

ANNEX F: INDIGENOUS PEOPLE'S FRAMEWORK (IPF)

1. Definition of IPs

The World Bank in OP4.10 defines indigenous people (IPs) as a “*distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees:*

- (i) *self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;*
- (ii) *collective attachment to geographically distinct habitats or ancestral territories in the project area and to natural resources in these habitats and territories;*
- (iii) *customary cultural, economic, social or political institutions that are separate from those of the dominant society and culture; and*
- (iv) *an indigenous language, often different from the official language of the country or region.*

IPs generally include minority groups following traditional livelihoods, generally marginalized, and discriminated against by the wider society.

2. IPs in Kenya

Kenya is home to a number of groups who self-identify as Indigenous Peoples. Some of these are hunter-gatherers with some transitioning to agro-pastoralism, others nomadic or seminomadic pastoralists and other artisanal blacksmiths and fishing communities. In the absence of updated and reliable statistics, it is difficult to give precise demographic data of the various groups. Estimations vary greatly and depend on personal or institutional judgments of which group is considered as Indigenous Peoples in Kenya. Some experts have put the total population of groups that self-identify as Indigenous Peoples at around 1.5 million.

A preliminary assessment indicates that it is not likely that indigenous people who meet the World Bank criteria under OP 4.10 will be present and affected in the projects area of influence. This framework is developed as a precautionary measure to guide mitigating adverse impacts on the vulnerable and marginalized groups, should screening of any sub-project indicate the presence of IPs.

3. Objective

Although it is not envisaged that indigenous people who meet the World Bank criteria of OP 4.10 will be impacted by the project, this framework is developed only as a precautionary measure to ensure that should IPs be affected, measures are put in place to:

- a) Avoid potentially adverse effects on the Indigenous Peoples' communities; or
- b) When avoidance is not feasible, minimize, mitigate, or compensate for such effects;
- c) Ensure that the IPs receive social and economic benefits that are culturally appropriate and gender as well as inter-generationally inclusive; and

- d) Ensure that there is broad IPs community support for the project.

Should screening show the existence of IPs in the project's area of influence, an Indigenous Persons Plan (IPP) will be prepared.

4. Policy and Legislative

4.1 Constitution of Kenya, 2010

The CoK, 2010, does not specifically use the term IP, it is nevertheless robust in articles that define vulnerability and marginalization, including issues that IPs cite as the reasons for their self-identification. It also addresses social exclusion in general. Article 260 of the Constitution defines a "marginalized community" as: (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or (d) pastoral persons and communities, whether they are (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole⁸.

Similarly, the COK, 2010, defines 'marginalized group' as: a group of people who, because of laws or practices, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4) which prohibits discrimination on the basis of ethnic or social origin, religion, conscience, belief, culture, dress or language. In addition, article 27(6) calls on the state to undertake, 'legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination'. This article prohibits both direct and indirect discrimination.

Articles 56 and 260 of the Constitution are a clear demonstration of the intentions of the country to deal with the concerns of minority and marginalized groups: The definition of marginalized communities and groups by the COK, 2010, and the provisions for affirmative action programmes for minority and marginalized groups are efforts to provide a legal framework for the inclusion of minority and marginalized groups into mainstream development of the country. These articles present the minority and marginalized groups including groups that fit the OP 4.10 criteria as a unique category of certain segments of the Kenyan population that deserve special attention in order to bring them to par with the rest of the country.

The Constitution of Kenya requires the State to address the needs of Indigenous People, including "minority or marginalized" and "particular ethnic, religious or cultural communities" (Article 21.3): The Specific provisions of the Constitution include: affirmative action programs and policies for minorities and marginalized groups (Articles 27.6 and 56); rights of "cultural or linguistic" communities to maintain their culture and language (Articles 7, 44.2 and 56); protection of community land, including land that is "lawfully held, managed or used by specific communities as community forests, grazing areas or shrines," and "ancestral lands and lands traditionally occupied

by hunter-gatherer communities” (Article 63); promotion of representation in Parliament of “...(d) ethnic and other minorities; and (e) marginalized communities” (Article 100); and an equalization fund to provide basic services to marginalized areas (Article 204).

Kenya’s 2010 Constitution provides a rich and complex array of civil and political rights, socio-economic rights and collective rights that are of relevance to indigenous communities. While important, constitutional provisions alone are not enough. They require a body of enabling laws, regulations and policies to guide and facilitate their effective implementation. In 2011, Kenya’s parliament enacted 22 laws. In the main, these laws are of general application and will have a bearing on the way in which the state exercises power in various sectors, some of them of fundamental importance to indigenous communities.

4.2 Other National Policies and Laws

Kenya’s legal and regulatory framework has inclusion of several provisions, policies and instruments that if well developed and implemented hold promise for addressing marginalization and inclusion of IPs. These include: The National Land Policy, The Forest Act 2005 and Forest Policy 2007, and National Policy on Culture and Heritage.

5. Framework for Indigenous Persons (IPs) under the Program

Each proposed sub-project will be subjected to the following processing requirements for IPs that include:

- (i) Screening to determine the presence of IPs,
- (ii) Social assessment, in consultations with communities involved,
- (iii) Community support through a process of Free Prior Informed Consent (FPIC)
- (iv) preparation of Indigenous Peoples Plan (IPP) and,
- (v) Disclosure.

5.1 Screening

Screening of all the sub-project investments for the presence of IPs will be a mandatory requirement prior to implementation to determine if IPs are present in or have collective attachment to, the project area. In conducting this screening, the technical judgment of qualified social scientists with expertise on the social and cultural groups in the project area will be sought. Consultations with the IPs concerned and the executing agency will be undertaken.

To ensure inclusive participation:

- a) Meetings may be conducted in indigenous languages
- b) Representatives of the IPs in collaboration with the local administration in the sub project area will select a venue that is considered by way of mutual consensus as appropriate.
- c) Provide adequate notice for the meetings and allow time for consensus building, and the articulation by IPs of their views and preferences.
- d) Ensure the time chosen for the meetings is appropriate for majority of the IPs to attend.

5.2 Social Assessment

If, based on the screening, it is concluded that IPs are present in, or have collective attachment to, the project area; a social assessment will be undertaken to evaluate the project's potential positive and adverse effects on the IPs, and to examine project alternatives where adverse effects may be significant. The breadth, depth, and type of analysis required for the social assessment will be proportional to the nature and scale of the proposed sub project's potential and effects on the IPs present.

The social assessment will also identify if the proposed investment will involve change in use or management of commonly held properties in the community as well as involving the commercial development of natural and cultural resources on lands or territories that IPs traditionally owned, or customarily used or occupied. The social assessment will ensure free, prior and informed consultation with the IPs during project planning and implementation.

5.3 Stakeholder Consultation

Engagement will be based on honest and open provision of information, and in a form that is accessible to IPs. Engagement will begin at the earliest possible stage, prior to substantive on-the-ground activity implementation. Engagement, wherever possible, will be undertaken through traditional authorities and structures within communities and with respect for traditional decision-making structures and processes. However, recognition of the limitation these structures sometimes pose for some groups, such as women and young people will be taken into account.

Such consultation will include use of indigenous languages, allowing time for consensus building, and selecting appropriate venues to facilitate the articulation by IPs of their views and preferences. Representatives of the vulnerable and marginalized groups in collaboration with the local administration in the sub project area will select a venue that is considered by way of mutual consensus as appropriate.

Consultations will be based on the principle of Free, prior, informed and accessible consultation (FPIA-Consultation, refers to a process whereby affected vulnerable and marginalized communities, freely have the choice, based on sufficient information concerning the benefits and disadvantages of the project and how these activities occur.

Good practice in IPs community engagement will aim to ensure that:

- IPs have an understanding of their rights
- IPs are informed about, and comprehend the full range (short, medium and long-term) of social and environmental impacts – positive and negative – that can result from the proposed investment
- Any concerns that IPs have about potentially negative impacts are understood and addressed by the project
- Traditional knowledge informs the design and implementation of mitigation strategies and is treated respectfully
- There is mutual understanding and respect between the Project and the IPs as well as other stakeholders

- IPs aspirations are taken into account in project planning so that people have ownership of, and participate fully in decisions about, community development programs and initiatives
- The project has the broad, on-going support of the IPs
- The voices of all in the IPs that is, engagement processes are inclusive.

5.4 Indigenous Peoples Plans (IPPs)

This framework calls for the preparation of Indigenous Peoples Plan (IPP) for each micro-project screened and found to be implemented in areas where IPs are present or have a collective attachment. The IPP will be prepared through a consultative process.

All the IPPs that will be prepared will include the following elements, as needed:

- a) A summary of a scale appropriate to the project, of the legal and institutional framework applicable to Indigenous Peoples. Relevant baseline information on the demographic, social, cultural characteristics of the affected Indigenous Peoples' communities, and the natural resources on which they depend within project affected area.
- b) A summary of the social assessment findings
- c) A summary of the framework and results of the FPIC with the affected IPs that was carried out during project preparation and that led to broad community support for the project.
- d) An action plan of measures to ensure that the IPs receive social and economic benefits that are culturally appropriate, including, if necessary, measures to enhance the capacity of the project implementing agencies.
- e) When potential adverse effects on IPs are identified, appropriate action plans of measures to avoid, minimize, mitigate, or compensate for these adverse effects.
- f) The cost estimates and financing plan for the IPP.
- g) Accessible procedures appropriate to the project to address grievances by the affected IPs arising from project implementation. When designing the grievance procedures, the borrower takes into account resolution of grievances at lowest levels possible; the availability of judicial recourse and customary dispute settlement mechanisms among the IPs.
- h) Mechanisms and benchmarks appropriate to the project for monitoring, evaluating, and reporting on the implementation of the IPP. The monitoring and evaluation mechanisms should include arrangements for the FPIC with the affected IPs.

6. Adverse Impacts

Permanent effects - Permanent effects could result in loss of use of property, vegetation, or land by the affected person as a result of the subproject activities. Such effects are anticipated to affect:

- Indigenous groups whose land is found suitable for these infrastructures and this can translate into either loss of land, pasture and crop cover or all. The mitigation is for the project to avoid the need for land acquisition and displacement of people.
- Increase of infectious diseases like HIV/AIDS due to new interactions of communities,' specifically "foreign" workers who will be engaged in the construction activities. Sensitization and awareness about HIV/AIDs will be carried out as a mitigation measure for reducing incidence of contracting HIV/AIDs and other sexually transmitted diseases.
- Some of the sites chosen for sub-projects may be culturally important or sacred to IPs. It will be essential to have consultations to address such concerns, and ways to avoid or mitigate adverse cultural impacts.

- Exclusion of IPs from the project due to:
 - a) Limited understanding of IPs by national and country government officers, and other stakeholders.
 - b) Language barriers due to low literacy and competence in national language
 - c) Cultural barriers that exclude women and youth from certain economic activities and assets
 - d) Livelihood style like pastoralism, hunting and gathering, fishing
 - e) Women on-farm and household chores
 - f) Logistical issues like remoteness, distance, and transport cost from and to IPs sites
 - g) Lack of institutional frameworks (saving and credit)
 - h) The remoteness of IPs site might limit the market-oriented opportunities

Temporal impacts - Temporal impacts will result in an interruption in the current use of property or land by the affected communities or individuals as a result of the subproject activities.

7. Proposed Mitigation Measures

To avoid or minimize adverse impacts and, at the same time, ensure enhancement of benefits and full participation of the Indigenous People, the project will:

- Ensure that IPs and their organizations are informed of activities selection, design, and implementation processes to seek input and to provide clarification.
- Carry out analysis of socio economic impacts of proposed sub projects on Indigenous People through a transparent process with the free and informed participation of the affected communities.
- Ensure that the interventions do not unnecessarily and unintentionally exacerbate factors outside the scope of planned impacts;
- Screen the activities of subprojects for a preliminary understanding of the nature and magnitude of potential impacts, and explore alternatives to avoid or minimize any adverse impacts as detailed in the ESMF;
- Be guided by the ESMF which spell out the principles of mitigation measures to address such negative impacts.
- Undertake the necessary tasks in order to adopt appropriate mitigation measures. The most important in this respect is consultation with the IP communities, community elders/leaders, civil society organizations like NGOs and others who have experience working with other Indigenous People.

ANNEX G: CHANCE FIND PROCEDURE

1. Purpose of the chance find procedure

The chance find procedure is a project-specific procedure that outlines actions required if previously unknown heritage resources, particularly archaeological resources, are encountered during project construction or operation. A Chance Find Procedure, is a process that prevents chance finds from being disturbed until an assessment by a competent specialist is made and actions consistent with the requirements are implemented.

2. Scope of the chance find procedure

This procedure is applicable to all activities conducted by the personnel, including contractors, that have the potential to uncover a heritage item/site. The procedure details the actions to be taken when a previously unidentified and potential heritage item/site is found during construction activities. Procedure outlines the roles and responsibilities and the response times required from both project staff, and any relevant heritage authority.

3. Induction/Training

All personnel, especially those working on earth movements and excavations, are to be inducted on the identification of potential heritage items/sites and the relevant actions for them with regards to this procedure during the Project induction and regular toolbox talks.

4. Chance find procedure

If any person discovers a physical cultural resource, such as (but not limited to) archaeological sites, historical sites, remains and objects, or a cemetery and/or individual graves during excavation or construction, the following steps shall be taken:

1. Stop all works in the vicinity of the find, until a solution is found for the preservation of these artefacts, or advice from the relevant authorities is obtained;
2. Immediately notify a foreman. The foreman will then notify the Resident/Supervising Engineer and the Environment Officer (EO)/Environmental Manager (EM);
3. Record details in Incident Report and take photos of the find;
4. Delineate the discovered site or area; secure the site to prevent any damage or loss of removable objects. In cases of removable antiquities or sensitive remains, a night guard shall be arranged until the responsible local authorities take over;
5. Preliminary evaluation of the findings by archaeologists. The archaeologist must make a rapid assessment of the site or find to determine its importance. Based on this assessment the appropriate strategy can be implemented. The significance and importance of the findings should be assessed according to the various criteria relevant to cultural heritage such as aesthetic, historic, scientific or research, social and economic values of the find;
6. Sites of minor significance (such as isolated or unclear features, and isolated finds) should be recorded immediately by the archaeologist, thus causing a minimum disruption to the work schedule

of the Contractor. The results of all archaeological work must be reported to the National Museums of Kenya (NMK), once completed.

7. In case of significant find the National Museums of Kenya (NMK) should be informed immediately and in writing within 7 days from the find.

8. The onsite archaeologist provides the NMK with photos, other information as relevant for identification and assessment of the significance of heritage items.

9. The NMK must investigate the fact within 2 weeks from the date of notification and provide response in writing.

10. Decisions on how to handle the finding shall be taken by the responsible authorities. This could include changes in the layout (such as when finding an irremovable remain of cultural or archaeological importance) conservation, preservation, restoration and salvage;

11. Construction works could resume only after permission is granted from the responsible authorities.

12. In case no response received within the 2 weeks' period mentioned above, this is considered as authorization to proceed with suspended construction works.

One of the main requirements of the procedure is record keeping. All finds must be registered. Photo log, copies of communication with decision making authorities, conclusions and recommendations/guidance, implementation reports - kept.

5. Additional information

Management options for archaeological site

- a) **Site avoidance.** If the boundaries of the site have been delineated attempt must be made to redesign the proposed development to avoid the site. (The fastest and most cost-effective management option)
- b) **Mitigation.** If it is not feasible to avoid the site through redesign, it will be necessary to sample it using data collection program prior to its loss. This could include surface collection and/or excavation. (The most expensive and time-consuming management option.)
- c) **Site Protection.** It may be possible to protect the site through the installation of barriers during the time of the development and/or possibly for a longer term. This could include the erection of high visibility fencing around the site or covering the site area with a geotextile and then capping it with fill. The exact prescription would be site- specific.

Management of replicable and non-replicable heritage

Different approaches for the finds apply to replicable and non-replicable heritage.

Replicable heritage¹

¹ Replicable cultural heritage is defined as tangible forms of cultural heritage that can themselves be moved to another location or that can be replaced by a similar structure or natural features to which the cultural values can be transferred by appropriate measures. Archaeological or historical sites may be considered replicable where the particular eras and cultural values they represent are well represented by other sites and/or structures.

Where tangible cultural heritage that is replicable and not critical is encountered, mitigation measures will be applied. The mitigation hierarchy is as follows:

- a) Avoidance;
- b) Minimization of adverse impacts and implementation of restoration measures, in situ;
- c) Restoration of the functionality of the cultural heritage, in a different location;
- d) Permanent removal of historical and archaeological artefacts and structures;
- e) Compensation of loss - where minimization of adverse impacts and restoration not feasible.

Non-replicable heritage²

Most cultural heritage is best protected by in situ preservation, since removal is likely to result in irreparable damage or even destruction of the cultural heritage. Nonreplicable cultural heritage must not be removed unless all of the following conditions are met:

- a) There are no technically or financially feasible alternatives to removal;
- b) The overall benefits of the project conclusively outweigh the anticipated cultural heritage loss from removal; and
- c) Any removal of cultural heritage must be conducted using the best available technique advised by relevant authority and supervised by archaeologist.

Human Remains Management Options

The handling of human remains believed to be archaeological in nature requires communication according to the same procedure described above. There are two possible courses of action:

- a) ***Avoid.*** The development project is redesigned to completely avoid the found remains. An assessment should be made as to whether the remains may be affected by residual or accumulative impacts associated with the development, and properly addressed by a comprehensive management plan.
- b) ***Exhume.*** Exhumation of the remains in a manner considered appropriate by decision makers. This will involve the predetermination of a site suitable for the reburial of the remains. Certain ceremonies or procedures may need to be followed before development activities can recommence in the area of the discovery.

² Nonreplicable cultural heritage may relate to the social, economic, cultural, environmental, and climatic conditions of past peoples, their evolving ecologies, adaptive strategies, and early forms of environmental management, where the (i) cultural heritage is unique or relatively unique for the period it represents, or (ii) cultural heritage is unique or relatively unique in linking several periods in the same site. Examples of non-replicable cultural heritage may include an ancient city or temple, or a site unique in the period that it represents.