

Este resumen contiene la carátula, la síntesis y el extracto de una sentencia de la Suprema Corte de Justicia de la Nación. Para facilitar la lectura del extracto, se realizaron modificaciones al texto original de la misma. Este documento tiene fines informativos, por lo que carece de efectos vinculantes.

**PUBLIC PARTICIPATION IN ENVIRONMENTAL MATTERS
(MINING SPILL IN THE SONORA AND BACANUCHI RIVERS)**

**PARTICIPACIÓN PÚBLICA EN ASUNTOS MEDIOAMBIENTES
(DERRAME MINERO EN LOS RÍOS SONORA Y BACANUCHI)**

CASE: *Amparo en Revisión 365/2018*

REPORTING JUSTICE: Javier Laynez Potisek

DECISION ISSUED BY: Second Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: September 5, 2018

KEY WORDS: human right to a healthy environment, rights to access to information, and public participation in environmental matters.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 365/2018*, Second Chamber, Javier Laynez Potisek, J., decision of September 5, 2018, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-embematicas/sentencia/2022-02/AR%20365-2018.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo en Revisión 365/2018*, Mexico.

SUMMARY OF THE *AMPARO EN REVISION* 365/2018

BACKGROUND: On August 6, 2014, 40,000 m³ of acidulated copper sulfate (CuSO₄) spilled into the Tinajas creek, Cananea Municipality, Sonora, from the facilities of the mining company Buenavista del Cobre, Sociedad Anónima de Capital Variable, which affected the Sonora and Bacanuchi rivers. In February 2016, Bacanuchi's residents learned of the authorization for the construction of a new tailings dam by the same mining company. MEBH, on behalf of other affected parties, filed an *amparo* lawsuit in which he also alleged that the Ministry of Environment and Natural Resources failed to consult with the members of the community of Bacanuchi before authorizing the above-mentioned project. The district judge of Sonora dismissed the *amparo* considering that the petitioners did not have standing. MEBH filed a *recurso de revision* against that decision. At the request of the Collegiate Circuit Court that received the *recurso de revisión*, Mexico's Supreme Court of Justice (this Court) exercised its power to assert jurisdiction over the case.

ISSUE PRESENTED TO THE COURT: Whether prior to granting the environmental impact authorization to the mining company to build and operate a new tailings dam, the Ministry of Environment and Natural Resources should have consulted with the members of the community of Bacanuchi.

HOLDING: The *amparo* was granted to the members of the community of Bacanuchi for essentially the following reasons. It was recognized that according to the General Law of Ecological Balance and Environmental Protection, some works and activities, such as the construction of a tailings dam, only require the presentation of a preventive report and not an environmental impact statement when there are Mexican official norms or other provisions that regulate all the relevant environmental impacts that may occur. However, even though the authorities acted in accordance with the applicable regulations, they were required to consult with the members of the community of Bacanuchi prior to issuing the authorization to the mining company to develop the tailings dam, based on their obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence,

indivisibility and progressive realization. The fact that the responsible authorities had not consulted with the members of the community of Bacanuchi prior to granting the authorization violated their constitutional and conventional right to access to information and participation in matters that could affect their right to a healthy environment.

VOTE: The Second Chamber decided this case by a four-vote majority of justices Margarita Beatriz Luna Ramos, Alberto Pérez Dayán, Javier Laynez Potisek and José Fernando Franco González Salas. Justice Eduardo Medina Mora Icaza voted against.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=235777>

EXTRACT FROM *THE AMPARO EN REVISION 365/2018*

p.1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of September 5, 2018, issued the following decision.

BACKGROUND

p.1.4 On August 6, 2014, 40,000 m³ of acidulated copper sulfate (CuSO₄) spilled into the Tinajas creek, Cananea Municipality, Sonora, from the facilities of the company Buenavista del Cobre S.A. de C.V. (the mining company).

p.1 On February 26, 2016, Bacanuchi's inhabitants learned of the construction of a new tailings dam by the mining company, authorized by the Ministry of Environment and Natural Resources (SEMARNAT).

p.2 MEBH, as a common representative, filed an *amparo* lawsuit against SEMARNAT's failure to consult with the members of the Bacanuchi community before granting authorization to the mining company to build and operate a new tailings dam.

p.3-5 The district judge of Sonora dismissed the lawsuit considering that the inhabitants of the Bacanuchi community who filed the lawsuit did not prove they had standing. The petitioners filed a *recurso de revisión* over which this Court asserted jurisdiction.

STUDY OF THE MERITS

p.7 In their *amparo* lawsuit, MEBH and the other petitioners stated that their right to informed participation in matters that could affect their right to a healthy environment was violated, since SEMARNAT did not consult with the inhabitants of the Bacanuchi community before issuing an environmental impact authorization for the construction of a tailings dam by the mining company. They argued that the environmental impact authorization was unilaterally imposed by SEMARNAT without guaranteeing them a real, effective, accessible, sufficient and timely opportunity for informed participation in a matter of public interest.

p.7-8 This Court understands that the authorization to the mining company was granted for the preparation, construction, operation and closure of a new tailings dam, which included a curtain containing tailings, a storage vessel for the tailings, a reclaimed water dam and other

associated services. The authorization was issued in accordance with the provisions of the General Law of Ecological Balance and Environmental Protection (LGEEPA), its Regulations on Environmental Impact Assessment (REIA) and the Mexican Official Standard NOM 141-SEMARNAT-2003.

- p.15 This Court realized that the legal provisions based on which SEMARNAT granted the authorization of the project to the mining company establish that mineral exploration and exploitation projects require an environmental impact authorization. Those works and activities can be authorized through the presentation of a preventive report and not through an environmental impact statement when there are Mexican official standards or other provisions that regulate emissions, discharges, the use of natural resources and, in general, all relevant environmental impacts they may produce.
- p.16 The same legislation establishes that SEMARNAT may carry out a public consultation at the request of any person in the impacted community in the case of works and activities that require an environmental impact statement, but not in the case of works requiring a preventive report.
- p.20 In this case, when granting the authorization, SEMARNAT concluded that the project was designed with a preventive approach to ensure compliance with the environmental regulations and that its implementation would have favorable socioeconomic repercussions at the local and regional level. The same federal authority determined that the project was viable on the proposed site and that a preventive report could be presented instead of an environmental impact statement since there is a Mexican official standard that regulates the environmental impacts the work could produce.

For these reasons, in the opinion of SEMARNAT, it was not obligated to carry out a public consultation with the inhabitants of the Bacanuchi community before authorizing the mining company to carry out the tailings dam project.

- p.21 This Court considers that although SEMARNAT acted in accordance with the applicable environmental impact regulations, the members of the Bacanuchi community should have been consulted before granting the mining company the authorization to build and operate a

tailings dam. This is based on articles 1, 4, fifth paragraph, 6 and 35, section III of the Mexican Constitution; 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, "Protocol of San Salvador"; 25, subsection a) of the International Covenant on Civil and Political Rights; and 13, numeral 1 and 23, numeral 1, subsection a) of the American Convention on Human Rights.

p.23 This Court bases this interpretation on the mandate of the Federal Constitution that all authorities, in performing their roles, are required to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressive realization.

The Constitution recognizes people's right to a healthy environment for their development and well-being, and the obligation of the State to guarantee respect for that right. This is also recognized in the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, "Protocol of San Salvador", which establishes the right to live in a healthy environment and to have basic public services, specifying that the Member States shall promote the protection, preservation and improvement of the environment.

The Federal Constitution guarantees the right to free access to diverse and timely information, and to seek, receive and disseminate information and ideas of all kinds by any means of expression. This right is also established by the American Convention on Human Rights, which states that the right to freedom of thought and expression includes the freedom to seek, receive and disseminate information and ideas of all kinds.

p.24 The Federal Constitution also enshrines the right of citizens to peacefully take part in the political affairs of the country. This right is also recognized in the International Covenant on Civil and Political Rights by establishing that citizens enjoy the right to participate in the conduct of public affairs, directly or through freely elected representatives.

The Second Chamber of this Court also recalls that the *Amparo en Revision* 641/2017 noted that the reforms to article 4 of the Constitution sought to define an objective parameter for

the State's obligation to guarantee its citizens conditions for development and well-being and the citizen's responsibility to participate in the safeguarding of that fundamental right.

p.25 In this regard, Congress expressly intended the fundamental right to a healthy environment to have full legal effect and not be limited to "a programmatic norm", establishing a concrete mandate for the authorities to guarantee a healthy environment for people's development and well-being. Thus, because of this constitutional mandate, the Mexican courts are able to review whether, in fact, the actions or omissions of the authority are in accordance with the full realization of the human right to a healthy environment.

p.26 The right to access to information found in article 6 of the Constitution and article 13.1 of the American Convention on Human Rights forms the basis for the exercise of other rights and has an intrinsic relationship with public participation in environmental protection. As the Inter-American Court of Human Rights has explained, access to information on activities and projects that could affect the environment constitutes a matter of obvious public interest where public participation requires the application of principles of publicity and transparency and, above all, access to information. Thus, for this Court, access to information on the environment enhances the transparency of environmental governance and is a prerequisite for the effective participation of the public in environmental decision-making.

Although this Court has not ruled on the participation of persons interested in environmental matters that do not relate to the protection of the rights of indigenous communities, the United Nations Environment Program adopted the Objectives and Principles of Environmental Impact Assessments, which states that States should allow experts and interested groups to comment. While these principles are not binding, they are recommendations of an international technical entity that should be taken into account to resolve the problem raised in this case.

p.27 Article 25 of the International Covenant on Civil and Political Rights sets out the broad right of all persons to participate, directly or indirectly and without undue limitations, in the conduct of the public affairs of their country. This right is protected in article 23.1.a) of the American

Convention, which provides that all citizens must enjoy the right and opportunity to participate in the conduct of public affairs either directly or through their representatives.

- p.28 The right of public participation in environmental matters is reflected in various international instruments related to the environment and sustainable development, including the United Nations Declaration on Environment and Development (Rio Declaration); the North American Agreement on Environmental Cooperation; the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), and the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines).

Although not all these instruments are binding, this Court sees them as guidelines that allow us to note the importance of public participation in environmental matters, and provide criteria for achieving the full realization of the human right to a healthy environment.

- p.34 These international instruments emphasize the importance of citizen access to environmental information and the opportunity to participate in decision-making processes in order to influence the measures adopted that may affect their right to a healthy environment.

For the above reasons, this Court concludes that the right to participation provided for in articles 35, section III of the Federal Constitution; 25, sub-section a) of the International Covenant on Civil and Political Rights; and 23.1, sub-section a) of the American Convention on Human Rights, is not limited to participating in political affairs, such as voting in elections, but includes the opportunity to influence discussions regarding environmental policies and projects, especially when these affect citizens.

Thus, Congress' express intention in reforming article 4 of the Constitution can become a concrete mandate for the authority to guarantee a healthy environment for people's development and well-being through their participation in the conservation, protection and improvement of the environment.

p.35 Indeed, the participation of the interested public ensures a more complete analysis of the possible environmental impact of a specific project or activity and any potential impact on human rights. Therefore, it is important to allow the people who could be directly affected to present their opinions or comments on a project in its early stages when options and alternatives are still possible and they can exert a real influence.

In its Advisory Opinion OC-23/17, the Inter-American Court of Human Rights stated that public participation represents one of the fundamental pillars of instrumental or procedural rights, since it is through participation that individuals exercise democratic control over State efforts and question, inquire and consider the fulfillment of public functions. In that sense, participation allows people to be part of the decision-making process and have their opinions heard. Public participation allows communities to hold public authorities' accountable for decision-making while improving the efficiency and credibility of government processes.

p.36 For the reasons set out above, this Court concludes that the fact that the responsible authorities had not consulted with the members of the Bacanuchi community prior to the issuance of the authorization granted to the mining company to build and operate a tailings dam, regardless of what the LGEEPA and its REIA establish, violates the right of the people of the affected community to participate in an informed manner in those matters that could affect their right to a healthy environment.

Indeed, since the purpose of that work is the storage or final disposal of the tailings, solid waste generated in the primary operations of separation and concentration of minerals, which are considered hazardous waste in accordance with the applicable environmental regulations, their right to consultation and participation in all phases of planning and development of that project had to be guaranteed, given that it may affect the environment of the territory in which they live, as well as other rights that are essential for their survival.

p.36-37 To reach this conclusion, this Court considered that in August 2014, 40,000 m³ of acidulated copper sulfate (CuSO₄) spilled into the Tinajas creek in Cananea Municipality, Sonora from the facilities of the mining company, which reached the Bacanuchi River. Technical opinions conducted at the site by the National Water Commission showed that the levels of contaminants found at the spill site—including copper, arsenic, aluminum, cadmium,

chromium, iron, manganese and lead— had been in violation of the ecological, health and river quality standards prior to the spill. It was also shown that the spill caused by the mining company altered the ecosystem by contamination of the Bacanuchi and Sonora rivers. Cases of impacts on human health were also identified in the area.

p.37 Consequently, this Court considers that the failure to consult the Bacanuchi community regarding the construction of a tailings dam by the mining company prevented them from influencing the decision-making process regarding a project that could affect their right to a healthy environment, especially in light of the previous spill, so it is understandable that the inhabitants of Bacanuchi perceived that the development of a project of that magnitude would affect their right to a healthy environment and related rights.

DECISION

p.38 The *amparo* is granted for SEMARNAT to organize a public meeting to inform the affected community of: (i) the technical environmental aspects that were considered for the construction of the work, (ii) the impacts that could be caused by its operation, and (iii) the prevention and mitigation measures that will be implemented. Likewise, the community members should be given the opportunity to express their concerns and possible suggestions so that they can be heard and taken into account by the authorities in the preventive measures they carry out. In addition to the above, the competent authorities must use all means at their disposal to prevent the work from causing significant damage to the environment.