (promulgated by the Nat'l People's Cong. Mar. 15, 2017, effective Oct. 1, 2017). The government planned to complete the compilation of the sub-series of the civil code by 2020. The sub-series will then be merged with the General Principles of Civil Law to form a unified civil code. See LI, *supra* note 71, at 4.

75. XU Guodong (徐国栋), *Lvse Minfadian: Quanshi Minfa Shengtai Zhuyi* (绿色民法典: 诠释民法生态主义) [Green Civil Code: Interpretation of Civil Ecologism], *CHINA ENVTL. NEWS* (Apr. 5, 2004), <http://news.sina.com.cn/c/2004-04-05/09292227897s.shtml>.

76. *MINFA*, *supra* note 74, art. 9.

77. See generally LV Zhongmei (吕忠梅), *Lvse Yuanze Zai Minfadian Zhong de Guanche Lungang* (绿色原则在民法典中的贯彻论纲) [Outline of the Implementation of the Green Principle in The Civil Code], *CHINESE LEGAL SCIENCE* 5 (2018) (describing environmental protection principles in the civil code).

78. See LI, *supra* note 71, at 32.

Principle reflects the new national strategy of green and sustainable development. It addresses the national conditions that China, with such a large population, must properly solve: the conflict between human beings and natural resources.<sup>79</sup> Furthermore, the Green Principle encapsulates the spirit of all existing environmental protection laws. Natural resources conservation and ecological environmental protection are embedded and required by China's Constitution and many laws. For example, Article 9 of the Constitution stipulates that the state should ensure the rational use of natural resources, protect rare animals and plants, and prohibit any person from occupying or destroying natural resources by any means.<sup>80</sup> Article 6 of Environmental Protection Law provides that all persons have the obligation to protect the environment.<sup>81</sup> Specifically, producers and operators shall prevent and reduce environmental pollution and ecological destruction, and shall be responsible for the damage caused thereby.<sup>82</sup> Chapter 8 of Tort Law specifically regulates the civil liability of environmental pollution, stipulating the rules of multiple polluters infringement, reversal of burden of proof, and fault of the third person.<sup>83</sup> Given these extensive rights and obligations under Chinese environmental law, the Green Principle is expected to wield great influence over private conduct.

### *B. Influence of the Green Principle on the Validity of Contract*

The Green Principle has important value orientation in China. First, it demands that the legislature take natural resources conservation and ecological environmental protection as a significant consideration in regulating civil activities.<sup>84</sup> Second, civil subjects, including natural persons, legal persons, and unincorporated organizations, must act in accordance with the ideas of saving natural resources and protecting the ecological

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79. *Id.*

80. XIANFA art. 9 (2018) (China).

81. Huanjing Baohu Fa (环境保护法) [Env'tl Protection Law] (promulgated by the Standing Comm. of the Nat'l People's Cong. Dec. 26, 1989, revised Apr. 24, 2014, effective Jan. 1, 2015), art. 6.

82. *Id.*

83. Qinquan Zeren Fa (侵权责任法) [Tort Law] (promulgated by the Standing Comm. of the Nat'l People's Cong. Dec. 26, 2009, effective Jul. 1, 2010), art. 67 ("If more than two polluters pollute the environment, the responsibility of each polluter shall be determined according to the kinds of pollutants and the amount of discharge and other factors."); art. 66 ("In the event of disputes over environmental pollution, the polluter shall bear the burden of proof that there is a statutory exemption and mitigation of responsibility or there is no causation between the act and the injury."); art. 68 ("Where the environmental pollution was caused by the third person's fault, the infringed may claim compensation from the polluter, or may claim compensation from the third party. The polluter shall have the right to recover the claim from the third party after the compensation has been paid to the infringed.")

84. See LI, *supra* note 71, at 32.

environment when engaging in private conduct.<sup>85</sup> Third, the judiciary must protect behaviors that save natural resources and safeguard the ecological environment, while condemning activities that do otherwise.<sup>86</sup> When hearing cases, the judges may make judgments on the ground of the Green Principle, provided that there are no specific laws applicable to the case.<sup>87</sup> Thus, the Green Principle elevates environmental protection as an important public interest. The SPC Judicial Interpretation on Mining Rights Disputes specifically incorporates environmental public interest as a public interest that can serve as a basis to invalidate a contract.

V. THE VIOLATION OF MANDATORY PROVISIONS OF ENVIRONMENTAL AND NATURAL RESOURCES LAWS AND ADMINISTRATIVE REGULATIONS CAN BE A BASIS FOR INVALIDATING A CONTRACT.

The rules established in the *Jinhe* case and the subsequent Judicial Interpretation seem straightforward in light of Article 52 of China's Contract Law, which already provides that a contract "shall be deemed null and void if it . . . damages the public interest [or] violates a mandatory provision of law or administrative regulation."<sup>88</sup> However, whether an environmental law can form the basis for invalidating a resource development and utilization contract and result in the cessation of illegal exploitation of mineral resources in a special region is debatable and somewhat controversial in practice.<sup>89</sup> This is because the current Contract Law favors the fostering of transactions and disfavors the invalidation of a contract that expresses the intent of the parties.

China's current Contract Law was the result of a major revision in 1999 that sought to resolve redundancies and inconsistencies of previous versions of contract laws and to guide the regulation of China's rapidly growing market economy.<sup>90</sup> It has established three key guiding principles—the principle of freedom of contract, the principle of good faith, and the principle of fostering transaction.<sup>91</sup> As the country moved away from "intense

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85. *Id.*

86. *Id.*

87. See SUN, *supra* note 70.

88. Hetong Fa (合同法) [Contract Law] (promulgated by the Nat'l People's Cong. Mar. 15, 1999, effective Oct. 1, 1999), art. 52(4)–(5).

89. ZHU Jing (朱婧), *Teshu Quyu She Kuang Hetong de Xiaoli Shencha*, (特殊区域涉矿合同的效力审查) [Review of the Validity of Mining Contracts in Special Regions], PEOPLE'S COURT JOURNAL (Feb. 15, 2017), <http://www.dcnlawyer.com/html/mszh/4531.html>.

90. WANG Liming & XU Chuanxi, *Fundamental Principles of China's Contract Law*, 13 COLUMBIA J. ASIAN L. 1, 5–7 (1999).

91. *Id.* at 9–33.

centralized planning and the elimination of freedom of contracts,” the law adopted an expansion of freedom of a party to form contracts with others and determine the terms.<sup>92</sup> This principle was needed also to foster transaction in order to build China’s market economy.<sup>93</sup> Thus, the Contract Law specifically prohibits illegal interference with the rights of a party to enter in a contract.<sup>94</sup> Article 52 of the Contract Law limits this expansion to ensure that contracts are not violative of the law or public interest.<sup>95</sup>

Not all violations of law or regulation can serve as a basis for invalidating a contract under Article 52, however. It must be a violation of a mandatory provision of law or regulation.<sup>96</sup> The SPC explained that the mandatory provision in Article 52 of the Contract Law refers to the mandatory provision relating to the validity or effectiveness of the contract.<sup>97</sup>

Scholars and judges have interpreted the mandatory provisions of law and administrative regulation under Article 52 to be divided into mandatory provisions of effectiveness and mandatory provisions of management.<sup>98</sup> Mandatory provisions of management aim to carry out administrative management and penalize the illegal acts, but they do not determine the validity of a contract.<sup>99</sup> Violating these provisions will subject the parties to administrative or criminal sanctions, without affecting the validity of the contract.<sup>100</sup> On the other hand, violating mandatory provisions of effectiveness will negatively affect the validity of the private conduct.<sup>101</sup>

In 2016, the SPC affirmed this interpretation in a notice to lower courts that in applying Article 52 in commercial cases, they must pay attention to the distinction between a mandatory provision relating to the effectiveness or validity of an act and mandatory provision relating to the management or regulation of the act and that they “must strictly limit the scope of

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92. *Id.* at 10.

93. *Id.*

94. Contract Law, *supra* note 88, art. 4.

95. *Id.* art. 52(4)–(5). Article 52 of the Contract Law also provides that a contract is null and void if it results from fraud or coercion, or malicious collusion, or is formed for an illegal purpose. *Id.* art. 52(1)–(3).

96. *Id.* art. 52(5); *see also* WANG & XU, *supra* note 90, at 26 (arguing that only violations of mandatory provisions of national laws and regulations may be a basis for voiding a contract).

97. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gonghe Guo Hetong Fa” Ruogan Wenti de Jieshi (II) (最高人民法院关于适用《中华人民共和国合同法》若干问题的解释(二)) [SPC Judicial Interpretation II on Contract Law] (promulgated by the Trial Comm., Sup. People’s Ct. Apr. 24, 2009, effective May 13, 2009), art. 14.

98. 1 WANG LIMING (王利明), HETONG FA YANJIU (合同法研究) [STUDIES ON CONTRACT LAW] 658–59 (1st ed. 2002).

99. *Id.*

100. HAN SHIYUAN (韩世远), HETONG FA ZONGZE (合同法总论) [GENERAL THEORY OF CONTRACT LAW] 175–80 (3d ed. 2011).

101. *Id.*

invalidation.”<sup>102</sup> The SPC’s reasoning was that if courts without restraint declare contracts invalid based on violations of any mandatory provision of law, such judicial actions would destroy the fundamental principles embodied in the Contract Law.<sup>103</sup> Therefore, under the SPC Judicial Interpretation on Mining Rights Disputes, courts must exercise great prudence in determining a contract null and void. It may do so only if the contract violates a mandatory provision of law or regulation relating to the effectiveness of the act or mandatory provision of effectiveness.<sup>104</sup>

Some scholars argue that the mandatory provisions of environmental and natural resources laws and administrative regulations should be categorized as mandatory provisions of management, since environmental laws are public laws, which mostly regulate management public resources and rarely regulate private civil conduct.<sup>105</sup> For example, the act of engaging in a pollution generating activity (e.g. operation of a facility that emits pollutants) without a permit is illegal under China’s Environmental Protection Law.<sup>106</sup> However, the law does not render the act null and void. It only provides an enforcement mechanism that authorizes the government to fine, prosecute, and perhaps shut down the operation.<sup>107</sup> Indeed, when it comes to following these environmental laws and regulations, some operators are willing to pay a certain amount of fines in exchange for continuing of their exploitation activities.<sup>108</sup> Because of the low statutory penalty amounts,<sup>109</sup> some

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102. Zuigao Renmin Fayuan Guanyu Yifa Shenli he Zhixing Minshi Shangshi Anjian Baozhang Minjian Touzi Jiankang Fazhan de Tongzhi (最高人民法院关于依法审理和执行民事商事案件保障民间投资健康发展的通知) [SPC Notice on Adjudication of Civil and Commercial Cases] (issued by the Sup. People’s Ct. Sept. 2, 2016), sec. 3.

103. SHEN DEYONG (沈德咏), ZUIGAO RENMIN FAYUAN GUANYU HETONG FA SIFA JIESHI (II) LIJIE YU SHIYONG (最高人民法院关于合同法司法解释 (II) 理解与适用) [UNDERSTANDING AND APPLICATION OF SPC JUDICIAL INTERPRETATION (II) ON CONTRACT LAW] 127–30 (2015).

104. *Id.* at 131–32.

105. LV, *supra* note 77, at 19–20.

106. Env’tl Protection Law, *supra* note 81, art. 45.

107. *Id.* arts. 59–69.

108. HUO Siyi (霍思伊), *Huanbao Zhifa Kunnan Chongchong: Qiangzhili Queshi Zhifa Zhouqi Manchang* (环保执法困难重重: 强制力缺失执法周期漫长) [Difficulties in Environmental Enforcement: Lack of Enforcement Force and Long Enforcement Cycle], CHINA NEWSWEEK (May 5, 2017), [http://www.china.com.cn/top/2017-05/05/content\\_40752675.htm](http://www.china.com.cn/top/2017-05/05/content_40752675.htm).

109. *Huanjing Weifa Chengben Di Fakuan Cengjing Buji Yitian Shebei Zhujing* (环境违法成本低 罚款曾经不及一天设备租金) [The Low Cost of Environmental Violation: Fines Used to be Less Than One-day Equipment Rental], FUJIAN DAILY (Mar. 8, 2015), <https://news.qq.com/a/20150308/006751.htm>.

companies merely include the fines in calculating their cost of doing business.<sup>110</sup>

This article argues that the environmental and natural resources law has the attributes of both public law and private law.<sup>111</sup> Violation of its mandatory provisions should not merely trigger administrative punishment but should invalidate the private acts. Invalid civil conduct should be subject to state interference and be non-performable.<sup>112</sup> In addition, as demonstrated in the *Jinhe* judgment and analysis of the Green Principle of Civil Law, the consideration of public interest is important in determining whether a provision is one of effectiveness or management.<sup>113</sup> If the performance of the act in violation of the provision injures public interest, then the law should be deemed mandatory affecting the validity of the act. Thus, the specific criteria for evaluating whether provisions of an environmental law or regulation affect the validity of a contract or merely regulate or manage the conduct under the contract should be as follows: (a) if the mandatory provisions clearly stipulate that violations of such laws will invalidate the contract, then those provisions shall belong to the mandatory provisions of effectiveness;<sup>114</sup> (b) even if the mandatory provisions do not stipulate that violations will invalidate contracts, but performing the terms of the contract will damage the state or public interest, then such provisions should also be deemed as mandatory provisions of effectiveness;<sup>115</sup> and (c) if the mandatory provisions do not explicitly stipulate that the violation will affect the validity of contracts, and if the continuing performance of the terms of the contract will not injure the state interest or public interest, but only the interests of

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110. XING Feilong (邢飞龙), *Duo Zhuanjia Jiedu Xin "Huanbao Fa" Niuzhuan Weifa Chengben Di Nanti* (多专家解读新《环保法》: 扭转违法成本低难题) [*Experts' Interpretation of the New Environmental Protection Law: Turning around the Problem of Low Illegal Cost*], CHINA ENVT'L NEWS (Dec. 31, 2014), <http://www.chinanews.com/n/2014/12-31/6928398.shtml>.

111. ZHOU KE (周珂) ET AL., HUANJING FA (环境法) [ENVIRONMENTAL LAW] 17–18 (6th ed. 2016).

112. WANG LIMING (王利明), MINFA ZONGZE YANJIU (民法总则研究) [STUDIES ON THE GENERAL PRINCIPLES OF CIVIL LAW] 578–79 (1st ed. 2003).

113. WANG LIMING (王利明), WOGUO MINFA DIAN ZHONGDA YINAN WENTI YANJIU (我国民法典重大疑难问题研究) [STUDIES ON THE MAJOR DIFFICULTIES IN DRAFTING THE CIVIL CODE] 460 (2006); Sichuan Jinhe Kuangye Youxian Gongsi Su Xinjiang Lingang Ziyuan Touzi Gufen Youxian Gongsi (四川金核矿业有限公司诉新疆临钢资源投资股份有限公司) [Sichuan Jinhe Mining Co. Ltd. v. Xinjiang Lingang Res. Inv. Co. Ltd.], 2017 SUP. PEOPLE'S CT. GAZ. 41 (Sup. People's Ct. 2017) (China).

114. See SHEN, *supra* note 103, at 133–35 (describing the application of contract law).

115. *Id.*

some specific parties, then those provisions shall belong to the mandatory provisions of management.<sup>116</sup>

In the *Jinhe* case, Article 26 of the Nature Reserves Regulations prohibits mining and other activities in nature reserves. It does not explicitly stipulate that violations of the Article will void the relevant mineral resources development contract.<sup>117</sup> However, mining is strictly prohibited and the mining permit, which should not have been issued under the law, did not change the compulsory prohibition of the regulation.<sup>118</sup> In finding the contract violated the Nature Reserves Regulations under Article 52 of the Contract Law, the SPC in effect held that the mandatory prohibition under the regulations was a provision of effectiveness. The SPC further found that the contract—if deemed valid and fulfilled—would cause severe damage to the natural ecological environment and injure the environmental public interest.<sup>119</sup> Moreover, in light of the Green Principle, which requires one engaging in a civil conduct to act in accordance with the principle of resource conservation and environmental protection, mandatory provisions of environmental laws and regulations, which serve an important public interest, should be considered mandatory provisions of effectiveness, the violation of which could invalidate a contract.

VI. PROTECTION OF THE ENVIRONMENT AND NATURAL RESOURCES IS A  
PUBLIC INTEREST, THE VIOLATION OF WHICH CAN RENDER A CONTRACT  
NULL AND VOID.

The *Jinhe* case and Judicial Interpretation on Mining Rights Disputes also establish that if a contract violates environmental public interest, it can be deemed invalid. While the analysis of the mandatory provision under Article 52 is intertwined with the public interest analysis,<sup>120</sup> a contract or civil act that complies with the law but violates public interest is still invalid.

According to Chinese Civil Law, civil subjects who engage in civil activities must not violate the law, public order, and good customs.<sup>121</sup> The Principles of Public Order and Good Custom make up for the fact that imperative laws cannot create safeguards for all aspects of social life. As a basic principle of the Civil Code, the Principle of Public Order and Good Custom, requires civil subjects engaging in civil activities not to contravene

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116. *Id.*

117. Nature Reserves Regulations, *supra* note 14, art. 26.

118. *Jinhe*, 2017 Sup. People's Ct. at 41.

119. *Id.*

120. See ZHU, *supra* note 89, sec. 1 (positing that mandatory provisions and public interest analyses are, in fact, two sides of the same coin).

121. GENERAL PRINCIPLES OF CIVIL LAW, *supra* note 74, art. 8.

the state interest and public interest, and not to violate the moral standards accepted by all members of the society.<sup>122</sup> This Principle is of great significance in coordinating the conflicts between individual interests, public interests, and state interests, in maintaining a normal social, economic, and living order, and in filling the gap between morality, reality, and law.<sup>123</sup> The activities that seem not to violate the existing mandatory provisions, yet actually harm the common interest of the public and undermine the social and economic order, violate public interest under the Principle of Public Order and Good Custom.<sup>124</sup> Thus, public interest is one of the key factors in measuring whether a contract is valid or not.

In *Jinhe*, the SPC held that if the contract were deemed valid and permitted to proceed it would result in serious ecological damage and would injure environmental public interest.<sup>125</sup> Indeed, the mining activities were taking place in a nature reserve, which was established to preserve the habitat for a state-protected animal—the Marco Polo sheep. Even though the mining activities were permitted by the local authorities, allowing them to continue would destroy habitat for the protected animal and cause erosion, pollution, and other damage to the ecology of the nature reserve. In selecting the *Jinhe* case as a typical case, the SPC specifically noted that courts should give special review of the validity of such resource exploration and exploitation contracts even if they were authorized by local government agencies.<sup>126</sup> It further noted that courts should not only focus on the realization of the parties' intent in entering into the contract, but also consider the protection of ecological environment and natural resources as a crucial factor.<sup>127</sup>

In issuing the Judicial Interpretation on Mining Rights Disputes, which specifically provides that a resource exploration and exploitation contract could be found to be null and void if it injures “the environmental public interest,” the SPC acknowledged that “[m]ineral resources have both economic value and ecological value, and the exploitation and utilization often have negative environmental externalities.”<sup>128</sup> It prescribes that if any

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122. See LI, *supra* note 71, at 30–31 (describing the general principles of civil law).

123. See WANG, *supra* note 112, at 133 (describing the underlying principles of civil law).

124. *Id.* at 132.

125. Sichuan Jinhe Kuangye Youxian Gongsi Su Xinjiang Lingang Ziyuan Touzi Gufen Youxian Gongsi (四川金核矿业有限公司诉新疆临钢资源投资股份有限公司) [Sichuan Jinhe Mining Co. Ltd. v. Xinjiang Lingang Res. Inv. Co. Ltd.], 2017 SUP. PEOPLE'S CT. GAZ. 41 (Sup. People's Ct. 2017) (China).

126. SPC Ten Model Cases on Mining Rights Disputes, *supra* note 61.

127. *Id.*

128. ZHENG XUELIN (郑学林), SPC ENVIRONMENT AND RESOURCES DIVISION, Zuigaofa Fabu Shenli Kuangyequan Jiufen Anjian Sifa Jieshi (最高法发布审理矿业权纠纷案件司法解释) [SPC Issuance of Judicial Interpretation on Mining Rights Disputes], (Jul. 27, 2017).

act of exploiting and utilizing natural resources within special regions results in ecological destruction, ecological function loss, or damage to environmental public interest, the court—taking the national development strategy and the common wellbeing of the people into consideration—should negatively judge the contracts signed by the parties.<sup>129</sup> This not only is a policy dissemination and behavior guidance for the public, but also is in line with the current ideas and requirements of green development and ecological civilization construction.<sup>130</sup> The temporary development of economy should not be achieved at the expense of the long-term survival rights of future generations.<sup>131</sup> Environmental public interest is an important public interest, the violation of which could invalidate a contract.

#### VII. THE JUDICIARY CAN PLAY A CORRECTING FUNCTION IN RESPONSE TO LACK OF ADMINISTRATIVE ENFORCEMENT OF ENVIRONMENTAL LAWS.

The *Jinhe* case is a judicial response to the unregulated resource exploration and exploitation that were happening in special protection regions, particularly those in the more remote western parts of China. The holding provided a legal hook to prevent the continued illegal exploitation of resources in special regions in cases where the administrative agencies have failed to act and indeed where they have permitted such illegal actions to continue. The SPC's designating the *Jinhe* case as a typical case and its subsequent Judicial Interpretation on Mining Rights Disputes provide the tools to lower courts to address the problem of illegal resource exploration and exploitation in special regions.<sup>132</sup>

##### *A. The Limit of Administrative Law Enforcement in the Dilemma Between Economy Development and Environmental Protection*

Many of the western regions of China, particularly, special regions, such as nature reserves, are rich in mineral resources.<sup>133</sup> In some areas, a large part of the local government's fiscal revenue comes from the mineral industry, and the exploration and exploitation of mineral resources remain a mainstay of local economy.<sup>134</sup> Therefore, the contradiction between environmental

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129. *Id.*

130. *Id.*

131. SPC ENVIRONMENT AND RESOURCES DIVISION, *supra* note 68, at 236.

132. *Id.* at 241–42.

133. *Id.*

134. *Id.*

protection and economic development will always be prominent within these regions.<sup>135</sup>

To promote economic development, some local governments ignore the needs of environmental protection and ecological conservation and approve mining and other projects in prohibited development regions.<sup>136</sup> This leads to soil erosion, destruction of surface plants and landscapes, pollution of water bodies, soil pollution, subsidence of ground, reduction of biological diversity and other environmental pollution and ecological damage that is hard to rehabilitate.<sup>137</sup> Apart from the foregoing *Jinhe* case, illegal development and destruction of the ecological environment in the Gansu Qilian Mountains National Nature Reserve aroused widespread concern in Chinese society. In that case, several officials were held accountable and got stern punishment.<sup>138</sup>

It is not uncommon for competent administrative authorities to avoid enforcing environmental and natural resources laws and administrative regulations in the name of local economy protection.<sup>139</sup> Some local environmental legislations even fail to meet the minimum requirements of national laws and policies and relax the standards of law enforcement to “protect” the illegal exploitation behaviors.<sup>140</sup>

In addition, the cohesion gap between different competent administrative authorities also provides opportunities for illegal development and utilization of natural resources.<sup>141</sup> In the past, the mineral industry departments and the nature reserves protection departments did not coordinate with each other and did not present a unified management.<sup>142</sup> The mineral industry departments reviewed the conditions for mining development in issuing and renewing mineral permits, without considering whether the mining areas were located

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135. See ZHU, *supra* note 89 (noting dispute between environmental protection and mining developments).

136. See ZHENG, *supra* note 128 (noting the protection of economic development).

137. SPC ENVIRONMENT AND RESOURCES DIVISION, *supra* note 68, at 234.

138. See *Zhongban Guoban Jiu Gansu Qilianshan Guojia Ji Ziran Baohu Qu Shengtai Huanjing Wenti Fachu Tongbao* (中办国办就甘肃祁连山国家级自然保护区生态环境问题发出通报) [Notice on Issues Relating to Gansu Qilian Mountains Nat'l Nature Reserve], XINHUA NEWS (Jul. 20, 2017), [https://news.china.com/domestic/945/20170721/30992111\\_all.html#page\\_2](https://news.china.com/domestic/945/20170721/30992111_all.html#page_2) (detailing the illegal mining operations and other development activities in the Qilian Mountains National Nature Reserve in Gansu Province, which were permitted by local government agencies).

139. *Id.*

140. *Id.* Gansu Provincial government passed administrative regulations on the Qilian Mountain National Nature Reserve, which failed to comport with the national Nature Reserves Regulations. The local regulations prohibit only certain activities—hunting, land reclamation, and open burning—while omitting the other enumerated activities that are prohibited under national regulations, namely, logging, grazing, fishing, mining, and harvesting, etc., thus allowing many of these prohibited activities to take place in the reserve in violation of the national regulations. *Id.*

141. SPC ENVIRONMENT AND RESOURCES DIVISION, *supra* note 68, at 241.

142. *Id.*

within a nature reserve.<sup>143</sup> When illegal mining activities were found or reported, the nature reserves protection departments might issue verbal warnings to the relevant enterprises or give law enforcement advices to the local governments, but in many cases, there was not much they could do because the enterprises had official mineral permits.<sup>144</sup> In the *Jinhe* case, the plaintiff tried to justify its illegal mining activity by arguing that the government had issued a mining permit and had never suspended or terminated their permit, and that some other mines had also been permitted in the same nature reserve.<sup>145</sup> The trial court accepted these arguments.<sup>146</sup>

Moreover, third parties cannot challenge mining permits, since only the administrative counterpart—namely the permit applicant—has the right to sue the government under the Administrative Litigation Law.<sup>147</sup> If the administrative departments do not take the initiative to revoke their own permits, or strictly enforce the environmental and natural resources law, it is difficult for other administrative departments or citizens to correct them.<sup>148</sup>

*B. The Correcting Function of the Judiciary and Special Review on the Validity of Contract.*

As the *Jinhe* case demonstrates, the court can fill the gap left in the law and in the implementation of the law by administrative agencies. Because of the neutrality of the court, it can play a rectifying function when hearing environmental and natural resources cases, and make up for the deficiencies of the administrative law enforcement.<sup>149</sup> By doing so, they can stop parties from performing their illegal development activities and force the relevant administrative authorities to review the permits they have issued.<sup>150</sup>

Indeed, the *Jinhe* case and the SPC Judicial Interpretation on Mining Rights Disputes effectively promoted the execution of a notice issued by ten

143. *Id.*

144. *Id.* at 242.

145. Sichuan Jinhe Kuangye Youxian Gongsi Su Xinjiang Lingang Ziyuan Touzi Gufen Youxian Gongsi (四川金核矿业有限公司诉新疆临钢资源投资股份有限公司) [Sichuan Jinhe Mining Co. Ltd. v. Xinjiang Lingang Res. Inv. Co. Ltd.], 2017 SUP. PEOPLE'S CT. GAZ. 36–37 (Sup. People's Ct. 2017) (China).

146. *Id.* at 38.

147. Xingzheng Susong Fa (行政诉讼法) [Administrative Procedure Law] (promulgated Apr. 4, 1989, revised Jun. 27, 2017), art. 12(3) (mandating that, in permitting cases, people's courts shall accept complaints filed by citizens, legal persons or other organizations against an administrative agency for “its denial of, or failure to respond within the statutory period to, an application for administrative licensing or any other administrative licensing decision made by the administrative agency”).

148. SPC ENVIRONMENT AND RESOURCES DIVISION, *supra* note 68, at 242.

149. See ZHU, *supra* note 89 (discussing history of environmental protections in enforcement).

150. *Id.*

ministries and commissions of the Central Government, led by the Ministry of Ecology and Environment, to all provinces and autonomous regions, municipalities, and relevant governmental agencies.<sup>151</sup> The notice highlighted many incidents of illegal development, including mining, in nature reserves and the impact that these illegal activities have created, directing the parties to coordinate to conduct inspections, develop remediation plans, and strengthen the management and protection of nature reserves.<sup>152</sup> This has resulted in concrete efforts by the Xinjiang government to phase out illegal mines in the Taxkorgan Nature Reserve.<sup>153</sup>

Moreover, the role of the courts in reviewing the validity of contract is grounded in Contract Law and the SPC Judicial Interpretation. In addition, while the typical case designation does not confer binding authority on the *Jinhe* holding, the commentary in the typical case announcement stresses that in hearing cases involving development of special regions that required protection under the law, courts are not confined to reviewing the validity of the contract in a vacuum.<sup>154</sup> They are to consider the development potential or protection restrictions of such regions in accordance with the National Main Functional Plan. For instance, in cases involving resource exploitation in areas that are designated for development, courts may consider the ecological carrying capacity of the environment and the need for development.<sup>155</sup> In cases involving areas where development is prohibited, especially in areas designated for protection because of its ecological sensitivity, courts should implement the strictest protection measures.<sup>156</sup> The courts may do so even if the activities have been approved by certain administrative authorities.<sup>157</sup> These considerations inform the evaluation of whether a contract violates a mandatory provision of effectiveness as well as whether it violates environmental public interest. In addition, the Green Principle of the Civil Code offers the courts a basis to review whether a private civil act contributes to “conservation of resources and the protection of the environment.”

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151. Guanyu Jing Yibu Jiaqiang Sheji Ziran Baohu Qu Kaifa Jianshe Huodong Jiandu Guanli de Tongzhi (关于进一步加强涉及自然保护区开发建设活动监督管理的通知) [Notice on Further Strengthening the Supervision and Management of Development Activities in Nature Reserves] (issued by the Ministry of Env't and Ecology et al. May 6, 2015).

152. *Id.*

153. BAI, *supra* note 15 (noting that, since 2018, government invested more than 45 million yuan [about 6.5 million US dollars] to restore areas once granted for mining; restoration work has proceeded for 37 mines located within the reserve and illegal mines have been phased out of the Pamir area).

154. SPC Ten Model Cases on Mining Rights Disputes, *supra* note 61.

155. *Id.*

156. *Id.*

157. *Id.*

## VIII. CONCLUSION

The *Jinhe* case illustrates a unique challenge that China faces as it implements its green development strategy. This challenge is prominent in the special regions where mineral resources are rich and local interest for economic development is strong. In order to develop economically, some local governments give little weight to environmental protection and resource conservation principles. Illegal mines spring up in nature reserves and other special protected regions. The *Jinhe* case demonstrates that the judiciary has a role to play in filling in the gap created by the lack of administrative enforcement and administrative challenge to these facilities. In reviewing the validity of resource exploration and exploitation contracts, the judiciary must balance the relationship between economic development and environmental protection, properly measure the effective requirements of contract, enforce the Green Principle of the Civil Code, and safeguard the environmental public interest. In the application of the Green Principle, the judiciary must actively review the validity of natural resource contracts, to see if they violate the obligation of environmental protection.<sup>158</sup> When there is conflict between contract purpose and the environmental protection, and no clear laws to apply, the judiciary can hold the contract invalid on the ground of the Green Principle, if the behavior would seriously damage the environment.<sup>159</sup> By prohibiting the illegal exploitation of resources and preventing the destruction of the environment, the judiciary can contribute to the ecological civilization construction and green development in China.<sup>160</sup>

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158. See LI, *supra* note 71, at 4 (describing the application of civil law).

159. See LV, *supra* note 77, at 20 (describing environmental protections in the civil code).

160. See ZHU, *supra* note 89 (discussing benefits of environmental protections in court decisions).