

The Dispute Resolution Process in Relation to Logging Permits in China

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The Rights and Resources Initiative

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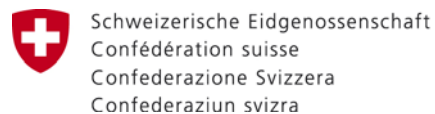


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I. Introduction

To increase its forest coverage and reduce ecological deterioration, China adopts a policy of restricting logging on forestland by setting an annual logging quota for each county-level jurisdiction and approval or denial of individual applications for a logging permit. Such restrictions are also applicable to collective forestland and the trees planted and managed by individual farmers on collective forestland allocated or contracted to them for a term of 30-70 years,¹ renewable upon the expiration of the term.² According to Chinese law, except for “scattered trees” on farmers’ allocated “private mountains” or around farmers’ residential houses, all logging must be endorsed with an appropriate logging permit,³ which is typically issued by the forest bureau at the county level or above.

Under such a logging management regime, when a farmer needs a logging permit to harvest trees on his or her contracted forestland, he or she must file an application with the township forestry station along with supporting documentation, including a forestland rights certificate, a timber logging scheme authorized by higher level government, a logging work plan, and a certificate for the reforestation of previously logged locations. Upon review and approval by the station, the application will be submitted to the forest bureau at the county level for final approval based on the annual logging quota allocated to the county.

One of the greatest defects of this logging permit system is the absence of an appeal mechanism available to farmers when their application is denied. Its impact on farmers’ rights to economic use of their forestland is aggregated by the fact that the process of reviewing farmers’ applications is largely discretionary and non-transparent.⁴ This paper will discuss the dispute resolution experiences in the US, UK and Ireland with respect to denial of applications for logging permits, and its possible application to China. Section II describes the structure and function of the appeals system established in the US, UK and Ireland for resolving dispute over denial of logging permit. Section III provides recommendations on introducing an appeals mechanism in China in order to create a greater harmony in forest areas.

II. Dispute resolution in western countries

The US practice

In the United States, different processes govern the appeal of logging permit denials, depending on the original grantor and the nature of the permit. For private property owners or users of state-owned public lands, the grantor of a logging permit is typically the state in which the logger resides. The federal government also issues logging permits for logging on federal public lands, and so has its own process for appealing the decision to deny a permit.

In the state of Washington, for example, the Forest Practices Appeals Board (Board) hears appeals from decisions of the Department of Natural Resources (DNR), which includes the appeal of an approval or disapproval of a forest practices application.⁵ The Board is an independent, quasi-judicial, state agency that is entirely separate from the DNR. It consists of three part-time members, who are appointed by the governor and confirmed by the State Senate for a six-year term. One of the three judges must be an attorney.

In order to appeal a decision of the DNR, one must file an appeal with the State Forest Practices Appeals Board within 30 days of the approval or disapproval of the forest practices application. No fee is required to file an appeal. After the appeal is filed, a pre-hearing conference will be convened with the presiding officer from the Board. There are three purposes to this conference: to discuss interest in settlement, including use of the Board’s no-cost mediation program; to determine legal issues; and to set a schedule for preparing the case for hearing if settlement is not reached. If the parties so choose, they may attempt to reach a compromise through mediation. The Board offers a voluntary mediation program at no cost. During the mediation, a trained administrative appeals judge works with the parties to resolve

the case. If the parties reach a settlement, the Board will dismiss the appeal provided that the settlement conforms to law.

If disputes cannot be resolved through mediation, the parties may choose to file a motion asking the Board to rule on a particular issue. A common example of such a motion is a request for summary judgment. The moving party may request an oral hearing from the presiding officer on the motion. If this request is granted, the parties will personally appear and present oral arguments to the Board.

If the case is not ended through mediation or summary judgment, the parties will proceed with a hearing. Before the hearing, the parties have the right to review the DNR's file of their decision. The hearing in many ways resembles a civil trial. First, each party gives an opening statement that briefly outlines the facts that each side will attempt to establish. After the opening statement, the party with the burden of proof will present its evidence. In a permit appeal, the appealing party has the burden of proof and presents its evidence first.

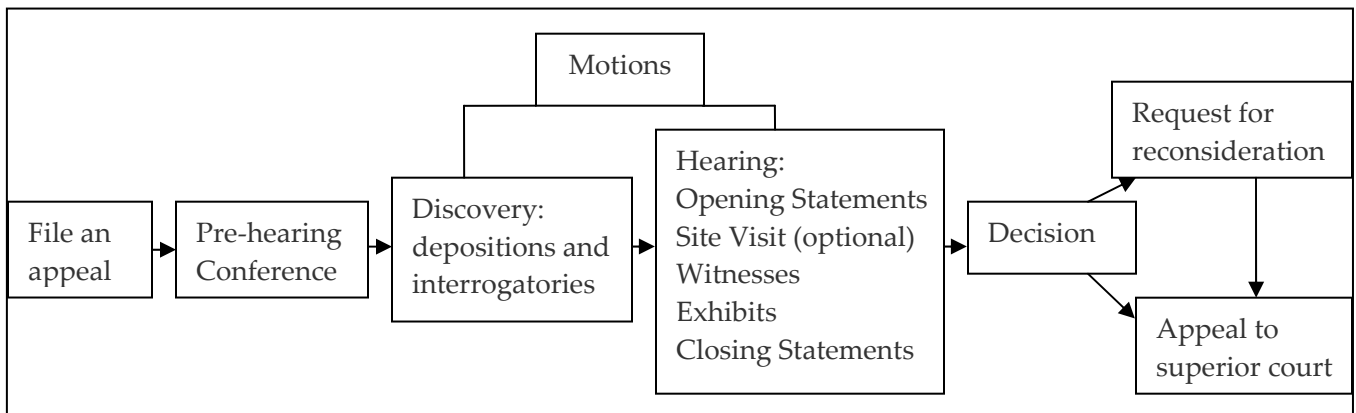
At the hearing, witnesses will be cross-examined by the opposing party. Quite often, one or more Board members will ask the witness questions. In addition to witnesses, exhibits such as letters, contracts, photographs or maps, may be offered by either side as support to prove contentions or facts. If there are no valid objections, the exhibits will be admitted as evidence.

After all testimony has been heard and all exhibits admitted as evidence, each party may summarize its side in a closing statement to the Board. At this point, the hearing is ended and the Board will deliberate on the testimony, exhibits and final arguments before issuing a written decision. The final decision, called the "Findings of Fact, Conclusions of Law and Order," is mailed to the litigants generally within 90 days after the hearing.

If a party is unhappy with the final decision, he may appeal to the Superior Court within 30 days from the date the order is mailed. Additionally, a party may choose to file a petition with the Board for reconsideration within 10 days of the date of the order. If the reconsideration from the Board is unfavorable, the party may then appeal the Board's final action to the superior court within 30 days from the date the order is mailed.

In Washington, judicial review of administrative decisions is conducted to review both facts and application of law surrounding the case in order to determine if the administrative decision was arbitrary and capricious or contrary to law.⁶ However, the administrative process must be exhausted before a superior court can hear the case.⁷

A Summary of the Washington State Forest Practices Appeals Board Appeals Process



The British practice

The Forestry Commission of Great Britain is the government department responsible for the protection and expansion of Britain's forests and woodlands.⁸ It exercises overall control for granting of felling licenses and assessment of environmental impact related to the granting of felling licenses.⁹

According to a general felling license pamphlet published by the Forestry Commission, a forestland owner must file an application with the Forestry Commission for a felling license to cut trees on his land.¹⁰ If the application is denied or granted with replanting conditions that the owner is not satisfied with, s/he may appeal to the Forestry Minister with jurisdiction over the region where the forestland is located. The decision on the appeal is usually made based on the advice of the Reference Committee.

The Reference Committee is a group that operates independently of the Forestry Commission. It consists of a minister-appointed chairman and two additional members, also selected by the minister, from a panel of persons from the conservancy in which the trees in question are growing. No forestry commissioner or person employed by the commissioners can be a member of this committee.¹¹ The Committee shall: (a) afford to the affected person an opportunity to appear and make representations in front of the Committee; (b) if the Committee thinks fit, or is requested, inspect the trees or land related to the appeal; and, (c) take into consideration any information given by the commissioners.¹²

The Committee will make a report to the forestry minister, who will either confirm the commissioners' original decision or modify that decision¹³ based on the recommendations made in the Committee's report. Moreover, the minister is also required to consult with interest groups, including environmental interest groups, before making his decision on the appeal.¹⁴

The Ireland practice

In Ireland, landowners are required to give notice of their intention to fell trees to the Minister of Lands, which is part of the Department of Agriculture and Food.¹⁵ After notice is given, a prohibition order is served, which prohibits the landowner from felling timber until a felling license can be issued. Most often, a Limited Felling License will be issued, with environmental and replanting conditions. General Felling Licenses are normally only granted to large estates where a management program is in place, or to facilitate silvicultural thinning.¹⁶

When application for a felling license is denied, the affected landowner may appeal the decision by the Forest Service to a panel of referees who are appointed by the government for the duration of five years.¹⁷ The referees will then review all documentation and send their recommendation to the Forest Service. Upon receiving the referees' recommendation, the Forest Service may: (a) reject the recommendation; (b) accept the recommendation; or (c) partially accept the recommendation.

III. Recommendations

Under the 1998 Forest Law of China, trees planted by farmers on their private mountains and developed wastelands are owned by farmers.¹⁸ Document No. 9 of 2003 further extends such ownership to the trees planted on other categories of land, such as contracted responsibility mountains, through the principle of "whoever plants the tree owns the tree".¹⁹ However, such ownership is likely to be much less meaningful if logging restrictions could be implemented arbitrarily, without the possibility of being contested and challenged.

Although most countries with a developed legal system require an administratively issued license for logging on forestland in order to prevent abusive and irresponsible activities in their forests, such a requirement often comes with a mechanism that allows affected landowners to appeal the administrative denial of applications for a logging permit. China, however, does not have such a mechanism. In most cases, forest farmers have to accept the denial even if it has been made recklessly, arbitrarily or even

maliciously. Because a logging permit functions as a way to transform trees into cash, the unchecked power in issuing logging permits creates an opportunity for rent seeking, which further undermines China's objective of building a harmonious society. One important task of China's ongoing forest reforms is to give forest farmers the right to appeal and challenge the administrative denial of their applications for logging permits.

Create a legal basis for the appeals mechanism

Although the 1998 Forest Law contains a provision on dispute resolution, that provision only applies to disputes over ownership of trees and usage rights to forestland.²⁰ Disputes over granting and denial of logging applications remain outside the jurisdiction of this dispute resolution channel. The 1999 Administrative Review Law allows the aggrieved party to appeal the decision that violates ownership of forests,²¹ but it is entirely unclear whether the denial of logging permits amounts to a violation of tree ownership.

Under Chinese laws, forest farmers have usufructuary property rights to collectively owned forestland, which include the right to profit from the land.²² In addition these rights, farmers have ownership rights to the trees growing on such land.²³ Such usufructuary rights to land and ownership rights to trees would be substantially weakened or even made meaningless if they were subject to discretionary decisions on logging permits without an appropriate process to appeal the decisions.

The first step for China is to create a legal basis for setting up an appeals mechanism through legislative reforms on forests and forestland. As discussed above, although a logging permit is required in most countries, the majority of developed countries with an established rule of law have a functional appeals system, either administrative or judicial in nature. This kind of system is intended to address the grievances of forest owners when their applications for logging permits are denied. China is moving toward a harmonious society through the rule of law, and such international comparative experience is worth noting.

Such legislative reforms in China should generate a remedial rule that allows farmers to contest administrative decisions with respect to their own applications for logging permits. Given the comparative experiences in the West and China's own administrative procedural rules on the review of administrative decisions,²⁴ the appeals mechanism may adopt the rule of exhaustion of administrative remedies before judicial involvement. That is to say, a challenge to the administrative denial of logging permits must be filed with an administrative review agency. If the appellant is not satisfied with the review decision, he or she may lodge a lawsuit with local People's Court.

Make functional criteria for reviewing logging applications and widely publicize them

It should be noted that one of the serious institutional defects in China's logging regime is the lack of functional and transparent standards when reviewing farmers' logging applications. Because of the absence of these criteria, officials tend to review applications and make decisions based on their own preferences or even on the existence or non-existence of a personal relationship with the applicants. Moreover, such a discretionary process may also invite "rent-seeking" by officials with power to decide on farmers' applications. Because the demand for logging far exceeds the supply of permissible logging in most areas, logging permits would inevitably become a goose that lays golden eggs, with no criteria as to how this goose is awarded.

This process would also create tremendous technical difficulties for an appeals body to functionally address the complaints presented in the appeal even if there were a formal mechanism. An appeal device is designed to address the grievances of farmers and correct misconducts of the officials who wrongfully decline farmers' application for logging permits. To do so, it must, therefore, have preset criteria to determine whether the officials are wrong, and if they are, why and to what extent.

These criteria should primarily reflect quantifiable technical standards applicable both during the initial review of farmers' applications and in the process of the appeal. This might include but is not limited to: environmental impacts, soil erosions, allocation of permissible logging quota among all geographical areas within the county's jurisdiction, fulfillment of replanting obligations imposed on farmer applicants for their previous logging practice, track records of lawful cutting, and compliance with forest laws and regulations. The appeals institution should review the logging permit decisions against these criteria.

These criteria should be widely publicized among farmers for at least two reasons. First, with awareness of such criteria, farmers should be able to know in advance whether their applications conform to these standards. If not, they may refrain from filing a logging application, thus reducing the workload of the county forest administration in reviewing such applications. Second, when farmers' applications are rejected on grounds other than the pre-determined standards, farmers would be able to file for an appeal with the violation of such standards as the prima facie evidence to substantiate their claims.

Ensure independence and functionality of the appeals mechanism

Independence of the appeal mechanism is the key to effectively protecting farmers' legitimate interests in forest rights through administrative processes. As the comparative experiences in the US, UK and Ireland suggest, the appeals would be better handled by an institution independent of the agency that makes decisions on granting or denying logging applications. By common sense, it would be extremely difficult, if not totally impossible, for a decision-maker on logging permits to impartially review the appeal against its own decision. Thus, it would be desirable in China to create the appeals body independent of the county forest bureau, since the bureau is such a decision-maker.

However, considering the budgetary and personnel constraints at the local level, it would also be difficult for the county-level government, at least initially, to establish an appeals mechanism outside of the county forest bureau while adequately financing its operation. Thus, we recommend that China take a two-step approach to introducing a logging-related appeals mechanism.

Initially, an appeals unit could be set up within the county forest bureau, but equipped with the power to review and correct the decisions made by the logging permit unit. Members of the appeals unit should be selected from units other than the logging permit unit and should directly report to the director of the bureau.

The second step would be the creation of an appeals institution outside of the existing forest bureau when the budget permits. Such an appeals body may be established at an administrative level higher than the county forest bureau, or be created as a quasi-judicial institution affiliated with the local People's Court. Reviewers should be selected from the legal community and government agencies (exclusive of the forest bureau), and trained in forest laws, regulations and government policies on forest development.

To reduce administrative costs and cope with personnel budgeting constraints, the appeals body may not work as a permanent existence at least initially when the caseload of appeals is relatively light. Members of such an appeals body may meet regularly to review all filed appeals.

Make procedures simple and easily understood

The procedures for appeal should be plain, simple, and easy to understand and comply with. There should be widespread publicity of the appeals process at the grass-roots level so that farmers become aware of how to file an appeal and have proper expectations of the process. When farmers first file a case, they should be given a copy of the essential rules on scheduling, evidence, hearing formalities, and roles of the reviewers.

The burden of production should be on the forest bureau that makes decision on granting or denying applications for logging permits. At the appeals session, the forest bureau must produce relevant evidence that substantiates its decision based on existing laws, policies and technical criteria governing logging permit issuance. Such assignment of the duty of production also conforms to Chinese laws on administrative litigation.²⁵

Provide legal assistance to farmers

The appeals process is essentially a legal proceeding that most farmers are not familiar with even if its procedures were to be simplified. Thus, legal assistance should be made available to farmers for two reasons. First, upon request, it will provide direct legal representation by arguing cases on behalf of the farmer clients in both administrative appeals hearings and, later on, in court proceedings if farmers choose to pursue such an option. Second, it will help farmers to acquire knowledge about their rights and obligations with respect to forest practices under existing rules.

References

¹ The Property Law (2007), *Article 126*, “The Rural Land Contracting Law (2002),” and *Article 20*. In an authoritative decree on forest tenure reforms jointly issued by the Central Committee and the State Council in 2003, allocated “private mountains” should be used by farmers “for a long term free of charge” and cannot be taken back compulsorily, apparently creating a de facto perpetual right to collective forestland. See the Central Committee and the State Council Decision on Speeding Up Forest Development (Document No. 9 of 2003), art. 13.

² The Property Law (2007), *Article 126*.

³ The Forest Law (1998), *Article 32*.

⁴ For information on the reviewing process at local levels, see Li Ping and Keliang Zhu, A Legal Review and Analysis of China’s Forest Tenure System with an Emphasis on Collective Forestland, Appendix C.

⁵ The information in this section was derived from Washington State Forest Practices Appeals Board Environmental Hearings Office, “Your Right to be Heard” (2006) (an informational packet for those interested in appealing a decision of the Washington State Department of Natural Resources).

⁶ *Short v. Clallam County*, 593 P.2d 821(1979). See also, *State v. MacKenzie*, 60 P.3d 607 (2002); *Washington Public Employees Ass’n v. Washington Personnel Resources Bd.*, 952 P.2d 1143 (1998).

⁷ *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 958 P.2d 962 (1998). See also *Technical Employees Ass’n v. Public Employment Relations Com’n*, 20 P.3d 472 (2001).

⁸ *Forestry Commission of Great Britain*, <http://www.forestry.gov.uk/>

⁹ *Forestry Commission—Grants and Regulations in England*, available at <http://www.forestry.gov.uk/forestry/infd-74adb6>

¹⁰ This pamphlet can be found at [http://www.forestry.gov.uk/pdf/treefellingaugust.pdf/\\$FILE/treefellingaugust.pdf](http://www.forestry.gov.uk/pdf/treefellingaugust.pdf/$FILE/treefellingaugust.pdf)

¹¹ *The Forestry Act (1967)*, § 27.

¹² *Id.*

¹³ *Id.*, art. § 16.

¹⁴ *Id.*

¹⁵ Department of Agriculture and Food, Forest Service, available at: http://www.agriculture.gov.ie/index.jsp?file=forestry/pages/forest_service.xml.

¹⁶ Department of Agriculture and Food, Felling and Legislation, available at: http://www.agriculture.gov.ie/index.jsp?file=forestry/pages/felling_and_legislation.xml.

¹⁷ *Irish Forestry Act (1946)*, ch. 4 § 55(1).

¹⁸ *The Forest Law (1998)*, art. 17.

¹⁹ Document No. 9 of 2003, art. 15.

²⁰ *The Forest Law (1998)*, art. 17.

²¹ *The Administrative Review Law (1999)*, art. 30.

²² *The Property Law (2007)*, art. 117.

²³ *The Forest Law (1998)*, art. 27; the Reforestation Regulation (2002), art. 47.

²⁴ *The Administrative Review Law (1999)*, art. 30.

²⁵ The 1989 Administrative Litigation Law, art. 32, explicitly requires that the administrative agency be burdened with the production of evidence for its administrative action at issue, including provision of evidence and regulatory documents on which its administrative action is based.