

SIWI WORLD WATER WEEK, 2018

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## Securing Water Tenure: Legal Protections for Indigenous and Local Communities

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## INTRODUCTION

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### **Rights and Resources Initiative (RRI)**

A strategic global coalition consisting of 15 partners, 7 affiliated networks, 14 international fellows, and more than 150 collaborating international, regional, and community organizations dedicated to advancing the forest, land, and resource rights of Indigenous Peoples and local communities.

### **Environmental Law Institute (ELI)**

A non-profit, non-governmental research and capacity building organization that fosters innovative, just, and practical legal and policy solutions to address complex environmental issues around the world.

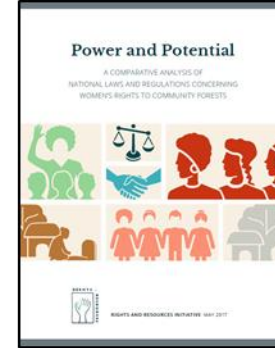
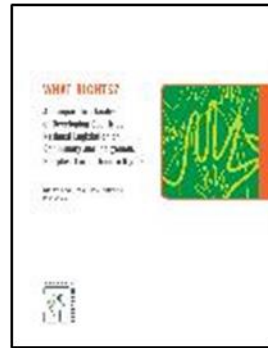
## OBJECTIVES

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- (1) Ensure that critical discourse on community-based land and resource rights reflects the relationship between land, forest, and water tenure.**
- (2) Bridge gaps between government bodies, CSOs, international organizations, academics, and other stakeholders who are either primarily focused on land/forests or water.**
- (3) Further develop the concept of “water tenure,” with a focus on communities.**

# RRI TENURE DATA: TRACKING INDIGENOUS PEOPLES', LOCAL COMMUNITIES' & RURAL WOMEN'S RIGHTS TO LANDS, FORESTS & NATURAL RESOURCES



**Qualitative Databases:** Depth of Rights & Gender  
**Quantitative Databases:** Forest Tenure & Land Tenure

Databases linked by a **bundle-of rights approach** whereby specific rights are assessed within identified **community-based tenure regimes (CBTRs)**

**CBTR:** A distinguishable set of national laws recognizing the right to own or manage terrestrial resources at the community level.

## Unit of Analysis: Community-Based Water Tenure Regime (CWTR)

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.

*Some countries have no legal frameworks addressing communities' freshwater rights (CWTRs), while others have one or many.*

### Bundle of Rights Assessment

Country	Tenure Regime	Duration	Access	Withdrawal (HFP)	Withdrawal (Timber)	Management	Exclusion	Due Process and Compensation	Alienation (Lease)	Alienation (Collateral)	Alienation (Sale)
Bolivia	Territorio Indígena Originario Campesino (Original Peasant Indigenous Territory)	Unlimited	✓	✓	✓	✓	✓	✓	✗	✗	✗
	Propiedades Comunitarias (Communal Property)	Unlimited	✓	✓	✓	✓	✓	✓	✗	✗	✗
	Títulos Comunales para Comunidades Agro-extractivistas (Norte Amazónico) (Communal Titles for Agricultural-Extractivist Communities in the Northern Amazonian Region)	Unlimited	✓	✓	✗	✓	✓	✓	✗	✗	✗
	Agrupaciones Sociales del Lugar (ASL) (Location-Based Social Associations)	40 years (extendable)	✓	✓	✓	✓	✓	✓	✓	Not available	✓

## WHAT IS THE VALUE OF GLOBALLY COMPARATIVE TENURE DATA?

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*RRI's Tenure Tracking Data informs research, advocacy, policy decisions, development assistance, investments, and stakeholder engagement concerning the land, forest and natural resource rights of Indigenous Peoples, local communities, and rural women.*

- **Conceptualize** the bundle of rights that comprise secure tenure for Indigenous Peoples, local communities, and rural women.
- **Compare and track** global/regional/national progress and setbacks in the distribution of formally recognized land and resource rights, with a focus on these same key populations.
- **Measure the implementation gap** between rights recognized by national laws (captured by RRI's databases) and the realization of communities' rights in practice.
- **Monitor progress on global commitments**, such as the SDGs.

### **Threshold Question 1: Human Right to Water?**

- For each country analyzed, does national law guarantee the human right to water?

### **Threshold Question 2: Customary Right to Water?**

- Within each CWTR analyzed, does national law recognize communities' customary water rights, laws, traditions and/or practices?

### **Threshold Question 3: Are Water Rights Dependent on Land/Forest Rights?**

- Within each CWTR analyzed, are communities' water rights dependent on their land and/or forest rights?

### **Threshold Question 4: Indigenous and Rural Women's Right to Water?**

- Within each CWTR analyzed, does national law explicitly and affirmatively acknowledge women's water rights to use and/or govern freshwater resources within indigenous communities, local communities, and other water user groups?

## 1) USE:

- Use for domestic purposes/basic human needs
- Small-scale/productive household uses for livelihoods
- Commercial uses
- Cultural/religious uses

## 2) TRANSFERABILITY

## 3) EXCLUSION

## 4) GOVERNANCE:

- Rule-Making and Planning
- Management
- Dispute Resolution
- Enforcement

## 5) DUE PROCESS AND COMPENSATION:

- Domestic Due Process: Prior Notice, Consultation and Appeal
- Transboundary Due Process: Prior Notice, Consultation and Appeal
- Domestic Compensation



## ASSESSMENT CRITERIA AND SCOPE OF ANALYSIS

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- **Threshold Question Criteria: Yes/No**
- **Indicator Assessment Criteria: Full Credit, Partial Credit, No Credit, Case-by-Case**
- **Additional information collected:**
  - Land/Water Nexus
  - Procedural Requirement
  - Hierarchy of Use Rights
- **29 CWTRs in 11 countries preliminarily identified thus far**
- **Final analysis will feature 16 countries:**
  - Africa: *Kenya, Liberia, Mali, Morocco, Zambia*
  - Asia/Oceania: *Australia, Cambodia, India, Nepal, Vietnam*
  - Latin America: *Bolivia, Chile, Colombia, Mexico, Panama, Peru*

## KEY FINDINGS: LAND/WATER NEXUS

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- **The dependence of communities' legally recognized water rights on their land/forest rights.**
  - Characterizes most CWTRs identified thus far.
  - High correlation between performance of all indicators and existence of nexus, particularly regarding Exclusion, Domestic Compensation, and Transboundary Due Process.
  - No land/water nexus? -> Form Water User Association
- **Water laws are not harmonized with land/forest laws, and vice versa.**
  - Water laws often fail to: 1) Contemplate natural resource governance frameworks found in land/forest laws; and 2) Articulate water rights of communities that informally and formally hold land.
  - Land/forest laws may only make passing or implicit references to water rights (including governance rights), even when water rights are entirely dependent on pre-existing land/forest rights.
- **In CWTRs with land/water nexus, laws regulating governance rights are often not focused on water resources:**
  - CWTRs based on ethnic or indigenous identity may grant broader rights of self-administration over natural resources broadly.
  - Some CWTRs based entirely on a forest/water nexus that includes appurtenant resource governance rights over community forests.

## KEY FINDINGS: PROCEDURAL REQUIREMENTS FOR USE RIGHTS

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- **Procedural barriers (permits, licenses, and incorporation requirements) are pervasive -> use rights limited in duration**
  - Most countries exempt **domestic use rights**, but some require permits for domestic uses
  - **Livelihood/small-scale uses** especially burdened by procedural requirements
  - Existing exemptions are almost never defined broadly enough to reflect water use patterns of communities/households, particularly regarding livelihood uses
- **Even where uses are exempt from permit requirements, processes for forming WUAs or incorporating as entity to use water can be onerous to the point of unconscionability:**
  - Examples of communities who must form multiple (3-4) separate legal associations in order to obtain a complete bundle of water rights.

## KEY FINDINGS: GOVERNANCE INDICATORS

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- **Weakest Governance Sub-Indicator: Dispute Resolution**

- Majority of existing rights relate to land/water nexus.
- Very few CWTRs recognize external enforcement rights

- **Strongest Governance Sub-Indicator: Rule-Making/Planning & Management**

- Rule-making rights not always accompanied by enforcement rights—and dispute resolution rights are often absent—which begs the question of how meaningful rule-making rights are.

- **Procedural hurdles also exist for governance rights:**

- Management, rule-making, and planning rights often contingent upon incorporation as legal entity (creation of founding constitution or other document), etc.

## KEY FINDINGS: WOMEN'S WATER RIGHTS

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- **Overall, the worst performer of all Threshold Questions and Indicators.**
  - Some instances of aspirational language in legislation, delegating authority to create gender equitable representation, processes, or institutions, but not amounting to actual granting of rights.
- **No explicit use rights for indigenous or rural women identified**
- **Less than half of identified CWTRs recognize women's governance rights thus far.**
- **Clear need for significant legal reforms to address the inadequate legal recognition of indigenous and rural women's rights to freshwater**

## IMPLICATIONS: NEED FOR HARMONIZATION AND GENDER-SPECIFICITY

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- Given the pervasiveness of the land/water nexus, **harmonization between land, forest, and water laws is critical**. Potential reforms include:
  - Explicit inclusion of water resources in legal definitions of natural resources, forest resources, and in land and resource laws.
  - Revising permit and user associations' requirements to recognize customary uses of water where already legally recognized on customary lands and forests.
- Harmonization and reform efforts **cannot be gender-neutral – significant reforms are necessary to address rural women's freshwater rights**. Potential reforms include:
  - Recognize that the land/water nexus requires addressing women's inequitable access to secure land tenure and power structures over land use decision-making;
  - Recognize women's right to equal participation in water governance institutions and include plans for empowering women to actively participate in water governance;
  - Prohibit discrimination based on gender in allocation of water use rights

## IMPLICATIONS: REDUCE PROCEDURAL BURDENS AND INCREASE INTER-SECTORAL COORDINATION/COLLABORATION

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- **Procedural requirements** for water rights (including use permits and incorporation requirements for governance and other water rights) are often onerous. Potential reforms include:
  - Expand permitting/licensing exemptions to reflect water use needs of communities/households, including small-scale productive/livelihoods for poverty alleviation, development, and resilience.
  - Prioritize the elimination of domestic and livelihood use permits.
- **All of these reforms necessitate enhanced inter-sectoral awareness, collaboration, and coordination amongst government bodies, CSOs, and international organizations focused on water, forests, land, and related matters.**
  - Existing silos run counter to the interests of Indigenous Peoples, local communities, and rural women.

## IMPLICATIONS: THE FUTURE OF “WATER TENURE” AND SUPPORTING INTEGRATED TENURE GOVERNANCE

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- **VGGT (2012): Provides key principles and internationally agreed standards for the responsible governance of tenure, establishing a framework for countries to develop strategies, policies, and legislation. Water left out of VGGT as concept of “water tenure” too nascent**
  - FAO’s proposed definition of water tenure is “the relationship, whether legally or customarily defined, between people, as individuals or groups, with respect to water resources” (FAO Land and Water Discussion Paper, 2016)
- **This global assessment could inform a more specific understanding of community-based water tenure grounded in the bundle of rights identified in the methodology and existing legal status of CWTRs:**
  - How are countries actually creating community-based water tenure regimes?
  - What would ideal CWTRs look like?
  - What are the existing implementation gaps between the law on paper and communities’ realization of their water rights?



## IMPLICATIONS: THE FUTURE OF “WATER TENURE” AND SUPPORTING INTEGRATED TENURE GOVERNANCE

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**Driving Questions:** How can we best **expand on** and **develop** this work to create a **nuanced understanding of water tenure, supported by associated legal data**, that:

- (1) Better supports efforts to strengthen and harmonize the legally recognized land, water and forest tenure of Indigenous Peoples, local communities and rural women, as well as other kinds of natural resource tenure?
- (2) Informs the development of guidelines on community-based water tenure?

# THANK YOU.

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