

# **LEGAL OPINION ON THE IMPLEMENTATION OF ENVIRONMENTAL CONSERVATION AREAS**

## **1. Background**

This evaluation is carried out within the framework of the CONSULTING SERVICES CONTRACT N° 001-2020 WETLANDS-062C-202000001. "Service of evaluation of legal and social feasibility of the implementation of Environmental Conservation Areas and identification of alternatives", according to the agreement between PROFONANPE and Law, Environment and Natural Resources – DAR for its acronym in Spanish.

This consultancy has been contracted in the framework of the project executed by PROFONANPE: "Building Resilience of the Wetlands in the Province of Datem del Marañón, Peru", a project approved by the Green Climate Fund in November 2015 that officially started its activities in June 2017.

## **2. General Objective of the Consultancy**

The objective of the consultancy is to evaluate the legal and social feasibility (feasibility) of the implementation/establishment of the Environmental Conservation Areas (ACA), for its acronym in Spanish), and their possible impacts in the project's territorial scope, as well as to explore what other conservation mechanisms are feasible to implement given the current legal framework, the level of development of related initiatives and the interests and expectations of the communities. The possible legal and social impacts of the establishment of ACAs or their possible alternatives should also be taken into account.

## **3. What are the ACAs?**

The Environmental Conservation Areas (ACA, for its acronym in Spanish), are a mechanism for environmental conservation at the local level regulated by the Organic Law of Municipalities (Law N° 27972). Through this mechanism, provincial local governments or provincial municipalities establish and delimit in their jurisdictions territorial spaces that need to be conserved due to their environmental importance.<sup>1</sup>

Peruvian legislation, including the Organic Law of Municipalities does not establish the characteristics or conditions (whether environmental - biological, ecological, of representativeness, etc. -, social, cultural, economic, etc.) that an ACA must meet to be established as such, nor does it establish the formality to be followed for its correct establishment and effectiveness, nor for its functioning or governance.

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<sup>1</sup> According to Article 79 of Law N° 27972, the provincial municipalities approve the Territorial Conditioning Plan at the provincial level, which identifies urban areas and urban expansion, as well as protection or security areas for natural risks, agricultural areas and environmental conservation areas.

However, since the ACAs are a conservation mechanism, it is correct to state that they must ensure the conservation of natural resources, ecosystem services and relevant values (cultural, economic, landscape, etc.) that are important for the local area and that require environmental management that is different from the rest of the municipal territory.

Likewise, it is important to point out that in Peru the legal system recognizes different modalities of biodiversity conservation *in situ*, and the conservation of areas with environmental purposes. The forms of *in situ* conservation are described in the specialized regulations on the conservation of biological diversity, highlighting the General Environmental Law - Law N° 28611, the Law of Conservation and Sustainable Use of Biological Diversity - Law N° 26839, the Law of Natural Protected Areas - Law N° 26834, the Forestry and Wildlife Law - Law N° 29763, the Law of Water Resources - Law N° 29338 and development regulations.

Although the ACAs are a mechanism for *in situ* conservation (they establish "protected areas" or areas destined for conservation in natural physical spaces), they are not recognized by the national legal system as a type of natural protected area (NPA), which is the way Peru has incorporated the categories of protected areas promoted by the International Union for Conservation of Nature - IUCN<sup>2</sup>. It is stated that the ACAs are not a NPA since the Natural Protected Areas Law (Law N° 26834) does not mention the ACAs or any type of locally administered NPA in its text<sup>3</sup> (See Law of NPA, Art. 3). However, the municipalities have in fact filled the local conservation gap through the ACAs, so they could be functionally equated with a locally administered NPA, although legally they do not have the protection or mandate of the NPA Law.

#### **4. Does an ACA violate rights? Does it violate the property and access rights to natural resources of indigenous peoples or local populations?**

To the question of whether or not an ACA violates rights, the answer is that *per se* (in itself) an ACA does not violate rights.

The ACA "in itself" is a conservation mechanism that does not violate human rights or indigenous or community rights, nor does it constitute an obstacle to the effective exercise of these rights or impede the right to territory and land of indigenous peoples or their process of formalization before the state's legal security system called the "physical-legal guarantee of communal territory" (whether native community or peasant community), and does not prevent either the formalization of agricultural property to non-indigenous local inhabitants (colonists or river dwellers) under the modality of individual property called "individual rural property (PRI for its acronym in Spanish)".

In this regard, it is specified that the existence of an ACA does not prevent the physical and legal guarantee of the lands and territories of indigenous peoples, that is to say, that

- a) The ACA does not prevent the recognition of the legal status of a native community or its registration in the Public Records (in the Book of Native Communities of the Registry

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<sup>2</sup> See <https://www.iucn.org/es>

<sup>3</sup> The NPA Law states that these can be of national, regional and private administration. It omits to mention the level of municipal administration.

of Legal Entities of the Public Records) with the consequent registration of its statutes and board of directors, which is the previous step for the physical-legal guarantee of communal territory

- b) The ACA does not prevent the "physical and legal guarantee of the communal territory", colloquially called "titling" (whether of a native community or a peasant community) and the consequent guaranteed legal security of the indigenous territories (lands and territory) in their favour obtained by their registration in the Public Records (in the Real Estate Property Registry of the Public Records).
- c) The ACA does not prevent processes of expansion of communal territory, which is the process by which a titled native community requests that its territory be expanded.
- d) The ACA does not impede the processes of improvement in its graphic and cadastral survey in cases of not having UTM coordinates or in cases of graphic inaccuracies or needs of resizing in the field by overlapping.

Notwithstanding what is indicated in paragraphs a) to d) above, the existence of an ACA could make the process of physical-legal guarantee of the communal territory more difficult and complex, as well as make compatible a proposal of demarcation different from the communal one in the same area even when there is no occupation (population settlement) or direct use of the territory by some native community, since the indigenous peoples are in a process of claiming their territories.

It is important to recognize that indigenous peoples are "strategic allies" in the conservation of natural and cultural heritage because they are *in situ* and are true "guardians of their territories". Likewise, as we will explain later, a key stakeholder in the social licensing of an ACA are the indigenous peoples whose collective rights are recognized and guaranteed by the national legislation (right to territory, indigenous participation, right to prior consent, rights to access, use, administration and conservation of the natural resources existing in their lands and territories, among other rights), being essential actors in the social licensing process, whose traditional lands and/or territories are overlapping, adjoining or territorially close to the surface of the ACA.

On the other hand, it is important to recognize that the ACA, like any mechanism, can be an opportunity to improve and ensure such rights. However, its implementation could violate rights if these are not respected, complied with, ensured and guaranteed at three key moments of the implementation of the ACA, which are

- Moment 1: The process developed for the constitution of the ACA.
- Moment 2: The formality and effects of the legal acts of incorporation.
- Moment 3: The implementation of the ACA.

Below we present the progress in the development of the consultancy explaining in more detail the implications of these moments and the results of the evaluation of the legal and social feasibility of the ACAs obtained to date (which includes the early analysis of possible violation or not of rights) as well as the early identification of alternatives.

## **5. What do we mean by legal and social feasibility? What does it mean to evaluate the legal and social feasibility of ACAs?**

We understand feasibility to be the probability that an initiative, that is implemented or that is intended to be implemented, will actually be carried out (real, true). In other words, that it will be developed in compliance with its purpose. In order to evaluate the feasibility, it is necessary to consider the key aspects of the initiative being evaluated, be they legal, social, economic, etc.

In this sense, we understand **legal feasibility** to be the probability that an initiative that is implemented or is intended to be implemented can be effectively linked to the existing legal or judiciary system and not transgress it. This link with the legal system implies being subject to the legal regulations in force, respecting, complying with, ensuring and guaranteeing both the mandates of the legal regulations *per se* (in themselves) as well as the rights and legal assets they protect.

We understand **social feasibility** to be the probability that an initiative that is implemented or is intended to be implemented will be linked to and obtain social support or legitimacy<sup>4</sup> from the actors involved directly and indirectly with it.

In the case of the ACAs, we maintain that the legal and social feasibility must be evaluated at three moments:

- 1) Moment 1: The process developed for the constitution of the ACA. The constitution (also called establishment or creation) of an ACA is a technical, social and political-legal process. Therefore, at this point, the process prior to the establishment of the ACA is evaluated in terms of its technical, social and political-legal components in order to know if they have been fulfilled or not. It is evaluated in the following way:
  - a) The technical component or technical support undergone that allowed the determination of the objective, importance and ecological and environmental functionality of the ACA and the relevant associated values; as well as the area and limits of the ACA and information on the overlaps and concurrence of rights and uses in the same space.
  - b) The social component in terms of effective citizen participation in the process (not only informative participation but also participation in decision-making) and obtaining the necessary social legitimacy as a result of the social licensing or social approval for the constitution of the ACA due to the participatory process in which the actors who could be impacted by the effects of the establishment of the ACA participate and express their approval of the initiative to constitute the ACA. In this process, key information must be collected and social agreements must be reached on the spatial location of the proposed ACA, the uses and restrictions of the territory and natural resources located in the ACA, the governance and management model to be followed in the ACA and other relevant aspects resulting from the participatory process.

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<sup>4</sup> Social legitimacy is understood as the recognition and/or support of social actors to a norm, institution or initiative.

In the process of creating an ACA, social licensing must be ensured by local actors, mainly indigenous and riverine peoples settled in the area of the ACA and its neighbourhood and/or influence area. A key point of discussion at this time is the assurance of rights to the communal territory and to individual agrarian property (already obtained in legal terms but still to be formalized). This point must be explicitly addressed and clarified with the assurance of rights and/or the commitment to ensure that the recommended discussions and agreements are reflected as agreements in the minutes of the participatory process and the process of the right to consent and in the drafting of the proposed ordinance establishing the ACA, a proposal that in the interests of good governance should explicitly recognize the peoples and local actors and their rights and set out the management model of the ACA, with the state-community co-management model being recommended as a mechanism for the administration of the ACA or a community or indigenous management model.

It is important to know and recognize that the Peruvian State has a historical debt in the recognition of the rights of indigenous peoples, among them their territorial rights. Indigenous peoples have an unsatisfied territorial demand, claiming their lands and territories for titling as areas destined for the conservation and use of natural resources that guarantee their survival as peoples. Likewise, the indigenous people have a distrust towards the model of territorial management directed by the State<sup>5</sup>, distrust that reaches every modality of territorial management like the NPAs (of national administration including the Communal Reserves and the Regional Conservation Areas - RCAs) and which is expressed sometimes in an open opposition to its establishment and to the model of management that governs them.

c) Political-legal support:

- To provide legitimacy and legal rigour to the process for the constitution of the ACA, which is carried out within the framework of the powers that assist local governments (provincial municipal governments) according to the Organic Law of Municipalities and the regulations in force for the country (also called applicable legislation, which includes both national regulations and international instruments in force and enforceable in Peru)
- Complying with respecting and ensuring the exercise of the right to citizen participation in general and the collective rights of indigenous peoples (indigenous participation, right to land and territory, right to access natural resources and to participate in the benefits of their use, right to development

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<sup>5</sup> In territories that the indigenous peoples demand as their own, different categories of management and land management have been established according to the social and political dynamics (Permanent Production Forests - PPF, Natural Protected Areas - NPA, etc.). ), formal rights have been granted to take advantage of natural resources and build infrastructure without previous consent processes or social licensing (hydrocarbon lots, mining and forestry concessions), external actors have settled (foreign population centres, annexes, etc.) and legal, informal (informal mining) and even illegal (illegal logging, illegal fishing, illegal mining, illegal crops, etc.) economic activities are developed that impact their territories. In the face of this, voices are raised from the indigenous peoples demanding life plans for the management of their territories and proposals such as that of integral territory (CORPI proposal).

respecting their indigenous worldview, organizational autonomy, right to free and informed prior consent, etc.).

2) Moment 2: The formality and effects of the constituent legal acts. At this moment, the legal acts of incorporation are evaluated by considering whether or not the formality required by law has been followed and whether it produces the necessary effects (legal and social) for its validity and enforceability. In this way, the following is evaluated:

a) The formality required by law, which concerns the administrative verification of compliance with the previous process, the acts of approval by the corresponding government bodies as: the approval in session of the Municipal Council of the Provincial Municipality, then the issuance of the corresponding ordinance and, finally, its publication and dissemination in accordance with the provisions of the Organic Law of Municipalities - Law No. 27972 in its Article 44<sup>6</sup>.

b) The legal and social effects of the legal acts constituting the regulation, i.e. the effects of the entry into force of the regulation from the day after its publication, unless the regulation itself postpones its entry into force.

3) Moment 3: The implementation of the ACA. At this moment the following is evaluated:

a) The governance<sup>7</sup> of the ACA, analyzing the general principles of good governance in protected area decision-making, including: respect for rights and application of the law; promotion of constructive dialogue and fair access to information; accountability in decision-making; and the existence of institutions and procedures for fair conflict resolution, etc.

b) The management of the ACA according to the model of administration by the provincial municipality and/or the model or variants agreed upon in the participatory process (followed at moment 1) and/or made explicit in the norm of constitution of the ACA or in subsequent management agreements.

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<sup>6</sup> Law No. 27972, Article 44. - Publicity of municipal regulations

Ordinances, mayoral decrees and agreements on the mayor's remuneration and aldermen's allowances must be published:

1. In the official newspaper "El Peruano", in the case of all municipalities in the province of Lima and the Constitutional Province of Callao.

2. In the newspaper in charge of the judicial publications of each jurisdiction in the case of district and provincial municipalities of the cities that have such publications, or in another medium that undoubtedly ensures their publicity.

3. On printed municipal posters displayed in visible places and on municipal premises, to which the respective judicial authority shall attest, in all other cases.

4. On electronic portals, where they exist.

The municipal regulations are valid from the day after their publication, unless the regulation itself postpones their validity.

Municipal government regulations that have not complied with the requirement of publication or dissemination do not take effect.

<sup>7</sup> The interactions between structures, processes and traditions that determine how power and responsibility are exercised, how decisions are made and how citizens and other stakeholders have a voice. See <https://portals.iucn.org/library/sites/library/files/documents/PAG-020-Es.pdf>

- c) Whether there are public spaces for accountability and the adoption of agreements and changes that allow for transparency in management as well as the introduction of corrective measures, clarifications and adjustments based on the results of the evaluation and the internalization of learning (lessons learned), adapting the ACA to the social dynamics and context.

It is important to emphasize that in both moments 1 and 3 social feasibility is closely linked to the participation, social licensing and support of the actors, mainly the local population, highlighting the local indigenous population whose participation is an enforceable right and condition of feasibility if the ACAs are in areas overlapping or close to their traditional territories.

## **6. How are human rights and collective rights respected, fulfilled, ensured and guaranteed when an ACA is implemented?**

When implementing an ACA, human rights and the collective rights of indigenous peoples recognized in the 1993 Political Constitution of Peru, its implementing regulations and international instruments such as the Universal Declaration of Human Rights (UN, 1948), the International Covenant on Civil and Political Rights (UN, 1966), the International Covenant on Economic, Social and Cultural Rights, (UN, 1966), the American Convention on Human Rights (OAS, 1969), the International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO, 1989), the United Nations Declaration on the Rights of Indigenous Peoples (UN, 2007), the American Declaration on the Rights of Indigenous Peoples (OAS, 2016) must be respected, complied with, ensured and guaranteed.

In this sense, when implementing an ACA, human rights and collective rights must be respected, complied with, ensured and guaranteed at all three moments of implementation:

- Moment 1: The process developed for the constitution of the ACA. At this point, the effective exercise of the following must be respected, complied with, ensured and guaranteed:
  - The right to citizen participation in general, in accordance with the provisions of the General Environmental Law.
  - Of the collective rights recognized by ILO Convention 169, the following rights stand out:
    - The right to indigenous participation in decision-making
    - Right to land and territory
    - Right of access to natural resources and to share the benefits of their use
    - The right to development respecting the indigenous worldview
    - Right to organisational autonomy
    - Right to free and informed prior consent

- Moment 2: The formality and effects of the constituent legal acts. At this moment it is necessary to :
  - Make the process transparent.
  - Approve the municipal regulation (Municipal Ordinance) for the constitution of the ACA with an understandable wording that undoubtedly states the location of the ACA (limits in UTM coordinates). It is also recommended that the ordinance include an article of explicit recognition of "unrestricted respect for the rights of indigenous peoples" such as the right to land and territory in order to prevent, in the future, any interpretation that could put at risk the optimal exercise of these rights or prevent the physical-legal guarantee. In addition, it must be ensured that the generation of benefits for indigenous peoples and local communities from the sustainable use of natural resources is integrated as part of the objectives of establishing the ACA. It is also advisable to include participatory management formulas or a governance model.
  - Publish and disseminate the norm.
- Moment 3: The implementation of the ACA. At this point, it is necessary to:
  - Guarantee citizen participation and indigenous participation in the management of the ACA, specifically in decision making and implementation of actions. It is recommended that management should not be an exclusive responsibility of local government but rather a shared management or co-management or another model that contributes to good governance mainly when these ACAs are overlapping or are located in areas close to indigenous territory (in these cases governance should be shared between local government authorities and indigenous peoples or delegated to the latter where appropriate since there are functions of public entities that cannot be delegated to the population, such as the issue of sanctions or the granting of rights).
  - Guarantee citizen participation and indigenous participation in monitoring and evaluation by strengthening the accountability process, and adopting agreements and changes in order to take corrective measures as necessary, including changes and deepening the successes in management and governance.

## 7. Conclusions

The following are the preliminary conclusions that have been reached:

1. The ACA is a conservation mechanism that does not violate human rights or indigenous or community rights, nor does it constitute an obstacle to the effective



exercise of these rights, nor does it impede the right to territory and land of indigenous peoples or their process of formalization before the state legal security system called "physical-legal guarantee of communal territory" (whether native community or peasant community of the forest), and it does not prevent either the formalization of agrarian property to non-indigenous local inhabitants (colonists or river dwellers) under the modality of individual property called "individual rural property (PRI for its acronym in Spanish)".

2. It is important to recognize that the ACA, like any mechanism, can be an opportunity to improve and secure such rights, however, its implementation could violate rights if these rights are not respected, fulfilled, secured and guaranteed at the three key moments of the implementation of the ACA which are:
  - Moment 1: The process developed for the constitution of the ACA.
  - Moment 2: The formality and effects of the legal acts of incorporation.
  - Moment 3: The implementation of the ACA.
  
3. The establishment of an ACA in general and specifically in the province of Datem del Marañón would not prevent any potential future effort by the indigenous peoples to secure titles and rights to lands included in the ACA. What is to say, it is not an impediment to the "recognition", "titling" and consequent guaranteed legal security of indigenous territories in their favour obtained with their inscription in the Public Registry. Furthermore, it does not prevent the processes of expansion of communal territory or the improvement of its graphic and cadastral survey in cases of not having UTM coordinates or in cases of graphic inaccuracies or needs of field redimensioning due to overlapping. However, the existence of an ACA could make the process of physical-legal guarantee of the communal territory more difficult and complex, as well as make compatible a proposal of demarcation different from the communal one even when there is no occupation (population settlement) or direct use of the territory by any native community, since the indigenous peoples claim for themselves the totality of the territories in the Province of Datem del Marañón.

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