

WORKING PAPER

Supporting the Inclusion of Indigenous Peoples in Transboundary Water Cooperation

An exploration of how Indigenous Peoples have been engaged in Transboundary Water Cooperation and where barriers to their inclusion persist.





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Floating islands of the Uros community on Lake Titicaca, Peru. Source: Shutterstock

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Executive Summary

The purpose of this working paper is to examine how Indigenous Peoples can have a more meaningful role in Transboundary Water Cooperation (TWC). The paper is intended for those involved within transboundary processes, whether as a representative of an Indigenous group, country representative, or those working for institutions such as river basin organizations, and sets out to examine these questions:

- How can the recognition of Indigenous Peoples and the inclusion of their perspectives strengthen efforts to improve transboundary water cooperation?
- Why is it important that Indigenous peoples and others are involved?
- What can be learned from other forms of stakeholder engagement that could support Indigenous people's inclusion in transboundary water cooperation?

The working paper draws on case studies to explore how Indigenous Peoples have been engaging in TWC and where barriers to their inclusion persist. The three case studies are the Isleta Pueblo community, the Mackenzie River Basin, and the Amazon River. The Isleta Pueblo community was the first tribal Nation to establish water-standards; however, despite these long-established standards, the extent to which they play an active role in the TWC agreements remains limited. The Mackenzie River Basin, while located within one country, is an example of TWC that includes representation from different levels of jurisdiction, as well as Indigenous Peoples. The Mackenzie River basin also weaves Indigenous Knowledge with hard sciences for monitoring and evaluation. The Amazon basin is an example of why a river basin is not only important for the provision and sustenance of life in one of the most important ecosystems of the world, but it also demonstrates how Indigenous Peoples are at the centre of many threats in their attempt to protect their lands and rivers, while enacting their rights.



Mackenzie River near Fort Providence, NT Canada. Source: T. Schofield

The paper makes recommendations to support and improve platforms for engagement, and to increase the presence of Indigenous Peoples in transboundary processes. These recommendations include:

1. Recognition that Indigenous Peoples have inherent rights and obligations regarding water and their traditional territories, based upon long-standing relationships with their environment.
2. Recognition of different value systems for water and water governance, and their impacts on agreed upon priorities.
3. That water governance should reflect on, and account for, differences in goals, values, and objectives between differing parties.
4. Improve the resourcing of participation of Indigenous Peoples in water governance, including capacity development. Capacity needs vary across Indigenous Peoples, including but not limited to legal and technical knowledge, expertise, and staff, financial resources, and leadership.



Isleta Pueblo community, New Mexico. Source: CC by 2.0, Jason Woodhead

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Introduction

Transboundary waters account for 60 percent of the world's freshwater flows¹, covering 47.1 percent of the Earth's surface. More than 150 countries have territory within at least one of 286 transboundary river and lake basins², or within 592 transboundary aquifer systems³. Increased water withdrawals for agricultural, industrial, and urban use, as well as substantial land use change that modifies hydrological conditions, are altering the quantity and quality of freshwater resources within many basins. Basin populations face growing and often interrelated challenges from climate change, land-use change, and ecosystem loss. To address these challenges, and water scarcity, good water governance is critical. In many basins around the world, this requires cooperation over shared rivers, lakes, and aquifers.

Transboundary water cooperation (TWC) refers to 'any interaction between countries concerning the use and protection of shared rivers, lakes and aquifers'⁴. Cooperation over shared waters offer benefits, such as being a catalyst for peace, social and economic development, and stability, in fragile and conflict-affected settings. It can also provide opportunities for dialogue and negotiation. Around two-thirds of the world's transboundary rivers – and many more aquifers – do not have a cooperative management framework or treaty, nor basin organisation or formal institution that claims responsibility for management of the basin⁵.

The meaning of transboundary for the International Centre for Water Cooperation (ICWC)

Boundaries and borders exist in many ways and forms in the global community, such as political, sectoral, and societal boundaries. For the ICWC, rivers, lakes, and groundwater aquifers shared between nations are the prime targets for activities. For its work, the ICWC identifies three types of transboundary settings – *international, subnational, and sectoral*.

¹Progress on Transboundary Water Cooperation GLOBAL STAT US OF SDG INDICATOR 6.5.2 AND ACCELERATION NEEDS 2021.

² McCracken, M., and Wolf, A.T., 2019. Updating the Register of International River Basins of the world. *International Journal of Water Resources Development*, 35(5), pp.732-782;

³ Using the European Union Water Framework Directive definition of transboundary groundwater bodies. Source: IGRAC (International Groundwater Resources Assessment Centre), UNESCO-IHP (UNESCO International Hydrological Programme), 2015. *Transboundary Aquifers of the World [map]*. Edition 2015.

⁴ Progress on Transboundary Water Cooperation GLOBAL STAT US OF SDG INDICATOR 6.5.2 AND ACCELERATION NEEDS 2021.

⁵ Jägerskog, A., (2013). Transboundary water management – why it is important and why it needs to be developed. In *Free Flow – Reaching Water Security Through Cooperation*. UNESCO. pp.49-52.

The ICWC focuses primarily on political boundaries at the international and subnational levels, but may also address waters shared between sectoral boundaries when relevant in a local context, particularly when the use of existing shared water resources is disputed.

TWC processes are intended to respond to shared challenges that are broadly grouped. These might include: increasing demands of water uses and users, delivering integrated water resource management, the impacts of climate change, such as extreme weather events, heat waves, and droughts that affect water availability and quality, and, finally, reconciling political borders and basin boundaries^{6,7}. These challenges exacerbate those faced by non-state actors such as Indigenous Peoples, who have long faced barriers to involvement in TWC processes.

Non-state actors often hold information critical for the success of a programme, such as knowledge held by Indigenous Peoples, or may bring critical resources and capacity for projects that otherwise have limited resources allocated. Including non-state actors in TWC can help catalyse strong partnerships in the pursuit of implementation of a programme, increase priorities related to transboundary actions, and ensure a wider set of values are included within decision-making process. A deliberate inclusive approach can increase the likelihood that the impacts and benefits of shared water management are rooted in sustainable and equitable solutions.

Formal TWC processes have conventionally been limited to the interactions between nation states (Track 1 Dialogue), whereas informal processes involve both state and non-state actors. Non-state actors include representatives of civil society organizations, academia and think tanks, media, and faith-based traditions. Participatory approaches to water governance take many forms, including Track II Dialogues – between government and non-state actors⁸. Track II dialogues are useful where "decisions involve complex issues, with a diverse range of actors, with trade-offs between policy options, under high levels of uncertainty and low levels of trust"⁹. Additionally, dialogue can build trust between actors across borders and

⁶ Zeitoun, M., Goulden, M., & Tickner, D. (2013). Current and future challenges facing transboundary river basin management. *Wiley Interdisciplinary Reviews: Climate Change*, 4(5), 331–349. <https://doi.org/10.1002/wcc.228>

⁷ Transboundary water resources are increasingly over utilized and degraded through pollution, and by 2050, 50 to 100% more people could live in water-stressed transboundary basins. Climate change increases uncertainty and risks in shared waters. Source: Munia, H.A., Guillaume, J.H., Wada, Y., Veldkamp, T., Virkki, V. and Kummu, M., 2020. Future transboundary water stress and its drivers under climate change: A global study. *Earth's future*, 8(7), p.e2019EF001321.

⁸ Klimes, M. and Yaari, E. (2019). Water diplomacy: Facilitating dialogues. Accessed <https://siwi.org/wp-content/uploads/2019/07/HLPF-Policy-Brief-3-july-Web.pdf>

⁹ Hanasz, P. (2017) A Little Less Conversation? Track II Dialogue and Transboundary Water Governance. *Asia & the Pacific Policy Studies*, 4: pp 299.

help both state and non-state actors to come to a shared understanding of key issues¹⁰.

Building trust can be of particular importance where Indigenous Peoples have established grievances and deep seeded distrust for government actors. The inclusion of Indigenous People's in more formal TWC processes is rare.

The purpose of this working paper is to examine the current role of an underrepresented non-state actor, Indigenous Peoples, within TWC processes, and determine why their inclusion is critical. The paper offers recommendations to international actors regarding the better inclusion of Indigenous Peoples within transboundary processes¹¹.

Indigenous Peoples and Transboundary Water Cooperation

Indigenous Peoples live in 90 countries around the world, speaking at least 4,000 languages of the approximately 7,000 languages that exist¹². Indigenous Peoples are estimated to be 476.6 million people, or approximately 6 percent of the global population, encompassing around 5,000 self-identified groups. Traditional territories (lands and waters), whether formally recognised or not, managed by Indigenous Peoples cover an estimated 38 million km², or 22 percent of terrestrial land area¹³.

These traditional territories and ancestral lands contain important water sources, wetlands, groundwater aquifers, and water towers, and many play an important role in atmospheric moisture flows that have global impacts. Many downstream communities are reliant on the water and benefits sourced from such traditional territories, whether surface waters, aquifers, or atmospheric moisture flows.

¹⁰ Ibid.

¹¹ This working paper follows the United Nations Declaration on the Rights of Indigenous People (UNDRIP, 2007) that recognises Indigenous Peoples' as right holders and actors in TWC issues.

¹² ILO, 2020: Implementing the ILO Indigenous and Tribal Peoples Convention No 169: toward an inclusive, sustainable, and just future. International Labour Organization. Geneva, Switzerland. URL https://www.ilo.org/global/publications/books/WCMS_735607/lang-en/index.htm

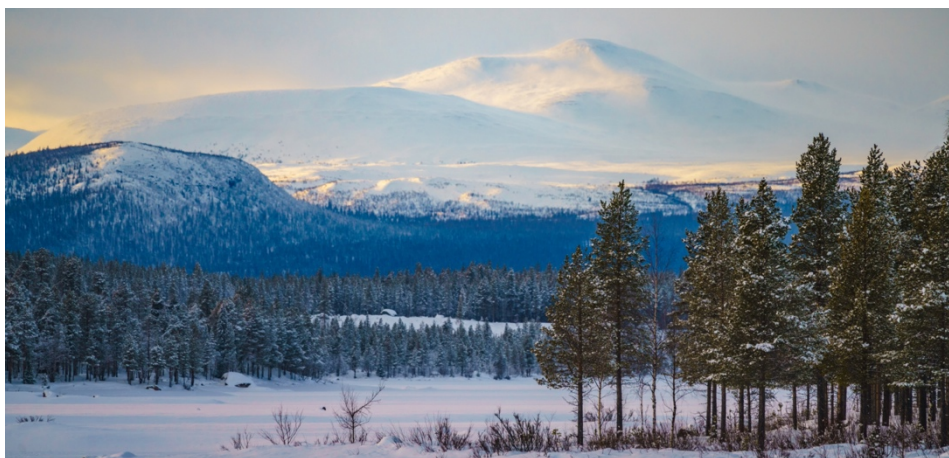
¹³ Garnett, S. T., Burgess, N. D., Fa, J. E., Fernández-Llamazares, A., et al. (2018). A spatial overview of the global importance of Indigenous lands for conservation. *Nature Sustainability*, 1, 369-374. Retrieved December 16, 2022, from <https://doi.org/10.1038/s41893-018-0100-6>.

Many Indigenous territories pre-date modern nation states, while some traditional territories cross country boundaries, and are further segmented by provincial, federal state, or other sub-national boundaries. Examples of Indigenous Peoples' whose members span across state borders include: the Mapuche across the Chile-Argentine border, the Tohono O'odham across the US-Mexico border, the Maya-Mam across the Guatemala-Mexico border, the Sinixt people across the US-Canada border, the Sámi people across Norway, Sweden, Finland, and Russia, as well as many groups located in the Mekong and Salween River basins in Asia.

Indigenous Peoples

As there is no universal definition of Indigenous Peoples, for this working paper we adopt the characterisation made by the UN (2004): "Considering the diversity of indigenous peoples, an official definition of "indigenous" has not been adopted by any UN-system body. Instead, the system has developed a modern understanding of this term based on the following:

- Self-identification as indigenous peoples at the individual level and accepted by the community as their member.
- Historical continuity with pre-colonial and/or pre-settler societies.
- Strong link to territories and surrounding natural resources.
- Distinct social, economic or political systems.
- Distinct language, culture and beliefs.
- Form non-dominant groups of society.
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.



Jokkmokk, north Sweden, home to Sweden's largest Sámi community. Source: Mats Lindberg

Indigenous Peoples face many barriers to their meaningful participation and inclusion in decision making processes regarding shared waters. At present, international laws around transboundary basins do not recognize Indigenous Peoples' international rights to fully participate in environmental decision-making. The Westphalian system imposes the international legal principle of state sovereignty and the requirement to operate within the domestic or internal spaces, rather than the international spaces, upon Indigenous Peoples¹⁴. Even when recognised in domestic law, in states that have recognised ILO 169 (Indigenous and Tribal Peoples Convention), or in states that have included the United Nations Declaration on the Rights of Indigenous Peoples in domestic law, Indigenous Peoples still have only limited participation in the decision-making processes in transboundary waters.

In a transboundary basin, development projects in one country can affect a group, or groups, located in another country. Access to justice in transboundary cases can be difficult when communities are impacted across borders and don't have redress access in the courts where the injustice originated. For example, in one country, Indigenous Peoples may not be recognised, or have a more limited set of rights and tenure rights resulting in different treatment or access to justice than in a neighbouring country. Non-state actors in the second country where the effects are felt may not have access to effective remedies within their respective domestic legislation and must rely on the country in which they reside to act on their behalf.

Can TWC be reframed to include Indigenous Peoples?

The inclusion of Indigenous Peoples in TWC is important for the many reasons highlighted throughout this working paper. Many scholars¹⁵ agree that improving Indigenous Peoples participation in water cooperation processes is possible, but that it requires actors take into account three related factors: redistribution of power, recognition, and political representation.

It is important to acknowledge power asymmetries and think about power redistribution. In the case study examples provided, Indigenous Peoples were not included within initial water processes, but through their efforts, the need for them to be included became clear. In some instances, this was due to the recognition of Indigenous Peoples as right-holders, or the recognition of differences in governance or land tenure systems that meant that their interests

¹⁴ Bauder, H. Mueller, R. (2023) Westphalian Vs. Indigenous Sovereignty: Challenging Colonial Territorial Governance, *Geopolitics*, 28:1, 156-173, DOI: 10.1080/14650045.2021.1920577

¹⁵ Jackson, S. (2018). Indigenous peoples and water justice in a globalizing world. *The Oxford handbook of water politics and policy*, 120; Martinez-Cruz, T. E., Adelman, L., Castañeda-Quintana, L., & Mejía-Montalvo, D. (2024). Water is more than a resource: Indigenous Peoples and the right to water. *Social Sciences & Humanities Open*, 10, 100978; and Robison, J., Cosens, B., Jackson, S., Leonard, K., & McCool, D. (2018). Indigenous water justice. *Lewis & Clark L. Rev.*, 22, 841.

were not being represented. However, this should have occurred earlier in the process (See box 1, the Pueblo Isleta community case).

Second, within TWC processes, the values that Indigenous Peoples place on water should be recognised, such as that water is not a mere resource. Indigenous Peoples believe that there are cultural and relational values tied to water and the land in a dynamic system of rights and obligations. Since cultures and traditions of Indigenous Peoples tied to waters and lands have prevailed for generations, inclusive approaches to water security should recognize Indigenous Peoples' right to cultural self-determination. TWC processes should not be limited to primarily negotiating around instrumental values or water quantities, e.g. volume, but should include a wider set of values, potentially those that have manifested through cultural flows. Water plays multiple roles not only for Indigenous Peoples, but also for the life and balance around rivers, lakes, and aquifers. Cooperation becomes essential to understand the different values tied to water, the needs and the proposals for successful and inclusive decision making.

Third, Indigenous Peoples should be active participants, not passive subjects in the processes that affect their lands, waters, territories, and livelihoods. This is a principle of customary international law, but may not be fully recognised or properly implemented. Indigenous Peoples have knowledge and expertise that can benefit TWC, as well as a holistic perspective that can benefit and support everyone in the making of coalitions to tackle collective challenges.

To date, the involvement of Indigenous Peoples within TWC processes has been rare, at least in terms of active recognition and inclusion. The most cited examples of involvement come from North America, predominantly from the border areas between the United States and Canada, around the Great Lakes, or between Mexico and the United States around the Columbia River Basin. Another area where there is increased participation is in Latin and Central America, especially within the Amazon Basin, as well as within the Sixaola Basin, shared between Costa Rica and Panama.

Given their longstanding relationships with territories that predate colonial times and modern states, manifested through acts of looking after the land and waters in accordance with their cultural identity, rights, and responsibilities, Indigenous Peoples are not simply stakeholders. There are ongoing court cases and protests for recognition for Indigenous Peoples to be viewed as sovereign nations and as rights holders. In multiple jurisdictions, Indigenous Peoples have launched legal actions to protect their rights as sovereigns. It is, therefore, relevant to recognise them as sovereigns rather than as stakeholders within broader groupings, policy processes, and the implementation of projects. This recognition as sovereigns is crucial to Indigenous Peoples. In Canada, there is evidence of integrating indigenous people's perspectives, from First Nations, Inuit, and Métis communities, with Western

viewpoints to better inform water resource management. This has provided benefits to all, including outside of the local community¹⁶. The growing recognition of Indigenous Peoples approaches to managing transboundary water could reshape the existing relationship between Canada and the United States.

The Isleta Pueblo community and the Rio Grande in Mexico-USA

The Isleta Pueblo community in the USA was the first tribal Nation to establish their water-standards under the Clean Water Act¹⁷; which affected the Rio Grande, a river between Mexico and the US, along with the community. These standards were implemented to decide what could or could not be discharged in the Rio Grande, set limits for the wastewater discharged into the river and controlled the arsenic level. The Rio Grande's transboundary agreement was defined by the US and Mexico in 1906¹⁸. Despite the long-established residence of the community of the Isleta Pueblo in the Rio Grande basin, their participation in decision-making and in the governance of Rio Grande was limited. However, Indigenous Peoples of the Isleta Pueblo community utilized a mechanism that recognised their sovereignty and seniority rights on the water, based on a US supreme court ruling, known as *Winter vs United States* in 1908¹⁹. This ruling claimed that those who first made use of the water have the right to water, and that this right cannot be supplanted by others who arrived afterward. This affirmed that Indigenous Peoples have the right to water. The community of Isleta Pueblo also utilized the Guadalupe Hidalgo treaty, which recognised Indigenous Peoples' rights to water in 1848²⁰ as one of the first settlers that made use of Rio Grande's waters²¹.

Despite these successes, it is unclear to what extent the Isleta Pueblo community are active in the TWC agreements of the Rio Grande today. They have managed to secure some rights through the Clean Water Act that affect the quality of water passing through their territories but limited further progress.

¹⁶ Brandes, O.M. and Curran, D. (2017). Changing Currents. In S. Renzetti & D. Dupont (Eds.), *Global Issues in Water Policy*, Volume 17: Water Policy and Governance in Canada (pp. 45-68) Springer: Switzerland.

¹⁷ Trudeau and Goodluck 2022. Indigenous feminism flows through the fight for water rights on Rio Grande. *HighCountryNews*. Jan 1st, 2022. Available at <https://www.hcn.org/issues/54.1/indigenous-affairs-water-indigenous-feminism-flows-through-the-fight-for-water-rights-on-the-rio-grande> Accessed on (12-09-23)

¹⁸ Convention between the United States and Mexico on 'Equitable distribution of the water of the Rio Grande'. Available at <https://www.ibwc.gov/wp-content/uploads/2022/11/1906Conv.pdf> Accessed on (12-11-23)

¹⁹ *Winters v. United States*, 207 U.S. 564 (1908). Available at <https://supreme.justia.com/cases/federal/us/207/564/> Accessed on (12-09-23)

²⁰ Treaty between the United States of America and the Mexican Republic known as the Treaty of Guadalupe Hidalgo. Available at https://www.ibwc.gov/wp-content/uploads/2022/11/Treaty_of_1848.pdf Accessed on (12-11-23)

²¹ Osborn, M. and Darcy S. B. "American Indian Water Rights." *Water Matters!* 2015, 1 (2015): 5-1-5-7. https://digitalrepository.unm.edu/utton_watermatters/vol2015/iss1/10

Inclusion and Participation

TWC activities and agreements form a part of water governance, however, defining water governance can be difficult, as there are multiple definitions and interpretations of the term. The Stockholm International Water Institute (SIWI) defines water governance as a process that includes functions, attributes, and outcomes, underpinned by values within the Water Governance Framework (WGF)²². (Figure 1). Within the framework, functions refer to the core activities/components of water governance, while attributes refer to how these functions are performed. Attributes strongly interrelate with functions, and frame how functions will be prioritised and implemented. Inclusivity and participation are key attributes that strongly contribute toward outcomes. Inclusivity and participation speak to what is included within decision-making processes and what outcomes are prioritised.

Inclusive processes have been shown to have a positive impact on the durability and sustainability of peace agreements²³ as well as helping to determine what is prioritised within management processes²⁴. Inclusion must be meaningful and substantive to ensure agreements are reached and sustainably implemented. It is not the number of included groups, but rather the quality of the influence that matters²⁵. Inclusivity is a key aspect of water governance, taking into account the needs of vulnerable groups, minorities, and Indigenous Peoples. Inclusivity is highly relevant in transboundary basins, as impacts on a critical resource to an Indigenous group, such as fishery stocks, may be the result of development activities in another country²⁶.

Participatory decision-making is dependent upon bridging the gap between communication and inclusion when linking countries and non-state actors, such as Indigenous Peoples. Power dynamics in society present a major issue for Indigenous

²² Jiménez A. Saikia P. Giné R. Avello P. Leten J. Lymer B. L. Schneider K. Ward R. 2020 Unpacking water governance: a framework for practitioners. *Water* 12 (3), 1–21

²³ Desirée Nilsson, 'Anchoring the Peace: Civil Society Actors in Peace Accords and Durable Peace,' *International Interactions: Empirical and Theoretical Research in International Relations* 38, no. 2 (2012); Paffenholz, T. (2015) "Broadening Participation Project" Briefing Paper', (Geneva: The Graduate Institute of International and Development Studies: Centre on Conflict, Development and Peacebuilding).

²⁴ Baudoin L. & Gittins J.R., 2021, The Ecological Outcomes of Collaborative Governance in Large River Basins: Who is in the Room and does it Matter? *Journal of Environmental Management* 281: 111836.

²⁵ Paffenholz, T. and Ross N. (2015) Inclusive peace processes – an introduction. *Development Dialogue* 2015. Accessed 30 October: https://www.daghammarskjold.se/wp-content/uploads/2016/01/DHF_DD63_p28-37.pdf

²⁶ Baird, I.G., Silvano, R., Parlee, B., Poesch, M., Maclean, B., Napoleon, A., Lepine, M., Hallwass, G. 2021. The downstream impacts of hydropower dams and indigenous and local knowledge: Examples from the Peace-Athabasca, Mekong and Amazon. *Environmental Management* 67(4): 682-696.

Peoples participation in TWC processes, a problem common to frequently marginalized groups, including women, and minorities.

Indigenous Peoples claim stewardship over extensive traditional territories. These territories also play an integral role within hydrological processes that affect other territories. Further, Indigenous Peoples bring significant contributions to land and water governance. If, for example, for a millennia, Indigenous Peoples have undertaken actions along waters/freshwater ecosystems that are within their rights and obligations, this knowledge and expertise should be valued and included in any decision making process.

It is critical that Indigenous Peoples be included within Integrated approaches to water governance. Excluding them means that certain values and perspectives will not be included. Not only do Indigenous Peoples deserve this right, but meaningful participation in TWC decision-making must include other worldviews, and not simply use a set of indicators or values to define outcomes.



Beyond general principles of inclusion and participation, there are further reasons why the inclusion of Indigenous Peoples in transboundary water cooperation is important. These include:

1) Indigenous Peoples' traditional governance and knowledge systems are tied to territories that holistically interconnect water systems.

Some water sources, wetlands, and forested recharge area exist due to ongoing governance of Indigenous Peoples and actions that have been undertaken by Indigenous Peoples for millennia in line with their rights and obligations. Achieving the intended outcomes of water governance requires the recognition and consideration of local governance systems of water commons (e.g., traditional management of irrigation schemes, indigenous ecological governance models), as well as customary practices in water governance. Indigenous Peoples' perspectives or approaches that are based upon traditional approaches to resolving problems, such as restorative justice²⁷, can offer alternatives for resolving local water problems, and may further benefit modern conflicts over shared water resources among countries.

2) Recent scholarship notes that both ecosystem and biodiversity quality tend to be higher in Indigenous-governed territories compared to surrounding lands, within similar ecosystem types.

The traditional territories of Indigenous People (6 percent of the global population) are estimated to hold 80 percent of the world's biodiversity, within less than 28 percent of land on earth²⁸. Further, linguistics and biological diversity are connected. Seventy percent of the languages spoken in the world cover 24 percent of the world's surface. These regions are known to be the most linguistically diverse. Indigenous Peoples speak 4,000 languages of the approximately 7,000 that exist²⁹ and much knowledge is contained within these languages, including respect for biological diversity. Indigenous Peoples activities are essential for the maintenance of different ecosystems in many locations. Indigenous Peoples preserve, and have adapted to a broad range of environments, including crossing geographical borders. For example, the Maasai Indigenous People follow the water streams that start in

²⁷ Haluska, A. (2023) Restorative Justice and the Rights of Nature: Using Indigenous Legal Traditions to Influence Cultural Change and Promote Environmental Protection. *Mitchell Hamline Law Review*: Vol. 49: Iss. 1, Article 5. Available at: <https://open.mitchellhamline.edu/mhlr/vol49/iss1/5>

²⁸ Sobrevila, C. 2008 *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners* (English). Washington, D.C.: World Bank Group. <http://documents.worldbank.org/curated/en/995271468177530126/The-role-of-indigenous-peoples-in-biodiversity-conservation-the-natural-but-often-forgotten-partners>

²⁹ United Nations Department of Public Information. 2018. Indigenous Peoples [online]. New York [Cited 10 January 2023]. www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Languages.pdf

the Mau Forest in Kenya and flow through the waterscapes in the Savannahs into Tanzania³⁰.

The impact of Indigenous Peoples on biodiversity, such as through forest governance in Latin America, has also shown that Indigenous Peoples' food systems are sustainable and resilient³¹. In many countries, the highest levels of biodiversity values are found within Indigenous managed territories³². Research also suggests that high levels of biodiversity are maintained in conflict settings, when maintained by Indigenous people³³. Yet Indigenous People only hold the legal rights for 10 percent of their traditional lands³⁴.

3) In recent years, there has been growing recognition of Indigenous Peoples in international and domestic legal systems, with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), being the most important.

UNDRIP, adopted in 2007 with 144 countries voting in support, 4 voting against and 11 abstentions, affirms the international status of Indigenous peoples³⁵. Although UNDRIP is non-binding on signatories, many of the measures therein are supported under international human rights law³⁶.

Recognition of the rights of Indigenous Peoples in international policy discourse, especially regarding biodiversity, land-rights, self-determination, and the use of such tools as the Free, Prior and Informed Consent (FPIC) principle are on the rise, however, acceptance and application rates remain uneven across countries. Some countries specifically recognise Indigenous Peoples within their domestic legislation processes, whereas in other locations, the recognition of Indigenous Peoples may be reliant on different agreements that the country is bound to.

³⁰ Richards, N., Anderson, E. P., Rouillé-Kielo, G., McClain, M., & Mombo, F. (2023). 9. From the Mau Forest to Lake Victoria: The Journey of the Mara River in East Africa. *River Culture: Life as a dance to the rhythm of the waters*, 191.

³¹ (FAO 2021)

³² Ibid.

³³ Beattie, M., Fa, J. E., Leiper, I., Fernández-Llamazares, Á., Zander, K. K., & Garnett, S. T. (2023). Even after armed conflict, the environmental quality of Indigenous Peoples' lands in biodiversity hotspots surpasses that of non-Indigenous lands. *Biological Conservation*, 286, 110288. doi:10.1016/j.biocon.2023.110288

³⁴ Rights and Resources Initiative (RRI) 2016. Land Mark & Woods Hole Research Center. *Towards a Global Baseline of Carbon Storage in Collective Lands*. Accessed on 03/01/2022. Available at <https://rightsandresources.org/wp-content/uploads/2016/10/Toward-aGlobal-Baseline-of-Carbon-Storage-in-Collective-Lands-November-2016-RRIWHRC-WRI-report.pdf>

³⁵ Since the first vote, the four countries voting against (Australia, Canada, New Zealand, and the United States) have reversed their position and now support UNDRIP. However, implementation remains uneven, in part as UNDRIP is non-binding.

³⁶ Archer, J.L. (2012). *Transcending Sovereignty: Locating Indigenous Peoples in Transboundary Water Law*. Master of Law Thesis submitted to the University of British Columbia.

Under ILO 169 and UNDRIP³⁷, Indigenous Peoples are entitled to special procedural rights in relation to decisions that affect them – the right to FPIC. FPIC applies to Indigenous Peoples' lands or natural resources, including water, and cultural property – both tangible and intangible. FPIC provisions, found in ILO 169, are binding, although a small number of countries have ratified this document. Even though states have signed on to, or endorsed, international instruments on Indigenous Peoples' rights – including FPIC – and despite the potential impact that development in one country may have on the realisation of rights in another jurisdiction, Indigenous Peoples issues have been neglected under international transboundary water agreements. In TWC, land-use changes and development projects may affect a community that resides in another country.



Samwel Nangiria, Northern Maasai Community leader speaking at the 2023 World Water Week, Stockholm. Source: Thomas Henrikson

4) From a human rights perspective, it is important to recognize that those most affected by land-use changes and development have the right to be involved in decision-making. A rights-based argument for inclusion justifies the meaningful participation of underrepresented groups, including Indigenous Peoples, in processes that impact them.

Indigenous Peoples are often highly dependent on ecosystem services derived from their traditional territories, many of which are under threat. Approximately 25 percent of Indigenous Peoples' lands are under high industrial development pressure from renewable energy, oil and gas, mining, commercial agriculture, and

³⁷ UNDRIP Article 32.2 states that countries "shall consult and cooperate in good faith with the Indigenous peoples [...] to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

urban sectors³⁸. Minerals critical for energy transition are found in or near Indigenous territories in an estimated 54% of projects³⁹. In 2021, 358 land and environmental defenders were killed in 35 countries; one-third were Indigenous Peoples defending their territories, forests, and rivers against climate-destructive industries⁴⁰.

As noted earlier, due to the international geographical boundaries that cut across traditional territories of Indigenous Peoples, some Indigenous Peoples face different legal processes for different parts of their traditional territories. Many large-scale development projects that affect land and water will have significant effects on Indigenous Peoples due to these dependencies. The history of large transboundary projects illustrates this. Further, there is increased complexity in terms of meeting obligations to land and waters due to country borders imposing barriers that limit access to critical cultural resources or sites important for cultural identity⁴¹, including waters.

Several articles within UNDRIP affirm an "indirect right to water as incidental to Indigenous peoples' rights to cultural integrity and economic development". Articles 25 and 32(2) expressly affirm Indigenous peoples' rights to water:

"Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard".

However, recognition of Indigenous Peoples' international right to fully participate in environmental decision-making is absent from the law of transboundary rivers. In many jurisdictions, Indigenous Peoples seek recognition as rights holders in terms of land and water rights, and therefore must be treated as more than stakeholders.

The Mackenzie River Basin Board (MRBB), located within one country, is an example that includes representation from different levels of jurisdiction as well as

³⁸ Kennedy, C. M., Fariss, B., Oakleaf, J. R., Garnett, S. T., Fernández-Llamazares, Á., Fa, J. E., ... & Kiesecker, J. 2022. Indigenous Lands at Risk: Identifying Global Challenges and Opportunities in the Face of Industrial Development.

³⁹ Owen, J.R., Kemp, D., Lechner, A.M., Harris, J., Zhang, R., Lebre, E. (2022). Energy transition minerals and their intersection with land-connected peoples. *Nature Sustainability*, 6: 203–21. <https://doi.org/10.1038/s41893-022-00994-6>

⁴⁰ Frontline Defenders report. 2021. Frontline Defenders Global Analysis 2021. https://www.frontlinedefenders.org/sites/default/files/2021_global_analysis_-_final.pdf [consulted on 07 July 2022]

⁴¹ B Corvin, B., Burnham, M., Hart-Fredeluces, G., Du Bray, M., Graves, D. 2023. Transboundary cultural resources: Sacred wildlife, Indigenous emotions, and conservation decision-making. *Journal of Political Ecology* 30 (1), 219-39.

Indigenous Peoples. It is an example of weaving indigenous knowledge and hard sciences together for the processes of monitoring and evaluation. It also demonstrates a case where Indigenous Peoples are included in TWC processes. Yet, barriers to larger scale participation in water governance processes persist.

The Mackenzie River Basin Board (MRBB)

The Mackenzie River Basin (MRB) is the 10th largest in the world, at 1.8 million square kilometres⁴², and includes six large sub-basins, Athabasca, Peace, Liard, Peel, Great Slave, and Mackenzie-Great Bear (figure 1). Approximately 300,000 people live in the basin, 10 percent of whom are First Nations, Métis, and Inuvialuit⁴³. It is one of the most intact large-scale ecosystems in North America; however, it is at risk of degradation due to human induced activities, extractive and hydrological industries⁴⁴. The MRBB was established in 1997⁴⁵ as a path forward for basin-level governance. It includes the Canadian federal government, three provinces, three territories, and Indigenous governments⁴⁶. While the basin is located entirely within the borders of Canada, the independent jurisdictional responsibilities of the parties presented challenges and problems typical in shared international basins⁴⁷. One such challenge is the differing values and relations to the basin between upstream and downstream actors. The boundary between the Northwest Territories and the provinces, is also a dividing line between the mostly non-Indigenous population in the south and Indigenous Peoples who have lived there for thousands of years in the north⁴⁸. Relation to the basin in the south

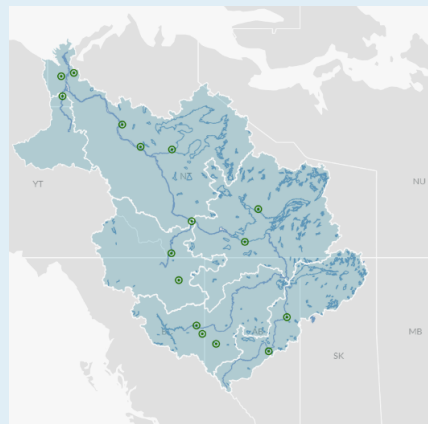


Figure 1 MRB (image credit SOAER.ca)

⁴² Latta, A. (2022). Reasserting Traditional Knowledge across a fragmented governance landscape: The Mackenzie River Basin in M. Sioui (Eds.), *Current Directions in Water Scarcity Research*, Volume 4 (pp. 41-61).

⁴³ The Mackenzie Basin. Tracking Change. Retrieved 15 December, 2023, from <https://trackingchange.ca/river-basins/mackenzie/>

⁴⁴ Rosenberg International Forum on Water Policy (2013). *Rosenberg International Forum: The Mackenzie Basin*. The Gordon Foundation. p. 6. Retrieved 10 December, 2023 from <https://gordonfoundation.ca/resource/rosenberg-international-forum-the-mackenzie-basin/>

⁴⁵ The Mackenzie River Basin Transboundary Waters Master Agreement aims to provide for negotiating bilateral water management agreements to address water issues at jurisdictional boundaries on transboundary streams and to provide parameters on the quality, quantity and flow of water. Source: <https://mrbb.ca/about-us/what-we-do/mackenzie-river-basin-transboundary-waters-master-agreement/>

⁴⁶ The board has 13 members; 3 representatives from the Federal Government and 10 from the provinces and territories, with one government member and one representing an indigenous organisation. Source: <https://mrbb.ca/about-us/>

⁴⁷ Morris, M., and R. C. De Loë. (2016). Cooperative and adaptive transboundary water governance in Canada's Mackenzie River Basin: status and prospects. *Ecology and Society* 21(1): 26.

⁴⁸ Rosenberg International Forum on Water Policy (2013). *Rosenberg International Forum: The Mackenzie Basin*. The Gordon Foundation. p. 34. Retrieved 10 December, 2023 from <https://gordonfoundation.ca/resource/rosenberg-international-forum-the-mackenzie-basin/>

is measured primarily by economic growth, whereas, in the Indigenous Peoples areas, traditional values are paramount in relation to the basin⁴⁹.

Regarding monitoring and evaluation (M&E) of the state of the basin⁵⁰, the meaningful inclusion of Indigenous Peoples has progressed. Recognising that meaningful inclusion of Indigenous Peoples' knowledge was absent from previous M&E reports (2003 and 2012), Indigenous leaders established the "Traditional Knowledge Steering Committee" (TKSC) under the MRBB. The TKSC considers the role of Indigenous People's knowledge in the discussions of transboundary issues⁵¹. In the most recent report from 2021, after recognising that there was a lack of traditional knowledge and values in previous reports⁵², a 'braided knowledge' approach was implemented, combining Indigenous People's knowledge, scientific data and "the story they tell together"⁵³, to assess the health of the Basin. However, the authors themselves recognise that information gaps persist⁵⁴ and meaningfully engaging with Indigenous communities is a shortcoming that needs to be addressed⁵⁵. A roadmap for how this should be done has not yet been made clear.

Water governance in the MRB has been fragmented, and participation of Indigenous Peoples limited. Indigenous representatives are appointed by the provincial and territorial governments and limited to one representative per jurisdiction, despite multiple Indigenous Nations being present in the basin. *The Master Agreement* requires multi-party collaboration and co-operation in managing the land and water resources of the Basin. It stipulates that the needs and concerns of Indigenous Peoples must be considered and "their traditional knowledge and values" be incorporated. However, according to Morris and de Loë (2016), the MRBB has underperformed in this regard⁵⁶. Latta states that "Canadian federalism has inhibited all Indigenous governments in the basin from responding to new environmental threats by scaling up traditional practices of water stewardship and governance"⁵⁷. The MRBB is designed to coordinate information exchange, but this does not appear to extend to governance

⁴⁹ Ibid.

⁵⁰ 2021 State of the Aquatic Ecosystem Summary (SOAER), Accessed: https://soaer.ca/wp-content/uploads/2021/07/July-2021-SOAER_summary.pdf

⁵¹ Parlee B, Huntington H, Berkes F, Lantz T, Andrew L, Tsannie J, Reece C, Porter C, Nicholson V, Peter S, et al. One-Size Does Not Fit All—A Networked Approach to Community-Based Monitoring in Large River Basins. *Sustainability*. 2021; 13(13):7400. <https://doi.org/10.3390/su13137400>

⁵² <https://soaer.ca/about/#introduction>

⁵³ https://soaer.ca/wp-content/uploads/2021/07/July-2021-SOAER_summary.pdf

⁵⁴ 'Changes in climate, snow and ice cover, and wetlands'; ice quality and thickness; e regarding ice breakups and – freeze up dates for lakes and rivers; changes in fish stocks.

⁵⁵ Summary - Mackenzie River Basin State of Aquatic Ecosystem 2021 (soaer.ca) p. 4

There is a clear need to meaningfully engage and work with Indigenous communities in all parts of the basin to better understand Indigenous knowledge, observations, and concerns regarding the basin's aquatic ecosystems.

⁵⁶ Morris, M., and De Loë R. C. 2016. Cooperative and adaptive transboundary water governance in Canada's Mackenzie River Basin: status and prospects. *Ecology and Society* 21(1):26. <http://dx.doi.org/10.5751/ES-08301-210126>

⁵⁷ Latta, Alex.

processes, whether Indigenous Peoples' knowledge has meaningfully informed monitoring and decision making is not clear⁵⁸.

The MRBB demonstrates a pathway for Indigenous Peoples' participation in M&E, however, for meaningful participation of Indigenous Peoples in water governance, the MRBB, "as an independent body charged with managing and protecting the basin" must be strengthened. The Canadian government, as well as the province of British Columbia, have both recently passed legislation to implement UNDRIP, however, it is too early to evaluate the effectiveness of the implementation.

The Amazon basin represents the largest basin in the world, with water governance mechanisms from eight different countries in place. Indigenous Peoples are included in the legal agreements through the Cooperation Treaty Organisation of the Amazonas. This case shows an example of transboundary agreement among countries, and a holistic perspective that highlights how a river basin is not only important to provide water, but to sustain life, eco-systemic equilibrium, and biodiversity in one of the most important ecosystems of the world. It also demonstrates that there are many challenges that threaten Indigenous Peoples, particularly when they attempt to protect their lands and rivers, or enact their rights, and that there is still a long way to their meaningful participation.

The Amazon River and the Cooperation Treaty Organisation of the Amazonas

The Amazon River and tributaries is the largest river system in the world with more than 10,000 direct tributaries and an overall size of 7,500,000 km² with adjacent rainforests⁵⁹. It begins as a small river, 'the Apurimac', in the north of Peru, and it ends in the Atlantic on the coast of Brazil, where the flow is approximately 220,000 m³/s of water⁶⁰. It is a highly significant watershed that passes through eight different countries: Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, and Venezuela⁶¹. The Amazon basin covers modern countries or states (post-colonial); it is also the home of many Indigenous Peoples and extensive traditional territories. Approximately 1.6 million people live in the basin, some of them in voluntary isolation. Some threats include deforestation, land grabbing, and pollution of lands, waters, and environment due to mining, industrial agriculture, and oil drilling, among others. A significant

⁵⁸ Morris, M., and De Loë R. C. (2016).

⁵⁹ Staack, L. (2022). The Amazon: The Largest River on Earth. In: Fascination Amazon River. Springer, Berlin, Heidelberg. https://doi.org/10.1007/978-3-662-64452-2_2

⁶⁰ USAID, 2023. Indigenous People.

⁶¹ OTCA, 2018. Análisis Diagnóstico Transfronterizo de la Cuenca amazónica.

number of inhabitants are highly dependent on Amazon lands and waters for their survival and livelihoods.

Two multilateral conventions legally govern the Amazon Basin: the Cooperation Treaty Organisation (OTCA), which was adopted on July 3rd, 1978⁶², and entered into force on August 2nd, 1980, and the Amendment Protocol to the Amazon Cooperation Treaty (ACTO) body, which entered into force on December 14th, 1998. Some bilateral agreements have also been put into place to support governance, such as the Memorandum of Understanding between the coordinating body of the Indigenous Organisations of the Amazonas Basin (COICA for its acronym in Spanish) signed on October 25th, 2004, and a second agreement between the OTCA and the Andean community in September 2004. However, as previously indicated, multiple Indigenous Peoples' territories can be found in the basin.

The ACTO's intended purpose is to foster sustainable development of the Amazon River. Participating states promote harmonious development within their territories, but also seek mutual benefits that support conservation of natural resources and the environment, promote commercial navigation, enhance health services, and work toward collaborative research, infrastructure, and tourism. Under Article V, the Member States commit to making efforts towards the rational use of water resources⁶³. The ACTO had a strategic plan from 2004-2012 and prepared a new strategic agenda in 2009 around two crosscutting issues: the conservation and sustainable use of renewable natural resources and sustainable development.

The strategic agenda included thematic areas that focus on forests, water resources, management, monitoring and control of endangered wild fauna and flora species, protected areas, sustainable use of biodiversity and promotion of bio-trade, Indigenous Peoples' affairs, knowledge management and information sharing, regional health management, infrastructure and transport, commercial navigation, tourism, regional development, climate change and energy (these last three being new)⁶⁴.

The ACTO water resources plan promotes the development and dissemination of an efficient, integrated, and comprehensive water management framework that will increase water access and sanitation. Indigenous Peoples have been considered in the goals and objectives of the new plan, not only as beneficiaries, but as knowledge holders, actors with a voice, and decision-makers. Further, the plan links other considerable processes such as the Convention of Biodiversity, the ILO Convention 169 on Indigenous Peoples representation and active

⁶² Landau, 1980. The Treaty for Amazonian Cooperation: A bold new instrument for development. Georgia Journal of International and Comparative Law. Volume 10. Issue 3. Retrieved on (12-December, 2023, from <https://acervo.socioambiental.org/sites/default/files/documents/10D00614.pdf>

⁶³ ACTO, 1978. Treaty for Amazonian Cooperation. Ratification in 2009. Available at <http://otca.org/en/wp-content/uploads/2021/01/Amazon-Cooperation-Treaty.pdf> Accessed on (12-09-2023).

⁶⁴ ACTO 2013. Amazonian Strategic Cooperation Agenda. Available at <http://otca.org/en/wp-content/uploads/2021/01/Strategic-Agenda-of-Amazon-Cooperation.pdf> Accessed on (12-09-2023).

participation, and the role of Free, Prior and Informed Consent (FPIC). For Indigenous Peoples in voluntary Isolation, the plan provides frameworks for good practices on how to respect their rights.

The Amazon basin highlights the holistic nature of rivers and basins, showcasing that biodiversity, soils, water, forests, and people cannot be separated. This holistic perspective has been adopted as the Amazon is home for more than 400 different Indigenous Peoples and plays a crucial role in the planet's sustainability.

Despite Indigenous Peoples being included in the plans, commitments being made in documents and official agreements, it is unclear as to what extent Indigenous Peoples participate in the decision-making process. Implementation is still directed top down, it is one of the regions with the highest number of reported violations of the rights of Indigenous Peoples, including only a few occasions of obtaining their FPIC, and a lack of participation in processes that affect their territories⁶⁵.

Further, human rights defenders in the region that have been murdered are often linked to environmental issues, with a high percentage of these defenders being Indigenous Peoples.

Transboundary water cooperation faces many challenges; meaningful participation of Indigenous Peoples is not guaranteed, even with mechanisms in place.



Tributary of the Amazon River in Peru, with remote indigenous settlement. Source: Shutterstock

⁶⁵ Alto Comisionado de los Derechos Humanos de Naciones Unidas, 2023. Avanzando la realización de el Derecho Humano a un Medio Ambiente Limpio, Saludable y Sostenible en la Amazonía. Diálogos Amazónicos y Cumbre de la Amazonía. 4 al 9 de agosto de 2023, Belém do Pará, Brasil.

Policy Recommendations

The following recommendations are targeted towards audiences that have roles within transboundary processes, such as country representatives, water professionals working in transboundary settings, or institutions, e.g. river basin organisations. These recommendations are intended to support and improve platforms for engagement and increase the presence of Indigenous Peoples in transboundary processes.

The starting point for change is **the recognition that Indigenous Peoples' have inherent rights and obligations regarding water and their traditional territories based upon long-standing relationships with their environment.** Due to its importance, such knowledge should inform preferences and choices within dialogues by partnering or leading Indigenous groups. This knowledge might emerge through many different forms, as it is carried and passed on through everyday life practices and through language. A common understanding and way of engaging with this knowledge is vital; conditions for its inclusion should be established, along with trust between partners.

Decision-makers need to enhance their understanding of how different types of values (including relational) affect the meaning of water and water governance for different communities. They must also consider how this affects priorities for all affected. Differences of understanding can lead to different priority levels for activities in a basin. There is a danger in transboundary processes that the focus will be on a narrow set of quantifiable elements, agreed to, or defined by, entities holding the most power, often based upon instrumental values. Such a narrow set of objectives will diminish or mask key priorities of others. For example, in relation to a water body, the first priority for smaller or less powerful groups may be to ensure the health of a river, with potential economic uses being of secondary importance. These preferences may differ from more conventional choices.

Water governance should reflect on, and account for, differences in goals and objectives, even when there may be perceived similarities in activities leading to the objectives. For example, some governance mechanisms of Indigenous Peoples' communities may have outward similarities to ecosystem-based management or ecosystem service approaches. However, the application of these mechanisms is framed within the relationship held by an Indigenous community to its territory, in accordance with rights and obligations, rather than meeting specific goals and objectives that are defined in a basin planning process. The lack of such recognition has led to ongoing problems in sectors such as conservation, where, for example, land managers have decided that the best way to protect a given landscape and meet

a predetermined goal was to remove a community from the area. These practices often removed the presence of land and water guardians, and the expertise based on their relationships, to the detriment of the local ecosystem or water body.

It is also important to recognize that the relationships across the traditional territory may define the identity of an Indigenous Peoples living there, as well as others that traditionally lived there. Defining **cultural identity, and the performance of rights and obligations, should not be limited to specific locations such as sacred sites and the use of language. Although sacred sites and language use are important, cultural identity is about the maintenance and expression of relationships.** This means that the impacts of large-scale transboundary projects may have direct and secondary impacts beyond the physical location, such as through shifting ranges of flora and fauna, including fishery stocks, or hydrological regimes. These changes will affect the relationship between peoples and their traditional territories.

Improving the resourcing of participation of Indigenous Peoples in water governance, whether in local efforts or through transboundary initiatives, is an important step to overcoming certain barriers. Increased resources should be made available for Indigenous Peoples to enable meaningful participation in decision-making within their own watersheds and communities. This should also include resourcing the presence and activities of basin-wide Indigenous led organisations and increased representation, whether political or technical, within river basin organisations, as appropriate. Accepting the use of tools such as cultural flows or the cultural health index as part of building baseline information, goal setting, and monitoring would also be beneficial. There are examples of these activities emerging in many settler-colonial states, including in Canada and Australia, but should be used more widely⁶⁶.

⁶⁶ From 2011-2018 less than 1% of the resources were reaching Indigenous Peoples directly and in 2020, the number went up to 8%

About this working paper

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About SIWI

SIWI is a leading water institute, focused on water governance and capacity building to reach a just, prosperous, and sustainable water wise world. It is well-known for its research, knowledge generation, and applied science, which helps to develop policy recommendations and supports the implementation of programmes. In addition, SIWI uses its trusted convening power to facilitate multi-stakeholder dialogues, most evident in its annual event, World Water Week.

About ICWC

The work of ICWC focuses on the facilitation of cooperation on water resources shared between different parties in a transboundary setting. The ICWC focuses primarily on political boundaries at the international and subnational levels but may also address water shared between sectoral boundaries when relevant in a local context, particularly when the use of existing shared water resources is disputed.