

Whose Water?

A COMPARATIVE ANALYSIS OF NATIONAL LAWS AND REGULATIONS RECOGNIZING INDIGENOUS PEOPLES' AND LOCAL COMMUNITIES' RIGHTS TO FRESHWATER



August 2019

Clearly defined and legally secure freshwater tenure rights are essential to Indigenous Peoples' and local communities' livelihoods and food security, as well as to countries' efforts to achieve sustainable development priorities and ensure climate resilience. However, the extent of the legal recognition of these rights to water remains largely unknown and unmonitored. To date, the bundle of legal entitlements most critical for enabling communities' water tenure security has not been fully articulated or endorsed through global guidance such as the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT).

This brief summarizes findings from the **first international comparative assessment of the extent to which various national-level legal frameworks recognize the freshwater rights of Indigenous Peoples and local communities, as well as the specific rights of women to use and govern community waters.** The analysis stems from a collaboration between the Environmental Law Institute and the Rights and Resources Initiative—which hosts the world's only research program dedicated to monitoring the status of community-based land, forest, and freshwater tenure rights—and will be expanded and updated over time.

The analysis finds that legal frameworks recognize local communities' and Indigenous Peoples' rights to at least use and govern freshwater in 14 of the 15 countries, though substantial gaps remain. Communities' legal rights to freshwater are dependent on their recognized land or forest rights in 25 (over 60 percent) of the 39 legal frameworks analyzed in this study, and these frameworks establish consistently more adequate protections for communities' freshwater rights—including the rights of women to use or govern community waters. Nonetheless, women's freshwater rights are specifically recognized in just one-third of legal frameworks analyzed. Cross-sectoral reforms to effectively harmonize water, land, and forest laws and policies in a gender-sensitive and integrated fashion are urgently needed in order to address legislative inconsistencies and oversights that hinder the realization of communities' water and land tenure security.

The study analyzes **39 legal frameworks** across **15 countries**—home to more than **1.1 billion rural people** and over **25 percent of the renewable water resources found across Africa, Asia, and Latin America**—equivalent to more than three times the renewable water resources of the United States. Thirteen of the 15 countries are categorized as low- and middle-income countries (LMICs), and two countries (Chile and Panama) are categorized as high-income.

Focus countries were chosen to represent diverse regions, biomes, levels of freshwater availability, economic status, and legal traditions, as well as to include states that share transboundary watercourses and that overlap with existing RRI datasets on land and forest tenure.



Read the full report: <http://bit.ly/WhoseWater>

Questions and indicators underpinning the assessment of community-based freshwater tenure in selected countries:

National-Level Threshold Questions:	Community-Level Threshold Questions:	Community-Level Legal Indicators:
Freshwater rights impacting all individuals within a country, regardless of whether they exercise property rights through a community-based tenure system.	Contextual factors impacting recognition of rights for each legal framework within a country.	Legal entitlements supporting community-based freshwater tenure under national law.
Rights analyzed: <i>Human Right to Water and Transboundary Due Process</i>	Rights analyzed: <i>Recognition of Customary Water Rights, Land-Water Nexus, Women's Water Rights</i>	Rights analyzed: <i>Use, Transferability, Exclusion, Governance, Domestic Due Process and Compensation</i>

Key Findings

Indigenous Peoples and local communities tend to use and govern resources in an integrated manner. This harmonized approach to resource governance stands in stark contrast to the sectoral approach that characterizes many countries' land, forest, and water laws. Legal frameworks commonly render community-based freshwater rights dependent on rights to community lands, thus establishing a "land-water nexus" as defined under this analysis. The presence of a legislative "land-water nexus" is often an essential factor in communities' abilities to claim, protect, and realize water tenure rights, and serves as their only source of recognized water entitlements under the national laws of Cambodia, India, Liberia, and Mexico. Similarly, women's rights to use or govern community waters are most frequently recognized when they stem from frameworks recognizing communities' land or forest tenure rights. Of the 13 legal frameworks that explicitly protect women's rights to participate in freshwater governance, 8 protect women's rights to participate in community-based decision-making processes pertaining to the management of community land or territories, which are interpreted to include rights to govern freshwater. The five frameworks that explicitly recognize indigenous and community women's rights to govern water resources include three kinds of water user associations (two of which are found in Nepal, and one in Zambia).

Country-Level Context:



The **human right to water** is legally recognized in 9 of 15 countries. Five of 6 Latin American countries (Bolivia, Colombia, Mexico, Panama, and Peru); 3 of 5 African countries (Kenya, Mali, and Zambia); and only 1 of 4 Asian countries (India) recognize the human right to water.



National-level provisions for the protection of community-based **transboundary due process** rights are rare: of the 15 countries analyzed, only Panama and Zambia adequately protect this right. None of the four Asian countries analyzed protect communities' due process rights in transboundary contexts.

Community-Level Context:



Communities' **customary water rights** are recognized across all legal frameworks in 10 countries (Bolivia, Cambodia, Chile, Colombia, India, Kenya, Liberia, Mali, Mexico, and Peru), and at least one legal framework recognizes communities' customary water rights in two countries (Panama and Zambia). Ninety percent of legal frameworks in Africa and Latin America recognize communities' customary water rights, respectively, compared to 55 percent of legal frameworks analyzed in Asia.



Laws regulating community-based freshwater rights are typically gender-blind, with just one-third (33 percent) of legal frameworks protecting **women's specific rights to participate in freshwater governance**. India, Liberia, and Zambia are the only three countries studied to specifically recognize women's rights to participate in community freshwater governance across all legal frameworks. However, women's rights to participate in community freshwater governance are recognized by one or more legal frameworks in five additional countries (Colombia, Kenya, Mexico, Nepal, and on a case-by-case basis in Panama).

Community-Level Legal Indicators:



Community-based rights to **use water** for cultural/religious, domestic, livelihood, and commercial purposes are recognized to some extent under the national laws of 14 countries, though the duration of communities' rights to use water for livelihood and commercial purposes is particularly likely to be limited through the imposition of procedural requirements or other legal provisions.



Just over half of all legal frameworks analyzed recognize communities' right to sell, lease, or otherwise **transfer** their freshwater rights, including all legal frameworks in six countries (Chile, Colombia, Liberia, Mexico, Vietnam, and Zambia).



Community-based rights to **exclude** at least some third parties from freshwater sources to which they have rights exist in just over 60 percent of legal frameworks identified, with an additional 20 percent of legal frameworks recognizing such rights on a case-by-case basis. These rights most frequently exist where a land-water nexus enables communities to exclude third parties from water resources appurtenant to their lands, territories, or forests.



Outside of Morocco (where no legal frameworks recognizing community-based water rights exist) communities' rights to **establish rules, develop, and implement plans, and manage** their freshwater in accordance with those rules are recognized by nearly all legal frameworks across 14 countries. More than three-quarters of legal frameworks recognize communities' right to **resolve internal disputes**. By contrast, the right to **enforce rules** against third parties is the least recognized community-level right assessed in this study.



Fourteen countries recognize communities' **domestic due process** rights of prior notice, consultation, and appeal, but their right to **receive compensation** from public and private entities who infringe upon or extinguish their freshwater rights is more limited.

Box 1

PROCEDURAL OBSTACLES

Communities may face onerous procedural hurdles in order to realize their rights to use freshwater. While Panama is the only country where national law requires Indigenous Peoples and other local communities to obtain permits in order to use freshwater for cultural/religious and domestic purposes, governments frequently require communities to meet a range of procedural requirements in order to realize their right to use freshwater for livelihood or commercial purposes. In more than one-third (17, or 44 percent) of the 39 legal frameworks analyzed, communities require a permit for abstracting water for livelihood needs. Commercial water uses are the most heavily burdened by permitting requirements among the use, governance, and exclusion indicators, with 29 (74 percent) of 39 legal frameworks requiring a commercial use permit for communities wishing to pursue community enterprises. In Nepal, communities are required to form three separate types of water users' associations in order to use freshwater for drinking, consumption (including agricultural uses, such as animal husbandry and fisheries; hydroelectricity; cottage industry and mining uses; navigation/transport; and recreational uses), and irrigation.

Implications and Recommendations for Action

While this analysis finds that diverse legal frameworks recognize community-based rights to at least use and govern freshwater in 14 of the 15 countries analyzed, it also demonstrates that **significant legislative gaps and additional constraints remain** across all countries that hinder the consistent realization of these rights by Indigenous Peoples and local communities. These legislative gaps and constraints call for stakeholders to work collaboratively across the water, forest, land, and gender sectors to:

1. Support the passage of legislative and policy reforms recognizing and protecting the full bundle of community-based water tenure rights and promoting an integrated approach to community-based resource tenure.
2. Ensure reforms are aligned with the priorities and particular needs of Indigenous Peoples and local communities, and women within these communities.

3. Strengthen legal protections for indigenous and local community women’s specific water use and governance rights in ways that address the linkages between their land and water tenure and that provide them with expanded livelihoods and economic opportunities.
4. Refine and build consensus around the concept of “water tenure,” and integrate a tenure-based approach into decision-making processes and initiatives related to forest, land, and freshwater governance.
5. Extend analysis of “community-based water tenure” to other countries around the world to facilitate national advocacy as well as legislative and policy reforms, and establish a global baseline that enables international monitoring of progress toward global human rights, health, sustainable development, and climate objectives.

Advancing the recognition and implementation of Indigenous Peoples’ and local communities’ water tenure rights—as well as women’s particular rights to community waters—is essential for their ability to sustainably govern, benefit from, and protect freshwater resources, as well as for countries to achieve the myriad of Sustainable Development Goals that hinge upon effective and responsible governance of freshwater. Through pursuit of these goals, a more just, peaceful, and inclusive future can be achieved.

The Rights and Resources Initiative

The Rights and Resources Initiative is a global Coalition of more than 200 organizations dedicated to advancing the forestland and resource rights of Indigenous Peoples, local communities, and women within these communities. Members capitalize on each other’s strengths, expertise, and geographic reach to achieve solutions more effectively and efficiently. RRI leverages the power of its global Coalition to amplify the voices of local peoples and proactively engage governments, multilateral institutions, and private sector actors to adopt institutional and market reforms that support the realization of rights. By advancing a strategic understanding of the global threats and opportunities resulting from insecure land and resource rights, RRI develops and promotes rights-based approaches to business and development and catalyzes effective solutions to scale rural tenure reform and enhance sustainable resource governance.

RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, DC. For more information, please visit www.rightsandresources.org.

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