

CORTE CONSTITUCIONAL DEL ECUADOR

Referencia caso: 502-19-JP, acción de protección

Amicus Curiae

INSTITUCIONES QUE FIRMAN EL DOCUMENTO



Earth Law Center
249 East 118th Street, Suite 3B
New York, NY 10035 (USA)
info@earthlaw.org



Great Lakes Environmental Law Center
Green Garage, 4444 2nd Ave
Detroit, MI 48201 (USA)
nhall@wayne.edu



International Rivers
2054 University Ave #300
Berkeley, CA 94704 (USA)
monti@internationalrivers.org



CEDENMA
Lugo #N24-389 y Coruña
Quito, Ecuador
info@cedenma.org

PROFESORES DE DERECHO QUE FIRMAN EL DOCUMENTO

Oliver A. Houck
Tulane Law School
ohouck@tulane.edu

Zygmunt Plater
Boston College School of Law
plater@bc.edu

Patrícia Galvão Ferreira
Windsor Law
patricia.galvao@uwindsor.ca

Viviana Morales Naranjo
Universidad de las Américas
vivianamoralesnaranjo@outlook.fr

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I. INTRODUCTION AND STANDING

1. Earth Law Center, Great Lakes Environmental Law Center, International Rivers and CEDENMA (together, “the Environmental Organizations”) environmental nongovernmental organizations that promote the rights of nature and the recognition of its inherent rights, base their intervention as *amici curiae* before the Constitutional Court of Ecuador in Principle 10 of the Rio Declaration on the Environment and Development of 1992 that guarantees effective access to judicial and administrative procedures to citizens. Likewise, in the Constitution of the Republic of Ecuador, articles 397 numeral 1 (consecration of the principle of access to justice), 71 (enforceability of the rights of nature), 426 (principle of constitutional supremacy), as well as in articles 8.3 (effective protection of the right to live in a healthy environment), 8.4 (citizen participation) and 6 (access to information, participation and justice in environmental matters) of the Organic Environmental Code.

2. This Amicus Curiae is intended to contribute to the claims in the Protective Action, presented by Harold Burbano, in his capacity as Legal Director of the Office of the Ombudsman and Others, before the Constitutional Court of Ecuador. The Environmental Organizations seek the effective realization of the rights of nature regarding the Dulcepamba River and its watershed, according to the precepts established in the Constitution of Ecuador in articles 71, 72, 73 and 74.

3. The Environmental Organizations have known the antecedents and the problems presented since 2003, when the State Water Agency in Guaranda granted a water use authorization of the Dulcepamba River to Hidrotambo SA for a hydroelectric project designed for auto-generation and sale of surplus. Since 2003, the construction of the San José del Tambo hydroelectric plant has been responsible for a series of co-violations of the rights of nature, fundamental rights and economic, social and cultural rights, as well as deception, harassment and threats against members of the community of San Pablo de Amalí.

4. From its origins the project has suffered from irregularities that, without being exhaustive, include the breach of the concession contract of energy provision, breach of the conditions of the water right authorization, non-compliance with construction deadlines, excessive delay in the environmental impact study, non-compliance with environmental audits, and failure to comply with citizen participation mechanisms, among others.¹

5. The construction of this hydroelectric project involved the diversion of the Dulcepamba River over a stretch of four kilometers, thus bringing the river approximately 200 meters closer to the community of San Pablo de Amalí. What constitutes a clear affectation to the river, to its health and ecosystem, creating an enormous risk for the populations, due to the constant and imminent threat of floods. In fact, in March 2015, while the dam was still under construction, the river's flow increased, and its sediment load was unable to be expelled through the narrowed channel of the dam. This resulted in a devastating flood that

¹ Aunque la compañía presentó un acta de reunión ciudadana esta no se realizó con anterioridad al licenciamiento sino en una etapa posterior. Además, no se contaba con los requisitos establecidos para ser válida de acuerdo a la legislación vigente en ese momento, debido a que no asistieron los delegados del Consejo Nacional de Electricidad (CONELEC), tampoco los representantes del Ministerio de Ambiente y no contó con la presencia de representantes de las comunidades afectadas. En su lugar asistieron residentes de comunidades alejadas al área de influencia del proyecto, sin embargo, la concesión no fue revocada. Por lo que el Estado omitió su obligación de consulta a las poblaciones afectadas.

destroyed 12 houses, the agricultural land and livelihoods of 33 families, and, most tragically, caused the deaths of 2 adults and a child in the community of San Pablo de Amalí.²

6. The community of San Pablo de Amalí has previously brought suit in administrative court alleging that the reduction of the flow does not meet their needs for human consumption and is not enough to carry out the agricultural activities that sustain their economic subsistence. Likewise, the river would not have sufficient flow to guarantee its own life. In addition, the communities that are in the upper part of the basin, above the dam, have been left without access to water, because the company now controls the river and the territory. The antecedents and facts are amply explained in the lawsuit filed by the plaintiffs before the Constitutional Court.

7. The Environmental Organizations consider it necessary to declare to this most excellent Court that this case is emblematic not only for Ecuador, but also for the international community, which is progressively adhering to this innovative, rights-based way of protecting the environment. Ecuador, in this way, is being observed as an example and pioneer in the matter. Ecuador can take the next step, through this ruling, and demonstrate to the world that policies, decisions, projects and administrative acts must be carried out within the framework of respect for the rights of nature, international environmental law, and international human rights law.

8. The Environmental Organizations present to the Constitutional Court of Ecuador this *amicus curiae* with the objective of requesting that it: A) Protects and guarantees the validity of the rights of the Dulcepamba River, including its right to exist, regenerate, structure, functions and evolutionary processes; B) Recognizes the following specific rights of the Dulcepamba River: (a) The right to flow, (b) The right to exercise its essential functions within the ecosystem, (c) The right to be free from contamination, (d) The right to feed and be fed by its tributaries, (e) The right to native biodiversity, (f) The right to restoration and (e) right to representation; C) Names guardians and representatives of the Dulcepamba River; D) Protects and guarantees the right to restoration of the Dulcepamba River and; E) Orders the implementation of effective mechanisms for the State to fulfill its duty to guarantee the rights of nature.

II. THE RIGHTS OF NATURE: THE FUNDAMENTAL RIGHTS OF THE DULCEPAMBA RIVER

9. In 2008, a reform to the Political Constitution of the Republic of Ecuador introduced the rights of nature in articles 71, 72, 73 and 74, recognizing that nature has the right to exist, to its maintenance, to the regeneration of its vital cycles, structure, functions, evolutionary processes and their restoration. Recognizing nature as a subject of rights evidences an evolution in law, which seeks to position nature in the same rights regime as human beings. This implies that no one can appropriate, abuse, interfere with or disrespect the rights of those who hold them, so that today in Ecuador nature has an equal privileged status as all Ecuadorian citizens and human beings. Giving nature rights is the most effective strategy to fight against the climate crisis and break the current development model that prioritizes monetary gains over good living (*buen vivir*). Nature provides human beings with food, water, materials to produce necessary

² Martha Pskowski, Los Opositores a la presa Hidrotambo Acusan al Gobierno Ecuatoriano de Criminalización, 10 enero 2017. Disponible online <https://es.mongabay.com/2017/01/ecuador-opositores-gobierno-hidrotambo/>

goods, and stabilizes the climate of our planet, therefore giving rights to nature guarantees the very life of terrestrial ecosystems in which human beings live.

10. The Constitution of the Republic of Ecuador also recognizes water as a fundamental and inalienable human right in Article 12. Additionally, Article 318 of the Ecuadorian Constitution recognizes water as a vital element of nature and vital for the existence of humans. Being a vital element, water, rivers, and river basins need the recognition of specific rights. As Thomas Berry points out in the Charter of Rights of Planet Earth, "all rights are specific and circumscribed to each species. Rivers have fluvial rights. Birds have bird rights. Insects have insect rights. Humans have human rights. The difference of rights is qualitative, not quantitative. The rights of an insect would not be useful for a tree or fish."³ In this sense, the rights of nature generically established in the Ecuadorian Constitution must be interpreted and put into practice in the direction of the recognition of fundamental rights of the Dulcepamba River.

11. The Constitutional mandate that recognizes the rights of nature is in harmony with Advisory Opinion Oc-23/17 of November 15, 2017, of the Inter-American Court of Human Rights. The Inter-American Court supports the recognition of the Law of the Land, declaring for the first time that the right to a healthy environment constitutes an autonomous right. Paragraph 62 of the advisory opinion supports the Ecuadorian Constitution, stating that "the Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently rights to nature."⁴

12. Although the recognition of the rights of nature in the Constitution of Ecuador represents a great step forward, it is necessary to go further towards the implementation of these rights and the establishment of specific rights of rivers, as essential elements of nature. Through this ruling of the Constitutional Court of Ecuador, there is an opportunity to effectively implement and guarantee the rights of nature.

13. Based on international declarations and comparative legislative and jurisprudential experience, the Earth Law Center has drafted the Universal Declaration of the Rights of Rivers ("the Declaration"), where the fundamental rights of the rivers are codified [ANNEX 1] listing among them (1) the right to flow; (2) the right to exercise their essential functions with the ecosystem; (3) the right to be free from all contamination; (4) the right to feed and be fed by its tributaries; (5) the right to native biodiversity; (6) the right to restoration and 7) the right to representation.

Thus, as specific rights of rivers we want to highlight the following:

³ Mike Bell, Thomas Berry and an Earth Jurisprudence: An Exploratory Essay, *The Trumpeter* Volume 19, Number 1 (2003), available at <https://www.rainforestinfo.org.au/deep-eco/earth%20jurisprudence/Earth%20Justice.htm>

⁴ Corte Interamericana de derechos Humanos, *Opinión Consultiva solicitada por la República de Colombia*, OC-23/17, 15 de noviembre de 2017, párr. 62.

A. THE RIGHT TO FLOW AND ECOLOGICAL FLOW

14. Among the most powerful threats to the rivers of the world are the creation of dams, the diversion of flows, the drying of groundwater, and the excessive extraction of water for human use. All of these activities directly affect the flow or volume of rivers. The flow is the essential attribute of the river and the ecosystems that feed in general from it, thus "naturally high and low water levels create habitat conditions essential for reproduction and growth and promote the necessary ecological processes for the health of ecosystems." In this respect, it should be noted that the Dulcepamba River is especially vulnerable with regard to its fundamental right to flow, due to the fact that the flow of the river has been modified and dramatically reduced by the hydroelectric project developed by the company Hidrotambo SA, to the extent of putting at risk the very existence of the river and with it the source of water for consumption and agricultural use, as well as the recreational use of the surrounding communities.

15. The importance of recognizing the right to flow is that in cases where alteration of the flow cannot be avoided, the State must ensure a minimum flow and adequate management of it, sufficient to maintain the health of the entire fluvial ecosystem. In addition, it is important to remember that rivers, not humans, are the owners of the water that flows within them, and as such it is necessary to prioritize the life of rivers and ecosystems over short-term economic criteria in planning decisions.

16. In Ecuador, water, as a resource, is also recognized as a human right and is considered a vital part of nature, which must be protected by the State as mandated by Article 411 of the Constitution. "The State shall guarantee the conservation, recovery and integral management of water resources, watersheds and ecological flows associated with the water cycle. Any activity that may affect the quality and quantity of water, and the equilibrium of ecosystems shall be regulated, especially in water replenishment sources and zones. The sustainability of ecosystems and human consumption shall be priorities in water use and development."

17. The Constitution even establishes priorities for the use of water in Article 318, considering the ecological flow as the third priority, following only human consumption and food sovereignty. Productive use is the last priority listed. In the case of the Dulcepamba River, the constitutional mandate has been ignored, giving preference to a hydroelectric company and placing human rights and maintenance rights of an ecosystem at risk. More generally, dams, as in the case of the Dulcepamba River, and other projects that physically modify the rivers are particularly worrisome under a paradigm of the Rights of Nature; they ought to be avoided unless the dams are objectively necessary to achieve a vital social or ecological purpose, with no reasonable alternatives. Even then, they must be constructed and maintained in the least harmful way possible to the surrounding environment. The Universal Declaration of the Rights of Rivers, assertively affirms that governments should evaluate the dismantling of all dams that lack an imperative social and ecological purpose, and that new dams should only be built under exceptional circumstances. Noting further, that the construction of a dam can only take place if it can ensure the prior, completely free and informed consent of the indigenous and other affected communities, including marginalized communities, and use the best available technologies to preserve health of ecosystems.

18. Likewise, Ecuador has developed a series of infra-constitutional legislation aimed at the protection of water resources. The Organic Law of Water Resources and Water Use (LORH), in Article 64 (b) and (c) establishes as a right of nature, and in turn water (as part of nature), the right to maintain the ecological flow as a guarantee of preservation of ecosystems and biodiversity and the preservation of the natural dynamics of the integral water cycle or hydrological cycle.

19. The LORH defines the ecological flow in Article 86 as "[...] the quantity of water, expressed in terms of magnitude, duration, time and frequency of specific flow and quality of water expressed in terms of the range, frequency and duration of the concentration of parameters that are required to maintain an adequate level of health in the ecosystem."

20. In the case at hand, the SENAGUA reports (Engineer Halbert Oswaldo Vera Coello, dated October 19, 2018) reveal defects in protecting the environmental flow and in the very hydrological design of the project. Regarding the ecological flow the report specifies, "the works originally designed to replace or supply the ecological flow does not operate, - due to the silting of the entrance to the canal, produced by rainy events recorded in previous years, - before the operation of the project."⁵

B. THE RIGHT TO REPRESENTATION: GUARDIANS OF THE RIVER

21. Regarding the right of representation of rivers, the International Declaration of the Rights of Rivers and comparative experience indicate that for the realization of the rights of nature in general, and of rivers in particular, it is indispensable that the Constitutional Court of Ecuador recognize that the Dulcepamba River has the right to be represented. The right to representation may be realized through the appointment of legal guardians on behalf of the Dulcepamba River. The guardians must be independent, qualified and appropriate, and act only in the name of the rights and interests of nature. A legal guardian, as well as any person, community, corporation or other legal entity, would have the right to exercise legal action in order to enforce rights on behalf of Nature. A legal guardian would also have the right to participate in all decision-making processes that put the validity of nature's rights at risk.

22. Although Article 71 of the Constitution establishes that "all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature", the proposal to designate a legal representative or guardian goes beyond the right to denounce and demand respect; it is aimed at giving a voice and human face to nature before the Courts because Nature herself cannot physically address the Courts.

23. Comparative experience allows us to explore the figure of the guardians and the right to representation. In 2017, the Parliament of New Zealand approved the Te Awa Tupua (Whanganui River Claims Settlement) Act, recognizing the Whanganui River as a "legal entity", with the right to be restored. It also established the appointment of guardians (Te Pou Tupua, a collegiate body composed of members of the Mori community and state officials) who are the human face of the river and will speak on behalf of the river. The main functions of Te Pou Tupua are the promotion and protection of the health and well-

⁵ Informe de SENAGUA. Ingeniero Halbert Oswaldo Vera Coello, fechado en octubre 19, 20118.

being of the river, representing the river before the courts of law and state and legislative bodies, acting in the exclusive interest of the river and participating in decision making processes that affect the river.

24. A similar path was adopted in India through the Supreme Court of Uttarakhand which, in addition to granting legal status to the Rivers Ganges and Yamuna rivers, recognized all the rights, duties and corresponding responsibilities of a living person to preserve and conserve them. In addition, the judgment of the Supreme Court establishes “the Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand ... [as] *persons in loco parentis*, as the human faces to protect, conserve and preserve the Rivers Ganga and Yamuna and their tributaries. These officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote health and well-being of these rivers.”⁶

25. Colombia, through its Constitutional Court, has also recognized the Atrato River as a subject of rights to protection, conservation, maintenance and restoration by the State and ethnic communities.⁷ In addition, the Court ordered the National Government to exercise legal guardianship and representation of the rights of the River (through the institution designated by the President of the Republic, which could well be the Ministry of the Environment) together with the ethnic communities that inhabit the basin of the Atrato River in Chocó; in this way, the Atrato River and its watershed - henceforth - will be represented by a member of the acting communities and a delegate of the Colombian Government, who will be the guardians of the River. This comparative experience is a guide to what the present Court is called to declare for the benefit of the Dulcepamba River.

C. THE RIGHT TO BE RESTORED

26. Another necessary aspect in this analytical framework is that of restoration. The Dulcepamba River affected by the damages caused by the company Hidrotambo S.A. needs to be restored, due to the fact that it was diverted from its natural flow and currently does not have the ecological flow to maintain its existence, maintenance, nor the regeneration of its life cycles. The restoration, according to the Society of Ecological Restoration, is the "process of renewal and maintenance of the health of the ecosystem". The Court must consider that restoration can be a long-term, costly process and must be addressed in a multidisciplinary manner.

27. The Ecuadorian Constitution, in article 72, recognizes the right to restoration of nature noting "Nature has the right to be restored. This restoration shall be independent of the obligation of the State and natural or legal persons to compensate individuals and groups that depend on the affected natural systems. In cases of serious or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources, the State shall establish the most effective mechanisms to achieve restoration, and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences."⁸

⁶ *Mohd. Salim v. State of Uttarakhand & Others*, High Court of Uttarakhand at Nainital, Write Petition (PIL) No. 126 of 2014 (Mar. 20, 2017).

⁷ Corte Constitucional de Colombia, Sala Sexta de Revisión, Acción de tutela del Río Atrato, T-622 de 2016, 10 de noviembre, 2016, párr. 4.

⁸ Para una discusión de los derechos de la naturaleza a la restauración bajo el Artículo 72, ver ANEXO 2: Oliver A. Houck, "El Segundo Viaje de Noé: El Reconocimiento Jurisprudencial de los Derechos de la Naturaleza" (2017), págs. 87-89 (Versión en inglés con citas disponibles bajo petición).

28. Article 396 of the Constitution locates this right with the strict responsibility to restore, as its second paragraph states: "[...] responsibility for environmental damage is objective. All damage to the environment, in addition to the respective sanctions, shall also entail the obligation of integrally restoring the ecosystems and compensating the affected persons and communities. Each one of the actors in the processes of production, distribution, marketing and use of goods or services shall accept direct responsibility for preventing any environmental impact, for mitigating and repairing the damages caused, and for maintaining an ongoing environmental monitoring system. The legal proceedings to prosecute and punish those responsible for environmental damages shall not be subject to any statute of limitations." The objective liability seeks to establish the person who caused the damage as responsible for the restoration to nature, even where the damage was caused by a lawful activity. Article 11 of the Organic Environmental Code establishes the following

"In accordance with the principles and environmental guarantees established in the Constitution, any natural or legal person that causes environmental damage shall be subject to strict liability, even if there is no intent, fault or negligence." The operators of the works, projects or activities must maintain a system of permanent environmental monitoring and shall implement all the necessary measures to prevent and avoid environmental damages, especially in the activities that generate the greatest risk of causing them."

29. The Ecuadorian State is not exempt from responsibility; it has the mandate to immediately restore as established in article 397 of the Constitution

In case of environmental damages, the State shall act immediately and with a subsidiary approach to guarantee the health and restoration of ecosystems. In addition to the corresponding sanction, the State shall file against the operator of the activity that produced the damage proceedings for the obligations entailing integral reparation, under the conditions and on the basis of the procedures provided for by law. The responsibility shall also pertain to the public servants responsible for carrying out environmental monitoring.

The most important aspect of this article is the spirit of the constituent assembly members of not leaving nature unprotected and guaranteeing the immediacy and validity of nature's right to be restored, even if those responsible for the damage do not initiate its restoration or respond immediately.

30. The current trend has shifted toward dismantling dams due to proven environmental damage. In the last 20 years, more than 850 dams have been dismantled in the United States.⁹ A similar trend is evident throughout Europe. Dismantling can be a costly remedy, but it pales in comparison with the possible ecological and human consequences of the maintenance of unsustainable hydroelectric plants. The Society of Dams of the United States has set forth the following factors that must be taken into account when evaluating whether it is necessary to dismantle a dam:

- a) Public Safety (implications of potential dam failure or recreational hazards)
- b) Fish Passage and Aquatic Migration (for migration of protected species)
- c) River Restoration (for improved water quality, aquatic habitat, and sediment transport)

⁹ American Rivers. 2019. Raw Dataset— ARDamRemovalList_figshare_2018. Figshare. Available:<https://doi.org/10.6084/m9.figshare.5234068.v5> Retrieved: 11:51, 13 de junio, 2019.

- d) Economics (due to dam obsolescence and high costs for operation and repair)
- e) Public Benefits (for fisheries, recreation, navigation, and aesthetics)
- f) Environmental Impacts (for environmental compliance and mitigation)

31. Comparative experience shows that the right to restoration of rivers has been made effective through the issuance of orders or restoration mandates ("injunctions" in English). One example of such an order being issued may be found in *Eyde v. State*, before the Supreme Court of Michigan, United States. The plaintiff claimed that the County sewer project was affecting his property and that the water discharges would contaminate the river's waters that flow down to Lake Michigan. The Court issued an injunction against the County that required: 1) reformulating an alternative sewer plan, and 2) restoring the land that belongs to the claimant to its original conditions. The restoration order was also used to enforce the state environmental law addressing toxic waste that was being violated, as the sewer system planned to dump toxic waste into Lake Michigan.

32. Another example of restoration orders can be found in the 1960 case of *United States v. Republic Steel Corp.*, where a Federal District Court of the United States was the one who assumed the jurisdiction of the case, because the contamination of steel tailings affected two or more states in the United States and violated the Federal Rivers and Harbors Act. The Supreme Court ruled that the release of industrial waste by the steel company was a violation of both the laws regulating industrial waste and the laws that protect the water of the rivers. The Court also affirmed the injunction issued by the court of first instance ordering the steel company to clean the deposits and restore the river's navigational capacity. The Court reasoned that, since federal laws prohibited the dumping of contaminants and the creation of blockages in the river, a just and appropriate remedy was to order the immediate repair of the damage caused to the River. Otherwise, the Court stated, "we impute to Congress a total inconsistency of the great design of this legislation," referring to the Rivers and Harbors Act.¹⁰

33. In the case of Ecuador, the rights of nature are constitutionally recognized, and do not only seek to protect nature in its entirety, but also to protect the population from all the negative impacts that the destruction of nature entails, including the violation of human rights such as the right to health, the right to live in a healthy environment, and the right to water. Ecuador also has abundant legislation for the protection of rivers and the environment, including secondary legislation that must be fully complied with by all actors in society. Therefore, it is entirely within reason that Ecuador, too, would issue a restoration order, which in many countries, has become a common way to guarantee the rights of human beings, the protection of nature, and the application of national laws and regulations.

34. The comparative law and jurisprudence, as well as the attached Declaration are excellent examples of how to guide, legislatively and jurisprudentially, the effective realization of the rights of nature, towards a legal model that respects the law of the land with an ecocentric perspective, which we respectfully invite this Court to adopt in the resolution of this case. Therefore, the Environmental Organizations request the Court guarantee that the right of nature to be restored is respected, through specific orders that allow for the full and effective application of the rights of the Dulcepamba River.

¹⁰ Susan Verdicchio. Environmental Restoration Orders. Boston College Environmental Affairs Law Review. Volume 12. 1988.

III. RESPONSIBILITY OF THE STATE TO GAURANTEE THE RIGHTS OF NATURE.

35. Natural resources are considered a strategic sector by the Ecuadorian Constitution and, therefore, the Ecuadorian State is called to administer, regulate and manage them. Article 313 of the Ecuadorian Constitution, states that the following are strategic resources: energy in all its forms, telecommunications, nonrenewable natural resources, oil and gas transport and refining, biodiversity and genetic heritage, the radio spectrum, water and others as established by law. In addition, Article 12 of the Constitution provides that: "[...] water constitutes a strategic national asset for use by the public and it is inalienable, imprescriptible, unattachable and essential for life."

36. The generation of electricity, such as the hydroelectric project at issue, although itself a strategic sector, must never jeopardize food sovereignty, the ecological balance of ecosystems or the right to water. Article 413 of the Constitution establishes, "The State shall promote energy efficiency, the development and use of environmentally clean and healthy practices and technologies, as well as diversified and low-impact renewable sources of energy that do not jeopardize food sovereignty, the ecological balance of ecosystems or the right to water."

37. The Ecuadorian State is called upon to guarantee the rights of nature, as established in Article 277 of the Constitution, which provides: "for the attainment of good living, the following shall be the general duties of the State: 1. To guarantee the rights of the people, collectives, and nature." As can be seen, the State has failed to comply with its duty because 1) its legal framework (previous and new) has not regulated anything about how to guarantee the rights of nature in each administrative act, in each authorization, each concession, each contract and each license issued; 2) its institutions have not defined effective mechanisms to do so; and 3) because of a lack of inter-institutional coordination.

38. In the present case, various state institutions are called upon to regulate and manage the strategic sectors of water, biodiversity, and energy. These institutions issue administrative acts that facilitate the administration, regulation, and management as empowered by the Constitution. Despite the obligation to guarantee constitutional rights demanded of each of the institutions of the Ecuadorian State, the rights of nature continue to be violated, even in cases where the institutions comply with their competencies and the acts of the entities involved are lawful. The Environmental Organizations observe that the rights of nature have not been appropriately settled at a legal, regulatory, and institutional level in Ecuador, which puts the validity, respect and effectiveness of these rights at risk. The administrative acts that the Ecuadorian State signed (through various institutions) with the company Hidrotambo S.A were: 1) Authorization for the use of water granted by SENAGUA (National Water Secretariat); 2) A contract for the self-generation electric power granted by CONELEC (National Electricity Council); and 3) Issuance of the respective environmental license for the construction of the project by CONELEC. In these administrative acts, the institutions fulfilled their competencies, and even so the rights of nature were violated. This indicates that at the infra-institutional level the mechanisms have failed.

39. Next, the different institutions that participated in the case, and their competences, are reviewed, with the purpose of demonstrating that the protection of the rights of nature is not the responsibility of a single entity, and that due to the multiplicity of actors and insufficient compliance mechanisms, the rights of nature are not adequately protected.

Tabla 1: Competencias institucionales en el caso Hidrotambo S.A.

INSTITUCIÓN	COMPETENCIA	MARCO LEGAL
National Water Secretariat (SENAGUA)	<ul style="list-style-type: none"> ❖ Granting of water use authorizations ❖ Authorization of ecological Flow to be used. ❖ Regulation and control. ❖ Determination of natural river channels. ❖ Administrative sanctions. 	<ul style="list-style-type: none"> ❖ Organic Law of Hydro Resources: art. 8, art. 57 y art. 123.
Ministry of the Environment (MAE)	<ul style="list-style-type: none"> ❖ At the time the license in this case was granted, MAE did not have the ability to grant environmental licenses for hydroelectric projects (this responsibility previously fell on CONELEC who provided Hidrotambo with the environmental license in this case) ❖ Environmental audits 	<ul style="list-style-type: none"> ❖ Ley de Régimen del Sector Eléctrico y Libro VI del Texto Unificado de Legislación Ambiental Secundaria del MAE (TULAS) ❖ Currently the COA regulates the granting of environmental licenses
National Council of Electricity (CONELEC)	<ul style="list-style-type: none"> ❖ Granting of environmental licenses as the Environmental Authority of Responsible Application, (not current). 	<ul style="list-style-type: none"> ❖ Resolución del Ministerio del Ambiente Publicada en el Registro Oficial 552 de 28 de marzo de 2005, en base a lo que establecía en ese entonces el Libro VI del, Texto Unificado de Legislación Ambiental Secundaria del MAE (TULAS)
Ministry of Energy and Nonrenewable Natural Resources	<ul style="list-style-type: none"> ❖ Authorization for generation of electric energy. 	<ul style="list-style-type: none"> ❖ Contract for the provision of nonconventional energy, of 8MW for auto-generation and excess.

40. Table 1 shows that the Ecuadorian State and several of its public agencies are called to make internal adjustments and improve coordination to effectively enforce the rights of nature and thus comply with the Constitutional mandate. All these institutions must clearly and fully apply Article 395, numeral 4 of the Ecuadorian Constitution, which establishes the principle of *indubio pro natura*, as well as Articles 411 and 318, which establish priorities regarding the uses of water over hydroelectric projects.

41. In this sense, the Organic Environmental Code (2017) establishes, in article 8.3, that: "without prejudice to others established by the Constitution and the law, the environmental responsibilities of the State are: ... to guarantee the effective protection of the right to live in a healthy environment and the rights of nature, which allow citizens to enjoy the right to health, collective well-being and good living." Although this declaration is important and the National Assembly has made an effort to update environmental regulations, the Organic Environmental Code lacks an effective, agile, tangible and innovative mechanism that specifies, at the level of institutional and interinstitutional competencies, the obligation to guarantee the protection of the constitutional rights of nature. This level of specificity is also lacking in the legislative field.

42. It is not new that the courts demand the fulfillment of the functions of the different institutions responsible for protecting nature. One example is the resolution of the First District Court in the State of Oaxaca, Mexico, which in relation to the contamination of the Atoyac River in Oaxaca stated: "States have the obligation to protect the human right to a healthy environment, which requires not only that they refrain

from carrying out polluting acts, but primarily, that they take positive and concrete actions tending to protect [nature] effectively". The court also noted that the responsible authorities in a coordinated manner should:

“Take the necessary actions to coordinate with the federal government [...] regarding environmental protection measures, specifically with respect to the wastewater that affects the Atoyac and the Río Salado; implement actions of conservation, restoration and monitoring of the ecological balance, carry out cleaning programs, execute and operate infrastructure and services for pollution prevention and control and improvement of the water quality of the rivers identified within the framework of their competencies that are constitutionally concurrent.”

The institutions that this sentence condemns are: 1) General Director of the Pacific Basin Agency south of the National Water Commission; 2) Delegate of the Federal Procurator for the Protection of the Environment City of Oaxaca; 3) General Director of the National Water Commission; 4) Governor of the Free and Sovereign State of Oaxaca; 5) Municipal President of Oaxaca de Juárez, Oaxaca; 6) Municipal President of San Miguel Amatlán, Oaxaca; 7) Municipal President of Díaz Ordaz, Oaxaca; 8) Municipal President of Tlacolula de Matamoros, Oaxaca; 9) Municipal President of Mitla, Oaxaca; 10) Municipal President of Xoxocotlán, Oaxaca; 11) Municipal President of Tlalixtac de Cabrera, Oaxaca; 12) Municipal President of San Sebastián Tutla, Oaxaca and: 13) Municipal President of Santa Cruz Ampilpas, Oaxaca. That is to say, the Court ordered that the different institutions, at different levels and with different competences, protect nature in a real, concrete and effective manner and that they also coordinate the application of measures to control pollution and restore the river.

43. We respectfully request that this excellent Court protect the rights of nature by providing for the creation of an effective supra and inter-institutional mechanism that requires that the institutions that have intervened in this case protect the rights of nature and that ensures that each administrative act respects the rights of nature to exist, maintain itself and regenerate, directly and without delay. The Environmental Organizations appreciate that a constitutional right is being diluted at the legal and institutional level and this can be avoided by the Constitutional Court ordering that the law and the institutions include in their precepts practical and effective positive actions to protect the rights of nature.

VI. PROPOSALS AND CONSIDERATIONS

44. By virtue of the above, the Environmental Organizations respectfully request the Constitutional Court of Ecuador:

- a. That, in the present case, the Dulcepamba River be recognized as a subject of rights and that the Court firmly apply the Constitutional mandate contained in articles 71, 72, 73 and 74, which sets forth the rights of nature to exist, to the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes, as well as the right to be restored. This brings with it an obligation to the Ecuadorian State not only to respect but to protect and guarantee these rights to nature.

- b. That the human right to water of the communities of San Pablo de Amalí be recognized. And also that water be recognized as a vital element of nature, essential for the life of the communities of Dulcepamba River watershed, in the Province of Bolívar, and throughout the country as established in Articles 12 and 318 of the Ecuadorian Constitution. The alterations to the Dulcepamba River put at risk both the human right to water and the rights of nature.
- c. That the Court recognizes the specific rights of the rivers, and especially of the Dulcepamba River. The fundamental rights of the rivers are: (1) the right of flow (grounded in the ecological flow recognized in the Ecuadorian legislation); (2) the right to exercise their essential functions within their ecosystems; (3) the right to be free from all contamination; (4) the right to feed and be fed by their tributaries; (5) the right to native biodiversity; (6) the right to restoration; and 7) the right to independent appointment of one or more legal guardians, who act solely in the name of river rights, with at least one legal guardian as representative.
- d. That the Court appoint one or more legal guardians on behalf of the Dulcepamba River. The legal guardians must be independent, qualified, appropriate, with human and financial capacity, and act solely in the name of the rights and interests of nature. Although Article 71 of the Constitution establishes that: "any person, community, people, or nation may demand from the public authority the fulfillment of the rights of nature," the Environmental Organizations recommend giving nature a voice, a human face and the ability to appear before the Court. We suggest that independent organizations can be part of this collegial body such as the Ombudsman's Office, as well as experts such as academics. In addition, it is suggested that the competence of the Ombudsman be recognized to represent nature in cases in which the communities so request.
- e. That special emphasis be given to the fundamental right to flow as dictated by article 411 and article 318, which prioritize the right of flow over productive activities, such as hydroelectric generation. In this case, the Court is requested to demand that the State respect the order of priority established in article 318 of the Ecuadorian Constitution in the following manner: 1) human consumption, 2) irrigation that guarantees food sovereignty, 3) ecological flow and 4) productive activities. The flow of the river should, as a minimum, follow natural flow patterns and be sufficient to maintain the health of the ecosystem of the entire river system. In addition, the Court is asked to consider that rivers and consequently nature - not people - own the water that flows within them. This right must be achieved through the establishment, recognition and respect of environmental flows, and understood as a system to manage the quantity, timing and quality of the flow with the objective of maintaining the freshwater and estuarine ecosystems and the human livelihoods that depend on them.
- f. That it guarantees the right to the ecological restoration of the Dulcepamba River as provided for in Article 72 of the Constitution of Ecuador, by issuing a) an order to enjoin and dismantle the Hidrotambo SA project as it is incompatible with the Rights of Nature, the human right to water, and the Human and Economic, Social and Cultural Rights of the communities of San Pablo de Amalí; and, b) a restoration order that must be applied in accordance with Article 396 of the Ecuadorian Constitution, establishing strict liability against those responsible for the project, and with Article 397, recognizing the immediate and subsidiary responsibility of the State.

- g. That it orders the Ecuadorian government to fulfill its obligation to guarantee the rights of nature established in article 277 of the Constitution of Ecuador and eliminate possibilities for dilution of the rights of nature. To do this, the government must ensure that state agencies coordinate to protect and promote the validity of the rights of nature. With such diffuse competencies of Ministries and Secretariats responsible for guaranteeing the rights of nature, it is not surprising that there are elements that go unnoticed in the actions of the corresponding institutions. A supra and inter-institutional commission, made up of those who approve, control, grant concessions, and authorize projects, would be an organization dedicated to guaranteeing the full and effective application of nature's rights and achieving a balance between economic interests versus the interests of protecting ecosystems. Therefore, we request that the Court establish a supra and inter-institutional commission, made up of Ministries and Secretariats, in charge of ensuring the protection and full application of the rights of nature.
- h. That it instructs the National Assembly that the Organic Environmental Code must include positive, concrete, and effective mechanisms for each state institution to protect the rights of nature in its administrative acts. Likewise, the Organic Environmental Code must include an inter-institutional coordination mechanism that avoids dilution of rights among the various institutions responsible for administering natural resources and strategic sectors.
- i. That it orders the creation of an independent subcommittee composed of environmental scientists and engineers, responsible for evaluating current and future hydroelectric projects for the prevention of negative impacts, the possible need for dismantling, and the restoration of nature. The establishment of a subcommittee dedicated to the above would ensure that the environmental effects of the dams are considered and that new dams are only constructed in exceptional circumstances when necessary to obtain a vital social, ecological or energy objective that cannot be achieved by other reasonable means.



CARLA CARDENAS

Earth Law Center (Licencia #8388 C.A.P-Ecuador)

1 de Julio de 2019



SHANNON NELSON

Student Fellow, Great Lakes Environmental Law Center

1 de Julio de 2019



CONSTANZA PRIETO

Earth Law Center

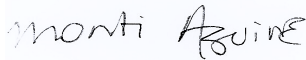
1 de Julio de 2019



GRANT WILSON

Directing Attorney, Earth Law Center

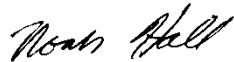
1 de Julio de 2019



MONTI AGUIRRE

International Rivers

1 de Julio de 2019



NOAH D. HALL

Professor of Law, Wayne State University Law School

Scholarship Director, Great Lakes Environmental Law Center

1 de Julio de 2019

NATALIA GREENE

Presidente, CEDENMA

1 de Julio de 2019

OLIVER A. HOUCK

Professor of Law, Tulane Law School

1 de Julio de 2019

ZYGMUNT PLATER

Professor of Law, Boston College School of Law

1 de Julio de 2019



PATRÍCIA GALVÃO FERREIRA

Assistant Professor of Transnational Law, Windsor Law

1 de Julio de 2019

VIVIANA MORALES NARANJO

Docente de Derecho, Universidad de Las Américas

Quito, Ecuador

1 de julio de 2019