Colombia Freshwater Resource Rights Report

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Final Draft – March 10, 2021

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I. Executive Summary

- **Scope and Purpose**

This report analyzes Colombia'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 question[5]), 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 Colombian 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 conducted targeted interviews with local subject-matter experts. Although the 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 Colombia maintains a legal framework broadly supportive of community-based management of freshwater resources and associated rights. Key features of Colombian law supporting this conclusion include but are not limited to (1) treating water as a human right, (2) recognizing the rights of nature through emerging case-law, (3) a clear prioritization scheme governing water uses and concessions, (4) opportunities for community participation in management and decision-making, (5) recognition of indigenous peoples' rights to ancestral territories, (6) a newly created regime incentivizing conservation through payment for environmental services, and (7) mechanisms for legal recourse in the event of abuses or violations of rights related to FWR.

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[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.*

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 fails to consistently engage in robust consultations with local communities (including indigenous communities, Afro-Colombian communities, and other *campesino* communities), deficiencies in wetlands management, and historically aggressive government support for hydroelectric projects.

In addition, this report draws attention to what appears to be a permissive approach to mining in riverine areas. Although Colombia's well-documented struggle with illegal and informal mining—especially for gold—is a product of various factors, the prevailing perception points to inadequate implementation and enforcement as the leading variable. While this report does not attempt an in-depth study of the issue, it does highlight the ways in which Colombia's mining law seems to accommodate practices potentially at odds with FWR conservation and community FWR rights.

The following table summarizes our findings corresponding to key legal principles associated with global best practices:[8]

Key Legal Principles	***Relevant Provisions in Colombia***
Legal system provides for local management of FWR/local participation in management of FWR	Yes, to a significant degree. However, further investigation is needed to determine the depth of local management and participation in practice.
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; this concept has been crystalized in Colombian jurisprudence.
Legal system contains transparency and access-to-information mechanisms regarding FWR use and government actions that could impact FWR	Colombia maintains a general law regarding access to information. Further research is necessary to discern this law's scope and efficacy as concerns information relevant to FWR.
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. Colombia maintains a prior consultation regime, but court cases suggest that this regime is (a) not always respected in practice, and (b) may not always be clear in terms of precise requirements.
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, Colombia's ratification and implementation of ILO Convention No. 169 means that the State has committed to respecting territorial rights of indigenous and tribal peoples.
Legal system contains a clear FWR use prioritization regime, with basic human and ecosystem needs taking precedence over other uses	For the most part. Colombia's law on water concessions contains a clear prioritization scheme. However, ecosystem needs are not explicitly included in this scheme.
Legal system includes incentives for FWR conservation	Yes. Through Decree Law 870 of 2017 and Decree 1007 of 2018, Colombia has established a framework under which landowners and/or occupants can receive payments for taking actions to preserve and/or restore

[8] A more detailed version of this table is provided below. *See supra* "Conclusion."

	ecosystem services. Further research is necessary to discern the extent to which actions under this framework promote FWR conservation in practice.
Legal system includes deterrent penalties for violations related to FWR	Yes, but it is far from clear that these penalties are achieving widespread deterrence in practice.
Legal system provides special protections for riparian areas, while providing for equitable and sustainable access for community members	Yes, although the efficacy of these provisions (both as written and as applied) requires further investigation.
Legal system incorporates user-pays and polluter-pays principles	Yes. In practice, however, it is likely that the costs of use and pollution are frequently externalized (particularly in rural areas and other areas where the State's presence is tenuous).
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	Unclear.
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.e.,* authorities and roles are well defined)	Yes, in the main.
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	Yes.

- **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 *Porvenir II* hydroelectric project along the Samaná Norte river. The case study shows how freshwater resource rights may combine with other rights—in this case, the right to return to homelands following displacement from Colombia's armed internal conflict—to empower local communities to challenge harmful projects.

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 Colombia in the context of freshwater resources (FWR). In other words, this report focuses on the security of freshwater resource rights in Colombia, with a special focus on those rights most relevant to community-based management of freshwater resources (CBMFWR).

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 water, 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]

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* or *de facto* 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

[9] "Strong Voices, Active Choices: TNC's Practitioner Framework to Strengthen Outcomes for People and Nature," The Nature Conservancy, at 27 (2017).
[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.

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.

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.

In ways both direct and subtle, whether a country subscribes 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 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 Colombia with a focus on constitutional principles and certain overarching water law principles. Section V overviews the legal regime governing FWR rights in Colombia, their legal character, and interaction with other pertinent legal regimes, such as the protected areas regime, mining law, and fisheries law. Section VI contextualizes these rights through the lenses of the water management and planning scheme, community participation, and legal recourse. Section VII

[12] Stephen Hodgson, "Modern water rights: theory and practice," No. 92. Food & Agriculture Org. at 1 (2006).
[13] *Id.*
[14] *Id.*
[15] *Id.*

concludes that while Colombia's FWR rights regime reflects many of the features of a strong legal apparatus, with signs of positive trends, the system is imperfect.

To complement the core legal analysis, this report includes two appendices. Appendix A contains a case study of the conflict surrounding the *Porvenir II* hydroelectric project along the Samaná Norte river. Appendix B contains a summary of key water planning instruments in Colombia.

III. Methodology

This report is based on a desk-based analysis of Colombian law, along with information gleaned through a questionnaire and interview work with local experts. Our approach to identifying relevant Colombian laws was comprehensive. In addition to emblematic court decisions, we considered the following laws and national policies, although not all of these ultimately informed the analysis:

Relevant Legislation, Regulations, and Policies

Political Constitution of the Republic of Colombia (1991)
Law 99 of 1993 (fundamental environmental and renewable natural resource legislation)
Decree 1076 of 2015 (decree collecting and organizing scattered environmental and natural resources legislation)
Law 1541 of 1978 (law on continental waters, including water concessions)
Law 41 of 1993 (irrigation works legislation)
Law 142 of 1994 (legislation addressing residential potable water and sewage services)
Law 21 of 1991 (legislation implementing ILO treaty no. 169 and establishing consultation rights for indigenous peoples)
Law 13 of 1990 (general fisheries legislation)
Decree 2256 of 1991; Decree 1070 of 2015 (fisheries regulations)
Law 685 of 2001 (mining code)
Decree 2372 of 2010 (protected areas law)
National Policy for Integrated Management of the Water Resource (2010)
Decree 1640 of 2012 (watershed planning legislation)
Law 1658 of 2013 (mercury legislation)
Decree 2041 of 2014 (regulation on environmental licenses and environmental impact assessments)
Decree 1007 of 2018 (regulation on payments for environmental services; implements Decree Law 870 of 2017)

The core of the analysis herein relies on a thorough examination of the freshwater rights and management scheme established under laws directly relating to water and freshwater resources. 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 recourses (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 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 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, (5) management rights, and (6) due process rights.

Key Legal Principles for CBM, 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

[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).

[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.

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 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. Control rights, for their part, complement use rights by increasing the holder's power to (a) participate in management and other regulatory decisions regarding FWR, (b) exclude third parties from accessing the resource, (c) decide whether, and under what conditions, to transfer her rights to a third party, and (d) 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 from using the FWR" in question.[24]

[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.*

(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. 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 Colombia's Water Law System

Although highly developed, Colombia's approach to water law is hardly straightforward. This is partially due to the fact that Colombia does not have a single, overarching statute that governs rights to, and uses of, freshwater. Instead, Colombia's water system is built around a variety of laws and regulations, often sector- or topic-specific, as well as a handful of constitutional provisions. Judicial decisions, too, have emerged as an important source of water-related rights and obligations in Colombia. In short, Colombia's system is something of a patchwork.

To inform the more detailed FWR rights analysis contained in Section V, this section highlights several background concepts and norms relevant to CBMFWR in Colombia. These background concepts and norms are derived principally from the Constitution and select laws relating to natural resources. As this and later discussion reveal**, Colombia's legal system, however diffuse it may be, contains many of the key characteristics associated with a system supportive of CBMFWR**.

A. The Constitution: Key Background Provisions

Colombia's current Constitution dates to 1991.[29] As concerns CBMFWR and environmental issues writ large, the Constitution shows its age in places even as it was—and still is, in ways—ahead of its time on many environmental fronts. In general, the Constitution reflects a sustainable development approach to natural resources, including FWR. And, compared to newer constitutions in the region (*e.g.*, those of Ecuador and Bolivia), Colombia's approach to water rights is less conspicuous at the constitutional level. Nevertheless, Colombia's Constitution contains several important provisions that inform the country's overall approach to CBMFWR. This section describes these provisions in broad strokes, deferring deeper treatment for subsequent sections.

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[25] *Id.*
[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] Political Constitution of the Republic of Colombia (1991).

1. The Right to Water

Colombia's Constitution does not speak of a "fundamental right" or "human right" to water—at least not in such terms. Instead, the Constitution frames the provision of public services, including water, as one of the State's fundamental roles. Specifically, Article 366 provides that one of the State's "fundamental objectives" is to solve "unsatisfied needs of health, education, environmental sanitation, and potable water."[30]

This does not mean that access to sufficient—and sufficiently clean—water for basic human needs is not a fundamental right under Colombian law. In fact, the Constitutional Court has recognized that this *is* a fundamental human right, even though the Constitution is less than explicit on the matter.[31] In 2008, the Court held that potable water for human consumption is a "fundamental" right, such that its deprivation triggers a citizen's ability to seek immediate injunctive relief in court through a fast-track procedure known as an "*acción de tutela*."[32] Accordingly, the **Colombian courts appear to have consolidated the human right to water (*i.e.*, water for human consumption) despite the Constitution's somewhat limited language on the matter**.

2. The Right to a Healthy Environment

In comparison with the right to water, Colombia's Constitution leaves no doubt about the right to a healthy environment. Article 79 provides as follows: "All persons have the right to enjoy a healthy environment."[33] Relatedly, this same Article provides that the State has a duty to "protect the diversity and integrity of the environment" and to "conserve areas of special ecological importance."[34] The Constitutional Court has interpreted the right to a healthy environment as a "fundamental right" on several occasions.[35]

3. Indigenous Peoples' Right to Prior Consultation and Participation in Decision-Making

Colombia's Constitution does not include a clause explicitly addressing indigenous or other tribal peoples' rights to "free, prior, and informed consent" or "free, prior, and informed consultation." Nevertheless, Colombia has ratified International Labour Organization Convention No. 169 (a.k.a., the Indigenous and Tribal Peoples Convention),[36] which enshrines indigenous peoples' rights to free, prior, and informed consultation in various circumstances. Under Article 93 of the Constitution and Colombian jurisprudence, human rights treaties ratified by Colombia—like the International Labour Organization Convention No. 169—form part of the "constitutional block" of binding, constitutional norms.[37] Thus, Colombia's

[30] *Id.* at Art. 366.
[31] Corte Constitucional de Colombia, Sala Plena, Sentencia T-888 de 2008, https://www.corteconstitucional.gov.co/relatoria/2008/T-888-08.htm.
[32] *Id.*
[33] Political Constitution of the Republic of Colombia (1991), Art. 79.
[34] *Id.*
[35] *See, e.g.* Corte Constitucional de Colombia, Sala Sexta de Revisión, Sentencia T-154 de 2013, https://www.corteconstitucional.gov.co/RELATORIA/2013/T-154-13.htm.
[36] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, June 27, 1989, *entry into force* Sept. 5, 1991.
[37] *See* Sentencia C-067/03, La Sala Plena de la Corte Constitucional (2003), *available at* https://www.corteconstitucional.gov.co/relatoria/2003/C-067-03.htm.

constitutional regime does, in effect, incorporate this treaty's approach to indigenous peoples' rights to free, prior, and informed consultation. Moreover, Article 330 of the Constitution provides that, in the context of decisions regarding exploitation of natural resources within indigenous territories, the government has an obligation to ensure the participation of representatives of the relevant indigenous communities.[38] At a more general level, Article 79 guarantees "the participation of the community" in government decisions that may affect the right to a healthy environment.[39]

With the foregoing in mind, Colombia's Constitutional Court has held that indigenous communities have a fundamental right to prior consultation in connection with decisions to exploit natural resources within indigenous territories.[40] Nevertheless, individuals interviewed for this report expressed concern regarding the consistency of this rule's implementation in practice. Further field research may be warranted to corroborate, or dispel, these concerns.

4. Sustainable Development Framework

Colombia's Constitution contains several provisions that might be loosely characterized as reflecting a commitment to sustainable development, *i.e.*, "development which meets the needs of the present without compromising the ability of future generations to meet their own needs."[41] Although the precise implications for FWR and CBMFWR are not always apparent, the Constitution's incorporation of a sustainable development paradigm provides important context for the analysis of FWR-specific laws and developments in practice.

Special Provision on the Rio Magdalena

One of the Constitution's more striking provisions related to FWR is its establishment of a special institution designed to sustainably manage the Magdalena River. The Magdalena River is arguably Colombia's most important river. Nearly 80% of Colombia's population lives within the Magdalena watershed, which spans approximately 24% of the country's surface area. *See* L. F. Jiménez-Segura *et al.*, *River flooding and reproduction of migratory fish species in the Magdalena River basin, Colombia*, 19 Ecology of Freshwater Fish 178 (2010). In light of the Magdalena's critical social, economic, and ecological role, the Constitutional Assembly choose to create a specialized body, the "Autonomous Regional Corporation of the Magdalena River," entrusted with a range of responsibilities set forth in Article 331 of the Constitution. These responsibilities include "recuperation" of navigation and port activity, land conservation, electricity generation, and the "use and preservation" of the environment, fisheries resources, and other renewable natural resources.

Most obviously, Article 80 provides that the State "shall plan the management and use of natural resources to guarantee sustainable development" and such resources' "conservation, restoration, or substitution."[42] Underscoring the need to balance economic activity with ecological health, Article 333 enshrines a series of economic rights—including free enterprise and free competition—but then Article 334 establishes the State's prerogative to intervene when necessary to achieve any number of social goals, including "the preservation of a healthy environment."[43] This language may be important to head off

[38] Political Constitution of the Republic of Colombia (1991), Art. 330.
[39] *Id.* at Art. 79.
[40] Corte Constitucional de Colombia, Sala Plena, Sentencia SU-039/97, https://www.corteconstitucional.gov.co/relatoria/1997/su039-97.htm.
[41] Brundtland, G. (1987). *Report of the World Commission on Environment and Development: Our Common Future*. United Nations General Assembly document A/42/427.
[42] Political Constitution of the Republic of Colombia (1991), Art. 80.
[43] *Id.* at Art. 333, 334.

arguments that economic rights (including the right to work) trump environmental protection when the two come into conflict.

5. Indigenous Rights to Ancestral Territory; Indigenous Customary Law

The Colombian Constitution contemplates both (1) indigenous communities' rights to ancestral territories and (2) the application of indigenous customary law within those territories. Article 286 describes the "territorial entities" that make up Colombia. "Indigenous territories" are included alongside departments, districts, and municipalities.[44] As "territorial entities," indigenous territories have significant autonomy, including, *inter alia*, the right to govern themselves with their own authorities and to administer resources and establish taxes.[45]

While the foregoing describes "territorial entity" rights in general (and thus includes rights pertaining to municipalities and departments, in addition to indigenous territories), Article 330 of the Constitution provides further details in the specific context of indigenous territories. According to Article 330, indigenous territories shall be governed by "councils confirmed and regulated pursuant to the uses and customs of their [respective] communities."[46] These councils exercise the following functions: (1) ensure the application of legal rules regarding land uses and inhabitance within their territories; (2) design plans and policies for economic and social development; (3) promote public investment within their territories; (4) collect and distribute resources; (5) promote the preservation of natural resources; (5) coordinate programs and projects within their territories; (7) collaborate to maintain public order within their territories; and (8) represent their territories before the national government and its agencies.[47] As mentioned above, communities in indigenous territories also have consultation rights with respect to State decisions relating to natural resources within indigenous territories.

Finally, the Constitution recognizes the role of customary law to settle disputes and solve problems within indigenous territory. Article 246 provides that "indigenous peoples' authorities may exercise jurisdictional functions within their territories, in conformity with their own norms and procedures, so long as they are not contrary to the Constitution and laws of the Republic."[48]

B. Other Laws: Key Background Principles

As mentioned above, Colombia does not maintain a single law that comprehensively addresses water from various angles. Stated differently, the country has not established, through one legal instrument, an integral framework to govern use rights, control rights, management and planning, fees, pollution control, and so forth. Instead, Colombia maintains a *series* of laws that collectively establish water rights—and regulate water use—in various ways.[49]

In addition to concrete rules that directly define use and control rights, however, the Colombian approach to FWR is informed by overarching principles contained in (1) its general renewable natural resources law, Law of 1974, and (2) its general environmental law, Law 99 of 1993, both of which are consolidated with

[44] *Id.* at Art. 286.
[45] *Id.*
[46] *Id.* at Art. 330.
[47] *Id.*
[48] *Id.* at Art. 246.
[49] Here, however, it is important to note that many laws and decrees relevant to natural resources have been consolidated in Decree 1076 of 2015. This consolidation renders legal analysis considerably less onerous.

other associated instruments in Decree 1076 of 2015. These principles include (1) treating water as national patrimony and the province of State management, (2) requiring science-based decision-making and the use of the precautionary principle, (3) the user pays principle, and (4) the polluter pays principle. This section briefly describes these overarching provisions to frame the discussion of concrete FWR rights and associated norms in Section V ("Freshwater Resource Rights").

1. National Patrimony and State Management

As in many nations, water in Colombia is largely treated as a public resource and national patrimony. As explained in more detail below, Law 2811 of 1974 clarifies that the vast majority of bodies of water are "public use" in character.[50] More fundamentally—though perhaps more generally—the Constitution provides that "it is the duty of the State to protect the diversity and integrity of the environment"[51] and to "plan the management and usage of natural resources[.]"[52] The Constitution underscores the prerogative of the State by later observing, in the context of economic policy, that the State shall "intervene . . . in the exploitation of natural resources" to secure a rational economy and improve the lives of citizens.[53]

2. Science-Based Decision-Making and the Precautionary Principle

Colombian law encodes both science-based decision-making and the precautionary principle in a clear and forceful way. Law 99 of 1993 sets forth a series of "fundamental" concepts to steer national environmental policy. These include the overarching concept that the country's environmental policy shall "take into account" scientific investigation.[54] As relevant to water, this concept is operationalized, in part, through the work of the Institute of Hydrology, Meteorology, and Environmental Studies (IDEAM), a scientific and technical agency adjoined to the Ministry of Environment and Sustainable Development.[55] Among other functions, IDEAM is charged with obtaining, analyzing, and disseminating basic hydrological information, including groundwater studies.[56] This authoritative information is then used by other agencies and local governments in a variety of ways, from reviewing environmental impact studies, to developing watershed management plans, to granting water concessions and environmental licenses.

Notwithstanding this scientific apparatus, Colombian law recognizes that scientific uncertainty will always exist—including with respect to possible environmental harms flowing from human activity. To guide decision-making in the face of uncertainty, Law 99 of 1993 establishes a classic version of the precautionary principle: "[W]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[57] This is in fact a verbatim copy of the iteration contained in Principle 15 of the Rio Declaration.

3. User Pays Principle

[50] Decree 1541 of 1978, Art. 5.
[51] Political Constitution of the Republic of Colombia (1991), Art. 79.
[52] *Id.* at Art. 80.
[53] *Id.* at Art. 334.
[54] Law 99 of 1993, Art. 1(6)
[55] *Id.* at Art. 16-17; *see also* IDEAM's characterization of its own role on its public website, at http://www.ideam.gov.co.
[56] Law 99 of 1993, Art. 17.
[57] *Id.* at Art. 1(6).

In a manifestation of the "user pays" principle, Colombian law envisions (unsurprisingly) a framework for fees associated with water services.[58] There do not appear to be any exceptions to the fee scheme.

More interestingly, Law 99 of 1993 establishes that (1) the government is to use collected fees to pay for water "protection and renovation expenses,"[59] and (2) projects that use water taken directly from a natural source are subject to a special water conservation tax.[60] With respect to the latter point, the law states that the owners of such projects—no matter the water use (*i.e.*, whether for human consumption, recreation, irrigation, or an industrial activity)—must invest the equivalent of at least 1% of the total project cost toward "recovery, preservation, and monitoring" of the impacted watershed.[61]

In what may be the most ambitious implementation of the user pays principle (loosely defined), Colombia has recently passed legislation and adopted regulations to establish a "payment for environmental services" regime. Under Decree Law 870 of 2017 and Decree 1007 of 2018, Colombia has created a system under which landowners can receive payments for either (a) refraining from engaging in otherwise lawful land uses, or (b) proactively restoring degraded land (*e.g.*, through planting native species).[62]

Collectively, Decree Law 870 of 2017 and Decree 1007 of 2018 clarify several matters critical to the operation of this "payment for environmental services" system, including which persons, lands, and projects qualify; which lands and projects are to be prioritized; how payments are calculated; and more. With respect to the first issue, Decree Law 870 provides that legal owners and/or occupants of lands throughout the country are potentially eligible, including occupants of lands in protected areas, as well as indigenous and other ethnic communities on lands held either individually or collectively.[63] However, Decree 1007 of 2018 goes on to explain that the program will focus on strategic areas and ecosystems identified in either the Single Register of Ecosystems and Environmental Areas (REAA) or the Single National Registry of Protected Areas (RUNAP)—and, within those confines, that additional priority will be given to (a) areas in which the natural vegetation cover is at risk due to the expansion of the agricultural frontier, with emphasis on post-conflict municipalities, and (b) areas suffering from degraded ecosystems and disputes over use, again with emphasis on post-conflict municipalities.[64]

With respect to the kinds of environmental services that the regime hopes to promote, Decree 1007 highlights payments for water-regulation and water-quality services; payments for greenhouse gas reduction and capture; payments for biodiversity conservation; and payments for cultural, spiritual, and recreational environmental services.[65] Within this framework, Decree 1007 envisions payments for two broad categories of activities: (1) preservation (*i.e.*, the landowner or occupant *refrains* from using the land in a way that alters the natural cover); and (2) restoration (*i.e.*, the landowner or occupant takes affirmative action to restore, either partially or total, natural cover and biodiversity in degraded areas).[66] To curb the perverse incentive to degrade areas—so as to then benefit from restoration payments—Decree 1007 states that restoration projects are ineligible if the area in question had natural cover within the previous three years.[67] To calculate the payment for eligible preservation or restoration activities,

[58] *Id.* at Art. 43.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *See generally* Decree Law 870 of 2017; Decree 1007 of 2018.
[63] Decree Law 870 of 2017, Art. 6.
[64] Decree 1007 of 2018, Section 2 (*Focalización de áreas y ecosistemas estratégicos*).
[65] *Id.* at Section 2 (*Modalidades de pago por servicios ambientales*).
[66] *Id.* at Section 2 (*Acciones a reconocer con el pago por servicios ambientales*).
[67] *Id.*

Decree 1007 relies on estimates of representative agricultural activities and/or the rent that could be obtained by leasing the land for such agricultural activities.[68] However, the final terms of payment, and a host of other conditions and requirements, are set forth through individual agreements.[69]

Despite these baseline policies, it is unclear how authorities are implementing this "payment for environmental services" regime in practice. In light of the regime's potentially powerful benefits for CBMFWR and FWR conservation, field study is encouraged.

4. 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.

In the FWR context, Colombian law reflects the polluter pays principle in at least two ways. First, in a general but important provision, Law 99 of 1993 articulates as one of the country's guiding environmental principles the need to force internalization of pollution costs.[70] Second, and more concretely, the same law establishes a system of "retributive and compensatory fees" for pollution discharges.[71] This system requires payment for authorized discharges of virtually every kind of waste or contaminant introduced into the country's water, air, or soil, with the fee to be fixed based on, *inter alia*, the environmental and social harm produced by the discharge.[72] The law makes it clear that these fees apply only to discharges within authorized limits; a separate penalty regime applies to discharges in excess of legal limits.[73]

Yet the mere existence of a fee and penalty scheme should not be treated as evidence that the scheme is applied in practice, particularly away from urban centers. As always, discerning the degree of implementation and enforcement is a task apart.

[68] *Id.* at Section 2 (*Estimación del valor del incentivo de Pago por Servicios Ambientales*).
[69] *Id.* at Section 3 (*Formalización de acuerdos*).
[70] Law 99 of 1993, Art. 1(7).
[71] *Id.* at Art. 42.
[72] *Id.*
[73] *Id.*

VI. Freshwater Resource Rights

Although Colombia does not maintain a single, integrated water law, Colombia's legal system does establish an array of use and control rights pertaining to FWR. This section describes those rights, drawing from the many provisions contained in Colombia's scattered laws and regulations—and, increasingly, judicial decisions—relating to FWR. While the core focus is on FWR rights vis-à-vis indigenous, Afro-Colombian, and other local communities, this section also discusses FWR rights and privileges that may be enjoyed by other sectors (*e.g.*, industrial agriculture, mining interests, and the hydroelectric sector). Analyzing the legal framework germane to those sectors' use of FWR is important in light of the frequent tensions that arise over FWR between those sectors and local communities.

A. Public Waters and Private Waters

In Colombia, most sources and bodies of water are "public use" waters. Specifically, Law 2811 of 1974 (reproduced with other associated instruments in Decree 1076 of 2015) provides that the following waters are public use in character:

- Rivers and all waters that run in natural channels, whether permanent or not;
- Waters that run in artificial channels where such waters have been diverted from a natural channel;
- Lakes, lagoons, bogs, swamps, and other wetlands;
- Water in the atmosphere;
- Aquifers and underground water; and
- Rainwater.[74]

Water Supply & Demand

Freshwater is abundant in Colombia. However, most of this water is located in sparsely populated areas. Colombia's most heavily populated area has only 15% of the total water supply. Overall, 34,000 cubic meters per person per year are available. In dry years, this number falls to 26,700 cubic meters. *Vice-minister of the Environment*, NATIONAL POLICY FOR INTEGRATED WATER RESOURCES MANAGEMENT, p. 110 (2010).

Colombia's naturally stored water exceeds artificially stored water by more than five times. In addition to other sources, extensive wetland ecosystems contribute to the country's water wealth. Yet, while Colombia has an extensive supply of water, longer dry periods and worsening flooding are taking a toll. Mining, hydrocarbon, and agriculture projects add to the degradation. *Id.*

As of 2010, demand for freshwater broke down as follows: agriculture (54%), domestic use (29%), industrial use (13%), livestock (3%), and services (1%). *Id.* at 111.

As public use waters, the State is in charge of management, monitoring, control, and enforcement.[75]

There is, however, a narrow category of water that is subject to private ownership. Under the law, "privately owned waters" are "those that spring up naturally and disappear by infiltration or evaporation within the same estate."[76] Thus, if a person owns a piece of land in which a spring emerges in one quadrant but then returns to ground in another—or evaporates within the same property due to an extremely low rate of flow—such water would belong to the landowner.[77] Even then, however, such waters may revert to the public domain if the landowner refrains from using them for a period of three consecutive years.

[74] Decree 1541 of 1978, Art. 5.
[75] *Id.* at Art. 7.
[76] *Id.* at Art. 6.
[77] By contrast, the private waters rule does not apply to springs that begin in one plot and flow to another. Nor can otherwise public use waters be converted into private waters through the purchase of additional plots. *Id.* at Art. 18, 19.

B. The Right to Water for Human Consumption

Colombia's Constitution does not enshrine water as a human right (at least not explicitly). Nevertheless, other legal and policy instruments indicate that water for human consumption takes precedence over all other uses, and Colombia's judiciary has repeatedly stated that there is, in fact, a fundamental right to water for basic human consumption.

Law 99 of 1993 unequivocally establishes that human consumption is the number-one priority. In fact, that law's first article provides: "In the utilization of water resources, human consumption shall have priority over any other use."[78] Decree 1076 of 2015 reinforces this rule, providing a prioritized list of uses to govern concessions (described in more detail below), with use for human consumption standing at the top.[79] Finally, although not a law *per se*, the National Policy for Integrated Management of Water Resources (2010) echoes this prioritization scheme, stating that "access to water for human consumption and domestic [uses] shall have priority over any other use," and further providing that "collective uses shall have priority over private uses."[80]

Public Use of Water Sources for Certain Basic Needs

An older but still generally valid law, Decree Law 1541 of 1978 (Art. 32), establishes that all persons may utilize public use streams and lakes to drink, to bathe, to water animals, to wash clothes, and for any other similar purpose. Exercise of these rights is subject to health and environmental regulations. The extent to which these rights have been tempered through sanitary and environmental regulations is unclear. It is also unclear whether all persons are, *de jure* or *de facto*, afforded free access to public use water sources to exercise these rights.

Similarly, Decree Law 1541 of 1978 (Art. 33) provides that all persons have the same use rights with respect to waters flowing through an artificial channel (*e.g.*, an irrigation ditch). However, these rights may be exercised only so long as (1) the water is ultimately destined for a use that does not require purity, (2) the public users do not cause damages to the channel or other infrastructure, and (3) the public users do not frustrate rights afforded to the concessionaire.

In both instances, the law provides that these uses are free of charge and cannot be made exclusive to any single person or group of users.

The courts have arguably gone further, holding that the right to potable water for human consumption rises to the level of a "fundamental" right. Under Colombian law, this is not merely an empty label; rather, it means that a person who has suffered an infringement of the right may seek extraordinary injunctive relief in court through an "*acción de tutela*."[81] In a 2008 decision, the Constitutional Court addressed a case involving allegedly contaminated drinking water. The plaintiff, a private resident, claimed that the local water company had failed to maintain the municipal potable water tubes to such an extent that wastewater was leaching into them, contaminating the so-called potable water with fecal matter and other pollutants. Although the Constitutional Court ultimately ruled against the plaintiff, its decision was based on a lack of convincing evidence, not a rejection of the plaintiff's legal theory.[82] To the contrary, the court held that the right to potable water qualifies as a "fundamental right," such that an *acción de tutela* is viable, so long as the facts support the claim.[83]

[78] Law 99 of 1993, Art. 1.
[79] Decree 1076 of 2015, Art. 2.2.3.2.7.6.
[80] Ministry of Environment, Housing, and Territorial Development, *National Policy for Integrated Management of Water Resources* (2010), p. 95, https://www.minambiente.gov.co/index.php/gestion-integral-del-recurso-hidrico/direccion-integral-de-recurso-hidrico/politica-nacional-para-la-gestion-integral-del-recurso-hidrico.
[81] Corte Constitucional de Colombia, Sala Plena, Sentencia T-888 de 2008, https://www.corteconstitucional.gov.co/relatoria/2008/T-888-08.htm.
[82] *Id.*
[83] *Id.*

C. Priority of Other Uses and Basic Concession Regime

After water for human consumption, Colombian law establishes a priority of uses to guide concessions. According to Decree 1076 of 2015 (and Decree 1541 of 1978 before it), the government is to grant concessions in the following order:

(1) Use for collective human consumption, whether urban or rural,
(2) Use for individual domestic needs,
(3) Community agricultural use, including aquaculture and fishing,
(4) Individual agricultural use, including aquaculture and fishing,
(5) Hydroelectric generation,
(6) Industrial or manufacturing uses,
(7) Mining uses,
(8) Community recreation uses, and
(9) Individual recreation uses.[84]

However, as explained in more detail below, this is a default regime. The government may depart form this order in certain circumstances, although domestic uses should always prevail over non-domestic uses.[85]

Several categories of uses—including irrigation for agriculture, mining, and hydroelectric use—are discussed in more detail below. For present purposes, it is important to highlight (1) the rudiments of the concession process, (2) overarching environmental and social safeguards under the concession regime, and (3) salient critiques from local academics.

Basics of the Concession Process

With only a few exceptions, water uses in Colombia require a concession.[86] To obtain a concession, the interested party must submit an application specifying the use, quantity required, and a myriad of other information.[87] In keeping with the idea of water as a public good, concessions grant use rights but *not* ownership over the water in question.[88] When granted, the administrative act authorizing a concession includes, among other points, the terms and conditions of use.[89]

Environmental and Social Safeguards under the Concession Regime

Significantly, the concession process includes several environmental and social safeguards. These safeguards include but are not limited to the following:

- In cases involving industrial, mining, oil and gas, or hydroelectric uses of water, the putative concessionaire must submit a "feasibility study" in addition to the information otherwise required in the application process.[90]

[84] Decree 1076 of 2015, Art. 2.2.3.2.7.6.
[85] *Id.* at Art. 2.2.3.2.7.8.
[86] *Id.* at Art. 2.2.3.2.7.1.
[87] *Id.* at Art. 2.2.3.2.9.1 *et seq.*
[88] *Id.* at Art. 2.2.3.2.8.1.
[89] *Id.* at Art. 2.2.3.2.9.9.
[90] *Id.* at Art. 2.2.3.2.10.4, 2.2.3.2.10.12, 2.2.3.2.10.8.

- The law authorizes the environmental authority to deny a concession for reason of "public utility or social interest."[91] This authority is apparently separate from the preclusive effect of the denial of an environmental license that may be required for the project. The extent to which environmental authorities actually invoke "public utility or social interest" as a reason to deny concessions is an empirical question that could benefit from further research.

- Before granting any concession, the government must conduct a site visit to collect and confirm data on, *inter alia*, the presence of populations using the water under consideration for domestic or other uses that could be impacted by the concession.[92]

- The law recognizes the right of all persons to express opposition to a proposed concession. According to the law, an opposing party should convey such opposition to the environmental authority prior to or during the site visit. The environmental authority may then request, either from the opposing party or the putative concessionaire, further documentation, evidence, or studies. Based on this record, the agency must adjudge the validity of the opposition within the resolution that grants or denies the concession.[93]

- The environmental authority may deviate from the default priority of uses that generally governs concessions (see above) in consideration of (a) rain, temperature, and evaporation patterns, (b) current and projected future water demands in the region, (c) approved economic and social development plans, (d) environmental preservation, and (e) the need to maintain sufficient water reserves.[94]

Water Concessions, Environmental Licenses, and Environmental Impact Assessments

While water concessions plainly require some degree of environmental analysis, the extent to which Colombian law requires an environmental license and full-blown environmental impact assessment (EIA) for water concessions is less than perfectly clear. On the one hand, nothing in Sections 7 through 10 of Chapter 2 of Decree 1076 of 2015, covering water concessions, mentions either an environmental license or an environmental impact assessment. Furthermore, Decree 2041 of 2014, the primary regulation covering environmental licenses and EIAs, does not identify water concessions as requiring environmental licenses or EIAs. While Decree 2820 requires an environmental license and EIA prior to certain projects that interact with water or that otherwise impact water resources (*e.g.*, mining and hydrocarbon projects, dam construction, energy projects), water concessions as such are not listed.

On the other hand, certain provisions of other laws suggest that environmental licenses (and supporting EIAs) may be required in connection with some concessions. For example, Article 2.2.9.3.1.2 of Decree of 2015 requires a 1% watershed investment fee for projects that take water from natural sources and are otherwise subject to an environmental license. Granted, this may not apply to concessions, as such, but only to associated *projects* that use water and require an environmental license (*e.g.*, mining and hydrocarbon projects, dam construction, energy projects). That a water concession is also required for the project does not mean that it is the water concession that triggers the need for an environmental license.

On balance, it appears that an environment license and EIA is not required for most classes of water concessions—although water concessions attached to other projects may require such a license and underlying EIA by virtue of the project in question.

<u>Critiques of the Concession Regime</u>

[91] *Id.* at Art. 2.2.3.2.8.3.
[92] *Id.* at Art. 2.2.3.2.9.5.
[93] *Id.* at Art. 2.2.3.2.9.7.
[94] *Id.* at Art. 2.2.3.2.7.7.

However well-developed it may be, the concession regime is hardly immune to critique. Professor Gloria Lucía Álvarez Pinzón (Universidad Externado de Colombia) has noted that the concession requirement is overbroad and suffers from a lack of differentiation.[95] By requiring a concession for the vast majority of human uses, Álvarez Pinzón observes that the law subjects small-scale and basic human uses to the same process (at least at the concession level) as large-scale industrial and commercial uses.[96] Relatedly, Álvarez Pinzón notes that the law does not contain a mechanism to legalize existing uses of water occurring informally (*i.e.*, without a concession).[97] According to Álvarez Pinzón, individuals using water informally do not engage in the concession process out of fear of sanctions.[98] Further, Professor Álvarez Pinzón notes that the law does not articulate the precise circumstances under which the environmental authority may deny a concession for reason of "public utility or social interest," creating further ambiguity.[99] Finally, although not mentioned by Álvarez Pinzón, it is unclear whether the government adequately tracks the conservation yield of the 1% fee that concessionaires must invest toward "recovery, preservation, and monitoring" of the impacted watershed.[100]

Wetland Restoration

Decree 1541 of 1978, reproduced in Decree 1076 of 2015, contains a section that fixes the basic rules governing water works (*obras hidráulicas*) (*i.e.*, infrastructure for the capture, delivery, and storage of water for any permitted use). This section contemplates the "restoration" of wetlands under certain circumstances. *See* Decree 1541 of 1978, Art. 203; Decree 1076 of 2015, Art. 2.2.3.2.19.17. These circumstances include ecological need, improvement of biological productivity, and social and economic need. Nevertheless, the precise meaning of this provision is ambiguous, particularly given the broader context of the water works section within which it appears. Further research is needed to determine whether, and when, wetland restoration is required under this provision—and upon whom that obligation falls.

D. Irrigation

Apart from concessions, irrigation in Colombia is governed to a significant degree by Law 41 of 1993. This law establishes a basic structure covering (1) development and operation of irrigation infrastructure, (2) fees and irrigation financing, and (3) community involvement in the foregoing.

Law 41 of 1993 begins with the basic premise that irrigation and the development of irrigation infrastructure is a public service—though perhaps not a "right"—to be promoted and overseen by the State.[101] The law directs IDEAM to work with local communities to identify areas for priority development of irrigation infrastructure and services.[102] The law appears to invest local communities with significant agency and influence over the identification process, as the criteria for prioritizing efforts include (a) community interest and (b) the concentration of small- and medium-scale landowners.[103]

Once a zone has been identified for further irrigation development, communities have further influence through User Associations. User Associations have authority to promote the execution of irrigation

[95] Gloria Lucía Álvarez Pinzón, *La Concesión de Aguas* (2018), https://medioambiente.uexternado.edu.co/wp-content/uploads/sites/19/2018/12/La-concesión-de-aguas-Gloria-Luc%C3%ADa-Álvarez.pdf.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *See* Law 99 of 1993, Art. 43.
[101] Law 41 of 1993, Art. 3. *See also id.* at Art. 12.
[102] *Id.* at Art. 12.
[103] *Id.*

projects within their districts; conduct oversight to ensure proper execution and use of financial resources; make recommendations regarding design and budget of irrigation projects; administer and manage irrigation services following completion of a project; propose use fees and use rights for ratification by the government; conduct maintenance operations; and impose sanctions for violations relating to use.[104] Yet, to discern whether User Associations in fact furnish local communities with significant management power—as the law seems to suggest—field research may be appropriate.

While the law treats irrigation as a public service and includes a significant role for community participation and management, the law does not oblige the State to provide irrigation services free of charge. Rather, the law envisions user fees to both pay down the costs of infrastructure development (at least in part) and to finance the ongoing delivery of water. Yet, in what could be considered a further effort at community empowerment, the law provides that upon recovery of the investment related to infrastructure development, the infrastructure becomes the property of the local User Association.[105]

In terms of environmental protections, Decree 1076 of 2015 (and Decree 1541 of 1978 before it) establishes that water concessions for irrigation must direct the concessionaire to construct and maintain drainage systems adequate to prevent erosion and soil salinization.[106] This same law also creates a framework for the establishment of easements to facilitate delivery of water from source to the land to be irrigated.[107]

Illegal Mining

Illegal mining is a major issue in Colombia. Its deleterious effects on watersheds and local communities are well documented. While the most alarming impacts come in the form of mutilated rivers and mercury poisoning, illegal mining brings a host of social problems as well, thanks in part to the increasing role of organized criminal groups.

In recognition of the profit-driven nature of illegal mining—and that illegal mining can only thrive so long as buyers are able and willing to purchase illegally sourced minerals—Article 30 of the Mining Code requires certain wholesale buyers to verify the legal provenance of minerals in Colombia. Further research is warranted to determine whether this program has been effective in practice.

E. Mining

In Colombia, mining is frequently cited as one of the most urgent environmental concerns, with its impacts on watersheds and FWR standing out as particularly troubling. In fact, one expert interviewed for this report suggested that gold mining in rivers may be the leading threat to water resources in the country.

Because the State generally owns all mineral resources in Colombia, regardless of land ownership rights,[108] any and all mining activity is regulated by the State. To gain the right to explore and exploit minerals owned by the State, an individual or firm (whether national or foreign) must obtain a mining concession.[109] The details of the mining concession regime go beyond the scope of this report. However, it is important to note that concessions only allow exploration and extraction insofar as the concessionaire complies with the terms of the contract and applicable regulations. Among other grounds, concessions may be lost due to violation of environmental rules and mining in restricted or prohibited areas.

[104] *Id.* at Art. 22.
[105] *Id.* at Art. 23.
[106] Decree 1076 of 2015, Art. 2.2.3.2.10.2.
[107] *Id.* at 2.2.3.2.14.1 - 2.2.3.2.14.13.
[108] Law 685 of 2001 [hereinafter "Mining Code"], Art. 5.
[109] *Id.* at Art. 14, Art. 45.

Significantly, Colombian law contemplates mining in and around riverbeds. In addition to artisanal panning, Article 64 of Law 685 of 2001 (the Mining Code) authorizes the State to permit large-scale mining in and near rivers under certain conditions.[110] While this is troubling from one perspective, the Mining Code does limit the total geographical size of riverine concessions to areas smaller than the maximum permitted in non-riverine areas (though the areas are still quite large). Specifically, Article 64 provides that a concession to mine directly in or from a river channel may extend up to 2 kilometers in length (along the river).[111] In the case of a concession to mine riparian areas, the concession may cover up to 5 kilometers of river and a maximum of 5,000 hectares.[112] In all other areas (*i.e.*, non-fluvial projects), the concession may cover up to 10,000 hectares.[113]

As concerns spatial restrictions, the Mining Code establishes two main categories: (1) zones eligible for a ban on mining, in which mining *may* be outlawed; and (2) restricted zones, in which mining is authorized under limiting conditions.

Note on Law 1658 of 2013 and Mercury in Mining

Mercury in fluvial gold mining has wreaked havoc on Colombia's environment and human health for many years. In 2013, Congress passed a law—Law 1658 of 2013—to phase out mercury in mining and other sectors. Among other policies, Law 1658 established a five-year timeline to entirely prohibit the use of mercury in mining throughout the country. That five-year timeline expired in 2018.

With respect to the first category, Article 34 establishes that the State may prohibit mining in national and regional protected areas (discussed in detail below).[114] Nevertheless, the Mining Code goes on to provide that the mining authority, in collaboration with the environmental authority, may authorize mining through special administrative action in all protected areas *save* national natural parks. Colombia's judiciary has held that authorities must apply the precautionary principle when considering such authorizations.[115]

With respect to the second category—restricted zones—Article 35 identifies a list of areas in which mining activities are subject to special regulation.[116] These zones, and the rules that govern mining therein, are as follows:

- Areas within city or town limits: Mining permitted in accord with municipal agreements and ordinances.[117]

- Areas occupied by rural buildings or constructions (including associated gardens): Mining permitted so long as the owner(s) or occupant(s) consents *and* the activity would not threaten health of the owner(s) or occupant(s).

[110] *Id.* at Art. 64.
[111] *Id.*
[112] *Id.* at Art. 64.
[113] *Id.* at Art. 65.
[114] *Id.* at Art. 34.
[115] Corte Constitucional de Colombia, Sala Plena, Sentencia C-339-02, https://www.corteconstitucional.gov.co/RELATORIA/2002/C-339-02.htm.
[116] Mining Code, Art. 35.
[117] *Id.*

- Areas of special historical, archeological or historic interest: Mining permitted following authorization of relevant authority in charge of site or subject-matter.[118]

- Beaches, low-tide areas, and river routes served by public transport companies: Mining permitted if public transport company has previously authorized as much.[119]

- Areas housing a public work or public service infrastructure: Mining permitted so long as (1) the managing entity has given prior authorization, (2) the laws and regulations governing the public work or public service are not incompatible with the mining activity, and (3) the mining activity would not compromise or affect the stability of the work or infrastructure.[120]

- Areas designated as mining zones corresponding to indigenous communities: Mining permitted with the qualification that the relevant indigenous community essentially has a "right of first refusal" (*i.e.*, mining by others may only occur when the community has not exercised its preferential right to obtain a mining title).[121] Additionally, the courts have held that the government must engage in prior consultation with indigenous authorities prior to granting third parties mining rights in indigenous territories.[122]

- Areas designated as mining zones corresponding to black communities: Mining permitted with the qualification that the relevant indigenous community essentially has a "right of first refusal" (*i.e.*, mining by others may only occur when the community has not exercised its preferential right to obtain a mining title).[123] It is not clear whether the courts have addressed the issue of prior consultation rights vis-à-vis mining within these communities.

- Areas designated as mining zones corresponding to "mixed" communities: Mining permitted with the qualification that the relevant indigenous community essentially has a "right of first refusal" (*i.e.*, mining by others may only occur when the community has not exercised its preferential right to obtain a mining title).[124] As with indigenous communities, the courts have held that the government must engage in prior consultation with local authorities in "mixed" communities prior to granting third parties mining rights in indigenous territories.[125]

In addition to the above spatial restrictions—and any other restrictions or safeguards contained in ancillary legislation—the Mining Code recognizes that environmental damage is a major concern. To this end, the Mining Code obligates putative concessionaires to include environmental management within their proposed plans,[126] as well as an environmental impact study.[127] Based on the impact study, concessionaires must ultimately obtain an environmental license prior to engaging in extraction.[128]

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[118] *Id.*
[119] *Id*.
[120] *Id.*
[121] *Id.*
[122] Corte Constitucional de Colombia, Sala Plena, Sentencia C- 891-02, https://www.corteconstitucional.gov.co/relatoria/2002/C-891-02.htm.
[123] Mining Code, Art. 35.
[124] *Id.*
[125] Corte Constitucional de Colombia, Sala Plena, Sentencia C- 891-02, https://www.corteconstitucional.gov.co/relatoria/2002/C-891-02.htm.
[126] Mining Code, Art. 195.
[127] *Id.* at Art. 204.
[128] *Id.* at Art. 205.

Finally, it bears noting that the Mining Code largely protects the right of rural citizens to engage in artisanal panning in rivers (known as "*el barequeo*").[129] To participate in artisanal panning, an individual must register with the local mayor's office and, if the use of private land is necessary, obtain permission from the landowner.[130] Nevertheless, artisanal panning of this sort is *not* permitted in (a) protected areas that are generally closed to mining, (b) the restricted zones described above, unless in accordance with authorizing conditions, (c) where disallowed by a Territorial Management Plan,[131] and (d) in areas containing mining machinery and installations pursuant to a concession (amplified to include a 300-meter buffer zone).[132]

F. Hydroelectricity

The hydroelectric sector in Colombia is enormous. In fact, nearly 69% of Colombia's installed electricity capacity derives from hydroelectric sources.[133] As of 2018, installed hydroelectric capacity was 12,258 MW.[134] In 2014, the figure stood at 10,920 MW, revealing the continued growth of this energy sector.[135]

Despite this growth, hydroelectric facilities in Colombia are far from controversy-free. To highlight just one incident—and to say nothing of the impacts on local species and ecosystems—the Hidroituango dam on the river Cauca grabbed international headlines in 2018 when eight downstream municipalities were ordered to evacuate following the collapse of a machine room.[136]

Legally, the hydroelectric sector in Colombia by governed by a complex set of rules covering everything from financing to licensing to ratemaking. As concerns the sector's impact on FWR rights and interests held by indigenous and other local communities, however, three issues stand out as particularly import (1) the concession regime, (2) environmental licensing, and (3) legal recourse options for aggrieved communities. This section discusses the first two issues; legal recourse is treated below in Section VI.

1. The Hydroelectric Concession Regime

As is the case for most commercial and industrial uses, using water to produce energy requires a concession.[137] The law generally allows the government to grant water concessions for a period of ten years, although this period may extend to fifty years in the case of water used to provide public services

[129] *Id.* at Art. 155.
[130] *Id.* at Art. 156.
[131] In Colombia, the Territorial Management Plan is the basic land-use planning instrument used by municipalities and districts. Each Territorial Management Plan contains a set of objectives, policies, strategies, goals, norms, programs, and projects that guide the physical development of the territory in question. *See generally* Law 388 of 1997.
[132] Mining Code, Art. 157.
[133] Global Transmission Report, Colombia: Installed Electricity Capacity and Generation (March 2019), https://www.globaltransmission.info/archive.php?id=36283.
[134] *Id.*
[135] *Id.*
[136] Joe Parkin Daniels, *Colombia: tens of thousands ordered to evacuate after floods at dam*, The Guardian, (May 16, 2018), https://www.theguardian.com/world/2018/may/16/colombia-tens-of-thousands-of-ordered-to-evacuate-after-floods-at-dam; Taran Volckhausen, *Colombia's disaster-ridden hydropower project runs second largest river dry*, Mongabay (Feb. 7, 2019), https://news.mongabay.com/2019/02/colombias-disaster-ridden-hydropower-project-runs-second-largest-river-dry/.
[137] Decree 1541 of 1978, Art. 36; Decree 1076 of 2015, Art. 2.2.3.2.7.1.

or works of public or social interest.[138] As mentioned above, when granting water concessions, the government is to take into account the following order of priorities:

(1) Use for collective human consumption, whether urban or rural,
(2) Use for individual domestic needs,
(3) Community agricultural use, including aquiculture and fishing,
(4) Individual agricultural use, including aquiculture and fishing,
(5) Hydroelectric generation,
(6) Industrial or manufacturing uses.
(7) Mining uses,
(8) Community recreation uses, and
(9) Individual recreation uses.[139]

As this list reveals, concessions for hydroelectricity stand approximately in the middle of the pack; they stand behind concessions for human consumption and agricultural use, but before all other major industrial uses—and even before recreational uses. In this way, the law appears to support the development of hydroelectricity as a national policy. Notably, this law dates from 1978; from one perspective, it arguably encodes an outdated understanding of the benefits and costs of hydroelectricity.

In the case of water concessions for hydroelectricity, the applicant must also submit a feasibility study.[140] Further, waters conceded for hydroelectricity may also be conceded for other uses.[141]

2. Environmental Licensing for Hydroelectric Projects

A concession is a necessary but insufficient condition to constructing and operating a hydroelectric facility. In addition to the concession, a hydroelectric facility requires an environmental license. Specifically, the law provides that Autonomous Regional Corporations shall either grant or deny environmental licenses for hydroelectric projects with a capacity less than 100 MW.[142] For hydroelectric facilities with a greater capacity (*i.e.*, equal to or greater than 100 MW), applicants must obtain an environmental license from the National Environmental License Authority (ANLA).[143] Moreover, regardless of purpose, an environmental license from the relevant Autonomous Regional Corporation is required for the construction of any dam or reservoir with a storage capacity up to 200,000,000 cubic meters of water. For dams or reservoirs with a storage capacity greater than 200,000,000 cubic meters, an environmental license from ANLA is necessary.[144]

To be sure, many other projects—several of which may be prejudicial to FWR—also require environmental licenses. At the national, ANLA level, such projects include but are not limited to exploration and extraction of hydrocarbons, large-scale extraction of other minerals, dredging and port construction, diversion of waters from their normal channel, transferring waters from one basin to another, highway and railway construction, large-scale irrigation works, and importation of pesticides.[145] For smaller

[138] Decree 1541 of 1978, Art. 39; Decree 1076 of 2015, Art. 2.2.3.2.7.4.
[139] Decree 1541 of 1978, Art. 41; Decree 1076 of 2015, Art. 2.2.3.2.7.6.
[140] Decree 1541 of 1978, Art. 74; Decree 1076 of 2015, Art. 2.2.3.2.10.8.
[141] Decree 1541 of 1978, Art. 76; Decree 1076 of 2015, Art 2.2.3.2.10.10.
[142] Decree 2041 of 2014, Art.9; Decree 1076 of 2015, Art. 2.2.2.3.2.3.
[143] Decree 2041 of 2014, Art.8; Decree 1076 of 2015, Art. 2.2.2.3.2.2.
[144] Decree 2041 of 2014, Art.8; Decree 1076 of 2015, Art. 2.2.2.3.2.2.
[145] *See* Decree 2041 of 2014, Art.8; Decree 1076 of 2015, Art. 2.2.2.3.2.2.

projects (which can still be quite large) within these and other categories, such projects require environmental licenses from the relevant Autonomous Regional Corporation.

Prior to obtaining an environmental license, the applicant must prepare an adequate environmental study (*estudio ambiental*). The environmental study comprises two main parts: (a) an environmental impact assessment (EIA); and (b) an alternatives analysis (*diagnóstico ambiental del alternativas*).

In broad strokes, an EIA must address the following: (1) basic information regarding the project; (2) a description of the project's area of influence; (3) the natural resources that the project will use; (4) information related to environmental impacts and risk analysis; (5) a zoning plan for environmental management of the project; (6) economic cost-benefit analysis; (7) an environmental management plan, with costs of implementation; (8) a monitoring and evaluation program; (9) a contingency plan in the event of spills, fires, and other like events; (10) a plan for dismantling and abandonment of the project, including site restoration measures; (11) a 1% conservation investment plan (if required under other law); and (12) a compensation plan for loss of biodiversity (if required under other law).[146]

For its part, the alternatives analysis must contain the following basic elements: (1) a statement of the purpose, scope, and characteristics of the project; (2) a description of the site in question and possible sites for any alternatives, including the environmental, social, and economic characteristics of each alternative site; (3) information regarding compatibility of the project with established land and soil uses; (4) a comparative analysis articulating the risks and environmental impacts of each alternative; (5) identification of locally present communities and the mechanisms utilized to inform them of the proposed project; (6) an environmental cost-benefit analysis of the alternatives, and (7) justification of the preferred alternative.[147]

As the foregoing suggests, environmental licensing includes an element of community participation. Specifically, Decree 2041 of 2014 (incorporated in Decree 1076 of 2015) provides that, prior to the granting of an environmental license, communities must be informed of the scope of the project, with an emphasis on the impacts and proposed management measures.[148] When "pertinent," community feedback should be incorporated in the associated EIA.[149] Although not entirely clear from the law's syntax, it appears that the applicant—not the government—is to conduct this community outreach. In clearer language, Decree 2041 of 2014 underscores that this community-participation requirement does *not* supplant the standard "prior consultation" regime that applies with respect to indigenous communities and traditional Afro-Colombian communities under Law 99 of 1993.[150]

G. Rights of Nature

Unlike other countries in the region (*e.g.,* Bolivia, Ecuador), Colombia does not recognize the "rights of nature" concept at the explicit, constitutional level. Nevertheless, the "rights of nature" concept is quickly gaining traction in Colombia—particularly with regard to rivers—through the courts.

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

[146] Decree 2041 of 2014, Art. 21, Decree 1076 of 2015, Art. 2.2.2.3.5.1.
[147] Decree 2041 of 2014, Art. 19, Decree 1076 of 2015, 2.2.2.3.4.3.
[148] Decree 2041 of 2014, Art. 15; Decree 1076 of 20152.2.2.3.3.3.
[149] *Id.*
[150] *Id.*

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.[151]

In 2016, Colombia's Constitutional Court issued a decision finding that the Atrato River is a holder of its own rights, introducing the "rights of nature" concept to Colombian jurisprudence in dramatic fashion.[152] The Atrato River and its tributaries have long suffered from illegal mining and other sources of contamination. This activity has not only impaired the watershed and its flora and fauna; it has also had a dramatic impact on local communities and indigenous peoples, affecting livelihoods, health condition, food sovereignty, and intangible cultural practices. Against this backdrop, the Constitutional Court canvassed the Colombian Constitution en route to finding that several principles effectively lead to "rights of nature." Among other provisions, the Court noted that the Constitution obliges the government to care for the country's natural and cultural patrimony and to protect the environment. The court also observed that the Constitution enshrines the right to live in a healthy environment and grants rights to life, culture, and territory. While many of these rights can be characterized as anthropocentric in nature, the court derived from them a biocentric right: the Atrato River's right to "protection, conservation, maintenance, and restoration."[153] The court further found that current activity was infringing the river's rights.

By way of remedy, the court ordered the government (1) to choose a body to serve, alongside a representative of the local indigenous communities, as the legal representative of the rights of the river;[154] (2) to form a "commission of guardians" that includes the government and community representatives—as well as an advisory board made up of NGO, academic, and other representatives—with the task of ensuring the "protection, recovery, and due conservation" of the river; (3) to develop an action plan to eliminate illegal mining throughout the watershed, and (4) to design and implement a plan to decontaminate the watershed, recover its ecosystems, and avoid additional damage through measures such as reestablishing the flow of the river, eliminating sediment build-ups formed through mining, and reforesting the areas affected by mining (both legal and illegal).

The Colombian judiciary has solidified the "rights of nature" concept vis-à-vis rivers and river ecosystems in several additional decisions following of the Atrato ruling. Perhaps most dramatically, the Supreme Court of Colombia in 2018 held that Colombia's portion of the Amazon River ecosystem is entitled to treatment as a rights-holder.[155] With this in mind, and in light of massive levels of deforestation in Colombia's Amazonian region, the Court ordered the President and other national, regional, and municipal authorities to adopt a plan with short-term, medium-term, and long-term components to protect the region.[156] To protect the rights and interests of local communities—whose youth initiated the

[151] For a general discussion of the concept as implemented in Ecuador, *see* Fundación Panchamama, *Recognizing Rights for Nature in the Ecuadorian Constitution* (undated), https://therightsofnature.org/wp-content/uploads/pdfs/Recogniting-Rights-for-Nature-in-the-Ecuadorian-Constitution-Fundacion-Pachamama.pdf.
[152] Corte Constitucional de Colombia, Sala Sexta de Revisión, Sentencia T-622 of 2016, https://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm.
[153] *Id.*
[154] *Id.*
[155] Corte Suprema de Justicia, Sala de Casación de civil, Sentencia STC4360 de 2018 (April 5, 2018), https://www.cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf.
[156] *Id.*

litigation—the Court further ordered these authorities to develop the plans "with the participation of the plaintiffs, affected communities, and the interested population in general[.]"[157]

Despite these judicial advances—and they are significant—questions remain regarding the extent to which these decisions have forced changes on the ground. While measuring the full impact of any given decision is a difficult and perhaps impossible task, decisions like that in the Atrato and Amazon cases provide some metrics for assessment. The court decisions in those cases ordered concrete actions: the formation of bodies and the development and execution of plans. The government's progress in carrying out these orders is subject to evaluation—an endeavor that would be well worth the effort. If such an evaluation shows non-compliance, then further judicial action may be in order.

H. Uses in Indigenous Territories; Territorial Rights; Role of Customary Law

In Colombia, FWR rights in indigenous territory largely flow from the broader indigenous rights framework articulated in ILO Convention 169 (a.k.a., the Indigenous and Tribal Peoples Convention). Colombia ratified ILO Convention 169 in 1991, incorporating its terms verbatim into domestic law through Law 21 of 1991.[158] Although ILO Convention 169 does not explicitly address water, many of its provisions effectively reach water and related resources.

1. Territory and Natural Resource Rights

ILO Convention 169 contains a core set of rights related to territory and the natural resources contained therein. These include the right of indigenous and tribal peoples (1) to own and/or possess the lands which they have traditionally occupied,[159] (2) to use lands "not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities,"[160] (3) to participate in the use, management, and conservation of natural resources within their territories,[161] (4) in the case of sub-surface resources or other resources owned by the State, to consultation and other safeguards prior to exploration and extraction, and, thereafter, to share in the benefits and receive compensation for any damages suffered,[162] and (4) to special protections to prevent outside parties from "taking advantage" of indigenous and tribal peoples so as to acquire ownership, possession, or use rights over land.[163] Although not framed as a right related to territory, the Convention also requires recognition of subsistence and traditional activities, including fishing, and directs Parties to "strengthen[] and promote[]" such activities "whenever appropriate[.]"[164]

2. Customary Law

In addition to rights related to territory and natural resources, ILO Convention 169, through its incorporation into Colombian law, creates a space for legal pluralism. Specifically, the Convention

[157] *Id.*; *see also* Nicholas Bryner, *Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem*, IUCN (April 20, 2018), https://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem.
[158] Law 21 of 1991; ILO Convention 169 (1989).
[159] Law 21 of 1991; ILO Convention 169, Art. 14.
[160] Law 21 of 1991; ILO Convention 169, Art. 14.
[161] Law 21 of 1991; ILO Convention 169, Art. 15.
[162] Law 21 of 1991; ILO Convention 169, Art. 15.
[163] Law 21 of 1991; ILO Convention 169, Art. 17.
[164] Law 21 of 1991; ILO Convention 169, Art. 23.

requires Parties to (1) apply national law to indigenous and tribal peoples with "due regard" for the role of customary law, (2) respect indigenous and tribal peoples' "right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights," and (3) to the extent possible with human rights and similar limitations, respect indigenous and tribal peoples' customary methods for dealing with offenses committed by their members.[165]

3. Legal Recourse

By ratifying and implementing ILO Convention 169 through domestic law, Colombia has committed to providing legal recourse to aggrieved indigenous and tribal peoples under certain circumstances. According to the treaty and domestic law adopting the same, the State is required to furnish a mechanism by which indigenous and tribal peoples may "take legal proceedings, either individually or through their representative bodies, for the effective protection of [their] rights."[166] Moreover, in recognition of disparities around language and legal literacy, the State must take measures (e.g., translation services) to ensure that indigenous and tribal peoples "can understand and be understood in legal proceedings[.]"[167]

I. Freshwater Fishing

Like freshwater itself, Colombia treats fish and other hydrobiological resources as pertaining to the public domain.[168] As a result, the State has the right and responsibility to manage fishing activity throughout the country.[169]

Article 8 of the General Fishing Statute, Law 13 of 1990, categories the types of fishing that may occur in continental waters (*i.e.*, freshwater rivers and lakes).[170] These include subsistence fishing, research fishing, sport fishing, and commercial fishing, the latter of which may be either industrial or artisanal in character.[171] Regardless of the category, the State has the authority and responsibility to engage in basic management functions (*e.g.*, setting quotas and minimum size limits) and monitoring and enforcement (*e.g.*, through fines and other administrative sanctions).[172]

As concerns indigenous peoples and rural communities, artisanal fishing and subsistence fishing are likely the most relevant categories. Definitionally, artisanal fishing is fishing conducted at a "small scale" using "systems, gear, and methods" consistent with a small-scale operation.[173] In keeping with its commercial character, artisanal fishing requires a permit and is subject to fees.[174]

In contrast, the General Fishing Statute establishes that "subsistence fishing is free throughout the national territory."[175] The implementing regulations clarify that this exempts subsistence fishers from the

[165] Law 21 of 1991; ILO Convention 169, Art. 8.
[166] Law 21 of 1991; ILO Convention 169, Art. 12.
[167] Law 21 of 1991; ILO Convention 169, Art. 12.
[168] Law 13 of 1990, Art. 2.
[169] *Id.*
[170] *Id.* at Art. 8.
[171] *Id.*
[172] *See id.* at Art. 13.
[173] Decree 2256 of 1991, Art. 2.4.1.
[174] *Id.* at Art. 62, 113.
[175] Law 13 of 1990, Art. 47.

need to require a permit of any kind.[176] Moreover, the law does not appear to require registration or any other administrative process prior to engaging in subsistence fishing. That said, the law defines subsistence fishing narrowly: It is fishing without a profit motive to "provide food to the fisherman and his family."[177]

To prevent industrial fisheries from marginalizing artisanal and subsistence fisheries, the government and interested communities have several tools at their disposal. First, the fisheries regulations authorize the creation of zones in which *only* subsistence fishing is permitted.[178] Second, the regulations clarify that third parties with fishing permits do *not* have the right to impede subsistence fishers from engaging in subsistence fishing.[179] Third, in the context of artisanal fishing, the law similarly contemplates the establishment of areas reserved exclusively for that sector.[180] Finally, in the case of over-exploitation of a particular species (and without prejudice to the agency's right to declare a complete moratorium), the agency may reduce quotas and/or revoke permits in a step-wise fashion. Specifically, the fisheries regulations provide that in the case of over-exploitation, the agency may take actions in the following order: (1) reduce the quota corresponding to foreign-flagged vessels and, if necessary, suspend permits (only relevant in the case of marine fisheries); and (2) reduce quotas corresponding to industrial and artisanal fishers and, if necessary, suspend permits.[181] As subsistence fisheries are not mentioned, they seem to be sheltered under this scheme.

With respect to access to water bodies to engage in fishing, Decree 1541 of 1978 (reproduced in Decree 1076 of 2015) clarifies that "transitory occupation" of beaches and riparian zones to engage in subsistence fishing does not require a permit.[182] Taken as a whole, then, it appears that subsistence fishers have a right to both engage in fishing and use riparian lands *without* the need for a permit.

J. Protected Areas, Water Reserves, Emergency Measures, and Associated Land-Use Restrictions

Colombian legislation accommodates the creation of a robust system of protected area—and, by many metrics, the government has used this framework to impressive effect over the years. This section briefly describes Colombia's National System of Protected Areas, along with ancillary tools to protect water systems and riparian lands.

1. National System of Protected Areas

Colombia's National System of Protected Areas covers a wide range of spaces, with varying rules for each. Categories include (1) National Natural Parks, (2) Protective Forest Reserves, (3) Regional Natural Parks, (4) Integrated Management Districts, (5) Soil Conservation Districts, (6) Recreation Areas, and (7) Civil Society Natural Reserves.[183]

[176] Decree 2256 of 1991, Art. 52.
[177] Law 13 of 1990, Art. 47.
[178] Decree 2256 of 1991, Art. 52.
[179] *Id.*
[180] Law 13 of 1990, Art. 51; Decree 2256 of 1991, Art. 64.
[181] Decree 2256 of 1991, Art. 59.
[182] Decree 1541 of 1978, Art. 106; Decree 1076 of 2015, at Art. 2.2.3.2.12.1.3.
[183] Decree No. 2372 of 2010, Art. 10.

Although precise management and use rules are set forth in site-specific planning documents, Decree 2372 of 2010 establishes an overarching framework for the system as a whole. This framework includes, *inter alia*, the overall objectives of the system, the process and criteria for establishing protected areas, the distinguishing characteristics of each of the seven types of protected areas, basic rules regarding permitted and prohibited uses, and community participation norms.

Category	Basic Characteristics/Subtypes
National Natural Parks	National Natural Parks comprise several subtypes. These include National Parks, Natural Reserves, Unique Natural Areas, Flora Sanctuaries, Fauna Sanctuaries, and Parkways.[184] Collectively, there are 59 National Natural Parks covering over 11% of Colombia's land territory and 1.5% of its marine territory.[185]
Protective Forest Reserves	Protected Forest Reserves are designed to promote sustainable use of forest ecosystems. Significantly, "sustainable use" in this context does *not* include logging. Instead, it implies use of flowers, fruits, fibers, leaves, seeds, and other "secondary fruits" of the forest.[186] Protected Forest Reserves can be either national or regional in scale.
Regional Natural Parks	Regional Natural Parks are sub-national parks designed to protect strategic ecosystems at the regional scale. It is not the national government, but rather Regional Autonomous Corporations that lead development and management of these parks.[187]
Integrated Management Districts	Integrated Management Districts can be either regional or national in character. Either way, designation eligibility hinges on the area's maintenance of ecosystem composition and function despite human modification, and where sustainable use and restoration are achievable.[188]
Recreation Areas	As the name suggests, Recreation Areas are focused on providing outdoor recreation opportunities. They are regional in scale, and established and managed by Regional Autonomous Corporations.[189]
Soil Conservation Areas	Soil Conservation Areas are dedicated to recovery of degraded or altered soil and the prevention of activities that threaten soils in vulnerable areas. Soil Conservation Areas are regional in scale, with designation and management corresponding to Regional Autonomous Corporations.[190]
Civil Society Natural Reserves	Civil Society Natural Reserves are protected areas that private landowners establish in coordination with government authorities, under established legal criteria. Civil Society Natural Reserves cannot be forced upon a landowner; they are voluntary in nature. Civil Society Natural Reserves may exist within public protected areas so long as they comply with the relevant public area regime.[191]

While detailed analysis of the permitted uses and other variables impacting FWR within Colombia's protected areas requires study of site-specific management plans, Decree 2372 of 2010 contains several

[184] *Id.* at Art. 11.
[185] Parques Nacionales Naturales de Colombia, Sistema de Parques Nacionales Naturales, https://www.parquesnacionales.gov.co/portal/es/sistema-de-parques-nacionales-naturales/.
[186] Decree No. 2372 of 2010, Art. 12.
[187] *Id.* at Art. 13.
[188] *Id.* at Art. 14.
[189] *Id.* at Art. 15.
[190] *Id.* at Art. 16.
[191] *Id.* at Art. 17.

provisions that have an important bearing on the matter. First, in an Article entitled "Strategic Ecosystems," Decree 2372 identifies several ecosystems that merit priority treatment, including through designation as a protected area. These "strategic ecosystems" include "paramos, sub-paramos, headwaters, and aquifer recharge zones[.]"[192]

Consultation and Community Participation Rights in Relation to Protected Areas

Article 42 of Decree No. 2372 of 2010 directs the government to "generate . . . community participation" with recognized ethnic communities when the government designates, enlarges, or withdraws spaces from protected areas—and also when the government adopts a management plan for a given protected area. In addition, prior to designating an area as a protected area, Article 42 requires the government to conduct "the process of prior consultation" with those communities that inhabit or use the area in question. The wording in Article 42 suggests that "community participation" is distinct from "prior consultation." The precise character and upshot of this distinction, however, are unclear.

Next, Decree 2372 contemplates that the government may at times wish to permit activities or uses within a protected area that are otherwise unauthorized. In such cases, the law creates a process to withdraw delimited zones from the broader protected area in question. According to the law, such withdrawals may occur when (a) warranted by "public utility" or "social interest," and (b) justified under environmental and cultural criteria. These criteria include ensuring that the withdrawal zone does not include unique biodiversity elements, that the withdrawal would not affect the ecological integrity of the broader protected area, that the withdrawal zone does not contain habitat of an endangered or threatened species, that the withdrawal zone does not contain spaces that are culturally important to certain ethnic groups, and that the withdrawal would not otherwise impair the generation of environmental benefits.[193] These criteria, together with the separate requirement to obtain any regularly-required licenses or permits for specific activities, would seem to offer significant protection against capricious or unthoughtful decisions to break up protected areas through extensive withdrawals.

Outside of the withdrawal process, permitted uses and activities respond to a zoning scheme that theoretically cuts across all categories of protected areas. The zoning categories include (1) preservation zones, (2) restoration zones, (3) sustainable use zones, and (4) general public use zones.[194]

- **Preservation zones:** Preservation zones are strictly managed to avoid anthropogenic alteration or degradation; they are "untouchable" and free of human interference. While preservation zones are designed to maintain the status quo, restoration zones are designed to improve upon it.[195]

- **Restoration zones:** In restoration zones, human activities are permitted insofar as they are designed to achieve a heightened state of conservation. Once achieved, these zones may be re-classified (*e.g.*, as preservation zones).[196]

- **Sustainable use zones:** For their part, sustainable use zones comprise two sub-zones: (1) subzones for sustainable exploitation; and (2) subzones for development. Subzones for sustainable exploitation are designed to permit exploitation of biodiversity in a way that "contributes to its preservation or restoration." Subzones for development are designed with more impactful activity in mind: agriculture, livestock, mining, forestry, industrial, and non-nuclear housing with

[192] *Id.* at Art. 29.
[193] Decree No. 2372 of 2010, Art. 30.
[194] *Id.* at Art. 34.
[195] *Id.*
[196] *Id.*

density restrictions are permitted in these areas, so long as otherwise compatible with the protected area's management plan.[197]

- **General public use zones:** Finally, general public use zones also break down into two sub-zones: (1) subzones for recreation; and (2) high density use subzones. In the former, minimal infrastructure to facilitate visitor access is permitted (*e.g.*, trails, look-out points). In the latter, more robust infrastructure is permitted (*e.g.*, welcome centers, interpretative facilities).[198]

Significantly, a zoning designation by itself does *not* mean that uses consistent with that designation are automatically permitted. The law states that users, private property owners, and habitants within the designated zone do not have the right, by virtue of the designation alone, to conduct activities. Instead, uses and activities that are consistent with the zoning designation require a separate authorization, permit, or license—as the case may be—granted by the competent environmental authority.[199]

2. Water reserves, emergency water measures, and related authority

Decree 1541 of 1978, as reproduced in Decree 1076 of 2015, contains a legal figure of potentially great importance to FWR conservation. Specifically, Article 118 provides that the competent environmental authority may decree "water reserves" for several specified purposes.[200] These purposes include, among others, (1) "to advance programs of restoration, conservation, or preservation" of waters and related ecosystems, (2) to maintain sufficient availability of water in light of national needs, and (3) to maintain habitat of aquatic flora and fauna "worthy of protection."[201] Desk research was unable to verify whether, or to what extent, the government has used this authority. On its face, these provisions would seem to furnish the basic legal framework necessary for the creation of fluvial and other water-centric protected areas.

Separately, under Article 124 of Decree 1541 of 1978, the environmental authority may take a range of actions to protect sources or reserves of water (*fuentes ó depósitos de aguas*).[202] Such actions include fixing buffer zones around sources or reserves of water in which otherwise legal activities are prohibited;[203] prohibiting, either temporarily or indefinitely, recreation, sports, and fishing throughout an entire watershed or subcomponents in the event of contamination;[204] and prohibiting all other uses if necessary to restore or recover a contaminated or degraded watershed.[205] Similarly, in cases of scarcity (whether due to drought, contamination, or any other reason), the environmental authority may restrict and ration uses, even if that means diminishing concession rights.[206]

3. Property rights over riverbeds

[197] *Id.*
[198] *Id.*
[199] Decree No. 2372 of 2010, Art. 37.
[200] Decree 1541 of 1978, Art. 118; Decree 1076 of 2015, Art. 2.2.3.2.13.12.
[201] Decree 1541 of 1978, Art. 119; Decree 1076 of 2015, Art. 2.2.3.2.13.13.
[202] Decree 1541 of 1978, Art. 124; Decree 1076 of 2015, Art. 2.2.3.2.13.18.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] Decree 1541 of 1978, Art. 122; Decree 1076 of 2015, Art. 2.2.3.2.13.16.

Decree 1541 of 1978, the general continental waters law, establishes a scheme to prevent landowners from acquiring title to riverbeds up to the high waterline. As a practical matter, this scheme appears to apply largely in rural areas. As the National Land Agency (*Agencia Nacional de Tierras* or "ANT," preceded in this task by the now-defunct Colombian Institute of Rural Development ("INCODER")[207]) works to formalize land titles, it is directed to work with environmental authorities to determine the high waterline and exclude the covered lands from the titled plot.[208] In the case of private lands that have not yet been so delimited, the law clarifies that natural events causing permanent exposure of riverbeds (*e.g.*, through changes in course or prolonged droughts) do *not* give the adjacent landowner property rights over the same.[209] Rather, such lands belong to the State and cannot be subject to private property rights.[210]

4. Implementation of the Ramsar Convention and Wetlands Protection

Colombia is blessed with an extensive system of wetlands. In fact, recent estimate suggests that approximately 27% of the country's land area consists of wetlands.[211] Yet, according to two experts interviewed for this report, Colombia's management of wetlands stands out as a weak point—primarily due to lax implementation and enforcement of protective measures.

Legally, Colombia has taken steps to preserve and sustainably manage wetlands through both international and domestic instruments. At the level of international law, Colombia is a party to the Convention on Wetlands of International Importance especially as Waterfowl Habitat, more commonly known as the "Ramsar Convention."[212] Among other obligations, the Ramsar Convention requires parties to designate one or more wetlands for inclusion in the treaty's List of Wetlands of International Importance (a.k.a. "Ramsar Sites").[213] With respect to such wetlands, each party is required to "formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory."[214] As of this report, Colombia has designated nine wetlands as Ramsar Sites, covering a total surface area of 760,000 hectares.[215] The nine Ramsar Sites are (1) *Complejo de Humedales de la Estrella Fluvial Inírida*, (2) *Complejo de Humedales del Alto Rio Cauca Asociado a la Laguna de Sonso*, (3) *Complejo de Humedales Lagos de Tarapoto, (4) Complejo de Humedales Laguna del Otún*, (5) *Complejo de Humedales Urbanos del Distrito Capital de Bogotá*, (6) *Delta del Río Baudó*, (7) *Laguna de la Cocha*, (8) *Sistema Delta Estuarino del Río Magdalena, Ciénaga Grande de Santa Marta*, and (9) *Sistema Lacustre de Chingaza*.[216] With respect to non-listed wetlands, Ramsar parties have a complementary generalized obligation under the treaty to "promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands . . . and provide adequately for their wardening."[217]

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[207] Agencia Nacional de Tierras, *Preguntas y Respuestas Frecuentes en la Agencia Nacional de Tierras*, https://www.agenciadetierras.gov.co/wp-content/uploads/2017/03/FAQs-ANT-2017.pdf
[208] Decree 1541 of 1978, Art. 11-14.
[209] Decree 1541 of 1978, Art. 14.
[210] Decree 1541 of 1978, Art. 14; Decree 1866 of 1994, Art. 2.
[211] Lisa Fernanda Ricaurte, et al., *A Classification System for Colombian Wetlands: An Essential Step Forward in Open Environmental Policy-Making*, 39 Wetlands 971 (2019).
[212] Ley 357 del 21 de enero de 1997.
[213] Ramsar Convention, Art. 2(1).
[214] Ramsar Convention, Art. 3(1).
[215] Ramsar Convention, Colombia Party Profile, https://www.ramsar.org/wetland/colombia
[216] Ramsar Sites Information Services, Annotated List of Wetlands of International Importance: Colombia, https://rsis.ramsar.org/sites/default/files/rsiswp_search/exports/Ramsar-Sites-annotated-summary-Colombia.pdf?1612291278.
[217] Ramsar Convention, Art. 4(1).

At the domestic law level, Colombia has passed a series of laws and decrees to implement the Ramsar Convention and other wetland policies.[218] In addition to designating the aforementioned Ramsar Sites, these laws and decrees articulate baseline management and conservation directives. Some of most important bedrock rules are found in Article 202 of Law 1450 of 2011. Specifically, this Article authorizes, but does not compel, the responsible government officials to "restrict partially or totally" agricultural activities, as well as exploration and exploitation of hydrocarbons and minerals, in *all* wetland ecosystems. In Ramsar Sites, Article 202 goes further, outright *prohibiting* agricultural activities and exploration and exploitation of hydrocarbons and other minerals.

Baseline Prohibitions in Páramo Ecosystems

Article 202 of Law 1450 also articulates important baseline prohibitions in the context of Páramo ecosystems. As with Ramsar Sites, Article 202 flatly prohibits agricultural activities and exploration and exploitation of hydrocarbons and other minerals. For purposes of this prohibition, Article 202 states that the "Atlas of Páramos of Colombia" (produced by the Alexander von Humbodlt Research Institute) shall be used to define the relevant spaces pending cartographic work at a finer scale. It is unclear whether such work has advanced since the 2011 enactment of Law 1540.

Site-specific management and conservation policies are set forth in individually tailored Management Plans. While we were able to identify management plans for most of Colombia's Ramsar Sites, there were a few exceptions. This could be due to the recent designation of certain sites (e.g., Colombia designated both *Complejo de Humedales Urbanos del Distrito Capital de Bogotá* and *Complejo de Humedales del Alto Rio Cauca Asociado a la Laguna de Sonso* as Ramsar Sites in 2019).[219] Moreover, it is important to note that the management plans are iterative—at least to some degree. For example, the Ministry of Environment recently announced the receipt of funding from the European Union to update the Management Plan for the *Sistema Delta Estuarino del Río Magdalena, Ciénaga Grande de Santa Marta* Ramsar Site.[220]

Overall, while Colombia's legal infrastructure related to wetlands management and conservation appears promising on the surface, further investigation is required to arrive at an informed assessment. This is particularly so with respect to the regime's implementation on the ground in light of interviewee comments suggesting deficiencies in practice.

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 in

[218] *See generally* Decree 1076 of 2015, Art. 2.2.1.4.2.1 - 2.2.1.4.6.1; *see also* Instituto de Investigación de Recursos Biológicos Alexander von Humboldt, *Marco legal humedales* (collecting other legal provisions relevant to wetlands management and conservation in Colombia), http://repository.humboldt.org.co/bitstream/handle/20.500.11761/9888/Anexo%201_Marco%20legal%20paramos%20yhumedales.pdf?sequence=2&isAllowed=y.

[219] Ramsar Convention, *Colombia designa dos nuevos humedales de importancia internacional* (Dec. 20, 2019), https://www.ramsar.org/es/nuevas/colombia-designa-dos-nuevos-humedales-de-importancia-internacional.

[220] Ministry of Environment, Minambiente avanza en la conservación y gestión sostenible de los humedales del país (Feb. 2, 2020), https://www.minambiente.gov.co/index.php/noticias/4615-minambiente-avanza-en-la-conservacion-y-gestion-sostenible-de-los-humedales-del-pais.

Colombia, opportunities for community participation, and potential recourse options when infringements occur.

A. Water Resource Management Planning

Colombia does not lack for a comprehensive water resource planning regime. In general, Colombia takes a watershed-based approach, with various instruments designed to simultaneously address different management aspects while articulating with one another to form a cohesive whole. While these instruments—described below in summary fashion and more thoroughly in Appendix B—impress on paper, serious questions remain regarding their efficacy in practice.

1. National Policy for Integrated Management of the Water Resource

While the lion's share of government planning occurs at the watershed level or lower, Colombia has developed a national policy and plan to orient this work. The Ministry of Environment, Housing and Territorial Development published the (apparently) current policy and plan in 2010. This document, entitled "National Policy for Integrated Management of the Water Resource" (*Política Nacional para la Gestión Integral del Recurso Hídrico*), articulates a national policy and plan to guide national water management efforts from 2010 to 2022.[221]

In brief, the National Policy for Integrated Management of the Water Resource enumerates a series of principles for water management at the country-wide level. These principles, many of which replicate or resonate with the Constitutional and water law principles discussed above, are as follows:

- Water is a public asset, and everyone has the responsibility to preserve it.
- The State has a fundamental duty to provide access to water for human and domestic consumption, which has priority over all other uses.
- Water is a strategic resource, and socio-economic development within Colombia is dependent on the stability of the water supply.
- Integrated management of water resources must recognize the country's social and economic diversity, as well as the needs of vulnerable populations.
- Watersheds are the basic unit for integrated management.

[221] Ministry of Environment, Housing, and Territorial Development, *National Policy for Integrated Management of Water Resources* (2010) https://www.minambiente.gov.co/index.php/gestion-integral-del-recurso-hidrico/direccion-integral-de-recurso-hidrico/politica-nacional-para-la-gestion-integral-del-recurso-hidrico.

- Freshwater is a scarce resource and should be managed efficiently to minimize waste.

Regional Environmental Planning Beyond FWR

Colombia's approach to environmental planning in general is characterized by a division between national and regional efforts.

At the regional level, the key actors are Regional Autonomous Corporations. Regional Autonomous Corporations, established under Decree 1768 of 1994, are responsible for regional environmental planning. To carry out this task, Regional Autonomous Corporations use both long-term and short-term instruments, identified in Decree 1200 of 2004.

The long-term instrument, covering a minimum of a ten-year period, is the Regional Environmental Management Plan (*Plan de Gestión Ambiental Regional*). Each Regional Environmental Management Plan must contain four basic components: (1) an environmental diagnostic analysis, which must include an evaluation of the state of renewable natural resources; (2) an environmental vision statement, designed to ensure sustainable regional development; (3) lines of strategy (i.e., concrete policy plans to address identified problems and to achieve the regional environmental vision); and (4) monitoring and evaluation instruments.

To complement the longer-term Regional Environmental Plan, Regional Autonomous Corporations also develop short-term plans (*Planes de Acción Cuatrienal*). These short-term plans cover a period of four years and contain a minimum of five components: (1) a general framework, to include a description of the principal environmental and socioeconomic characteristics of the region, problems within the region, and goals and strategies to address those problems; (2) an "environmental synthesis" of the region, i.e., an analysis that pinpoints the geographical zones characterized by major problems identified in the long-term plan, so as to prioritize such sites for intervention; (3) operative actions, i.e., concrete programs and projects that are designed to meet enumerated environmental planning goals over the four-year period; (4) a financial plan for the contemplated work, and (5) monitoring and evaluation instruments.

- Effective management requires transparency in decision-making, along with participation from users both public and private.

- An integrated management approach requires access to information and scientific research.

Informed by these principles, the National Policy for Integrated Management of the Water Resource sets forth a series of objectives grouped into six main categories: supply, demand, quality, risk, institutional strengthening, and governance. Each category is associated with specifical goals, indicators, and action strategies.[222]

2. Watershed Planning Under Decree 1640 of 2012

Decree 1640 of 2012 establishes the primary framework for watershed planning in Colombia. Key features of the Decree include (1) articulation of a series of planning instruments, each of which serves a unique feature, (2) a high degree of subsidiarity, with regional and sub-regional planning taking center stage, and (3) notable opportunities for community participation. Appendix B contains a table summarizing this information. As the table suggests, watershed planning under Decree 1640 appears to remain a work in progress.

B. Community Participation

On paper, indigenous, Afro-Colombian, and other local communities enjoy significant participation rights relating to FWR management in Colombia. Some of the more important participation rights include the following:

[222] For example, under the governance category, the National Policy for Integrated Management of the Water Resource articulates three basic strategies to strengthen water governance: participation, water culture, and conflict management. As concerns participation, the strategy is guided by the notion that that all water users, public and private, need to involve themselves in water management. With respect to water culture, the strategy is based on the idea that awareness and education programs can create a culture of sustainable use. Finally, with regard to conflict management, the document indicates that institutions managing water resources must have the authority to handle conflicts over use, accessibility, and pricing. *See generally* Ministry of Environment, Housing, and Territorial Development, *National Policy for Integrated Management of Water Resources* (2010), p. 117-18, https://www.minambiente.gov.co/index.php/gestion-integral-del-recurso-hidrico/direccion-integral-de-recurso-hidrico/politica-nacional-para-la-gestion-integral-del-recurso-hidrico.

- Public opposition to water concessions: Colombian law grants all persons the right to object to a proposed water concession. Once an objection is lodged, the environmental authority may require supplemental information from either the objecting party, the would-be concessionaire, or both. With this information in hand, the competent environmental authority is to resolve the objection and either grant or deny the concession as appropriate.[223]

- Environmental licenses/EIAs/alternatives analysis: Even if a water concession is granted, communities often have another opportunity to challenge or otherwise influence the character of a proposed activity through the environmental licensing process. Environmental licenses are required for many of the more impactful projects and activities in Colombia. Under Colombian law, locally present communities have a right to be informed about the nature and scope of the proposed project—and they have a further right to provide feedback on the same. Such feedback, when "pertinent," is to be incorporated in the EIA required for an environmental license.[224]

- Participation and consultation rights for indigenous communities under ILO Convention 169 and associated domestic law: Through ratification and domestic implementation of ILO Convention 169, Colombia has committed to furnishing indigenous and tribal peoples with several important rights related to territory and natural resources. In addition to the right to occupy and use traditional territories, indigenous and tribal peoples have the right (a) to participate in the use, management, and conservation of natural resources within their territories,[225] and (b) in the case of sub-surface resources or other resources owned by the State, to enjoy consultation and other safeguards prior to exploration and extraction.[226] Building upon these treaty obligations, Colombia has incorporated prior consultation rights for indigenous and other ethnic communities throughout its environmental and natural resource laws.[227] Nevertheless, one interviewee suggested that authorities continue to struggle with consistent and faithful implementation of this requirement in practice.

- Watershed Management Plans and Watershed Councils: Citizens have a right to participate in the development of Watershed Management Plans by presenting "recommendations and observations" through Watershed Council representatives.[228] Although it is generally the responsibility of Autonomous Regional Corporations to lead the development of Watershed Management Plans,[229] the Watershed Council serves as an important consultative body, providing information and perspectives on behalf of all persons who live and work within the watershed.[230] Significantly, the Watershed Council is to be comprised of "representatives of each of the public and/or private legal entities that carry out activities in the watershed, as well as of the peasant, indigenous and black communities, and user associations [or] unions, as the case may be."[231] Citizen input may include not only forward-looking recommendations, but also baseline information regarding existing water uses and threats. Moreover, protected ethnic communities

[223] Decree 1076 of 2015, Art. 2.2.3.2.9.7.
[224] Decree 2041 of 2014, Art.15; Decree 1076 of 2015, Art. 2.2.2.3.3.3.
[225] Law 21 of 1991; ILO Convention 169, Art. 15.
[226] *Id.*
[227] *See, e.g.,* Decree 1076 of 2015, Art. 2.2.2.3.3.3.
[228] Decree 1640 of 2012, Art. 53.
[229] *Id.* at Art. 18
[230] *Id.* at Art. 48.
[231] *Id.* at Art. 49.

have a right to prior consultation to the extent that such plans would have a "direct and specific" impact on those communities.[232] The law also requires prior consultation with protected ethnic communities in the context of Micro-watershed Environmental Management Plans.[233]

- Judicially crafted participation mechanisms: In 2016, Colombia's Constitutional Court decided that the Atrato River is entitled to certain rights, including the right to "protection, conservation, maintenance, and restoration."[234] In light of ongoing violations of those rights, the Court ordered the formation of a "commission of guardians" to oversee activities fostering the "protection, recovery, and due conservation" of the river. This "commission of guardians" includes representatives of local indigenous communities.[235] Depending upon implementation, this judicially crafted body could grow to become an important model for community participation vis-à-vis FWR in other cases.

C. Community Recourse Opportunities

Colombian law provides several mechanisms for community recourse in the event of infringement of FWR rights. These mechanisms include both administrative challenges and litigation in court. This section summarizes some of the more important recourse tools for communities vis-à-vis FWR and FWR rights. It bears emphasizing that this section does *not* represent an exhaustive catalogue of all legal recourse options.

- *Acción de tutela* for violation of fundamental rights related to FWR, including rights of nature: The Colombian judiciary has recognized the right of citizens to seek immediate relief, through an *acción de tutela*, when an action or omission violations a "fundamental" right. In the area of FWR, this may include challenges based on a violation of the human right to water, the right to access to water to engage in subsistence fishing, and, more generally, the right to a healthy environment (although suits seeking vindication of this last right normally come in the form of *acciónes populares*, in keeping with this right's character as a collective right). More recent jurisprudence shows that the "rights of nature" concept can be used to force government intervention when river ecosystems and watersheds are threatened by human activity.

- Challenges to projects or initiatives based on violation of prior consultation principles: Because indigenous and tribal peoples have a special right to prior consultation under ILO Convention 169 and associated domestic law, such communities may seek to challenge projects or other initiatives on this procedural basis. Colombian jurisprudence is replete with challenges based on a failure to respect prior consultation norms. Here, it is important to note that prior consultation is not limited to projects in the traditional sense; it is also required prior to certain legislative and administrative rule-making activities. Thus, in 2006, the Constitutional Court recognized that

[232] *Id.* at Art. 18, 30, 33. The River Guiza Watershed Management Plan has been cited as a relatively successful example of how the Water Management Plan process can at once empower local communities and advance conservation goals. *See* WWF, *La cuenca del río Guiza, un ejemplo a seguir* (April 24, 2014), https://www.wwf.org.co/?220209/La-cuenca-del-ro-Guiza-un-ejemplo-a-seguir.
[233] *Id.* at Art. 55.
[234] Corte Constitucional de Colombia, Sala Sexta de Revisión, Sentencia T-622 of 2016, https://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm.
[235] *Id.*

indigenous communities had a right to prior consultation regarding a forestry bill (*proyecto de ley*) that stood to impact those communities' territories and associated natural resources.[236]

- Challenges to environmental licenses: When required, an environmental license serves as a legal gateway to project execution. Of course, there are many substantive and procedural requirements to obtaining an environmental license. If a community perceives that ANLA has erred in grating license, it may seek to nullify that license through a contentious administrative action. If necessary, the complainant may seek resolution all the way to the Council of State, home to Colombia's highest administrative tribunal. The *Porvenir II* saga (discussed in Appendix A) provides an example of this recourse pathway.

- *Conversatorios de acción ciudadana*: Local communities may often find it difficult to capture the attention of authorities in a proactive manner; they may often feel that their only chance to participate in decision-making or provide input occurs in *response* to a government call for such participation or input. A novel mechanism, the *conversatorio de acción ciudadana* addresses this problem by allowing citizens to call meetings with public authorities, rather than the other way around. This mechanism helped to advance community input in planning decisions regarding the Rio Guiza watershed,[237] and it could be an important instrument for marginalized communities in other instances.

VIII. Conclusion

Colombia's FWR regime is sophisticated and mature. Setting aside the country's lack of an overarching "Water Law" or similar unifying statute—the absence of which arguably creates unnecessary complexity and juridical ambiguity—Colombian law reflects a series of principles and core rights that generally align well with CBMFWR and sustainable management of FWR. These principles and core rights include recognizing water for human consumption as a fundamental right; an emerging "rights of nature" concept; user pays and polluter pays principles; a strong watershed management framework; community participation in management; a clear use prioritization regime; consultation rights for indigenous and Afro-Colombian peoples; protected subsistence fishing rights; rights to legal recourse; and others.

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

Key Legal Principles	***Relevant Provisions in Colombia***
Legal system provides for local management of FWR/local participation in management of FWR	Yes, to a significant degree. *See* Law 41 of 1993, Art. 22 (covering User Associations of irrigation services); Appendix B; Decree 1640 of 2012 (providing several avenus for community participation in watershed management planning instruments); Decree 1076 of 2015, Art. 2.2.3.2.9.7 (opportunity to voice opposition to water concessions); Law 21 of 1991; ILO Convention 169, Art. 15 (guaranteeing right of indigenous and tribal

[236] Corte Constitucional de Colombia, Sala Sexta de Revisión, Sentencia T-382 of 2006, https://www.corteconstitucional.gov.co/relatoria/2006/T-382-06.htm.

[237] *See, e.g.,* WWF, *La cuenca del río Guiza, un ejemplo a seguir* (April 24, 2014), https://www.wwf.org.co/?220209/La-cuenca-del-ro-Guiza-un-ejemplo-a-seguir.

	peoples to participate in the use, management, and conservation of natural resources within their territories). Further investigation is needed to determine the depth of local management and participation in practice.
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; this concept has been crystalized in Colombian jurisprudence. *See* Corte Constitucional de Colombia, Sala Plena, Sentencia T-888 de 2008.
Legal system contains transparency and access-to-information mechanisms regarding FWR use and government actions that could impact FWR	Colombia maintains a general law regarding access to information, Law 1712 of 2014 (*Ley de Transparencia y del Derecho de Acceso a la Información Pública Nacional*). Further research is necessary to discern this law's scope and efficacy as concerns information relevant to FWR.
Legal system includes a specialized regime regarding indigenous peoples' rights to FWR	Yes. *See* Political Constitution of the Republic of Colombia, Art. 330 (providing that, in the context of decisions regarding exploitation of natural resources within indigenous territories, the government has an obligation to ensure the participation of representatives of the relevant indigenous communities); Law 21 of 1991; ILO Convention 169, Art. 15 (guaranteeing right of indigenous and tribal peoples to participate in the use, management, and conservation of natural resources within their territories).
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. Colombia maintains a prior consultation regime, but court cases suggest that this regime is (a) not always respected in practice, and (b) may not always be clear in terms of precise requirements. *See generally* Law 21 of 1991 (legislation implementing ILO treaty no. 169 and establishing consultation rights for indigenous peoples); *see also* Article 42 of Decree No. 2372 of 2010 (before designation of a protected area, prior consultation required with those communities that inhabit or use the area in question).
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, Colombia's ratification and implementation of ILO Convention 169 means that the State has committed to respecting territorial rights of indigenous and tribal peoples. *See* International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, June 27, 1989, entry into force Sept. 5, 1991; Law 21 of 1991. *See also* Political Constitution of the Republic of Colombia, Art. 286.
Legal system contains a clear FWR use prioritization regime, with basic human and ecosystem needs taking precedence over other uses	For the most part. Colombia's law on water concessions contains a clear prioritization scheme. *See* Decree 1076 of 2015, Art. 2.2.3.2.7.6. However, ecosystem needs are not explicitly included in this scheme.
Legal system includes incentives for FWR conservation	Yes. Through Decree Law 870 of 2017 and Decree 1007 of 2018, Colombia has established a framework under

	which landowners and/or occupants can receive payments for taking actions to preserve and/or restore ecosystem services. Further research is necessary to discern the extent to which actions under this framework promote FWR conservation in practice.
Legal system includes deterrent penalties for violations related to FWR	Yes, but it is far from clear that these penalties are achieving widespread deterrence in practice. *See, e.g.,* Law 99 of 1993, Art. 42.
Legal system provides special protections for riparian areas, while providing for equitable and sustainable access for community members	Yes, although the efficacy of these provisions (both as written and as applied) requires further investigation. *See, e.g.,* Decree 1076 of 2015, Art. 2.2.3.2.12.1.3 (access to riparian areas for subsistence fishing); *Id.* at Art. 2.2.3.2.13.18 (authorizing environmental authority to fix buffer zones around sources or reserves of water); Decree 1541 of 1978, Art. 11-14 (preventing private ownership of riverbeds up to high-water line).
Legal system incorporates user-pays and polluter-pays principles	Yes. *See* Law 99 of 1993, Art. 1(7), 42-43. In practice, however, it is likely that the costs of use and pollution are frequently externalized (particularly in rural areas and other areas where the State's presence is tenuous).
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	Unclear.
Legal system recognizes customary practices as a valid source of law in certain circumstances	Yes. *See* Political Constitution of the Republic of Colombia, Article 246.
Legal system is clear vis-à-vis FWR management structure and decision-making authorities (*i.e.,* authorities and roles are well defined)	Yes, in the main. *See* Appendix B; Decree 1640 of 2012.
Legal system contemplates science-based decision-making/a strong role for science in decision-making	Yes. *See* Law 99 of 1993, Art. 1(6).
Legal system incorporates a version of the precautionary principle	Yes. *See* Law 99 of 1993, Art. 1(6).

Appendix A

Case Study: Forced Displacement, Victims' Rights, and Environmental Licensing in Connection with the *Porvenir II* Hydroelectric Project on the Samaná Norte River

On May 16, 2019, Colombia's Council of State issued a decision provisionally suspending the environmental license for the *Porvenir II* project, a proposed hydroelectric dam along the Samaná Norte River in northwestern Colombia.[238] Although the decision does not, on its face, preclude the project under a revised environmental license, the practical consequence may be just that. Since the decision, the firm leading the project, Celsia, has stated that it is attempting to sell the project and turn its efforts to other "renewable energies" in lieu of hydroelectricity.[239]

Why did the Council of State, Colombia's highest administrative court, find fault with the environmental license? The answer lies not so much with the nature of the project, as such, but with the social context in which it was to take place. The project site, located along the Samaná Norte River in eastern Antioquia department, was the scene of atrocities and massive human displacement during Colombia's internal conflict in the 1990s and early 2000s. In the municipality of San Carlos, one of the four municipalities slated for the project, thirty-three massacres took place between 1998 and 2005.[240] The death toll was considerable: San Carlos saw 126 assassinations, 156 forced disappearances, and 78 deaths from anti-personnel mines.[241] But the social fallout of the violence was equally tragic: As a result of the conflict, approximately 18,000 residents were forced to flee the San Carlos area.[242]

What does any of this have to do with the environmental license for a dam project? According to the Council of State, the *Porvenir II* project would threaten to compound the harm of the violence and ensuing forced displacement. Under Colombia's post-conflict framework, former residents of San Carlos are presumptively entitled to return to their lands. Specifically, Law 1448 of 2011 establishes that victims of the conflict have several rights, including the right to return to their original lands and to restitution of those lands.[243] The driving principle is that the State should, to the extent possible, restore persons suffering forced displacement and other harms to the *status quo ante.* Although the law recognizes that restitution of original lands may not always be possible (in which case alternative remedies are contemplated), the law provides that restitution of deprived lands is the preferred remedy.[244] But, by inundating approximately 1,000 hectares of land in San Carlos, the *Porvenir II* project would effectively preclude this right to restitution. Worse, for those victims who had already returned to their lands under a collective reparation process initiated in San Carlos in 2012, they would be forced to relocate for a second time.[245] As if that were not enough, studies suggest mass graves may be located within the

[238] Consejo de Estado, Sala de lo Contencioso Administrativo, Seccion Primera, Expediente 11001 03 24 000 2016 00149 00 (May 16, 2019), available at https://kavilando.org/images/stories/documentos/AUTO-QUE-SUSPENDE-LICENCIA-AMBIENTAL-DEL-PROVENIR-II-MAYO-2019.pdf.

[239] *Celsia no hará Porvenir II y pondrá en venta el Proyecto*, El Colombia (May 20, 2019), https://www.elcolombiano.com/negocios/celsia-no-construira-porvenir-ii-IF10401458.

[240] Ángela Sánchez, *El Consejo de Estado: entre las hidroeléctricas y los derechos de las víctimas*, https://una.uniandes.edu.co/index.php/blog/175-el-consejo-de-estado-hidroelectricas-y-derechos-de-las-victimas.

[241] *Id.*

[242] *Id.*

[243] *See* Law 1448 of 2011, Art. 72, 97.

[244] *Id.* at Art. 73.

[245] Consejo de Estado, Sala de lo Contencioso Administrativo, Seccion Primera, Expediente 11001 03 24 000 2016 00149 00 (May 16, 2019), at 3.3.6.

proposed reservoir area. The dam project would render impossible any attempts to confirm (and possibly excavate) those graves.

While Celsia predictably offered several arguments in defense of the project, so too did the National Authority of Environmental Licenses (ANLA), the State agency that had granted the environmental license for *Porvenir II*. One of ANLA's main arguments centered on the notion that the satisfaction of restitution rights under Law 1448 of 2011 goes beyond the agency's remit when deciding whether to grant or deny an environmental license. According to ANLA, while the victims may have certain rights, the responsibility to guarantee those rights does not fall on ANLA but on other institutions or the State as a whole.[246] Relatedly, ANLA argued that the environmental license and project did not simply ignore victims' rights but contemplated an equitable relocation that would respect those rights while allowing for the development of a "project of national interest[.]"[247]

The Council of State rejected these arguments, coming down especially hard on ANLA's contention that it was not responsible for guaranteeing restitution rights in connection with environmental licensing. While the Council of State did not declare ANLA responsible for overseeing restitution rights, as such, the Council of State held that ANLA had a responsibility to work with other State entities and to ensure that its actions (here, granting an environmental license) did not undermine the restitution process. In essence, the Council of State characterized ANLA's position as one of attempting to hide within an administrative silo—of attempting to ignore, or at least minimize, its responsibility vis-à-vis the impaired rights of victims of armed conflict on the grounds that the protection of such rights corresponds to other agencies or the State at large, not ANLA.

To support its decision provisionally suspending the environmental license for *Porvenir II*, the Council of State pointed to Constitutional Court jurisprudence establishing victims' right to land restitution as "fundamental." Specifically, in 2012, the Constitutional Court wrote that "the right to restitution, as an essential component of the right to reparation [for victims of the armed conflict], and its connection to the balance of victims' rights to justice, truth, and to guarantees of non-repetition . . . . are fundamental rights [*sic*]."[248] Further, the Council of State observed that ANLA's decision to grant the license was arguably in tension with the advice of a co-equal agency, the Unit for Victims' Attention and Integral Reparation (*Unidad para la Atención y Reparación Integral a las Víctimas* or "UARIV"). The UARIV had earlier noted its concern in light of its reparation and return plan for San Carlos, a plan under which several individuals had already migrated back to the area. Although UARIV acknowledged that it did not have authority to issue or deny an environmental license—a function pertaining to ANLA—UARIV *did* have the responsibility to safeguard victims' rights. Accordingly, UARIV stated that the any environmental license needed to be consistent with those rights.[249]

As the Council of State saw it, ANLA failed to sufficiently consider victims' rights to restitution when granting the environmental license. Although the Council of State did not suggest that ANLA is ultimately responsible for ensuring restitution, the Council nevertheless held that ANLA has an obligation to cooperate with other State entities pursuing restitution and to otherwise harmonize its efforts to ensure the protection of these fundamental rights. Because ANLA failed to engage in this collaborative process to an adequate degree—and did so against the backdrop of a project threatening to violate fundamental

[246] *Id.* at 2.2.
[247] *Id.*
[248] *Id.* at 3.3.5 (quoting Corte Constitucional, Sentencia C-715 of 2012) (internal quotation marks omitted).
[249] *Id.* at 3.3.3.1.

human rights—the Council of State concluded that it was necessary to provisionally suspend the environmental license.

While the provisional nature of this relief theoretically suggests that ANLA could cure its errors, the Council's language implies that the problem may be beyond repair. The following passage from the Council's decision strongly suggests that ANLA should never issue an environmental license for a project that could impair land pending restitution: "[I]f a restitution process is underway with respect to properties in which an environmental license is requested, the way for the State to guarantee the right to comprehensive reparation for the victims is by making the granting of such a concession conditional upon the termination of the restitution process, since only then will there be certainty regarding the real impact of the project and the inhabitants of the area of influence, who at that point will have been determined."[250]

To be sure, the Council of State's decision covered other aspects of the administrative process leading up to the environmental license—and the saga of the *Porvenir II* project as a whole could fill a book. However, even this short analysis points the way to a few important conclusions relevant to FWR rights in Colombia.

First, and at the most obvious level, the *Porvenir II* decision augers well for those seeking to prevent new dams in Colombia. Celsia's reaction, in particular, suggests that this was a blow to the hydroelectric industry.

Second, when granting environmental licenses, ANLA must pay greater attention to potential adverse impacts to lands that may be subject to restitution to internally displaced citizens. Given the scale of internal displacement in Colombia and the long timelines involved in restitution, this variable has the potential to affect a great many licensing decisions.

Third, the *Porvenir II* decision shows the power of local communities to use non-environmental legal regimes to scuttle environmentally unsound projects. While the *Porvenir II* project was certainly problematic from a victims' rights' perspective, it also threatened to disrupt a unique riverine ecosystem full of flora and fauna (especially fish) upon which local communities depend. The decision by the Council of State demonstrates the utility of using non-environmental legal frameworks to challenge environmentally harmful initiatives.

Finally, by clarifying that disperse government agencies have a legal obligation to work together to protect fundamental rights, the Council of State has solidified a doctrine that may be useful in other situations involving FWR. If agencies cannot use the excuse of a limited mandate to ignore the broader implications of their decisions, this reduces the possibility of community rights getting lost in the space between bureaucratic silos.

[250] *Id.* at 3.3.6.

Appendix B

Watershed Planning Instruments in Colombia

Note: The following table is not comprehensive; it simply provides a snapshot of some of the more important planning instruments and salient features of the same. The bulk of this information derives from Decree 1640 of 2012.

Instrument Name	Geographic Scope	Contents & Characteristics	Lead Authorities & Community Participation	Other Observations
Macro-watershed Strategic Plans	Macro-watersheds, identified as *Caribe*, *Magdalena-Cauca*, *Orinoco*, *Amazonas*, and *Pacifico*	Long-term environmental planning instrument focused one of five macro-watersheds/regions. Establishes a framework for the formulation of the other instruments described below (*e.g.,* Watershed Management Plans) as well as the formulation of regional policies and criteria to improve quantity, quality, and governance.	Ministry of Environment and Sustainable Development, with participation of Regional Macro-watershed Environmental Councils.	According to information on the Ministry website, it appears that draft Marco-Strategic Watershed Plans have been developed for all of the identified macro-watersheds. However, it is unclear whether these plans have been finalized.[251]
Watershed Management Plans	Watersheds (as the term is commonly understood)	Watershed Management Plans set forth a coordinated plan for uses of water, soil, flora, and fauna within a given watershed. Regional Autonomous Corporations are to prioritize development of plans according to supply, demand, water quality, risk, and governance factors in each watershed. According to Article 23 of Decree 1640 of 2012, Watershed Management Plans are legally binding on, and hierarchically superior to, Territorial	Regional Autonomous Corporations, with participation of Watershed Councils. Note: Decree 1640 of 2012 clarifies that citizens have a right to participate in the development of Watershed Management Plans by presenting "recommendations and observations" through Watershed	According to information on the Ministry website, it appears that most (and perhaps all) of the Watershed Management Plans remain a work in progress.[252]

[251] Ministry of Environment and Sustainable Development, Advances in Implementation of Strategic Macro-Watershed Plans, https://www.minambiente.gov.co/index.php/gestion-integral-del-recurso-hidrico/planificacion-de-cuencas-hidrograficas/macrocuencas/avances-en-la-formulacion-de-los-planes-estrategicos/

[252] Ministry of Environment and Sustainable Development, Watershed Management Plans, https://www.minambiente.gov.co/index.php/gestion-integral-del-recurso-hidrico/planificacion-de-cuencas-hidrograficas/cuenca-hidrografica/planes-de-ordenacion ("Actualmente en desarrollo del Proyecto POMCAS Fondo Adaptación y Ministerio de Ambientes y Desarrollo Sostenible, la Dirección de Gestión Integral de Recurso Hídrico, a través del grupo de trabajo de Planificación de cuencas, realiza el acompañamiento para la revisión y ajuste de 60 Planes de Ordenación y Manejo de Cuencas Hidrográficas (POMCAS), las cuales se encuentran en desarrollo de la fase de aprestamiento. En el proyecto participan 30 autoridades ambientales en 25 Departamentos (14 Municipios). El área a intervenir es de aproximadamente 15.471.645 hectáreas, que corresponde al 15% del territorio nacional continental) en proceso de ordenación y manejo de cuencas (POMCA). Se beneficiarán aproximadamente 13 millones de personas.").

		Management Plans with respect to, *inter alia*, environmental zoning and risk management.	Council representatives. Prior consultation with local indigenous communities is also required when Plan may impact territorial and natural resource rights.	
Micro-watershed Environmental Management Plans	Micro-watershed, i.e., a water basin that flows into a larger river, which may in turn feed into a larger body of water.[253]	Micro-watershed Environmental Management Plans are designed to facilitate sustainability and conservation in select watersheds. The competent environmental authority is to develop a Micro-watershed Environmental Management Plan when one or more of the following circumstances prevails: -Physical, chemical, or ecological imbalances caused by use of renewable natural resources -Degradation of water, soil, and/or other renewable natural resources threatening sustainable development for the community living within the micro-watershed -Environmental threats, vulnerabilities, and risks that could affect ecosystem services and the quality of human life -When the micro-watershed is a water source for an aqueduct, and it is foreseeable that the source may be impacted by human or natural phenomena	The "competent environmental authority" may vary depending upon site in question. Note: In the case of Micro-watershed Environmental Management Plans, Decree 1640 of 2012 requires prior consultation with local indigenous communities.	It is unclear how many Micro-watershed Environmental Watershed Management Plans have been developed.

[253] Ministry of Environment and Sustainable Development, Micro-Watersheds, https://www.minambiente.gov.co/index.php/gestion-integral-del-recurso-hidrico/planificacion-de-cuencas-hidrograficas/microcuenca.

Aquifer Environmental Management Plans	Aquifer, i.e., a "unit of rock or sediment capable of storing and transmitting water, understood as the system involving zones of recharge, transition, and outflow[.]"	Aquifer Environmental Management Plans serve to plan and administer underground water, through the execution of projects and activities focused on conservation, protection, and sustainable use. The competent environmental authority is to develop an Aquifer Environmental Management Plan for aquifers that are *not* part of a broader Watershed Management Plan when one of the following conditions prevails: -Excessive exploitation or contamination of the aquifer -When the aquifer is the only or principal source of water for human consumption -When, due to hydrogeological features, the aquifer is strategic for the socio-economic development of a region -The existence of conflicts over use of the aquifer -When the aquifer must be used as an alternative source of water due to scarcity of surface water	The "competent environmental authority" may vary depending upon site in question.	Review of government websites suggests that these plans are in development in certain regions.[254]

[254] See, e.g., CVC, Evaluation of Subterranean Waters in Extreme Climate Conditions in the Cauca Valley, https://www.cvc.gov.co/plan-de-manejo-ambiental-del-acuifero-del-valle.