



# Catalyzing Innovation

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
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## **PROTECTING THE NEXUS BETWEEN COMMUNITIES' LAND AND WATER RIGHTS: A COMPARATIVE ANALYSIS OF NATIONAL LAWS RECOGNING THE FRESHWATER RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES**

**STEPHANIE KEENE (RRI), JESSICA TROELL (ELI), AND CHLOE GINSBURG (RRI)**  
Rights and Resources Initiative, United States of America  
[skeene@rightsandresources.org](mailto:skeene@rightsandresources.org)

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## **Abstract**

Indigenous and local communities utilize and govern terrestrial and freshwater resources in an integrated manner, yet insufficient attention has been paid to community-based “water tenure,” linkages between communities’ water and land tenure, and the extent that communities’ rights to freshwater are legally recognized. A forthcoming analysis seeks to narrow these critical knowledge gaps by assessing the extent to which countries’ national laws recognize freshwater rights of Indigenous Peoples and local communities. Analysis of 16 countries in Africa, Asia, Latin America and Oceania concludes that communities’ recognized freshwater rights are largely dependent on their land rights. Laws governing freshwater and terrestrial resources commonly lack sufficient harmonization and gender sensitivity, while also burdening communities with onerous procedural requirements that prevent them from realizing their water rights. Findings emphasize that the security of communities’ land and water tenure demands an integrated multi-sectoral approach to legislative reform and natural resource governance.

**Key Words: Land, Water, Tenure, Rights, Communities**



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## **Protecting the Nexus between Communities' Land and Water Tenure Rights:**

### **A Comparative Analysis of National Laws Recognizing the Freshwater Rights of Indigenous Peoples and Local Communities**

Freshwater flows through and is an essential aspect of landscapes, defining boundaries between land-based properties, furnishing a variety of ecosystem services, providing an essential input into land-based productive sectors, and shaping the future of landscape restoration efforts to secure sustainable development. The availability and equitable allocation of water resources are prerequisites for achieving multiple Sustainable Development Goals, including those related to food security, health, peace and stability, economic advancement and sustainable livelihoods, and the conservation of biodiversity and ecosystems. These objectives are of heightened importance for the world's Indigenous Peoples and local communities, who rely on forests, rural lands, and other natural resources for their subsistence, livelihoods, and culture. Indigenous Peoples and local communities utilize and govern terrestrial and aquatic resources in an integrated manner. However, despite the interdependence of land and freshwater systems, terrestrial and freshwater resources are frequently regulated in isolation, with legislation governing the rights of communities to freshwater and terrestrial resources lacking the level of harmonization and coherence necessary to ensure communities' water security. As demands for and pressures on water resources mount, the legal recognition of communities' water and land rights is increasingly critical for ensuring that communities' resource rights are realized in an equitable manner.

Because terrestrial and freshwater resources are fundamentally linked both under the law and in practice, the security of Indigenous Peoples' and local communities' land and water tenure demands an integrated, multi-sectoral approach to legislative reform and natural resource governance. Such an approach necessitates greater attention to the status of communities' water tenure security within the "land" and "forest" sectors. Indeed, while it is now widely known that the legal recognition of Indigenous Peoples' and local communities' land and forest tenure rights is essential for the achievement of positive sustainable development and climate outcomes, far less attention has been paid to the concept of "water tenure" (for communities or individuals), the manner in which water and land tenure are linked, the legal entitlements comprising secure water tenure for communities that exercise water rights collectively, and the extent to which communities' rights to freshwater are legally recognized across the globe. As a result, communities lack essential information about their freshwater rights when their water resources are threatened. Moreover, fundamental knowledge gaps persist regarding the broader impacts of communities' legally



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recognized water rights on their land tenure security, water tenure security, and sustainable management and conservation of both water and terrestrial resources.

The forthcoming Water Tenure Methodology and related analysis seeks to narrow this fundamental knowledge gap by identifying the various ways in which countries are addressing water rights of Indigenous Peoples and local communities in national law—thereby enabling stakeholders to measure countries’ progress in recognizing these rights through national constitutions, legislation, case law, and other legal means. This path-breaking and globally comparable framework for conceptualizing and tracking community-based water rights will provide the basis for data-driven advocacy and analysis, and can be used to facilitate the following key objectives:

- 1) Equip Indigenous Peoples, local communities, rural women, and other stakeholders with information on legally recognized community-based freshwater rights that can be used to advocate for communities’ resource rights and to ensure that critical discourse on community-based tenure accurately reflects the relationship between land, forest, and water;
- 2) Assist government bodies to more consistently work together across land, forest, water and other related sectors to more effectively conceptualize, recognize and protect communities’ water tenure through the establishment of harmonized legal frameworks that address linkages between terrestrial and freshwater resources; and
- 3) Further develop the concept of “water tenure,” with a focus on communities and the legal entitlements comprising water tenure security within community-based tenure systems.

## Methodology

This analysis identifies **community-based water tenure regimes (CWTRs)** in 16 countries across Africa, Asia, Latin America and Oceania. In the context of this methodology, a CWTR is understood as *a distinguishable set of national, state-issued laws and regulations governing all situations in which freshwater rights of use and at least either governance or exclusion are held at the community level*. A “community” in this context is defined as *a group of people (indigenous or otherwise) who share a common interest or purpose in freshwater resources*. As such, the term “communities” captures a range of Indigenous Peoples, local communities, and other community-based entities utilized by indigenous and local communities to exercise their rights to freshwater resources. The communities that may exercise freshwater rights within a particular CWTR are determined by the scope of laws comprising each regime.



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The methodology assesses five legal indicators for each identified CWTR, as well as associated sub-indicators. These legal indicators are: Use, Transferability, Exclusion, Governance, and Due Process and Compensation. Communities' rights to use freshwater are captured by four sub-indicators: (1) uses for domestic purposes/basic human needs (i.e., drinking water, washing, food preparation, sanitation); (2) small-scale/household productive uses for livelihoods (i.e., small-scale/household-level uses such as irrigation for agriculture, fisheries, brickmaking, or similar that satisfy needs beyond subsistence/survival); (3) commercial uses (i.e., the use of water as an input for generating income at a level higher than that necessary to maintain livelihoods); and (4) religious and/or cultural purposes. In addition to assessing whether these use rights are recognized, these sub-indicators assess whether these rights are subject to any temporal limitations, whether communities' use rights are prioritized over the rights of other rightsholders, and whether communities' use rights are subject to a procedural requirement (such as a permit).

Similarly, community-based "freshwater governance rights" are assessed through four sub-indicators: (1) rule-making (i.e., a community's right to collectively establish rules determining who can access/use water and water resources under the communities' control); (2) planning and management (i.e., a community's right to make collective decisions pertaining to the use(s) and protection of water resources, water allocation, and water infrastructure, and to implement such plans in accordance with applicable community-based rules); (3) dispute resolution (i.e., a community's right to utilize community-based mechanisms/rules to resolve internal water conflicts); and (4) enforcement (i.e., a community's right to inspect water resources, uses, protections and developments under the communities' control, and to impose penalties on both internal and external actors who violate community-based rules).

The Due Process and Compensation indicator pertains to situations where the state or another actor infringes or extinguishes community water rights. The Compensation sub-indicator assesses whether national law entitles communities to compensation in such circumstances. Two Due Process sub-indicators address domestic and transboundary contexts, assessing whether communities are entitled to prior notice, consultation, and appeal when some or all of their water rights are threatened.

Finally, analysis of the five legal indicators is framed by four yes/no threshold questions pertaining to the legal recognition of: 1) the human right to water; 2) customary water rights, laws, traditions and/or practices; 3) the nexus between communities' land/forest and water rights; and 4) indigenous and rural women's rights to water. In light of the common nexus between communities' land/forest and water rights, this analysis also seeks to track instances in which specific community rights concerning freshwater use, governance, and/or exclusion are dependent on the existence of legally recognized land/forest rights.



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## Findings and Implications

Findings indicate that communities' legally recognized freshwater rights are commonly dependent on their land or forest rights. There is a high correlation between the performance of indicators assessed and the presence of a land/water rights nexus. Despite the frequency with which communities' rights to freshwater depend on their terrestrial resource rights, water laws are seldom harmonized with land and other resource rights, thus creating a significant degree of ambiguity regarding the status of communities' water rights and the procedures required for them to realize and protect those rights in practice. Procedural obstacles such as permits, licenses, and institutional incorporation requirements associated with the lawful realization of water rights are pervasive, acting as high hurdles for indigenous and local communities to use water even for the domestic and livelihood purposes necessary for their everyday needs. The legal recognition of indigenous and rural women's rights to use and govern freshwater resources is also inadequate, despite the well-documented vulnerability of rural women's water resource rights and the gendered differences that pervade many indigenous and local communities with respect to the use of freshwater. All of these findings point to an urgent need to enhance inter-sectoral awareness, collaboration, and coordination amongst government bodies, civil society, and international organizations focused on water, forests, land, and related matters. Such collaboration is essential to ensure that the interrelated water, land and other resource rights of Indigenous Peoples, local communities, and rural women are effectively protected and capable of securing their livelihoods and advancement.