

Ecuador Freshwater Resource Rights Report

Nick Fromherz & Erica Lyman
Final Draft - March 8, 2021

Table of Contents

I.	Executive Summary	3
II.	Introduction.....	5
III.	Methodology	7
IV.	Community-Based Management of Freshwater Resources: A Legal Framework	8
V.	An Overview of Ecuador’s Water Law System.....	11
	A. The Constitution: Key Background Principles.....	11
	B. The Water Law: Key Background Principles	16
VI.	Freshwater Resource Rights	19
	A. Water as a Human Right	20
	B. Rights of Nature	21
	C. Discrimination and Women’s Rights	21
	D. Permitted Uses, Regulation of Uses, and Prioritization of Uses.....	22
	E. Protected Areas, Land Use Restrictions, and Easements.....	27
	F. Groundwater.....	31
VII.	Water Resource Management Planning and Due Process Rights.....	32
	A. Water Resource Management Planning.....	33
	B. Community Participation	34
	C. Special Planning Framework for the Amazonian Regime	35
	D. Community Recourse Opportunities.....	37
VIII.	Conclusion.....	40
	Appendix A	44
	Appendix B	46

I. Executive Summary

• Scope and Purpose

This report analyzes Ecuador’s legal approach to freshwater resource rights and community-based management of freshwater resources. For purposes of this study, freshwater resources, or FWR, are defined as “any body of water that is fresh (not salty), together with its associated species and ecosystem resources, including aquatic plants and animals such as fish.”¹ FWR rights can be framed as either “use rights” or “control rights.”² The primary FWR use rights analyzed in this study are access rights (i.e., “the right to enter freshwater bodies or pieces of land from which FWR can be accessed”³) and withdrawal rights (i.e., “the right to remove water, fish, or other FWR”⁴). The primary FWR control rights analyzed in this study are exclusion rights (i.e., “the right to prevent other from using the FWR” in question⁵), alienation or transfer rights (i.e., “the right to redistribute, sell, rent, gift, or bequeath rights over FWR”⁶), and management rights (i.e., “the right to make decisions about FWR, such as flow regulation, aquaculture, or fishery management”⁷).

• Methodology

In keeping with the report’s legal focus, the authors conducted a desk-based analysis of Ecuadorian law. This analysis centers on national laws, decrees, and regulations, as opposed to provincial law, municipal law, or other sub-national law. To gather contextual information, the authors used a questionnaire answered by five local experts, along with targeted interviews. Although the questionnaire and interviews provided helpful insights, they do not amount to a traditional field study. Readers should bear in mind this limitation when digesting the report and its conclusions. Where additional field study would be particularly valuable, the authors have noted as much.

• Highlights of Analysis and Findings

When measured against best practices and global indicators, the report concludes that Ecuador maintains a legal framework largely supportive of community-based management of freshwater resources and associated rights. Key features of Ecuadorian law supporting this conclusion include but are not limited to (1) treating water as a human right, (2) recognizing ecosystem needs and the rights of nature, (3) a clear prioritization scheme governing uses, (4) opportunities for community participation in management and decision-making, and (5) mechanisms for legal recourse. The following table summarizes our findings corresponding to key legal principles associated with global best practices:⁸

¹ Wei Zhang, *et al.*, *Community-Based Management of Freshwater Resources: A Practitioners’ Guide to Applying TNC’s Voice, Choice, and Action Framework*, at 1 (2020).

² *Id.* at 4.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ A more detailed version of this table is provided below. *See supra* “Conclusion.”

Key Legal Principles	Relevant Provisions in Ecuador
Legal system provides for local management of FWR/local participation in management of FWR	Yes.
Legal system facilitates collaborative partnerships (e.g., government-NGO alliances) in support of CBMFWR	Unclear.
Legal system recognizes water for essential human uses as an inalienable “fundamental right,” “human right” or similar	Yes.
Legal system contains transparency and access-to-information mechanisms regarding FWR use and government actions that could impact FWR	Yes, under the Organic Law on Citizen Participation.
Legal system includes a specialized regime regarding indigenous peoples’ rights to FWR	Yes.
Legal system embodies principle of free, prior, and informed consent (FPIC) regarding activities that could impact FWR in territory held or occupied by indigenous peoples	In part. Ecuadorian law consistently uses the term “consultation” rather than “consent.” Given ambiguities in both the law as written and as applied, it is unclear whether indigenous communities have the ability to stop projects based on community opposition.
Legal system promotes secure land tenure for indigenous peoples and local communities, including recognition of communally held lands	A full analysis of land tenure for indigenous peoples and local communities is beyond the scope of this report. However, the Constitution and the Organic Law on Rural Lands and Ancestral Territories contain provisions to promote land tenure for indigenous and rural peoples.
Legal system contains a clear FWR use prioritization regime, with basic human and ecosystem needs taking precedence over other uses	Yes. Building on the Constitution, the Water Law establishes the following hierarchy of uses: (1) human consumption, (2) food sovereignty, (3) ecological flow, and (4) productive uses.
Legal system includes incentives for FWR conservation	Obligations exist regarding conservation objectives, but it is not clear that positive incentives, per se, exist. Although the Constitution states that the government must provide incentives to preserve nature, implementation is unclear, especially in the FWR context.
Legal system includes deterrent penalties for violations related to FWR	The legal system includes a penalty regime, but further investigation is needed to determine whether (a) these penalties are applied with enough consistency to achieve deterrence in practice, and (b) the financial penalties are sufficient to outweigh the monetary benefits of non-compliance.
Legal system provides special protections for riparian areas, while providing for equitable and sustainable access for community members	The law provides for special protections for riparian areas. The law also enshrines an easement system for “public use.” Additional investigation is needed to assess <i>de facto</i> community access rights under the easement regime. Ecuadorian law also contains several other protective instruments for sources and bodies of water.
Legal system incorporates user-pays and polluter-pays principles	Yes, although the adequacy of fees and compensation is unclear.
Legal system includes an efficient and just system for conflict resolution (may include non-judicial apparatuses)	Yes, but significant challenges remain in practice.

Legal system provides for fair compensation to persons impacted by violations of FWR laws and other prejudicial acts or omissions related to FWR	The Water Law and regulations, as well as other laws, contemplate compensation to victims/prejudiced parties in certain circumstances. Additional investigation is necessary to discern the efficacy of this regime in practice.
Legal system recognizes customary practices as a valid source of law in certain circumstances	Yes.
Legal system is clear vis-à-vis FWR management structure and decision-making authorities (<i>i.e.</i> , authorities and roles are well defined)	Yes, for the most part.
Legal system contemplates science-based decision-making/a strong role for science in decision-making	Yes.
Legal system incorporates a version of the precautionary principle	The Water Law explicitly requires application of the precautionary principle in connection with hydroelectric activities. More generally, the priority scheme governing water uses can be viewed as a manifestation of the precautionary principle, loosely defined, insofar as “productive uses” are placed behind other uses, including maintenance of “ecological flow.”

Yet, strong rights on paper do not always translate into strong rights in practice. Accordingly, the report also identifies apparent shortcomings in implementation, such as the perception that the State overlooks the requirement of “ecological flow” in licensing decisions, as well as ambiguities in the law (*e.g.*, uncertainty regarding the full extent of indigenous communities’ power under prior consultation norms).

- **Case Study**

To illustrate how the various legal norms can articulate with one another on the ground, this report concludes with a case study of local opposition to the Rio Piatúa hydroelectric project. The case study describes how local indigenous communities leveraged freshwater resource rights to block—at least provisionally—a diversion dam authorized by the government.

II. Introduction

The Nature Conservancy’s (TNC) Voices, Choices, Action program is premised on four interconnected, mutually reinforcing pillars—secure rights to territories and resources, strong community leadership and capacity, effective multi-stakeholder platforms for decision-making, and environmentally sustainable economic development opportunities.⁹ Achieving successful community-based conservation programs depends on the implementation of these pillars and the additional cross-cutting themes of connection to place and equity. This report examines whether the first pillar—secure territory and resource rights—is realized in Ecuador in the context of freshwater resources (FWR). In other words, this report focuses on the security of freshwater resource rights in Ecuador, with a special focus on those rights most relevant to community-based management of freshwater resources (CBMFWR).

⁹ “Strong Voices, Active Choices: TNC’s Practitioner Framework to Strengthen Outcomes for People and Nature,” The Nature Conservancy, at 27 (2017).

Through a property rights lens, the key features of freshwater resource rights comprise both use rights and control rights. Use rights, or usufruct rights, describe the ability to access and withdraw FWR, whereas control rights describe the ability to manage, exclude, alienate, or transfer rights to a particular resource.¹⁰ The freshwater resource context gives rise to unique considerations, particularly in the context of the diversity of stakeholders and users of freshwater resources and the complexity of water flows across time and space.¹¹

Rights versus Privileges

The term “right” often connotes inherency and irrevocability. This is especially true in the context of “constitutional rights” and “human rights.” So understood, “rights” are inalienable, only bending to the extent necessary to accommodate competing “rights.”

“Rights,” from this perspective, stand in contrast with “privileges.” Whereas the government has no legal authority to impair or compromise “rights,” “privileges” are conditional. The state can lawfully cancel privileges by the same authority that it grants them in the first instance.

In general, this study uses the term “right” in a more generic sense—to convey a legal claim to a benefit, whether substantive or procedural, related to FWR. However, where a given “right” is conditional and thus susceptible to characterization as a “privilege”—and where that conditionality matters to the analysis—this study notes as much.

Together, these use rights and control rights form the “bundle of rights,” a phrase that describes the variety of rights that one, or many, may hold to property or, in this case, FWR. The security of freshwater resource rights depends on three intersecting characteristics that apply to rights in this so-called “bundle.” First, the distribution of the various rights in the “bundle” matters, *i.e.* whether the various rights are held by one person or distributed amongst stakeholders and who holds which rights. Second, the duration of the rights, including whether such duration is contingent on water availability, is an important factor. Third, the overall robustness of any rights system depends on the extent to which rights are known by holders, accepted by communities, and enforceable when conflict arises.

Like rights to territory or land, both the existence of rights and the governance of those rights may be subject to multiple legal systems. Such legal pluralism takes many forms and may be the result of either *de jure* (legally codified) or *de facto* (occurring in practice) realization. For example, legal pluralism might exist in such a way that custom and modern law sit side-by-side and operate on an equal hierarchical footing where the juridical parity of both custom and modern law is constitutionally provided. At other times, custom and State law co-exist because a modern legal system provides that, in certain circumstances, customary law controls. In these cases, the law of the State establishes that its legal system prevails in the face of conflict. Finally, in some cases, customary law simply persists to fill in the gaps of State-based law or operates *de facto* in communities with strong connections to traditional ways of life—sometimes the same communities wherein the State has but a tenuous presence. In any given context, understanding the security of freshwater resource rights depends on a close examination of the legal systems at play. When legal pluralism is *de jure*, the nature of the relationship between codified law and customary law depends on both how it is described legally and how it is interpreted and applied on the ground.

In ways both direct and subtle, whether a country prescribes to a “modern” or a “traditional” approach to water rights is interrelated to its approach to custom. In general, a “traditional” legal approach is one

¹⁰ Wei Zhang, et al., “Community-Based Management of Freshwater Resources: A Practitioners’ Guide to Applying TNC’s Voice, Choice, and Action Framework.” International Food Policy Research Institute (IFPRI) at 4 (2020), found at <https://www.ifpri.org/publication/community-based-management-freshwater-resources-practitioners%E2%80%99-guide-applying-tncs-voice>.

¹¹ *Id.* at 21.

in which water rights are “linked to land tenure rights and in particular to land ownership rights.”¹² In its simplest form, the traditional approach holds that water rights “run with the land” and thus are largely derivative of land rights. Under a traditional legal approach to water rights, clarity and security of land tenure is crucial. Without land tenure, water rights may be either difficult or expensive to procure.

A “modern” approach, in contrast, sets water apart for separate legal treatment.¹³ Water rights under such a system “are not intrinsically tied to specific land plots.”¹⁴ Thus, the holders of water rights in a modern regime are often able to access or transfer those rights independent of land rights, including through assignment or sale on a temporary or permanent basis.¹⁵ More fundamentally, modern systems strive to codify the myriad uses of freshwater, recognizing that these uses are interrelated and deserving of a body of law unto themselves. Yet, while the move to codify generally heightens legal certainty surrounding water rights—providing clearer answers to questions surrounding use rights and control rights—there is at least one exception. Under a “modern” approach to water law, the shift to codification may actually sow ambiguity regarding the extent to which custom and use are given adequate legal space and effect.

After briefly describing the methodology, this report identifies key features of a legal apparatus supportive of CBMFWR, including the integral role that secure FWR rights play, in Section III. Section IV provides framing insights into the legal system in Ecuador with a focus on constitutional principles and certain overarching water law principles. Section V overviews the legal regime governing FWR rights in Ecuador, their legal character, and interaction with other pertinent legal regimes, such as the protected areas regime, the rural land law, the food sovereignty law, and the fisheries law. Section VI contextualizes these rights through the lenses of the water management and planning scheme, community participation, and legal recourse. Section VII concludes that while Ecuador’s FWR management regime reflects many of the features of a strong legal apparatus, deficiencies persist in practice.

To complement the core legal analysis, this report includes two appendices. Appendix A contains a case study of the legal challenge to the Rio Piatúa hydroelectric project. Appendix B contains a chart identifying Ecuador’s main water service institutions and their functions.

III. Methodology

This report is based on a desk-based analysis of Ecuadorian law, along with information gleaned through a questionnaire answered by five local experts. Our approach to identifying relevant Ecuadorian laws was comprehensive. We considered the following laws and national policies, although not all of these ultimately informed the analysis:

¹² Stephen Hodgson, “Modern water rights: theory and practice,” No. 92. Food & Agriculture Org. at 1 (2006).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Relevant Legislation, Regulations, and Policies

The Constitution of the Republic of Ecuador (2008)
Organic Law of Water Resources and Uses (2014) (“Water Law”)
Regulation of the Organic Law of Water Resources and Uses (2015) (“Water Regulations” or “Water Law Regulations”)
Organic Code of the Environment (2017) (includes protected areas and forestry legislation)
Law of Forestry and Conservation of Natural Areas and Wildlife (last modified 2014) (no longer in force; reviewed for historical understanding)
Organic Law for the Development of Aquaculture and Fishing (2020)
Organic Law of Aquaculture and Fishing (2005) (no longer in force; reviewed for historical understanding)
Organic Law on Rural Lands and Ancestral Territories (2016)
Regulation of the Organic Law on Rural Lands and Ancestral Territories (2017)
Organic Law on Citizen Participation (2010)
Organic Law on the Food Sovereignty Regime (2009)
Law on Prevention and Control of Environmental Contamination (last modified 2004) (no longer in force; reviewed for historical understanding)
Organic Law for Comprehensive Planning of the Amazon Special Territorial Region (2018)

The core of the analysis herein relies on a thorough examination of the freshwater rights and management scheme established according to the Organic Law of Water Resources and Uses (“Water Law”) and its implementing regulations. Where certain provisions implicate land tenure or other real property rights, this report explores relevant provisions from Ecuador’s Organic Law on Rural Lands and Ancestral Territories and the Constitution. However, the report does not provide a detailed exploration of land tenure in Ecuador as this is outside the scope of this freshwater resource rights analysis. Because laws concerning FWR are often linked to laws concerning other natural resources and management regimes (e.g., protected areas legislation), this study also examines such ancillary laws to the extent necessary to elucidate FWR rights and community-based management of freshwater resources (CBMFWR).

To understand whether and how CBMFWR may operate in a given jurisdiction, the relevant legal regime must be analyzed through both a *de jure* and *de facto* lens. For this reason, questionnaires, interviews, and other field-based research is a critical element of a full analysis. This report highlights specific issues that would benefit from further field research to supplement the survey and limited interview work performed in connection with this report.

IV. Community-Based Management of Freshwater Resources: A Legal Framework

CBMFWR is a theoretical and practical approach to achieving environmentally sound, economically tenable, and socially just management of FWR.¹⁶ For purposes of this study, freshwater resources, or FWR, are defined as “any body of water that is fresh (not salty), together with its associated species and ecosystem resources, including aquatic plants and animals such as fish.”¹⁷ CBMFWR is built on the

¹⁶ CBMFWR grows out of the broader framework of community-based natural resource management (CBNRM), which has emerged as a leading sustainable development model over the past three decades. James S. Gruber, *Key Principles of Community-Based Natural Resource Management: A Synthesis and Interpretation of Identified Effective Approaches for Managing the Commons*, 45 ENVIRONMENTAL MANAGEMENT 52 (2010).

¹⁷ Wei Zhang, et al., *Community-Based Management of Freshwater Resources: A Practitioners’ Guide to Applying TNC’s Voice, Choice, and Action Framework*, at 1 (2020).

premise that local communities ought to have an outsized role in managing locally present FWR. Subsidiarity, or “devolution of decision-making power and authority,”¹⁸ serves as a key condition precedent for the achievement of longer-term CBMFWR goals: just and equitable use of FWR, a durable and socially legitimate management model, and environmental sustainability.

The academic literature on local management of natural resources and ecosystem services identifies a series of guiding principles that are generally adaptable to CBMFWR.¹⁹ Once adjusted to the CBMFWR context, these principles serve as a set of key features that a model legal regime might incorporate to support CBMFWR. The principles articulated below, adapted from CBNRM literature, provide the contours of a legal system that hosts an enabling environment for robust CBMFWR, but CBMFWR also depends on how the legal system identifies, distributes, prioritizes, and secures the rights related to FWR. The FWR rights analyzed in this study are (1) access rights, (2) withdrawal rights, (3) exclusion rights, (4) alienation or transfer rights, and (5) management rights.

Key Legal Principles, Adapted to the FWR Context

Legal system provides for local management of FWR/local participation in management of FWR
Legal system facilitates collaborative partnerships (e.g., government-NGO alliances) in support of CBMFWR
Legal system recognizes water for essential human as an inalienable “fundamental right,” “human right” or similar
Legal system contains transparency and access-to-information mechanisms regarding FWR use and government actions that could impact FWR
Legal system includes a specialized regime regarding indigenous peoples’ rights to FWR
Legal system embodies principle of free, prior, and informed consent (FPIC) regarding activities that could impact FWR in territory held or occupied by indigenous peoples
Legal system promotes secure land tenure for indigenous peoples and local communities, including recognition of communally held lands
Legal system contains a clear FWR use prioritization regime, with basic human and ecosystem needs taking precedence over other uses
Legal system includes incentives for FWR conservation
Legal system includes deterrent penalties for violations related to FWR
Legal system provides special protections for riparian areas, while providing for equitable and sustainable access for community members
Legal system incorporates user-pays and polluter-pays principles
Legal system includes an efficient and just system for conflict resolution (may include non-judicial apparatuses)
Legal system provides for fair compensation to persons impacted by violations of FWR laws and other prejudicial acts or omissions related to FWR
Legal system recognizes customary practices as a valid source of law in certain circumstances
Legal system is clear vis-à-vis FWR management structure and decision-making authorities (i.e., authorities and roles are well defined)
Legal system contemplates science-based decision-making/a strong role for science in decision-making
Legal system incorporates a version of the precautionary principle

Some of these principles reflect a particular FWR right or duty, such as access to water and the duty to avoid unnecessary diminishment or pollution. Others are cross-cutting, bearing on several rights and

¹⁸ James S. Gruber, *Key Principles of Community-Based Natural Resource Management: A Synthesis and Interpretation of Identified Effective Approaches for Managing the Commons*, 45 ENVIRONMENTAL MANAGEMENT 52 (2010).

¹⁹ *Id.* at 56.

duties. Still others deal with structural variables, such as management and organization. Taken as a whole, these principles provide the basic contours of a legal regime that supports implementation of CBMFWR. While these principles work together to achieve synergistic effects, the absence of laws implementing one or more principles does not necessarily mean that the legal system as a whole is unsupportive of CBMFWR. At bottom, evaluation of a country's legal system vis-a-vis CBMFWR depends on the totality of the circumstances and is highly dependent on national context.

FWR rights can be framed as either “use rights” or “control rights.”²⁰ As the name suggests, use rights determine permitted uses of FWR—along with the access necessary to achieve such uses (*i.e.*, withdrawal rights and access rights). Control rights, for their part, complement use rights by increasing the holder’s power to participate in management and other regulatory decisions regarding FWR (*i.e.*, management rights), exclude third parties from accessing the resource (*i.e.*, exclusion rights), decide whether, and under what conditions, to transfer rights to a third party (*i.e.*, transfer rights), and in the case of deprivations, achieve recompense or another legal remedy. When present, control rights render use rights more robust and secure.

The primary FWR use rights considered in this study, along with definitions, are as follows:

- (1) Access rights: For purposes of this study, “access rights” means “the right to enter freshwater bodies or pieces of land from which FWR can be accessed.”²¹
- (2) Withdrawal rights: For purposes of this study, “withdrawal rights” means “the right to remove water, fish, or other FWR.”²²

The primary FWR control rights considered in this study are as follows:

- (1) Management rights: For purposes of this study, “management rights” means “the right to make decisions about FWR, such as flow regulation, aquaculture, or fishery management.”²³
- (2) Exclusion rights: For purposes of this study, “exclusion rights” means “the right to prevent other[s] from using the FWR” in question.²⁴
- (3) Alienation or transfer rights: For purposes of this study, “alienation or transfer rights” means “the right to redistribute, sell, rent, gift, or bequeath rights over FWR.”²⁵

Whether falling in the category of “use” or “control,” FWR rights may derive from international law, constitutional law, statutory law, regulatory law, or local customary law—or from a combination thereof. Further, as concerns custom, there may be cases in which traditional customs and practices add a gloss to the understanding of legal rights even if they do not alter those rights in a strictly legal sense.

²⁰ Wei Zhang, *et al.*, *Community-Based Management of Freshwater Resources: A Practitioners’ Guide to Applying TNC’s Voice, Choice, and Action Framework*, at 4 (2020).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Particularly in rural and indigenous areas of the developing world, custom and use exert a strong influence on the *de facto* implementation of the law.²⁶

Finally, FWR rights may be categorized as either individually or communally held rights. Individually held rights are rights that belong to an individual person.²⁷ Communally held rights are those held by a collection of individuals. Under such a system, individual members of the community use water resources, but title is held by the community as a whole.²⁸

V. An Overview of Ecuador’s Water Law System

In recent years, the law in Ecuador has evolved to advance both FWR rights and CBMFWR. Beginning with Ecuador’s adoption of a new Constitution in 2008, Ecuador has been at the global vanguard of a suite of legal and policy movements favoring (1) a human right to water, (2) greater legal rights for rural and indigenous communities vis-à-vis local management of natural resources, (3) the “rights of nature” (*i.e.*, nature and its constituent parts as a subject or holder of rights, and not simply an object of human-held rights); and (4) development models that balance economic growth with environmental preservation and social equity (as reflected, for example, in the Constitution’s provisions around “*buen vivir*”).

Yet, while many legal instruments in Ecuador reflect these goals, the bare text of these instruments does not tell the full story. On the one hand, surveyed local experts generally concurred that legal reforms over the past several years have made a significant difference to management of freshwater resources and local communities’ relationship to those resources. On the other hand, these same experts observed significant shortcomings in implementation of legal mandates. In other words, according to local observers, there is an important disconnect between the *de jure* and *de facto* versions of the FWR regime in Ecuador, particularly as concerns FWR in areas inhabited by indigenous peoples and rural communities.

The balance of this section identifies several overarching legal principles—found in the Constitution and Water Law, respectively—relevant to understanding the legal context of FWR rights and FWR management in Ecuador. Because certain principles contained in the Water Law go to the very core of FWR rights as implemented in law—helping to define the character of use and control rights—discussion of those principles is saved for Section V.

A. The Constitution: Key Background Principles

In 2008, Ecuador adopted a new Constitution that was immediately heralded as “progressive” and even “revolutionary.”²⁹ Without attempting to evaluate the Constitution against those or any other value-laden characterizations, there is little question that the 2008 Constitution introduced and solidified important concepts and features germane to FWR rights and CBMFWR. These include, *inter alia*, water

²⁶ “Strong Voices, Active Choices: TNC’s Practitioner Framework to Strengthen Outcomes for People and Nature,” The Nature Conservancy, at 10 (2017).

²⁷ *Id.* at 9.

²⁸ *Id.* at 10.

²⁹ See, e.g., Rights and Resources, *Ecuador Passes New Constitution Acknowledging Indigenous Rights* (Oct., 10, 2008) <https://rightsandresources.org/blog/ecuador-passes-new-constitution-acknowledging-indigenous-rights/>; Marc Becker, Correa, *Indigenous Movements, and the Writing of a New Constitution in Ecuador*, 176 *Latin American Perspectives* 47, 47 (2011) (“In 2008, voters in Ecuador approved a new and progressive constitution.”)

as a human right; a commitment to environmentally and socially sustainable economic development;³⁰ a suite of new protections and rights for indigenous peoples (including rights to ancestral territories, recognition of indigenous legal systems, and guarantees surrounding community participation in decision-making); and, in what may be the most innovative development of all, rights of nature. As explained below, these concepts are also incorporated, with modifications, into the 2014 Water Law.

1. Water as a Human Right

In a clause of potentially broad implications, the Ecuadorian Constitution recognizes water as a “human right.”³¹ The Constitution uses strong language, characterizing the human right to water as “essential,” “inalienable,” and “non-waivable.”³² Underscoring the importance of the human right to water, the Constitution further establishes that one of the government’s “primordial duties” is to “guarantee” fundamental rights, “in particular [rights] to education, nutrition, social security, and water.”³³ In other words, the Constitution isolates water rights (along with education, nutrition, and social security) as of “particular” significance, seemingly above and beyond the significance of other constitutional rights.

As a corollary to treating water as a human right, the Constitution prohibits the privatization of water.³⁴ Moreover, the government has a constitutional duty to closely regulate activities that may impact the quality and amount of water available to Ecuadorians.³⁵ Finally, in a further nod to the notion of water as a human right (and also to the rights of nature), the Constitution prioritizes “human consumption” and “ecosystem sustainability” above other water uses.³⁶

2. Commitment to Environmentally and Socially Sustainable Economic Development

As a constitutional matter, Ecuador’s development structure is largely built around the dual principles of environmental stewardship and equitable community access to natural resources.³⁷ The role of water within this development framework is conspicuous. In fact, the Constitution explicitly states that one of the nation’s primary “development objectives” shall be “to restore and conserve nature and maintain a healthy and sustainable environment ensuring for persons and communities equitable, permanent and quality access to water[.]”³⁸ With respect to energy production, while the Constitution designates “energy sovereignty” (*i.e.*, energy independence) as a national goal,³⁹ it also states that the pursuit of “[e]nergy sovereignty shall not . . . affect the right to water.”⁴⁰ Similarly, in connection with the development goal

³⁰ Whether or to what extent this commitment is legally enforceable is unclear. The Constitution often uses lofty, aspirational language.

³¹ Constitution of the Republic of Ecuador, Art. 12.

³² *Id.*

³³ *Id.* at Art. 3(1).

³⁴ *Id.* at Art. 318.

³⁵ *Id.* at Art. 411; *see also id.* at Art. 419.8 (“The ratification or denunciation of international treaties shall require prior approval by the National Assembly when they compromise the country’s natural heritage and especially its water.”).

³⁶ *Id.* at Art. 411.

³⁷ *See id.* at Art. 276(4) (“Ecuador’s development structure shall have the following objective: to restore and conserve nature and maintain a healthy and sustainable environment ensuring for persons and communities equitable, permanent and quality access to water.”); Art. 15 (“Energy sovereignty shall not be achieved to the detriment of food sovereignty, nor shall it affect the right to water.”); Art. 281,4 (the State shall promote policies that provide small farmers to have access to land, water and other production resources).

³⁸ *Id.* at Art. 276.

³⁹ *Id.* at Art. 334.

⁴⁰ *Id.* at Art. 15.

of “food sovereignty” (discussed in more detail below), the Constitution assigns to the government the responsibility to promote small-scale farmers’ access to land and water.⁴¹

To complement economic development, the Ecuadorian constitution sets forth a human development framework. Guided by an overarching right “to enjoy the good way of living” (*buen vivir*), the Constitution articulates a series of public rights and State duties pertaining to topics ranging from health and social security to education, housing, and cultural preservation.⁴² Many of these duties and rights have a bearing on water, implicitly if not explicitly.⁴³

3. Rights of Nature

One of the Ecuadorian Constitution’s more celebrated features is its recognition of nature as a legal subject unto itself—a concept known as the “rights of nature.”⁴⁴ Whereas environmental law traditionally begins from the premise that humans need a healthy environment for their own purposes (*e.g.*, to enjoy fresh air, clean water, and the many benefits of biodiversity), the rights of nature concept flows from the notion that nature is itself entitled to rights regardless of human interests. The shift is subtle but significant: nature moves from being an *object* of the law to being a *subject* of the law and a holder of its own rights.⁴⁵

With this in mind, the Ecuadorian Constitution awards nature—defined as the place “where life is reproduced and realized”—the right to “full respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes.”⁴⁶ Nature also has a right to “restoration” when humans interfere in a way that causes severe or permanent damage.⁴⁷ Significantly, nature’s right to restoration exists independently of legal obligations to indemnify persons or communities affected by the harmful activity in question.⁴⁸

By way of implementation, the Constitution imposes several duties on the State to uphold the rights of nature. For example, the State must provide incentives to Ecuadorian citizens, legal entities, and communities to preserve and protect nature.⁴⁹ The State must also regulate potentially harmful activities through restrictive or preventative measures designed to prevent the extinction of species, destruction

⁴¹ *Id.* at 281(4).

⁴² *Id.* at Art. 66(2), 74

⁴³ See, *e.g.*, *Corte Constitucional para el Periodo de Transición*, Sentencia N° 0006-10-SEE-CC, Caso N°0008-09- EE, (March 25, 2010) (“El *sumak kawsay* (*buen-vivir*) es parte de la estructura del Estado sobre el cual se asienta el proyecto del Estado que conduce a la sociedad ecuatoriana a un *buen vivir*. Basa su fundamento en mantener un equilibrio entre el ser humano, los recursos naturales y el desarrollo, en un marco de racionalidad y equilibrio; para tal efecto, el Estado garantiza a sus habitantes el acceso a los derechos constitucionales y en especial constituye el marco de los derechos económicos, sociales y culturales, como son: el ambiente, la salud, la educación, el desarrollo, etc., no solo como mera enunciación declarativa, sino como todo un andamiaje conducente a que los mismos se viabilicen.”).

⁴⁴ Fundación Pachamama, *Recognizing Rights for Nature in the Ecuadorian Constitution* (undated), <https://therightsofnature.org/wp-content/uploads/pdfs/Recognizing-Rights-for-Nature-in-the-Ecuadorian-Constitution-Fundacion-Pachamama.pdf>.

⁴⁵ See *id.*

⁴⁶ Constitution of the Republic of Ecuador, Art. 71.

⁴⁷ *Id.* at Art. 72.

⁴⁸ *Id.*

⁴⁹ *Id.* at Art. 71.

of ecosystems, and the permanent alteration of natural cycles.⁵⁰ Finally, in recognition of the fact that the government may not always satisfy its duties related to the rights of nature, the Constitution grants citizens and communities the right to “demand” that public authorities take action.⁵¹ This last provision furnishes a legal mechanism for citizen-led litigation in cases involving the rights of nature.

4. *Indigenous Rights to Ancestral Territory; Indigenous Rights to Use and Manage Renewable Resources*

The Ecuadorian Constitution enshrines several rights for indigenous peoples. One of the more important—and what could be considered a cornerstone for all other indigenous rights in the Constitution—is the right to ancestral territory. Specifically, Article 57 grants indigenous peoples collective property rights over their community lands and exempts indigenous peoples from paying fees or taxes on those lands.⁵² The Constitution goes on to provide that such lands are indivisible and inalienable (*i.e.*, indigenous peoples cannot subdivide, sell, or otherwise transfer their lands to third parties).⁵³

Relatedly, the Constitution grants indigenous peoples a collective right to “participate in the use, management, and conservation of the renewable natural resources found on their lands.”⁵⁴ Indigenous peoples’ rights vis-à-vis renewable natural resources are, as a constitutional matter, more robust than indigenous peoples’ rights vis-à-vis non-renewable natural resources (*e.g.*, gas, oil, and minerals) in indigenous territory. Whereas the Constitution envisions indigenous peoples as the primary managers and beneficiaries of renewable resources in indigenous territory, the Constitution contemplates a stronger decision-making role for the national government in the context of non-renewable resources (although, as detailed below, indigenous peoples retain an important voice through the norm of “free, prior, and informed consultation”).

5. *Legal Pluralism: Upholding Indigenous Rights Through the Coexistence of Separate Legal Systems*

In another step toward building out indigenous rights, Ecuador’s Constitution forges a system of legal pluralism (a.k.a., juridical pluralism). In essence, this means that multiple legal systems exist side by side in Ecuador—and, depending upon the case, more than one legal system may govern the same dispute.⁵⁵

The Constitution provides for both indigenous legal systems (of which there are many⁵⁶) and the State’s justice system (translated literally as “ordinary” law or “ordinary” justice).⁵⁷ While this may seem to suggest that indigenous law and justice stands as the exclusive legal system in recognized indigenous territories, that is a great oversimplification. On the one hand, the Constitution notes that indigenous

⁵⁰ *Id.* at Art. 73. See also *id.* at Art. 403 (“The State shall not make commitments to cooperation agreements or accords that include clauses that undermine the conservation and sustainable management of biodiversity, human health, collective rights and rights of nature.”)

⁵¹ *Id.* at Art. 71.

⁵² *Id.* at Art. 57.4.

⁵³ *Id.*

⁵⁴ *Id.* at Article 57.6.

⁵⁵ Oswaldo Ruiz-Chiriboga, *Finding the right judge: challenges of jurisdiction between indigenous and ordinary adjudicators in Ecuador*, 49 *The Journal of Legal Pluralism and Unofficial Law* 1, 3 (2017).

⁵⁶ *Id.*

⁵⁷ Constitution of the Republic of Ecuador, Art. 57(10), 171.

communities have a right to develop and practice their own system of law within their territories, and may apply their own procedures for the settlement of internal disputes.⁵⁸ In keeping with these norms, national government authorities must honor the decisions of the indigenous legal system.⁵⁹ On the other hand, the Constitution places several qualifications on the indigenous legal system: (1) the system cannot infringe on constitutional rights, especially those of women, children and adolescents, and the State shall monitor all decisions for constitutionality; (2) the system cannot infringe on human rights enshrined in international instruments to which Ecuador is a party; (3) authorities of the indigenous community must guarantee the participation of women in the adjudication process; and, perhaps most importantly, (4) the system only applies within indigenous territory.⁶⁰

The extent to which indigenous justice systems and customary law apply to disputes involving FWR is, in large measure, unclear. The Constitution and implementing legislation (discussed below) suggests that the indigenous system applies to a wide variety of offenses within indigenous territory. However, case law confirms at least some exceptions to indigenous jurisdiction (for example, the “ordinary” justice system has exclusive jurisdiction to investigate and try murder allegations).⁶¹ Additional field research is needed to discern the role that the indigenous justice system plays in the resolution of FWR cases that occur within, or impact, indigenous territory. A key distinction could lie between cases involving internal disputes among members of the same indigenous community, on the one hand, and disputes between an indigenous community and external actors, on the other. A further distinction may exist between (a) cases wherein the acts or phenomena in question are entirely encompassed within indigenous territory, and (b) cases where such acts or phenomena straddle indigenous and non-indigenous territory. Given the mobile nature of water, the latter variety of case may be quite common in the FWR context. Further discussion on this topic is contained in Section V.

6. “Free, Prior, and Informed Consultation” and Other Consultation Rights

Building on a principle enshrined in International Labour Organization Convention No. 169 (a.k.a., the Indigenous and Tribal Peoples Convention),⁶² the Ecuadorian Constitution grants indigenous peoples a broad right to be consulted before the

The IACHR’s Decision in *Sarayaku v. Ecuador*

The Inter-American Court on Human Rights (IACHR) reinforced the right to free, prior, and informed consent in its ruling in *Sarayaku v. Ecuador*. In *Sarayaku*, the IACHR found that Ecuador violated international human rights obligations when it allowed a private oil company to undertake exploration for resources on Kichwa lands without the government having first consulted with, and obtained consent from, the resident community. The IACHR observed that the obligation to consult rests with the State and cannot be delegated to a third party. Accordingly, the IACHR found Ecuador liable for the failure to engage in proper consultation with the Sarayaku people, even though the oil company had made attempts to negotiate access on mutually agreeable terms. As the IACHR explained, “The obligation to consult is a responsibility of the State, therefore planning and performing the consultation process is not a duty that can be eluded by delegating it to a private company or to third parties, even more so if it is the same company interested in the exploitation of resources in the territory of the community subject of the consultation.”

⁵⁸ *Id.* at Art. 171.

⁵⁹ *Id.*

⁶⁰ *Id.* at Articles 57.10, 171.

⁶¹ See Sentence No. 113-14-SEP-CC, Constitutional Court of Ecuador (2014),

<http://portal.corteconstitucional.gob.ec:8494/FichaRelatoria.aspx?numdocumento=113-14-SEP-CC>.

⁶² International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, June 27, 1989, *entry into force* Sept. 5, 1991.

adoption of any legislative measure that might affect any of their collective rights⁶³ and a more specific right to “free, prior, and informed consultation” in relation to any project involving nonrenewable resources located within indigenous territories.⁶⁴ Should such a project move forward, the indigenous people also have the right to participate in the profits earned from it and to receive compensation should it cause social, cultural, or environmental damage.⁶⁵ Significantly, the Constitution does not explicitly address the scenario wherein a project (a) involves exploration or extraction of nonrenewable resources *outside* of indigenous territory, but (b) produces consequences within indigenous territory. For its part, and as discussed below, the Water Law provides that indigenous, Afro-Ecuadorian, and Montubio communities have a collective right to free, prior, informed consultation “regarding every normative decision or State authorization that may affect the management of water flowing through their lands or territories.”⁶⁶ It is unclear whether Ecuador’s judiciary has determined that this language (combined with the Constitution or otherwise) means that protected communities have consultation rights vis-à-vis projects upstream or outside of ancestral territories.

With all that said, several local experts surveyed for this report expressed concern about “free, prior, and informed consultation” in Ecuador. First, they noted that the Ecuadorian Constitution uses the term “consultation,” whereas International Labour Organization Convention No. 169 and the U.N. Declaration on the Rights of Indigenous Peoples suggest that the consultation ought to lead to—or at least be conducted with the objective of achieving—“consent.”⁶⁷ Second, the respondents observed that progress in implementation has been mixed. While the majority suggested that Ecuador has made progress in implementing the requirement of “free, prior, informed and consultation,” they also suggested that serious inconsistencies in application persist.

In a clause of potentially broader reach—as it is not limited to decisions impacting non-renewable resources in indigenous territory—the Ecuadorian Constitution also provides that “every State decision or authorization that could affect the environment must be consulted with the community[.]”⁶⁸ The shortcomings observed in the context of “free, prior, informed consultation” may also apply to this clause. Further information on consultation rights in the context of FWR is provided in Section VI.

B. The Water Law: Key Background Principles

Ecuador’s primary water law, the Organic Law of Water Resources and Uses (“Water Law”), takes a comprehensive approach to its subject matter. In fact, the Water Law contains few, if any, obvious legal gaps. This is not meant to suggest that the Water Law is immune from critique. Yet, insofar as concerns integrated treatment of the various issues surrounding water rights, duties, and management, the Water Law, as complemented by its implementing regulations, is impressive in its scope.

A series of principles, many with roots in the Constitution, are woven throughout the Water Law’s provisions and given deeper implementation through the associated regulations. These principles—sometimes explicit, sometimes implicit—include (1) treating water as a human right, (2) opposing

⁶³ Constitution of the Republic of Ecuador, Article 57.17.

⁶⁴ *Id.* at Art. 57.7.

⁶⁵ *Id.*

⁶⁶ Water Law, Art. 71.

⁶⁷ Here, however, it should be noted that Ecuador’s Constitution can also be read to suggest that the State ought to conduct consultations with the goal of obtaining consent, whenever possible. Article 57.7 provides that “if the consent of the consulted community is not obtained,” the State shall proceed “in accordance with the Constitution and the law.” *Id.*

⁶⁸ *Id.* at Art. 398.

privatization of water services whenever possible, (3) pricing water services in an equitable and sustainable manner, (4) using an ecosystem and watershed-based approach to planning, (5) acknowledging and even promoting the role of indigenous peoples in water management, (6) incorporating subsidiarity (most strongly seen in the role of community water boards, or *juntas*, in rural areas), (7) seeking equity in the use and distribution of water (e.g., through explicit recognition of historical inequities faced by women), and (8) establishing mechanisms for legal recourse in the event of violations or other defects in management.

Because many of these principles gave way to concrete rules that directly impact the character of FWR rights, those principles are discussed below in section V (“Freshwater Resource Rights”). This section highlights the remaining subset of principles that, while not critical to understanding FWR rights as such, nevertheless shed light on the broader water law context in Ecuador.

1. National Patrimony, Anti-Privatization, and Non-Profit Management

As in many nations, Ecuadorian law provides that water belongs to the State and is not subject to third-party “ownership” in the normal sense of the word.⁶⁹ But Ecuadorian law goes further still: It provides that water is “strategic” resource⁷⁰ and generally prohibits privatization of the *management* of freshwater and freshwater-related services.⁷¹ Save for a pair of narrow exceptions, the Water Law requires management and provision of water services by either (a) the government or (b) communities.⁷² (Community management is discussed separately, below.) Private companies may become involved in only two situations: (1) a declared state of emergency; and (2) when the otherwise competent authority lacks the technical or financial means—but even then a private company may only manage “subprocesses” (a vague term, to be sure).⁷³

In addition, the Water Law prohibits profit-based management.⁷⁴ Of course, prohibition of profit does not mean that water services are provided free of charge. The Water Law contains a complex regime for the fixing of fees—effectively operationalizing the “user pays” principle—discussed immediately below.⁷⁵

2. User Pays Principle

In a manifestation of the “user pays” principle, Ecuador’s Water Law and regulations establish a framework for fees associated with water services. The Water Law and regulations provide several guiding principles for determining these fees. Specifically, the Water Law and regulations state that the fee regime shall be built around the principles of “solidarity, equity, sustainability, and periodicity.”⁷⁶ While less than perfectly clear, the concept of water as a “human right” also seems to exert some influence over the fee regime.

⁶⁹ Constitution of the Republic of Ecuador, Art. 12.

⁷⁰ *Id.*

⁷¹ Water Law, Art. 6.

⁷² Water Law, Art. 6, 7.

⁷³ Water Law, Art. 7.

⁷⁴ Water Law, Art. 6.

⁷⁵ Water Law, Art. 135-147.

⁷⁶ Water Law, Art. 136; Water Regulations, Art. 117.

Although the Water Law and regulations do not set forth specific prices (*e.g.*, a fixed monetary value per liter of potable water), they do furnish basic rules to guide the Single Water Authority in its work to set prices. The pricing regime breaks down as follows:

Water for human consumption and household use:

Ecuadorian law seems to provide preferential pricing for basic human consumption and household use. The way in which the law gets there, however, is somewhat complex. First, the Water Law establishes that the State shall deliver a calculated minimum quantity (the “vital quantity” necessary for domestic hygiene and human consumption⁷⁷) of *untreated* water to water service providers free of charge.⁷⁸ Deliveries of untreated water to providers beyond the minimum “vital quantity” are subject to a fee.⁷⁹ As for the provision of *treated* water from providers to end users for basic human consumption and domestic purposes, the law authorizes charges on the “vital quantity” but states that such charges must be set to “guarantee the sustainability of the service.”⁸⁰ It is unclear whether uses beyond the “vital quantity” are subject to the same fee or, instead, trigger a higher fee to reflect what might be considered excessive consumption. Regardless, the cost-free delivery of untreated water to providers (up to the “vital quantity” threshold) effectively amounts to a subsidy.

Water for irrigation:

The fee regime corresponding to irrigation is characterized by a multi-tiered approach. At the smallest scale, the Water Law establishes that community irrigation systems receiving fewer than five liters per second of water are exempt from all fees so long as the water is used for activities that promote “food sovereignty.”⁸¹ Beyond that, fees begin to apply.

The Water Law provides that fees for irrigation water, when used for production consistent with “food sovereignty,” shall be fixed according to (a) the volume used, (b) the quantity of cultivated land, and (c) water conservation concerns.⁸² The regulations echo these criteria, and further clarify that the “food sovereignty” fee scheme only applies for irrigation used to produce food for national markets (*i.e.*, not for export).⁸³ For agriculture that does not fit within the “food sovereignty” rubric (*e.g.*, commodity crops for export, non-food crops), the relevant fee scheme is that governing “productive uses.” Again, the Water Law and regulations do not furnish monetary figures, although it seems that the “food sovereignty” fee may be lower than the fee corresponding to “productive uses.”

Water for “productive uses”

⁷⁷ Water Regulations, Art. 119.

⁷⁸ Water Law, Art. 59, 140; Water Regulations, Art. 117(a). Note that the Water Law and Regulations provide only basic guidance as to how the amount corresponding to the “vital quantity” shall be calculated. Specifically, the Water Regulations provide that the amount shall be fixed “based on what can be deduced from international standards and what is considered appropriate according to the technical criteria established by the Ministry of Water, which will [in turn] consider . . . the different geographical and climatic zones of the country.” Water Regulations, Art. 119(b).

⁷⁹ Water Law, Art. 59, 140; Water Regulations, Art. 117(a).

⁸⁰ Water Law, Art. 59.

⁸¹ Water Law, Art. 141.

⁸² Water Law, Art. 141.

⁸³ Water Regulations, Art. 122.

Finally, the Water Law and regulations establish a basic fee framework for a host of activities generically labeled “productive uses.” These applications range from large-scale agriculture for export, to hydropower, to industrial uses, to authorizations for discharges of wastewater. Once again, the law provides criteria—rather than a set of fixed prices—to inform fee-setting by the Single Water Authority. The basic criteria for fees associated with “productive uses” mirror those pertaining to the “food sovereignty” irrigation scheme, save for the addition of one criterion: the tendency of the use to “generate employment.”⁸⁴

Price differentiation

In a clause that seems to give effect to notions of equity, the Water Law regulations authorize differentiated prices, according to the socio-economic conditions of the user, in certain circumstances.⁸⁵ When authorized, the differentiation principle means that the fee-setting authority should consider (a) the plight of persons with lower incomes or disabilities, and (b) the need to incentivize certain users or uses in certain geographical areas.⁸⁶

Conservation component of fees

Regardless of the use, the Water Law provides that the Single Water Authority shall incorporate in all fee structures “a component for conservation of the public water domain, with priority for water sources and recharge areas.”⁸⁷ Similarly, the law provides that local governmental authorities shall incorporate, in connection with residential water services, a fee component to “finance the conservation of the public water domain, with priority for water sources and recharge areas.”⁸⁸

3. Polluter Pays Principle

If the user pays principle reflects the idea that individuals enjoying the benefits of a resource ought to pay for those use-derived benefits, the polluter pays principle is its mirror image. The polluter pays principle holds that that individuals causing pollution, or some other harm should bear the responsibility of internalizing the cost of the pollution or harm. Ecuador’s Water Law reflects the polluter pays principle in at least two key ways. First, in the context of authorized discharges, discharging entities must obtain a permit to lawfully discharge used or contaminated water.⁸⁹ Second, the Water Law establishes as “very grave infractions” a number of pollution offenses, including the unlicensed discharge of contaminated, untreated water and the accumulation of solid waste and heavy metals in a way that could compromise water sources.⁹⁰ Significantly, the Water Law clarifies that all persons have a right to denounce a party for administrative infractions, including pollution violations, before the Single Water Authority.⁹¹

VI. Freshwater Resource Rights

⁸⁴ Water Law, Art. 142.

⁸⁵ Water Regulations, Art. 118.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Water Law, Art. 137.

⁸⁹ Water Law, Art. 81.

⁹⁰ Water Law, Art. 151.

⁹¹ *Id.* at Art. 153.

Unlike some countries, wherein water rights are largely adjunct to land rights, Ecuador’s legal system treats water as a subject warranting tailored and comprehensive treatment. From the Constitution to the Water Law and its implementing regulations, Ecuador has recognized water as both (a) critically important and (b) in need of complex regulation. This section outlines, from a rights-based perspective, the legal regime that Ecuador has devised to meet these challenges.

A. Water as a Human Right

Building upon its counterparts in the Constitution, the Water Law affirms Ecuador’s treatment of water as a human right. While the totality of the legal and practical consequences of this approach may be difficult to catalogue, the Water Law provides several meaningful rules.

First, as a definitional matter, the Water Law clarifies that the “human right to water” includes a right to water that is clean, accessible, and sufficiently abundant and continuous to satisfy “personal and domestic” uses.⁹² As a corollary to clean and healthy water, the human right to water includes a right to pollution control and other “environmental cleaning” services.⁹³ Finally, the Water Law’s definition of the “human right to water” clarifies that this right is inalienable.⁹⁴

Second, recognizing that people will at times suffer deprivations of their “human right to water,” the Water Law provides a mechanism for legal recourse. Specifically, the statute states that individuals and communities may demand that government officials take action to satisfy the human right to water; if officials fail to respond appropriately, the Water Law authorizes sanctions.⁹⁵

Finally, in a provision that cuts two ways, the Water Law addresses the issue of costs and fees associated with the “human right to water.”⁹⁶ On one hand, the Water Law establishes that a calculated minimum quantity (the “vital quantity” necessary for domestic and basic personal use) of *untreated* water shall be provided free of charge to water providers—either municipally-owned companies or community water boards.⁹⁷ On the other hand, the Water Law establishes that authorities may charge for the provision of *treated* water to end users and for the provision of untreated water to providers in excess of the calculated minimum quantity.⁹⁸ In other words, the “human right to water” does not imply a right to free treated water—or even to free untreated water, for providers, beyond the minimum necessary for basic domestic use. Instead, and as explained in more detail above, the Water Law reflects a modified version of the user pays principle.

For their part, the Water Law regulations provide little in the way of additional content to help discern the scope and nature of the “human right” to water. Although the regulations in no way undercut the notion of water as a fundamental human right, they do little to further the concept. Put differently, while the regulations contain important details to systematize water rights and water management in Ecuador, these details do not help to crystalize the special, “human rights” dimension of water. While the regulations establish that management bodies (*e.g.*, the Intercultural and Plurinational Water Council, Administrative Drinking Water Boards, the Hydrographic Demarcation Authority) should consider

⁹² *Id.* at Art. 57.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at Art. 58.

⁹⁶ *Id.* at Art. 59.

⁹⁷ *See id.*; *see supra* Section VI.B.

⁹⁸ Water Law, Art. 69.

whether the “human right” to water is being fulfilled,⁹⁹ this function is lumped in with a host of other functions that have clearer operative content.

None of the foregoing should be read to suggest that the “human rights” language in the Ecuadorian water context is a mere platitude. As the Rio Piatúa case study demonstrates (see Appendix A), the Ecuadorian judiciary has—in some contexts—not hesitated to rule in favor of communities on the basis of a perceived violation of the human right to water (at least when accompanied with other illegality, such as a failure to respect consultation norms and the rights of nature).

B. Rights of Nature

The Water Law and regulations expand upon the constitutional concept of the “rights of nature” in several potentially important ways. To begin with, the Water Law clarifies that nature (or “Pacha Mama”) is a holder of certain rights related to water. These rights, held by nature, include the right to (1) protection of water sources, recharge zones, and other areas important to freshwater, in particular snowfields, glaciers, paramos, wetlands, and mangroves, (2) maintenance of an ecologically necessary flow as a guarantee of preservation of ecosystems and biodiversity, (3) preservation of the natural water cycle, (4) protection of watersheds and their ecosystems from “all” pollution and (5) restoration of ecosystems harmed by water pollution and soil erosion.¹⁰⁰

To bring these rights to fruition, the Water Law and regulations provides a pair of mechanisms, the efficacy of which merits additional investigation. First, the Water Law directs government actors to manage water with an “ecosystem focus that guarantees biodiversity, sustainability, and preservation[.]”¹⁰¹ Curiously, the associated regulations do not provide further detail on what this means. Second, building on a constitutional provision mentioned above, the Water Law establishes that the obligation to restore water and related ecosystems is independent of any legal obligation to indemnify persons or groups impacted by water pollution or similar harm.¹⁰²

C. Discrimination and Women’s Rights

The Water Law contains a handful of provisions specifically focused on discrimination and women’s rights vis-à-vis freshwater and freshwater services. First, the Water Law prohibits all forms of discrimination, related to the human right to water, based on, *inter alia*, ethnicity, gender, sex, language, religion, political opinion, economic status, disability, and/or sexual orientation.¹⁰³ Although it is unclear how a person or community allegedly suffering prohibited discrimination might seek legal recourse, the strong language and linkage with the “human right” to water would seem to suggest actionability in court.¹⁰⁴

Second, by way of implementation, the Water Law states that water policy and budget decisions shall be oriented to guarantee water access to all persons on an equal basis.¹⁰⁵ Significantly, the Water Law

⁹⁹ Water Regulations, Art. 33, 40, 111.

¹⁰⁰ Water Law, Art. 64.

¹⁰¹ *Id.* at Art. 65.

¹⁰² *Id.* at Art. 66.

¹⁰³ *Id.* at Art. 61.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

explicitly authorizes “affirmative action” (*i.e.*, preferential treatment) if necessary to promote genuine equality with respect to water rights.¹⁰⁶

Finally, the law singles out the issue of women’s water rights as an issue of particular importance. Although the language is vague, the Water Law provides that all water policies must incorporate a gender perspective with the goal of establishing specific measures to meet women’s needs regarding the exercise of the human right to water.¹⁰⁷

D. Permitted Uses, Regulation of Uses, and Prioritization of Uses

The Water Law and regulations establish a clear priority of uses for freshwater. The priority of uses runs as follows: (1) human consumption; (2) irrigation for “food sovereignty”; (3) maintenance of the necessary “ecological flow” within streams and other water sources; and (4) “productive” activities, a broad term of art that includes, *inter alia*, hydroelectric uses, industrial uses, and many forms of agriculture.¹⁰⁸ Each of these uses is subject to different rules and administrative requirements.

1. Uses Treated as “Rights”: Human Consumption, Food Sovereignty, and Ecological Flow

As a general proposition, the law separates use of water for human consumption, food sovereignty, and maintenance of “ecological flow” from “productive uses,” essentially treating the former as “rights” and the latter as “privileges.” This does not mean that water for human consumption, food sovereignty, and ecological flow is unregulated; rather, it means that the regulatory framework tends to focus on *how* water is delivered and used for these purposes, as opposed to *whether* it shall be delivered and used for such purposes.

i. Human Consumption

Human consumption stands as the first in line within Ecuador’s prioritized water use scheme. In the case of water for human consumption, the law assigns the Single Water Authority with the responsibility to grant and manage authorizations for this purpose.¹⁰⁹ As explained below, the actual delivery of water for human consumption, and any associated services, rests with local governments, municipally-owned firms, or, in their absence, Community Water Boards.

For human consumption, the Single Water Authority is to grant authorizations to deliver potable water for human consumption as a matter of course following verification that (1) the priority of water uses will be respected, (2) there is sufficiently abundant and sufficiently clean water available, (3) that any necessary water infrastructure has been approved according to law, (4) that the grantee of the authorization (usually a local government entity) has agreed to uphold its management responsibilities, including prevention and mitigation of environmental harm, and (5) that the water will be delivered immediately or otherwise within a specified period of time.¹¹⁰

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at Art. 62.

¹⁰⁸ *Id.* at Art. 86.

¹⁰⁹ *Id.* at Art. 87.

¹¹⁰ *Id.* Art. 89, 90.

Use permits for human consumption are exclusive to the grantee.¹¹¹ They are not transferable to third parties, save for succession due to death of the original grantee—and even then the purpose of the permit must be maintained.¹¹² Use permits for human consumption run for a period of up to twenty years, with the option for renewal.¹¹³

In rural areas where local governments are unable to manage and deliver water for human consumption, the right to potable water is administered by Community Water Boards. The characteristics and functions of Community Water Boards are discussed below in Section VI. In indigenous communities, access to water for human consumption is subject to the collective rights regime, discussed below.

As a human right under Ecuadorian law, an individual’s right to water for human consumption—distinct from the related use permit—cannot be sold, traded, or transferred.¹¹⁴ Further, the law grants individuals the right to lodge a complaint if authorities fail to satisfy their responsibilities to provide sufficiently clean and abundant water and sanitation services.¹¹⁵ This complaint can trigger sanctions for the offending authority.¹¹⁶ However, it is unclear whether this occurs in practice.

ii. Food Sovereignty

Following human consumption, the next highest priority water use is for food production falling within the “food sovereignty” rubric.¹¹⁷ Water for food sovereignty is most commonly used for irrigation. However, it can also be used for animal watering, aquaculture, and other activities related to domestic food production.¹¹⁸ Definitionally, food sovereignty activities are generally peasant and artisanal in nature, employing traditional methods of production.¹¹⁹

Non-Consumptive Uses of Water for Recreation and Sports

In recent years, Ecuador has become an important kayaking destination. The Water Law takes an inviting approach to this activity, providing in Article 91 that recreational activities “involving non-consumptive use of water” do not require prior authorization from the Single Water Authority.

Water for food sovereignty requires a permit.¹²⁰ However, as in the case of water for human consumption, the Single Water Authority is to authorize water for food sovereignty production when (1) the priority of water uses will be respected, (2) there is sufficiently abundant and sufficiently clean water available, (3) any necessary water infrastructure has been approved according to law, (4) the grantee has agreed to uphold its management responsibilities, including prevention and mitigation of environmental harm, and (5) the water will be delivered immediately or otherwise within a specified period of time.¹²¹

¹¹¹ *Id.* at Art. 89.

¹¹² *Id.* at Art. 96.

¹¹³ *Id.* at Art. 87.

¹¹⁴ *Id.* at Art. 57.

¹¹⁵ *Id.* at Art. 58.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at Art. 86.

¹¹⁸ *Id.*

¹¹⁹ Water Regulations, Art. 83.

¹²⁰ Water Law, Art. 87.

¹²¹ *Id.* at Art. 89, 90.

Use permits for food sovereignty are exclusive to the grantee.¹²² They are not transferable to third parties, save for succession upon death of the original grantee—and even then the purpose of the permit must be maintained.¹²³ Food sovereignty water permits run for a period of up to ten years, with the option for renewal.¹²⁴

As noted above, use permits for food sovereignty are generally not free, but rather are subject to a payment system designed around criteria that include the volume used and the size of the cultivated land. The one exception is for communities that operate under the collective-rights regime. Such communities are entitled to free water for food sovereignty purposes, so long as the accessed flows are under five liters per second.

iii. “Ecological Flow”

In what might be considered a manifestation of the “rights of nature” concept, Ecuadorian law requires both the State and all persons to refrain from actions that would impair the necessary “ecological flow” of bodies of water.¹²⁵ (Although the term “ecological flow” (*caudal ecológico*) applies most readily to rivers and streams, it appears that the basic rules may also apply to lakes, wetlands, and other aquatic ecosystems.) The “ecological flow” is defined as the quantity and quality of water required to maintain an “adequate level of ecosystem health.”¹²⁶

Legally, the “ecological flow” establishes an important limitation on anthropogenic water uses: “productive uses” of water (*i.e.*, most commercial and industrial uses) are not allowed insofar as they would reduce flow below the ecological flow threshold.¹²⁷ The Single Water Authority, in coordination with the National Environmental Authority, is charged with quantifying the ecological flow in bodies of water.¹²⁸ The Single Water Authority is tasked with policing this line and ensuring that productive uses do not impair the ecological flow.¹²⁹ If a government agency permits productive uses that impair the ecological flow, that agency is responsible for resulting environmental harm and for indemnifying third parties for losses, in addition to any other penalties authorized under law.¹³⁰

Although the Water Law seems to contemplate that maintenance of the “ecological flow” will normally not conflict with human use and uses for food sovereignty, ecological flow does follow the latter two in priority. That notwithstanding, the Water Law suggests that diminishment of the “ecological flow” to meet human consumption should only occur under exceptional circumstances—following a declared state of exception—and, even then, should only last until measures are established to meet human consumption needs by other means.¹³¹ There is no similar provision regarding circumstances that might justify diminishment of the ecological flow to meet food sovereignty needs. The legal implications of this statutory silence are unclear.

¹²² *Id.* at Art. 89.

¹²³ *Id.* at Art. 96.

¹²⁴ *Id.* at Art. 87.

¹²⁵ *Id.* at Art. 76-78.

¹²⁶ *Id.* at Art. 76.

¹²⁷ *Id.* at Art. 77.

¹²⁸ *Id.* at Art. 76. It is unclear whether the ecological flow has been established numerically for all or even most important streams and rivers.

¹²⁹ *Id.* at Art. 77.

¹³⁰ *Id.*

¹³¹ *Id.*

Finally, although the Water Law clearly states that maintenance of the “ecological flow” should trump competing “productive uses,” local experts surveyed for this study universally suggested that this

Energy Sovereignty and Renewable Energy Under the Constitution

Article 15 of the Constitution provides that the “State shall promote . . . the use of environmentally clean technically and non-polluting, low-impact alternative energies.” Article 15 goes on to state that “energy sovereignty shall not be achieved at the expense of food sovereignty, nor shall it affect the right to water.”

Article 413 of the Constitution reinforces this language, providing that the State “shall promote energy efficiency . . . as well as renewable, diversified, and low-impact energy [that] does not put at risk food sovereignty, the ecological equilibrium of ecosystems, or the right to water.”

Together, these clauses would seem to suggest important limitations on the development of hydroelectric facilities.

hierarchy is frequently subverted in practice. The consensus perception is that “ecological flow” and ecosystem needs are often overlooked in permitting decisions related to “productive uses.”

2. Uses Treated as “Privileges”: “Productive Uses”

In contrast with water for human consumption, for food sovereignty, and for maintenance of the “ecological flow,” water for “productive uses” is not backed by a constitutional right. In this way, it might be said that the law treats water for productive uses as a privilege rather than a right. In any event, the law authorizes productive uses only insofar as they do not compromise the higher-priority uses described above.

Productive uses of water cover a broad range of activities.¹³² Building on the overarching water priority regime, the sub-category of productive uses contains its own priority scheme.¹³³ Productive uses are prioritized as follows: (1) irrigation for agriculture and aquaculture that does not fit within the “food sovereignty” rubric; (2) tourism; (3) energy production; (4) strategic and industrial projects; (5) balneotherapy and bottling of mineral, medicinal, treated, or enriched waters; and (6) other productive uses.¹³⁴ Each of these uses requires a permit from the Single Water Authority.¹³⁵

Productive use permits are subject to several conditions.¹³⁶ First, the productive use must respect the priority of use scheme,¹³⁷ and the Single Water Authority must confirm the availability of water of sufficient abundance and quality for the desired use.¹³⁸ Second, new productive use permits must be consistent with previous studies and infrastructure projects approved by the Single Water Authority.¹³⁹ Third, the permit holder must take responsibility for mitigation of environmental damage,¹⁴⁰ and must contribute to the management of the water use in question.¹⁴¹ Fourth, the permit holder must use the water within the time period specified by the permit.¹⁴² Finally, government water authorities must have access to inspect the project.¹⁴³

¹³² *Id.* at Art. 93.

¹³³ *Id.* at Art. 94.

¹³⁴ *Id.*

¹³⁵ *Id.* at Art. 93.

¹³⁶ *Id.* at Art. 95.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Water Regulations, Art. 87.

Productive use permits are generally not transferable, with the sole exception of succession due to death.¹⁴⁴ If the permit holder dies, the permit may pass to their heir so long as the heir maintains the originally permitted use.¹⁴⁵

Although not technically a permit transfer, the law also facilitates the continued permitted productive use of water in the event of transfer or sale of the associated land or enterprise.¹⁴⁶ If the owner of the land or enterprise sells or otherwise transfers the land or productive enterprise, the new owner can effectively obtain the benefits of the permit by applying for an update, so long as the owner maintains the original productive use.¹⁴⁷ After confirmation of the legal change in ownership and unaltered productive use, the new permit holder must register the modified permit with the Public Water Registry.¹⁴⁸

A permit for productive use is not a guarantee for water.¹⁴⁹ In times of low water flow, whether temporary or permanent, permit holders will receive available water in proportion to available flow and with respect to the priority of water uses.¹⁵⁰ However, in light of the perception that productive uses are often granted priority over the “ecological flow” during the permitting process—at odds with the law as written—it is possible that the same dynamic occurs when rationing for scarcity.

3. *Collective Water Rights and Usage Rules in Indigenous Communities*

While water rights in Ecuador are generally held by individuals, there is an important exception. For communities of indigenous peoples, Afro-Ecuadorian peoples, and Montubio peoples, the Water Law and regulations confirm that their water rights are collective, or communal, in nature.¹⁵¹ Under this regime, it is the communities as a whole—and not their individual members—that enjoy certain enumerated rights under the Water Law.

The collective water rights enjoyed by these groups are vast and varied. The most significant of these rights are as follows: (1) the right to conserve and protect the water flowing through or otherwise located on their ancestral lands; (2) the right to the direct use and enjoyment of the water flowing through or otherwise located on their ancestral lands; (3) the right to participate in water management and preserve traditional management practices; (4) an exemption from permit fees for water irrigation necessary for food sovereignty that does not exceed 5 liters per second; (5) the right to free, prior, informed consultation regarding all regulatory or permitting decisions that could affect water flowing through or otherwise located on their ancestral lands; (6) the right to participate in the formulation of environmental impact studies; (7) the right to access public information concerning water; and (7) the right to participate in “social control,” or oversight, regarding public and private activities that could impact ancestral water uses.¹⁵²

¹⁴⁴ Water Law, Art. 96.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Water Regulations, Art. 88.

¹⁴⁸ *Id.*

¹⁴⁹ Water Law, Art. 97.

¹⁵⁰ *Id.*

¹⁵¹ Water Law, Art. 71-75.

¹⁵² Water Law, Art. 71.

In order to ensure protection for a community's traditional practices related to water, the Secretary of Water is to collect information on such practices and record the same in the Public Water Registry.¹⁵³ Registration of practices is considered evidence of their existence and can be used as a defense should the group holding the right to those practices ever be challenged.¹⁵⁴ It is important to note that the Secretary of Water shall not register any practices which limit free access to water for consumption and domestic use, constitute an inefficient use of water, or represent poor environmental practices.¹⁵⁵

E. Protected Areas, Land Use Restrictions, and Easements

Sources and bodies of water in Ecuador receive spatial protection under both the Water Law and the country's general protected areas legislation, contained in the Organic Code of the Environment. While the Water Law contains a handful of provisions related exclusively to protection of riparian areas and sources of water, the Organic Code of the Environment establishes a broader framework that benefits aquatic ecosystems along with other spaces.

1. Public Use Easements and Protective Restrictions for Riparian Areas and Water Sources Under the Water Law

Setting aside protections for groundwater (discussed below in connection with the broader groundwater regime), the Water Law provides a series of protections and restrictions for riparian areas and sources of water. These rules have significant implications for landowners.

i. Riparian Areas

The Water Law and regulations modify land use in riparian areas in two main ways: (1) through public use easements that generally exist along a five-meter strip bordering the body of water, and (2) through a series of additional restrictions that generally extend 100 meters outward from the body of water.

The Water Law regulations establish an automatic "public use" easement covering the banks of rivers and lakes, with the baseline width of the easement measuring five meters from the water line.¹⁵⁶ If necessary for topographic, hydrographic, or other concrete reasons related to facilitating the use of water, the government may widen or narrow the five-meter default following administrative proceedings.¹⁵⁷ These public use easements are designed to (1) protect the riparian ecosystem, (2) facilitate public pedestrian use, (3) permit "occasional" launching and landing of boats, and (4) guarantee access for persons tasked with the operation, maintenance, and control of surface waters and accompanying infrastructure.¹⁵⁸

In comparison to public use easements, "water protection zones" cover a broader stretch of riparian land. Although subject to administrative modification in certain circumstances, water protection zones as a default extend 100 meters from the water line of all rivers and lakes.¹⁵⁹ Among other purposes, water protection zones exist to preserve the public water domain and prevent deterioration of associated

¹⁵³ Water Regulations, Art. 52.

¹⁵⁴ *Id.* at Art. 20.

¹⁵⁵ *Id.* at Art. 52.

¹⁵⁶ *Id.* at Art. 62.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at Art. 64.

ecosystems. Throughout water protection zones, private owners and users of the underlying land must receive government authorization prior to undertaking certain sensitive activities. These activities include (1) substantial alternation of the natural relief of the land, (2) extraction of gravel, sand, clay, and other like substances, (3) construction of any kind, and (4) any other use that could degrade the body of water or associated ecosystems.¹⁶⁰

ii. Sources of Water

Water Provisions in the Organic Law on Rural Lands and Ancestral Territories

While its water-centric provisions are few and far between, Ecuador's Organic Law on Rural Lands and Ancestral Territories generally reinforces the Water Law's provisions related to protection of sources and riparian areas. As in many Latin American nations, Ecuador's approach to rural land law is centered around the idea of productivity: rural land rights are secured through production, usually agricultural in nature. Yet, the Organic Law on Rural Lands and Ancestral Territories clarifies that this production should not come at the expense of the environment. With respect to water, the law provides that rural land should not contribute to degrade of watersheds or the availability of quality water, and that owners of rural agricultural lands should "take actions to avoid pollution, sedimentation of water bodies, diminishment of flow and wasteful use of water." When the landowner leases her land to a third party for agricultural production, both the landowner and the lessee have a legal obligation to respect these environmental norms.

At the planning level, the Organic Law on Rural Lands and Ancestral Territories contemplates involvement of the Single Water Authority in an effort to, among other goals, improve the efficiency of irrigation systems.

Ecuador maintains an additional protection regime tailored to "sources of water." This term should not be confused with "bodies of water" or "surface waters." The Water Law defines sources of water as "the headwaters of rivers and their tributaries, springs, or natural springs, in which underground water sprouts to the surface, or the water collected at its beginning from the streamflow."¹⁶¹

To protect "sources of water," the Water Law regulations provide that lands containing "sources of water" shall belong to the State.¹⁶² To identify such sources and associated lands, the Secretary of Water is to carry out a delimitation program in coordination with the Hydrographic Demarcation Authority.¹⁶³ Where a land otherwise lawfully owned or used by a private party contains a "source of water" subject to reversion to the State, the law requires compensation. However, compensation is not required in the case of unlawful occupation.¹⁶⁴

Recognizing that "sources of water" require a buffer zone, the Water Law regulations also contemplate designation of "areas of influence." Similar to the "water protection zones" described above, the law contemplates heightened regulation of certain

activities on lands falling within "areas of influence."¹⁶⁵ In these areas, designated by administrative resolution, private landowners and users must receive government authorization prior to (1) substantial alternation of the natural relief of the land, (2) extraction of gravel, sand, clay, and other like substances, (3) construction of any kind, and (4) any other use that could degrade the body of water or associated ecosystems.¹⁶⁶

¹⁶⁰ *Id.*

¹⁶¹ Water Law, Art. 10.

¹⁶² Water Regulation, Art. 69.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at Art. 70.

¹⁶⁶ *Id.*

iii. *Water Protection Areas to Guarantee Human Consumption and Food Sovereignty*

When the foregoing regimes are insufficient to protect the ability of sources and bodies of water to provide for human consumption or ensure food sovereignty, the Secretary of Water may engage in an extraordinary process to designate a “water protection area.”¹⁶⁷ The regulatory language on the issue is vague in many respects; it is clear that these water protection areas may extend beyond the limits of the above-described regimes, but additional details are scarce and at times confusing. For instance, the regulations state that a “water protection area” may include limitations or prohibitions on uses of soil that are inconsistent with the designation, but the regulations seem to suggest that human consumption and food sovereignty uses may not be so limited. The regulations are clearer on indigenous peoples’ spiritual

Water Provisions in the Organic Law on Rural Lands and Ancestral Territories

While its water-centric provisions are few and far between, Ecuador’s Organic Law on Rural Lands and Ancestral Territories generally reinforces the Water Law’s provisions related to protection of sources and riparian areas. As in many Latin American nations, Ecuador’s approach to rural land law is centered around the idea of productivity: rural land rights are secured through production, usually agricultural in nature. Yet, the Organic Law on Rural Lands and Ancestral Territories clarifies that this production should not come at the expense of the environment. With respect to water, the law provides that rural land should not contribute to degrade of watersheds or the availability of quality water, and that owners of rural agricultural lands should “take actions to avoid pollution, sedimentation of water bodies, diminishment of flow and wasteful use of water.” When the landowner leases her land to a third party for agricultural production, both the landowner and the lessee have a legal obligation to respect these environmental norms.

At the planning level, the Organic Law on Rural Lands and Ancestral Territories contemplates involvement of the Single Water Authority in an effort to, among other goals, improve the efficiency of irrigation systems.

uses, stating that water protection areas shall always respect and allow for such uses. On the other hand, the regulations and Water Law are somewhat confusing in that they (1) state that wetlands, forests, and protective vegetation may not receive water protection area designations, but (2) authorize the existence of water protection areas for the “protection of riverbanks, river beds, lakes, lagoons, reservoirs, estuaries and water tables” when other protective measures are insufficient. It is unclear how this line is policed. Because the “water protection area” is a relatively new creature—Ecuador designated the first such area in 2018¹⁶⁸—field research could be particularly helpful to gather more information on this mechanism.

2. National Protected Areas under the Organic Code of the Environment

At a broader level, the Organic Code of the Environment articulates several categories of protected areas that, once established, profoundly alter land use rights—and, by extension, FWR rights—within those areas. Setting aside Marine

Reserves, national protected areas in Ecuador include (1) National Parks, (2) Wildlife Refuges, (3) Fauna Production Reserves, and (4) National Recreation Areas.¹⁶⁹ The National Environmental Authority is authorized to establish protected areas and promulgate relevant management rules.¹⁷⁰ As a general proposition, private land ownership within these areas is severely limited—though not prohibited

¹⁶⁷ See *id.* at Art. 71 (but noting that wetlands, forests, and vegetation may not receive water protection area designations); Water Law, Art. 78 (same).

¹⁶⁸ <https://www.iagua.es/noticias/senagua/ecuador-declara-primera-area-proteccion-hidrica>

¹⁶⁹ Organic Code of the Environment, Art. 41.

¹⁷⁰ *Id.*, at Art. 24, 40.

outright—as are most commercial and industrial activities, as well as public infrastructure works,¹⁷¹ in line with the system’s overarching principles of “intangibility” and “conservation.”¹⁷²

On the question of land ownership and use within protected areas, the law provides two sets of rules: one for individual landowners, and one for indigenous and other traditional communities whose ancestral lands are located within protected areas. For individual land owners who acquired land rights prior to the area’s establishment as a protected area, those individuals maintain the right to sell or subdivide their land and otherwise maintain use rights—with the important qualification that uses must be in keeping with the protected area’s management plan.¹⁷³ For indigenous and other traditional communities living on lands inside protected areas, their rights to occupy and use such lands remain intact, subject to certain limitations. Specifically, such communities have the right to “sustainably use natural resources [in a protected area] according to traditional uses, ancestral artisanal activities, and for subsistence means.”¹⁷⁴ Nevertheless, this baseline is still subject to fine-tuning to ensure conformity with the management plan that governs the protected area in question.¹⁷⁵

As concerns water conservation and FWR rights more specifically, the Organic Code of the Environment recognizes that a primary objective of the national protected areas system is to “maintain the hydrological cycle of watersheds and protect surface and underground bodies of water.”¹⁷⁶ Beyond this basic statement, water regulation and FWR rights within protected areas is a product of area-specific management plans. Nevertheless, it is important to note that,

Freshwater Fishing Rights and Regulation in Ecuador

Ecuador is a regional leader in fisheries activity and production. However, in economic terms, the vast majority of this activity is concentrated in the marine fisheries sector. Accordingly, it is perhaps not surprising that Ecuador’s new Organic Law for the Development of Aquaculture and Fishing (2020) (“New Fisheries Law”) is less well developed in the area of inland or freshwater fisheries. Its predecessor was similar in this respect.

A full discussion of the New Fisheries Law’s treatment of freshwater fisheries is beyond the scope of this report. This is particularly so because the government has not yet issued a regulation to implement the law. However, two points bear mentioning on the topic of local community fishing rights—keeping in mind that subsequent regulations may provide important clarifying details. First, while Article 44 defines “subsistence” fishing, the term is never used in any operative Articles. This stands in contrast with “artisanal” fishing, which the law regulates in several important ways. The upshot of this statutory silence vis-à-vis “subsistence” fishing is unclear.

Second, Ecuador’s New Fisheries Law is also largely silent as to fishing norms within indigenous territories. (So, too, was its predecessor.) In light of the Constitution’s provisions granting considerable autonomy to indigenous peoples within their territory—Article 57 states that indigenous peoples have the right to “participate in the use, administration, and conservation of renewable natural resources on their lands,” “conserve and promote their own biodiversity and management practices,” and “create, develop, apply, and practice their own customary law”—it seems that indigenous peoples may have the authority to regulate fishing, at least for subsistence purposes, within ancestral lands. While other constitutional provisions suggest limits—for example, if fishing practices within an indigenous community cause downstream harm or affect biodiversity, the State would seem to have the authority to intervene—the New Fisheries Law does not attempt to regulate this activity in any obvious way. Instead, indigenous customary law seems to be the primary source of regulation of fisheries activity within indigenous territory. In general, Ecuador’s Law on Rural Lands and Ancestral Territories appears to support this conclusion. So, too, does the Organic Code of the Environment, which largely exempts traditional subsistence uses by indigenous and Afro-Ecuadorian peoples from penalties that would otherwise apply in protected areas.

¹⁷¹ See *id.*, at Art. 54.

¹⁷² *Id.* at Art. 39.

¹⁷³ *Id.* at Art. 37, 43

¹⁷⁴ *Id.* at Art. 48.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at Art. 38.

insofar as indigenous and other traditional communities living in protected areas are concerned, the

Rainwater Collection

Ecuador takes a generally permissive approach to rainwater collection. Article 63 of the Water Law permits collection of rainwater in “cisterns, tanks, pots, or in small reservoirs” for household use and irrigation for agricultural activities that qualify within the food sovereignty rubric. While this language permits local communities and small-scale farmers to harvest rainwater without the need for a special authorization, it prohibits rainwater collection for “productive” uses (e.g., large scale industrial agriculture for export). In addition, the law includes a final qualification that otherwise permitted rainwater harvest may not “harm third parties or affect the quantity and quality [of water] that flows through public water courses.”

Organic Code of the Environment seems to preserve their rights to subsistence fishing and other traditional uses of FWR (e.g., artisanal irrigation). As stated above, the law provides that such communities have the right to “sustainably use natural resources [in a protected area] according to traditional uses, ancestral artisanal activities, and for subsistence means.” And, while this right is subject to regulation in accordance with the protected area’s management plan, indigenous communities have important participatory rights in the development and administration of that plan. Specifically, the law states that “the administration of protected areas shall be realized with the participation” of such peoples.¹⁷⁷

F. Groundwater

The Ecuadoran government manages groundwater alongside community organizations, water councils, and water users.¹⁷⁸ Legally, the rules break down into three categories: (1) exploration rules, (2) exploitation rules, and (3) zonal restrictions to protect aquifers.

1. Groundwater Exploration

Groundwater exploration activities require licensing from either the Hydrographic Demarcation Authority or its corresponding Citizen Support Center.¹⁷⁹ For purposes of the licensing regime, groundwater exploration includes all activities related to determining the existence of sub-surface water, including drilling and measurement of underground sources.¹⁸⁰ To obtain an exploration license, applicants must provide a detailed plan of the proposed exploratory activity, including the intended purpose for which the water will be used if found, maximum flow rates, annual volumes, and drawings of the planned areas and installations.¹⁸¹ If the applicant is not the landowner, an additional rule applies: the landowner is given a right of first refusal to conduct the exploratory activities. If the landowner declines that opportunity, then the exploratory right belongs to the applicant (assuming the license is granted).¹⁸² If the landowner objects to the exploratory activity, the State may impose a forced easement, along with compensation to the landowner.¹⁸³

¹⁷⁷ *Id.* at Art. 40.

¹⁷⁸ Water Law, Art. 118.

¹⁷⁹ Water Regulations, Art. 93.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at Art. 94.

¹⁸² *Id.*

¹⁸³ *Id.* at Art. 95.

Exploratory licenses expire after two years; however, holders must submit results of their explorations to authorities within two months of completion.¹⁸⁴ If the exploration is successful, licensees must apply for an exploitation or use permit within six months.¹⁸⁵

2. Groundwater Exploitation

Groundwater use, or exploitation, is likewise subject to a permitting regime. Groundwater extraction permits cannot be granted if they would harm aquifers, adversely affect surrounding water quality, or otherwise interfere with other water sources.¹⁸⁶ These permits fix the allowed usage and allocation, maximum annual and monthly volumes and flow rate, and the holder's obligation to pay for and install a water flow measurement device.¹⁸⁷ Permit holders are subject to inspection to ensure compliance with the terms of the permit and other legal requirements.¹⁸⁸

3. Restriction Zones

In the interest of protecting aquifers, authorities may declare "restriction zones" over lands containing subsurface waters. Specifically, the government may establish groundwater "restriction zones" in order to (1) avoid contamination of groundwater, (2) maintain or improve the aquifer's recharge capacity, (3) protect existing groundwater uses, and (4) protect waters that may flow naturally from the subject aquifer.¹⁸⁹ When declared, these zones trigger a requirement of prior authorization for all construction, substantial land alternation, and mineral extraction, similar to the scheme governing "water protection zones" (in the case of riparian land) and "influence areas" (in the case of sources of water).¹⁹⁰ The regulations do not provide any detail regarding the potential spatial reach of groundwater restriction zones.

VII. Water Resource Management Planning and Due Process Rights

Although the security of both use and control rights is most often linked to the distribution, durability, and enforceability of the bundle of rights, the context in which these rights sit makes all the difference for the full realization of the benefits of secure FWR rights. This context includes due process rights and approaches to water planning, forming part of the larger legal framework for CBMFWR and its effectiveness. This section provides a brief introduction to water resource management planning, opportunities for community participation, and potential recourse options when infringements occur.

¹⁸⁴ *Id.* at Art. 97.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at Art. 99.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at Art. 100.

¹⁸⁹ *Id.* at Art. 66.

¹⁹⁰ *Id.* at Art. 67.

A. Water Resource Management Planning

A group of government institutions, enumerated in the Water Law and regulations, carry out management of Ecuador’s freshwater. Collectively, these institutions constitute and carry out the “National Strategic Water System.”¹⁹¹ In general, these institutions’ roles are built around a tiered (but integrated) system of management that moves from national to watershed and finally to local levels of water management. The table contained in Annex B identifies the key government institutions and their management functions.

As in many nations, Ecuador uses the watershed as the primary unit of spatial management.¹⁹² For the most part, the law defines the term “watershed” consistent with ordinary understandings; however, the law clarifies that watersheds may include underground waters that lie beyond the surface limits of a given watershed where such underground waters ultimately flow or migrate to the watershed as defined by its surface boundaries.¹⁹³

If the watershed is the primary unit of spatial management, the Watershed Resource Management Plan is the key planning instrument at the watershed level. Watershed Resource Management Plans are nested within the National Water Resource Management Plan. The National Water Resource Management Plan is to contain a description of national water balances, the infrastructure necessary to meet national water needs, water and ecosystem conservation “factors,” and possible needs to transfer water between watersheds.¹⁹⁴ In turn, each Watershed Resource Management Plan is to include the following content:

1. A catalogue of present and future water uses throughout the watershed;
2. A description of the “hydric needs” of the watershed;
3. A list of water-preservation elements necessary to achieve the plan’s objectives;
4. A prioritization of the “productive” uses¹⁹⁵ of water, adapted to the needs of the watershed; and
5. A description of water sources and critical water protections zones in the watershed, along with identification of measures necessary to safeguard them.¹⁹⁶

Like the National Water Resource Management Plan, the Single Water Authority has the lead responsibility to draft Watershed Resource Management Plans.¹⁹⁷ However, both Watershed Councils and the Intercultural and Plurinational Water Council provide input and participate in the development of these Watershed Resource Management Plans.¹⁹⁸ The participation of these latter bodies should, in theory, provide for meaningful local and indigenous input into watershed planning decisions.

Merger of Secretary of Water with Ministry of Environment

On March 4, 2020, Ecuador’s President issued Executive Decree 1007, which fused the Secretary of Water with the Ministry of Environment. The full implications of this merger are not yet clear. This report, and the table in Appendix B, reference institutions described in the Water Law and regulations. It is possible that certain institutional changes may flow following the merger.

¹⁹¹ Water Law, Art. 15; Water Regulations, Art. 1

¹⁹² Water Law, Art. 8.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at Art. 29.

¹⁹⁵ Essentially, all uses that are neither for human consumption nor for food production within the “food sovereignty” rubric.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at Art. 30.

B. Community Participation

1. Consultation Opportunities

As mentioned above, Ecuador has constitutionalized the right to “free, prior, and informed consultation” in certain circumstances. More broadly, the Constitution also provides that “every State decision or authorization that could affect the environment must be consulted with the community[.]”¹⁹⁹

The language in both clauses is hardly free of ambiguity. Although Ecuador maintains a Law of Citizen Participation²⁰⁰—which establishes important norms surrounding access to information, petition rights, and other forms of citizen oversight—the law provides only limited clarification on how these consultation rights are operationalized. The key additional substance that the law provides deals with the consequences of “majority opposition” to a project or initiative. In such circumstance, the Law on Citizen Participation does *not* require that the government abandon the project or initiative. Rather, “majority opposition” triggers heightened procedural safeguards, including (1) a requirement to render the decision, to proceed or otherwise, through a reasoned administrative resolution, and (2) in the case of a decision to proceed, measures to minimize the impact on communities and ecosystems, as well as compensation and restoration in the event of harm, and, if possible, incorporation of local community labor in the project.²⁰¹ While this additional detail certainly builds on the bare bones of the Constitution, a local expert noted it is unclear when, for legal purposes, “majority opposition” exists. It is also worth noting that the Law on Citizen Participation does not contain any provisions explicitly dealing with freshwater resources. The implications of this silence are unclear.

The Water Law resolves at least some of the ambiguity inherent in the Constitution, extending consultation rights to (1) indigenous communities whose water resources may be affected by government actions, and (2) water user organizations who may be affected by certain water management decisions.²⁰² Specifically, Article 71 of the Water Law provides that indigenous, Afro-Ecuadorian, and Montubio communities have a collective right to free, prior, informed consultation “regarding every normative decision or State authorization that may affect the management of water flowing through their lands or territories.”²⁰³ In a similar clause that applies to all user organizations, Article 68 provides that the Single Water Authority shall, through the relevant Watershed Council, consult with such organizations, in a free, prior, and informed manner, on all watershed management issues that could affect those organizations.²⁰⁴ From a desk-study perspective, it is not clear whether the “majority opposition” regime contained in the Law on Citizen Participation applies to the scenarios covered in the Water Law.

2. Rural Community Management: Community Water Boards

Ecuador’s Water Law affords considerable space for quasi-autonomous community management. Essentially, while the default is State management, Ecuador recognizes that the State does not always have the wherewithal and administrative reach to manage water effectively in rural areas.²⁰⁵

¹⁹⁹ Constitution of the Republic of Ecuador, Art. 398.

²⁰⁰ Organic Law of Citizen Participation (2010).

²⁰¹ *Id.* at Art. 83.

²⁰² Water Law, Art. 71, 68.

²⁰³ *Id.* at Art. 71.

²⁰⁴ *Id.* at Art. 68.

²⁰⁵ *See id.* at Art. 32.

The Water Law contemplates two basic types of community water management entities: Community Potable Water Boards and Community Irrigation Boards.²⁰⁶ While the law provides that Community Potable Water Boards may *only* exist when the local government authority does not provide potable water and sanitation services to the area in question,²⁰⁷ the law is less clear with respect to Community Irrigation Boards.

When authorized, Community Potable Water Boards provide nearly the full range of water services related to the distribution of drinking water. Specifically, they are authorized to establish and collect fees (albeit within criteria established by law), operate and maintain potable water infrastructure, construct and seek financing for new infrastructure (so long as backed by a technical permit from the Single Water Authority), collaborate with the Single Water Authority to protect sources of potable water from pollution, remit annual management information to the Single Water Authority, resolve conflicts between members (with referral to the Single Water Authority if resolution at the Board level is impossible), and participate in watershed councils.²⁰⁸ In addition to the absence of government water services, Community Potable Water Boards can only be formed upon approval by a supermajority (60%) of the heads of households in the relevant rural area.²⁰⁹ In theory, this requirement would tend to increase the legitimacy of decisions made by Community Potable Water Boards.

For their part, Community Irrigation Boards perform a similar range of management functions with respect to the provision of irrigation services. Among other functions, they are authorized to operate irrigation infrastructure, ensure the equitable distribution of water for irrigation, resolve conflicts between members (with referral to the Single Water Authority if resolution at the Board level is impossible), establish and collect service fees, collaborate with the Single Water Authority to protect sources and avoid pollution, and participate on watershed councils.²¹⁰

Local experts surveyed for this report noted that Community Potable Water Boards and Community Irrigation Boards pre-date the Water Law. As one respondent explained, these Boards have, in practice, existed for decades if not longer, owing to the State's historical absence in rural areas. Thus, rather than thinking of the Boards as a creation of statutory law, it may be more accurate to say that the law has incorporated and institutionalized these customary bodies. Yet, if the Water Law can be said to have institutionalized these pre-existing bodies, that may point to another problem. Multiple respondents suggested that, in practice, the Boards' lack of financial and technical resources, as well as political capital, prevents them from effectively satisfying all of their legal functions. Another respondent suggested that the Boards pay little attention to ecological concerns, with their energy focused almost exclusively on human needs.

C. Special Planning Framework for the Amazonian Regime

In 2018, Ecuador's Congress passed a new legal framework to govern territorial planning in the Amazon basin. The law, entitled Organic Law for Comprehensive Planning of the Amazonian Special Territorial Region (*Ley Orgánica para la Planificación Integral de la Circunscripción Territorial Especial Amazónica*) charts a specialized course for environmentally and socially progressive territorial planning in the

²⁰⁶ *Id.* at Art. 32, 43, 47.

²⁰⁷ *Id.* at Art. 43.

²⁰⁸ *Id.* at Art. 44.

²⁰⁹ *Id.* at Art. 46.

²¹⁰ *Id.* at Art. 47.

provinces of Morona Santiago, Napo, Orellana, Pastaza, Sucumbious, and Zamora Chinchipe.²¹¹ Though the law reaches far beyond FWR, many of its provisions have implications for FWR management and community involvement in FWR management. While many of these provisions can be characterized as simply reenforcing or underscoring principles established elsewhere in Ecuador’s legal system, other provisions seem to point to heightened environmental and community protections for the Amazonian region. That being said, field work is needed to discern the efficacy with which authorities are implementing this new regime in practice.²¹²

Salient features of the Organic Law for Comprehensive Planning of the Amazon Special Territorial Region include but are not limited to the following:

- Establishment of a special planning council for the Amazonian region, known as the Council for Planning and Development of the Amazonian Special Territorial Region: This Council and its work constitute the main pillar of the 2018 law. The Council’s duties include approving a Comprehensive Plan for the Amazonian Region and coordinating with Decentralized Autonomous Governments and other public and private entities to ensure the Plan’s execution.²¹³ The Council comprises eleven members, one of whom must be a representative of the indigenous nationalities and peoples living within the Amazonian region. Other members include representatives of (1) the President (the representative must be a resident of the Amazonian region), (2) the national planning authority, (3) the national environmental authority, (4) the national mining or hydrocarbon authority, (5) the national agricultural authority, (6) the municipal governments of the region, (7) the provincial governments of the region, (8) the parochial governments of the region, (9) the institutions of higher education within the region, and (10) the “productive” economic sectors of the region.²¹⁴
- Special planning objectives for the Amazonian region: The 2018 law articulates a list of planning objectives that the Council and coordinating entities are to pursue in the Comprehensive Plan for the Amazonian Region. These objectives include, *inter alia*, guaranteeing human development; respecting the rights of nature; conserving ecosystems; reducing habitat degradation, ecosystem fragmentation, and deforestation; increasing control of extractive activities; promoting sustainable development of renewable and non-renewable natural resources; and guaranteeing individual and collective rights with special emphasis and priority for indigenous peoples.²¹⁵ In order to realize these objectives, the Comprehensive Plan for the Amazonian Region shall, *inter alia*, articulate general policies and minimum standards for the use and management of lands (with the exception of Protected Areas); identify sub-zones or specific territorial units that warrant unique treatment; set forth a diagnosis of the current state of affairs; define benchmarks and progress indicators; and elaborate a system for monitoring and evaluation.²¹⁶
- Prioritization of certain economic activities within the Amazonian region: The 2018 law outlines a series of goals and factors to guide planning vis-à-vis economically productive activities within the

²¹¹ *Id.* at Art. 1-2.

²¹² In this regard, we note that the development of a special planning document for the Amazonian region predates the approval of the 2018 law. See Secretaria Nacional de Planificación y Desarrollo, *Plan Integral para la Amazonia* (2016), at <http://extwprlegs1.fao.org/docs/pdf/ecu166986anx.pdf>.

²¹³ *Id.* at Art. 11, 13.

²¹⁴ *Id.* at Art. 15.

²¹⁵ *Id.* at Art. 23.

²¹⁶ *Id.* at Art. 24-25.

region. Among other points, the law states that agricultural and forestry activities should be designed to guarantee food sovereignty, to strengthen traditional and ancestral practices, and to arrest the expansion of the agricultural frontier. In addition, the law assigns priority to sustainable tourism, local artisanship, implementation of renewable energy sources, and preferential employment for local indigenous peoples in the context of public (and some private) works within the region.²¹⁷

- Articulation of a special environmental framework to guide planning within the Amazonian region: To complement the economic planning framework, the 2018 law articulates the contours of an environmental framework to guide planning decisions. The law states that the planning process shall include “aspects” of conservation and protection for ecosystems and biodiversity;²¹⁸ standards and rules established by the national environmental authority to control and prevent pollution and to respond to environmental damage;²¹⁹ measures to conserve wild species, with priority for endemic and/or endangered species;²²⁰ policies to ensure that forestry activities are sustainable;²²¹ policies related to climate change;²²² watershed planning in coordination with the relevant national and local government entities;²²³ and mechanisms for community participation in environmental monitoring.²²⁴
- Recognition of the *in dubio pro natura* principle: Conceptually related to the precautionary principle, *in dubio pro natura* directs government authorities to apply the most environmentally favorable interpretation to laws and regulations in the face of textual ambiguity or inconsistency.²²⁵ The 2018 law states that all decisions and activities within the Amazonian region should be guided by the *in dubio pro natura* principle.²²⁶
- Preferential treatment for local residents: Under the 2018 law, residents of the Amazonian region are to enjoy preferential access to natural resources and preferential rights to engage in “environmentally sustainable” activities within the region. The law directs the government to take “affirmative actions to guarantee the satisfaction of this principle.”²²⁷
- Access to information: The law provides that all public institutions involved in planning and management in the Amazonian region shall guarantee access to information regarding territorial planning, management, and the use of funds authorized under the law.²²⁸

D. Community Recourse Opportunities

Collectively, Ecuador’s Water Law and Constitution provide several mechanisms for community recourse in the event of legal harm. These mechanisms include alternative dispute resolution, administrative

²¹⁷ See generally *id.* at Art. 33-42.

²¹⁸ *Id.* at Art. 49.

²¹⁹ *Id.* at Art. 51.

²²⁰ *Id.* at Art. 52.

²²¹ *Id.* at Art. 54.

²²² *Id.* at Art. 55.

²²³ *Id.* at Art. 57.

²²⁴ *Id.* at Art. 58.

²²⁵ *Id.* at Art. 3.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at Art. 8.

procedures, and litigation in court. Although this section emphasizes the ability of communities to use these mechanisms, individuals may likewise take advantage of many of these options. It also bears noting that this section does not represent an exhaustive catalogue of all legal recourse options.

1. Alternative Dispute Resolution

The Water Law establishes what might be termed an “alternative dispute resolution” apparatus in two instances: (1) conflicts between indigenous communities and third parties regarding uses within the same watershed; and (2) conflicts between permit holders.

With respect to the first category, the label “alternative dispute resolution” is somewhat misleading. In Anglo-American legal systems, “alternative dispute resolution” implies out-of-court and occasionally non-binding proceedings, such as mediation and arbitration. In the context of disputes between an indigenous community and a third party over water use in the same watershed, the law does not contemplate mediation or arbitration. Instead, the Water Law simply recognizes that the parties may be able to resolve their differences without State intervention. Accordingly, the Water Law provides that certain conflicts may be settled through mutual agreement.²²⁹ The Water Law does not provide any procedural detail regarding how such agreements should be made or memorialized. Instead, the Water Law simply states that, if such an agreement cannot be made, the involved parties then have a right to petition the Single Water Authority for a decision.²³⁰ Significantly, the scope of conflicts subject to this “mutual agreement” scheme is narrow: It only applies to conflicts that (a) involve a disagreement between an indigenous community and a third party that is not a member of that community, over (b) access, use, distribution, or management of waters within a common watershed.²³¹

With respect to conflicts between permit holders, the Water Law establishes a more familiar “alternative dispute resolution” scheme.²³² The law makes clear that this scheme is optional and without prejudice to other conventional legal options.²³³ If the permit holders so choose, they may submit their conflict to a mediation or arbitration center in the jurisdiction of the water in question.²³⁴ Once an agreement or arbitration decision has been reached, it must be registered in the public water registry.²³⁵ If this process is unable to resolve the conflict, the parties may proceed with a judicial process.²³⁶

2. Government Enforcement, Administrative Actions, and Litigation Opportunities

As a constitutional matter, the government is required to defend the rights of citizens and communities.²³⁷ In the FWR context, the Water Law goes further, specifically stating that authorities must fulfill the human right to water—and that authorities’ failure to do so will result in sanctions.²³⁸ To facilitate government enforcement, the Water Law also contemplates a role for citizen oversight. Specifically, Article 82

²²⁹ Water Law, Art. 75.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at Art. 133, 134.

²³³ *Id.* at Art. 134.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Constitution of the Republic of Ecuador, Art. 11.

²³⁸ Water Law, Art. 58.

authorizes citizens and communities to engage in observation and other means of “social control” related to pollution and water quality.²³⁹ However, the full implications of this final provision are unclear.

Another legal mechanism communities and individuals may use to address a violation of their water rights is to file a complaint denouncing an administrative infringement.²⁴⁰ Administrative infringements are specific violations of water-related norms, listed in Article 151 of the Water Law, and include a wide variety of offenses, from illegally modifying soil in a protected zone to failing to comply with the terms of a use permit.²⁴¹ “Minor” and “serious” infringements are processed by the Citizen Support Center, while “very serious” infringements are processed by the respective Authority of each Hydrographic Demarcation.²⁴² Administrative infringement actions come with various procedural guarantees, including a timely response and guidelines for financial sanctions.²⁴³ The complaint process ends with resolution, dismissal, or declaration of abandonment (*i.e.*, an administrative order dismissing the claim for want of required action by the claimant).²⁴⁴

In addition to these administrative actions, the Single Water Authority is required to present a civil action—when warranted—against the offending party.²⁴⁵ Moreover, if the offense amounts to a crime, the Single Water Authority is required to refer the matter to the prosecutor’s office for investigation and possible criminal prosecution.²⁴⁶

For aggrieved communities, the Constitution and Water Law provide further opportunities for declaratory judgments, injunctions, compensation, and other remedies. First, in extremely broad language, the Constitution confirms that individuals and groups may “demand” vindication of their legal rights.²⁴⁷ Although a mapping of Ecuador’s judicial system is beyond the scope of this report, the Rio Piatúa case study (see Appendix A) suggests that individuals and groups have a right to be heard in court for a wide variety of constitutional and statutory claims. The point may seem obvious—it is difficult to speak of rights in the absence of a system furnishing legal recourse—but it bears emphasis all the same.

At a more specific level, the Constitution explicitly grants individuals and communities the right to file legal claims against individuals or groups contributing to environmental destruction.²⁴⁸ In the context of such claims, the plaintiffs may request damages, restoration, and preliminary injunctive measures pending final resolution of the case.²⁴⁹ Interestingly, in these cases, the burden of proof is on the defendant to prove that it has *not* damaged the environment.²⁵⁰

As stated above, the Constitution also envisions lawsuits to vindicate the rights of nature. Specifically, the Constitution states that any person or community may “demand” that public authorities take action to

²³⁹ *Id.* at Art. 82.

²⁴⁰ *Id.* at Art. 153.

²⁴¹ *Id.* at Art. 151.

²⁴² Water Regulations, Art. 123.

²⁴³ Water Law, Art. 153-158.

²⁴⁴ *Id.* at Art. 157, 158.

²⁴⁵ *Id.* at Art. 159.

²⁴⁶ *Id.*

²⁴⁷ Constitution of the Republic of Ecuador, Art. 11.

²⁴⁸ *Id.* at Art. 397.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

satisfy the rights of nature.²⁵¹ As the Rio Piatúa case demonstrates, this furnishes a legal mechanism for citizens to sue on behalf of the rights of nature.

Finally, the Water Law specifically references two instances for relief when pollution occurs. First, an individual or community who depends on the ecosystem which has been polluted may be compensated.²⁵² Second, the law grants a separate right to restoration of water sources and ecosystems—*independent of individual or community compensation.*²⁵³

An important caveat must be added to the foregoing: Several survey respondents noted that, while Ecuadorian law formally provides ample mechanisms for legal recourse, the reality on the ground is distinct. According to these local experts, many local communities are unaware of their rights and lack the legal sophistication and know-how to effectively seek recourse in the event of violations. When combined with limited State resources and powerful, often antagonistic economic interests, access to justice for communities seeking to vindicate FWR rights remains a challenge. On the other hand, survey respondents also noted progress over the years, suggesting that the situation may be trending in the right direction.

VIII. Conclusion

Ecuador’s water law regime is based on a series of principles and core rights that generally align well with CBMFWR and sustainable management of FWR. These principles and core rights include water as a human right; the rights of nature and the “ecological flow” concept; user pays and polluter pays principles; community management of water services in rural areas; indigenous rights over waters in ancestral territories; a clear use prioritization regime; consultation rights; rights to legal recourse; and others.

Through the lens of both “use rights” (principally, the ability to access and use FWR) and “control rights” (the ability to manage, exclude, alienate, or transfer), Ecuador’s legal system generally makes the grade. This is not to say that Ecuador takes a maximalist approach to all of these rights. For instance, the human right to water is not alienable or transferable; the law contains no apparent provision allowing an indigenous community to sell its water use rights; Community Water Boards in rural districts do not have completely unlimited authority to manage local water as they see fit; and so forth. However, insofar as Ecuador circumscribes FWR use and control rights, those limitations seem to strike an appropriate balance—they exhibit an intelligent design that aims to find equilibrium between basic human needs, ecosystem needs, and broader economic realities. As concerns FWR rights enjoyed by rural and indigenous communities, the law makes a conscious effort to amplify and support those rights in cognizance of historical disadvantage and marginalization.

²⁵¹ See Appendix A.

²⁵² Water Law, Art. 66. The reader should note that civil liability for environmental harm, including pollution, is a complex topic under Ecuadorian law. On the one hand, the Constitution provides that “[a]ny damage to the environment, in addition to the corresponding sanctions, will also imply the obligation to fully restore the ecosystems and compensate the affected people and communities.” Constitution of the Republic of Ecuador, Art. 396. Similarly, the Organic Environmental Code provides that “whoever pollutes will be obliged to make full reparation and compensation to the injured parties, adopting compensation measures for the affected populations and paying the corresponding sanctions.” Organic Environmental Code, Art. 9. On the other hand, it is not entirely clear how communities may assert their rights to monetary compensation or indemnity in practice. Neither is it clear to the researchers how courts would calculate the amount of compensation owed.

²⁵³ *Id.*

While significant questions remain regarding the state of affairs in practice, the legal framework in Ecuador, as it stands on paper, is broadly supportive of CBMFWR. The following table identifies salient features of Ecuador’s legal framework relative to the legal principles that guide a strong CBMFWR framework.

<i>Key Legal Principles</i>	<i>Relevant Provisions in Ecuador</i>
Legal system provides for local management of FWR/local participation in management of FWR	Yes, particularly through (a) Community Potable Water Boards and Community Irrigation Boards, <i>see generally</i> Water Law, Art. 32-47, and (b) protection of indigenous uses and management in ancestral territories. <i>See, e.g.</i> , Constitution of the Republic of Ecuador, Art. 57; Organic Law for the Development of Aquaculture and Fishing, Art. 57; Organic Code of the Environment, Art. 40; Water Law, Art. 71-75.
Legal system facilitates collaborative partnerships (<i>e.g.</i> , government-NGO alliances) in support of CBMFWR	Unclear.
Legal system recognizes water for essential human uses as an inalienable “fundamental right,” “human right” or similar	Yes. <i>See</i> Constitution of the Republic of Ecuador, Art. 12; Water Law, Art. 57.
Legal system contains transparency and access-to-information mechanisms regarding FWR use and government actions that could impact FWR	Yes, under the Organic Law on Citizen Participation. Although this law does not explicitly discuss information regarding FWR, its general provisions regarding access to information would seem to cover FWR-related information. <i>See generally</i> Organic Law on Citizen Participation, Art. 96-101.
Legal system includes a specialized regime regarding indigenous peoples’ rights to FWR	Yes. <i>See, e.g.</i> , Constitution of the Republic of Ecuador, Art. 57; Organic Law for the Development of Aquaculture and Fishing, Art. 57; Organic Code of the Environment, Art. 40; Water Law, Art. 71-75.
Legal system embodies principle of free, prior, and informed consent (FPIC) regarding activities that could impact FWR in territory held or occupied by indigenous peoples	In part. Ecuadorian law consistently uses the term “consultation” rather than “consent.” Given ambiguities in both the law as written and as applied, it is unclear whether indigenous communities have the ability to stop projects based on community opposition. <i>See, e.g.</i> , Constitution of the Republic of Ecuador, Art. 57.7 (providing that “if the consent of the consulted community is not obtained,” the State shall proceed “in accordance with the Constitution and the law”). It is further unclear whether indigenous and other protected communities’ consultation rights (and the consequences of opposition) are equally robust in the case of projects that (a) occur outside recognized territories, but (b) produce impacts on FWR within such territories. <i>See e.g.</i> , Water Law, Art. 71 (providing that indigenous, Afro-Ecuadorian, and Montubio communities have a collective right to free, prior, informed consultation “regarding every normative decision or State authorization that may affect the management of water flowing through their lands or territories”).

Legal system promotes secure land tenure for indigenous peoples and local communities, including recognition of communally held lands	A full analysis of land tenure for indigenous peoples and local communities is beyond the scope of this report. However, the Constitution and the Organic Law on Rural Lands and Ancestral Territories contain provisions to promote land tenure for indigenous and rural peoples. <i>See, e.g.</i> , Constitution of the Republic of Ecuador, Art. 57.4, Art. 321; Organic Law on Rural Lands and Ancestral Territories, Art. 1, 2, 7 8, 23, 32(j), 35.
Legal system contains a clear FWR use prioritization regime, with basic human and ecosystem needs taking precedence over other uses	Yes. Building on the Constitution, the Water Law establishes the following hierarchy of uses: (1) human consumption, (2) food sovereignty, (3) ecological flow, and (4) productive uses. <i>See Water Law, Art. 186.</i>
Legal system includes incentives for FWR conservation	Obligations exist regarding conservation objectives, but it is not clear that positive incentives, <i>per se</i> , exist. Although the Constitution states that the government must provide incentives to preserve nature, implementation is unclear, especially in the FWR context. <i>See Constitution of the Republic of Ecuador, Art. 71</i> (“The State shall incentivize natural and legal persons, and groups, to protect nature, and shall promote respect for all of the elements that form an ecosystem.”). However, as illustrated by the Cuenca watershed conservation project, Ecuador has engaged in innovative conservation financing.
Legal system includes deterrent penalties for violations related to FWR	The legal system includes a penalty regime, but further investigation is needed to determine whether (a) these penalties are applied with enough consistency to achieve deterrence in practice, and (b) the financial penalties are sufficient to outweigh the monetary benefits of non-compliance (<i>i.e.</i> , to ensure that penalties cannot be absorbed as an acceptable “cost of doing business”). <i>See, e.g.</i> , Water Law, Art. 160-163.
Legal system provides special protections for riparian areas, while providing for equitable and sustainable access for community members	The law provides for special protections for riparian areas. <i>See, e.g.</i> , Water Law Regulations, Art. 62, 64. The law also enshrines an easement system for “public use.” <i>See id.</i> at Art. 62. However, it appears that this easement system may be disproportionately focused on government access. <i>See id.</i> Additional investigation is needed to assess <i>de facto</i> community access rights under the easement regime. Ecuadorian law also contains several other protective instruments for sources and bodies of water. <i>See, e.g.</i> , Water Law Regulations, Art. 69-71.
Legal system incorporates user-pays and polluter-pays principles	Yes, although the adequacy of fees and compensation is unclear. <i>See Water Law, Art. 88, 140-147, 151, 153.</i>
Legal system includes an efficient and just system for conflict resolution (may include non-judicial apparatuses)	Yes, but significant challenges remain in practice.

Legal system provides for fair compensation to persons impacted by violations of FWR laws and other prejudicial acts or omissions related to FWR

The Water Law and regulations, as well as other laws, contemplate compensation to victims/prejudiced parties in certain circumstances. *See* Water Law, Art. 66; Organic Environmental Code, Art. 9. Additional investigation is necessary to discern the efficacy of this regime in practice.

Legal system recognizes customary practices as a valid source of law in certain circumstances

Yes. *See, e.g.*, Constitution of the Republic of Ecuador, Art. 57.10, 171; Organic Law for the Development of Aquaculture and Fishing, Art. 57; Water Law, Art. 74.

Legal system is clear vis-à-vis FWR management structure and decision-making authorities (*i.e.*, authorities and roles are well defined)

Yes, for the most part. *See* Appendix B. The recent merger between the Secretary of Water and the Ministry of Environment raises questions.

Legal system contemplates science-based decision-making/a strong role for science in decision-making

Yes. *See, e.g.*, Water Law, Art. 76-77 (establishing concept of ecological flow and setting forth criteria on the same).

Legal system incorporates a version of the precautionary principle

The Water Law explicitly requires application of the precautionary principle in connection with hydroelectric activities. *See* Water Law, Art. 106. More generally, the priority scheme governing water uses can be viewed as a manifestation of the precautionary principle, loosely defined, insofar as “productive uses” are placed behind other uses, including maintenance of “ecological flow.” *See* Water Law, Art. 186.

Appendix A

Case Study: Rio Piatúa Hydroelectric Project²⁵⁴

In May 2019, opponents of a hydroelectric project in Ecuador’s Amazon basin won a major legal victory. Working together, environmental NGOs and representatives of local indigenous communities convinced the Pastaza Provincial Court that the hydroelectric project, if permitted to proceed as planned, would violate both the rights of nature and several rights held by the community, including (1) the right to a healthy environment, (2) the right to water, (3) rights related to food sovereignty, (4) rights related to cultural identify, and (5) the right to free, prior, and informed consultation.²⁵⁵ The matter is now scheduled for review by Ecuador’s Constitutional Court.²⁵⁶

The project in question—authorized jointly by the Ministry of Electricity and Renewable Energy and the Secretary of Water, with financing, construction, and operation in the hands of a private firm known as GENEFRAN S.A.—lies near the Piatúa and Jandiyacu rivers in east-central Ecuador’s Santa Clara canton in Pastaza province.²⁵⁷ The construction plan calls for a diversion (or “run-of-the-river”) facility rather than a traditional impoundment dam.²⁵⁸ The facility would generate an expected 30 MW of energy by drawing off a significant portion (perhaps as much as 90%) of the Piatúa’s flow.²⁵⁹ However, whereas many diversion facilities are designed to direct the flow back to the same river following passage through turbines, the Piatúa project would not do this. Instead, it would discharge the water drawn off from the Piatúa river into the Jandiyacu river.²⁶⁰ Thus, the Piatúa would lose flow while the Jandiyacu would gain flow.

Alarmed by the impact of the project and procedural irregularities, local Kichwa communities brought suit to stop the project. They did not find success at first, losing in July 2019 before the court of first instance.²⁶¹ However, evidence acquired thereafter suggests that the judge of that court, Aurelio Quito Cortez, was likely compromised; authorities later detected Judge Quito attempting to bribe a member of the Pastanza Provincial Court with cash and whiskey in an effort to protect the decision on appeal.²⁶² The maneuver did not work, and Judge Quito was ultimately convicted for attempted bribery.²⁶³

Undeterred, the Kichwa people persisted and finally prevailed at the Pastanza Provincial Court. In its opinion, issued on September 5, 2019, the Pastanza Provincial Court noted human, cultural, and ecological interests at stake. The court observed flaws in the environmental impact study, including failure to account for the presence of endangered species, and also criticized the environmental management plan

²⁵⁴ Hugo Echeverria was interviewed for this case study, providing helpful insights and context. The authors remain responsible for the analysis and any errors.

²⁵⁵ See Sala Multicompetente de la Corte Provincial de Pastaza, Acción de Protección No. 16281-2019-00422 (Sept. 5, 2019).

²⁵⁶ Sala de Selección de la Corte Constitucional del Ecuador, Caso No. 1754-19-JP (July 9, 2020).

²⁵⁷ Sala Multicompetente de la Corte Provincial de Pastaza, Acción de Protección No. 16281-2019-00422 (Sept. 5, 2019).

²⁵⁸ Antonio Jose Paz Cardona, *Pleito: indígenas kichwa se oponen a polémica hidroeléctrica en la Amazonía ecuatoriana*, Mongabay (July 23, 2019), <https://es.mongabay.com/2019/07/hidroelectrica-rio-piatua-amazonia-ecuador-kichwa/>.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Tribunal de la CNJ ratifica sentencia por el delito de cohecho contra exjuez de Pastaza, Aurelio Quito*, El Universo (Nov. 20, 2020), <https://www.eluniverso.com/noticias/2020/11/20/nota/8056180/tribunal-cnj-ratifica-sentencia-delito-cohecho-contr-exjuez>.

for failure to include adequate mitigation measures to protect the ecosystem.²⁶⁴ More fundamentally, however, the court took aim at (1) the project's failure to comply with free, prior, informed consultation norms, and (2) the project's inconsistency with the priority scheme governing water uses and rights to water under the Water Law.²⁶⁵

With respect to consultation, the court largely based its decision on evidence showing that the Secretary of Water effectively performed an end-run around the requirement to consult with the local Kichwa community. The Secretary of Water knew that at least some members of the Kichwa community were opposed to the project, as the President of that community sent a letter to the Secretary of Water expressing opposition. Nevertheless, the Secretary of Water did not engage in further consultation with the Kichwa people. Instead, the agency engaged with the Mayor of Santa Clara and, having secured the Mayor's consent following his "reconciliation" with the company, considered the consultation complete and issued the permit. As the court explained, this sequence of events violated the Kichwa peoples' constitutional right to free, prior, and informed consultation.²⁶⁶

As for water rights and priority of water uses, the court began by reciting the Water Law's prioritization regime: First comes human consumption, then irrigation needs for food sovereignty, then the "ecological flow," and finally "productive activities," the latter of which includes hydroelectric uses. As the court noted, there is a further prioritization within the "productive activities" category. Irrigation for non-food sovereignty production and tourism are in line before hydropower. According to the court, the license to construct and operate the Piatúa hydroelectricity project flew in the face of this priority scheme; specifically, the court found that it prioritized hydroelectricity over the Kichwa community's human consumption and food sovereignty rights.²⁶⁷

To be sure, the Pastaza Provincial Court's analysis covered a number of other rights and regulatory norms. These include the rights of nature, the right to live in a healthy environment, cultural rights, and more. The court's opinion, on almost of all of these fronts, found the State's action wanting. As one survey respondent noted, this combination of several violations of the law may explain the case outcome more powerfully than a single violation, however grave.

With the matter now selected for hearing before the Constitutional Court, the Piatúa case has the chance to become a truly emblematic case for both Ecuador and the broader Latin American region. In many ways, the Rio Piatúa case can be framed as a classic struggle between peoples' water rights and the rights of nature, on the one hand, and hydroelectric development and energy needs, on the other. So framed, Articles 15 and 413 of the Constitution—establishing that the State shall not promote energy production at the expense of food sovereignty, ecosystems, or the right to water—could play a decisive role.²⁶⁸

²⁶⁴ Sala Multicompetente de la Corte Provincial de Pastaza, Acción de Protección No. 16281-2019-00422 (Sept. 5, 2019).

²⁶⁵ *Id.* To be sure, the court also analyzed the project from other legal perspectives, including the rights of nature.

²⁶⁶ *Id.* at p. 12.

²⁶⁷ *Id.* at p. 17.

²⁶⁸ We note, however, that the Pastaza Provincial Court did not mention Article 413 in its analysis.

Appendix B

Water Service Institutions and Their Functions

NOTE: Ecuador recently passed a decree to merge the Secretary of Water with the Ministry of Environment, forming a combined “Ministry of Water and Environment.”²⁶⁹ The below table is based on analysis of the Water Law and its implementing regulations, both of which predate the merger. Further research is required to determine how, or whether, the creation of a single Ministry of Water and Environment may impact the structure designated in the Water Law and its regulations.

<i>Institution</i>	<i>Functions and Roles</i> ²⁷⁰
Single Water Authority ²⁷¹	<ul style="list-style-type: none"> ○ Lead national authority over water planning and management; head of National Strategic Water System. ○ Responsibilities include designing and implementing water management policy; elaborating the National Water Resources Plan; establishing protected areas for water; granting authorizations for water uses; maintaining the public water registry (a registry of uses); granting legal operating authority to Community Water Management Boards; hearing appeals and other legal challenges to resolutions emitted by the Water Regulation Control Agency; establishing general fee parameters for water services; formulating annual hydraulic infrastructure plans and managing existing hydraulic infrastructure; authorizing movements of water between watersheds in extraordinary circumstances; fixing watershed limits for legal purposes.²⁷²
Intercultural and Plurinational Water Council ²⁷³	<ul style="list-style-type: none"> ○ National authority that, together with the Single Water Authority, forms parts of the national strategic water system. ○ Consists of officials elected in representation of the Watershed Councils, indigenous peoples, Afro-Ecuadorians, Montubio peoples, Community Water Management Boards, user organizations, Autonomous Decentralized Governments, and universities. ○ Responsibilities include exercising “social control” to guarantee the human right to water and equitable distribution of water; participating in the formulation of the National Water Resources Plan; and helping to resolve disputes between water users.²⁷⁴

²⁶⁹ See Acuerdo Ministerial, No. 2020-0363. <https://www.ambiente.gob.ec/wp-content/uploads/downloads/2020/03/Acuerdo-Ministerial-Senagua.pdf>

²⁷⁰ This table does not contain an exhaustive list of institutional functions. Instead, the table contains those functions most relevant to understanding core roles vis-à-vis water management in general CBMFWR in particular.

²⁷¹ *Id.* at Art. 17.

²⁷² *Id.* at Art. 18.

²⁷³ *Id.* at Art. 19.

²⁷⁴ *Id.* at Art. 20.

Ministry of Agriculture and Livestock; Ministry of Health; Ministry of Environment; Ministry of Production, Foreign Trade, Investment, and Fisheries ²⁷⁵	<ul style="list-style-type: none"> ○ These four agencies play targeted (and seemingly limited) roles within the national water management apparatus. Their participation is usually focused on discrete areas within their subject-matter expertise. (Note, however, that the recent fusion of the Secretary of Water with the Ministry of Environment—combining to form a new “Ministry of Water and Environment”—may effectively expand the influence of the erstwhile Ministry of Environment over water management.) ○ For example, the Ministry of Agriculture and Livestock plays a key role in cooperating with other agencies to define irrigation criteria within the “food sovereignty” rubric.²⁷⁶ ○ In the case of the Ministry of Production, Foreign Trade, Investment, and Fisheries, this Ministry contains a Vice-Ministry of Aquaculture and Fisheries.²⁷⁷ As the name suggests, the Vice-Ministry of Aquaculture and Fisheries is the lead regulatory authority at the national level vis-à-vis freshwater and marine fisheries and aquaculture.
Water Regulation and Control Agency ²⁷⁸	<ul style="list-style-type: none"> ○ National authority within the Single Water Authority tasked with making and implementing key technical decisions.²⁷⁹ ○ Responsibilities include establishing sector-specific technical rules; certifying and monitoring water availability based upon water balances and authorized uses; coordinating with the Single Water Authority to regulate quality and quantity of water; coordinating with the National Environmental Authority to ensure discharges are lawful; authorizing and regulating specific water uses; participating in fee fixing for water services; imposing administrative sanctions in the event of violations; investigate and resolve complaints and controversies between water users/sectors.²⁸⁰
Autonomous Decentralized Governments ²⁸¹	<ul style="list-style-type: none"> ○ Autonomous Decentralized Governments (ADGs) are sub-national governmental bodies that enjoy political, administrative, and financial autonomy. ADGs include Regional AGDs, Provincial AGDs, Cantonal AGDs, and Parish AGDs. ○ In keeping with the subsidiarity principle, AGDs perform various water-related functions in coordination with national institutions.
Watershed Councils ²⁸²	<ul style="list-style-type: none"> ○ Watershed Councils are bodies of “consultative” character (i.e., they do not have authority to make binding decisions).²⁸³ ○ Watershed Councils are tasked with participating in the development of watershed management plans; proposing public policies for consideration by the Intercultural and Plurinational Water Council; making position statements before the Single Water Authority; participating in consultative processes led by the Single Water Authority regarding watershed management decisions; and monitoring budget disbursements related to watershed management.²⁸⁴

²⁷⁵ *Id.* at Art. 15.

²⁷⁶ Water Regulations, Art. 84.

²⁷⁷ See *Organizational Chart of the Ministry of Production, Foreign Trade, Investment, and Fisheries*, at https://www.produccion.gob.ec/wp-content/uploads/2019/03/ORGANIGRAMA_MPCEIP_DEF.jpg; see also Executive Decree No. 559 (2018).

²⁷⁸ Water Law, Art. 21.

²⁷⁹ *Id.* at Art. 21.

²⁸⁰ *Id.* at Art. 23.

²⁸¹ *Id.* at Art. 15.

²⁸² *Id.* at Art. 25.

²⁸³ *Id.* at Art. 26.

²⁸⁴ *Id.* at Art. 26.

Community Water Management Boards²⁸⁵

- Community Water Management Boards are special entities that offer potable water and irrigation services in rural areas.
- They are only permitted to operate to the extent that the relevant Autonomous Decentralized Government is unable to provide legally required water services.
- Community Water Management Boards perform a variety of water services, operating with considerable autonomy. They are authorized to operate and maintain potable water infrastructure, deliver potable water, set and collect fees, and resolve disputes among members. With respect to irrigation, community irrigation boards similarly manage irrigation infrastructure, set and collect fees, make distribution decisions, impose sanctions, and settle disputes.
- Community Water Management Boards have a right to send a representative to sit on the Watershed Councils.²⁸⁶

²⁸⁵ *Id.* at Art. 43, 47.

²⁸⁶ *Id.* at Art. 47.