

Why indigenous land tenure security is a condition for indigenous community engagement in energy transition in South Africa

POLICY BRIEF

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ABSTRACT

Secure land tenure is a precondition to beneficial land occupation. Tenure security enables land holders to derive benefit from their land. Although they have valid claims to land, indigenous people experience persistent tenure insecurity which, in turn, undermines their livelihoods. Indigenous communities have experienced historical injustices that include the violent dispossession of their land and natural forest and marine resources. Although the democratic South African government initiated reforms to restore land and right the injustices, the failure to conclusively resolve these processes have not only perpetuated the injustices but have left indigenous communities vulnerable to further alienation from their land and livelihood resources. The climate-related pressure on indigenous lands juxtaposed with the targeting of the same land for renewables, poses new risks to the livelihoods of indigenous communities. Although the government has put in place legislation, policies and frameworks to support the energy transition, limited attention has been paid to land tenure issues, specifically indigenous land entitlements and the recognition and protection of those indigenous lands and livelihoods. This policy brief explores the just energy transition in South Africa to highlight how (if not sensitively handled) the process can potentially entrench land alienation for the indigenous populations. Focusing on the site earmarked for the country's green hydrogen hub in Boegoebaai in the Northern Cape Province, the brief highlights how the just energy transition can potentially undermine the social and livelihood circumstances of the local indigenous community who are the custodians of the Richtersveld. Using historical data, literature review, social media and key informant interviews, the brief then demonstrates how the development of the green hydrogen hub can be done to address historical spatial injustices while capitalising on economic opportunities arising from the global energy transition.

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Introduction

The climate change phenomenon has galvanised the global community to take actions to mitigate the impacts of careless human exploitation of natural resources. Reducing reliance on energy generated from fossil fuels is key to tackling this crisis. [Sustainable Development Goal \(SDG\) 13](#) urges the global community to take urgent [climate action](#) to combat climate change which includes the [energy transition](#) – switching from fossil fuels to renewable energy. Hydrogen, besides being a clean and sustainable energy source, presents commercial opportunities in terms of conversion and storage. The global demand for transportable and tradable green energy molecules to decarbonise industries is driving the growth of a new energy market in [green hydrogen](#), and South Africa is developing its own green hydrogen hub in line with SDG 13.

However, the SDGs also aim to address issues related to indigenous peoples, including poverty alleviation, inclusion, good governance and environmental sustainability. This presents a contradiction, since renewable energy infrastructure is materially located on tracts of land – an increasingly contested and scarce resource in South Africa, the [world's most unequal country](#) with a history of land dispossession. Furthermore, indigenous land territories are the main targets of renewable energy infrastructure development. The challenge is to reconcile the South African government's commitment to secure indigenous people's land tenure with the country's energy transition goals.

South Africa's [energy mix](#) is primarily sourced from coal which contributed 65 per cent in 2018. This is complemented by crude oil at 18 per cent, renewables and waste contribute 11 per cent and the rest comprises gas, nuclear and geothermal sources. South Africa's energy transition goal is to achieve carbon neutrality by 2050. South Africa's renewable energy ambitions aim to lift the share of renewable energy in its power generation mix from the current 11 per cent to 41 per cent by 2030. The 2003 [White Paper on Renewable Energy](#) set a ten-year target for diversifying the country's energy mix – focused on investment in renewable energy technologies; the direction of public resources, implementation of energy technology, fiscal incentives for renewable energy and creating an investment climate for development of the renewable energy sector.

In May 2011, the [Integrated Resource Plan \(IRP\) 2010-30](#) set a target of 17,800 MW of renewable energy to be achieved by 2030 in respect of the electricity generation mix. The [IRP 2019](#) envisages adding 14,400 MW of wind and 6,400 MW of solar photovoltaics (PV), including some additional 4,000 MW of embedded generation and 2,000 MW of storage by 2030. The main power generation technologies identified to contribute by 2030 are onshore wind (21 per cent of electrical energy), utility-scale solar PV (14 per cent), biomass/biogas (4 per cent), distributed solar PV (2 per cent), concentrated solar power (CSP) (1 per cent) and hydro (7 per cent; mostly imported). The IRP 2019 underscored the need to reduce reliance on unsustainable energy sources.

Importantly, the South African Just Energy Transition Plan recognises the direct effects that the energy transition has on livelihoods, workers and communities. South Africa's Just Energy Transition Investment Plan (JET IP) for 2023-2027 gives effect to the historic [Just Energy Transition Partnership](#) (JETP) which recognises the unique economic and social responsibility to transition South Africa's fossil fuel-dependent economy in a just and equitable manner. The [Just Transition Framework](#) places people at the centre of decision making and is guided by principles of distributive, restorative and procedural justice.

The commercial potential of the green hydrogen economy has incentivised South Africa to develop a [green hydrogen strategy](#), looking at the Northern Cape, Mpumalanga, KwaZulu Natal, Gauteng and the Western Cape as potential sites. Boegoebaai has been identified as a potential host for the [green hydrogen hub](#) in the Northern Cape. A master plan for a green hydrogen Special Economic Zone (SEZ) is being developed, which aims to support 40 GW of electrolyser capacity by 2050.

However, the justice interpretation of the energy transition in South Africa remains narrowly focused on employment creation and community participation in the BBBEE. The existing frameworks governing renewable energy do not acknowledge wider communities and specifically those who have claims and rights to the land and natural resource rights in the proposed renewable energy project location sites. These rights are recognised and formally acknowledged in policies, protocols and legislation which are listed in Table 1. The pressure to switch to renewable energy has increased competition for land held by indigenous populations globally and notably for the purpose of this policy brief, in Boegoebaai.

The Boegoebaai site is a large coastal land mass, and a sparsely populated greenfield, i.e. it has never been developed, making it ideal for green hydrogen production.¹ However, it is on a contested land claim – an asset that indigenous communities of the Richtersveld have been struggling to reclaim since 2001.

¹ <https://edepot.wur.nl/556044>

The Richtersveld community has been engaged in a struggle to regain possession of the land that it lost in dispossessions in 1926 to diamond-mining claims and the subsequent establishment of the [|Ai-|Ais/Richtersveld Transfrontier Park](#). The forceful eviction, displacement and relocation of the indigenous community has resulted in tenure insecurity and marginalisation of their cultural identity and livelihoods.

The [Restitution of Land Rights Act](#) mainly provides for redress for the historic injustice of land dispossession. The indigenous Richtersveld community successfully lodged a land restitution claim over the Richtersveld in 1998. According to the 2003 deed of settlement, the community was [awarded](#)

the restoration of the land and mineral rights to the community, on environmental matters, on an extraordinary reparation payment of R190 million and a lump sum development grant of R50 million and various ancillary matters.

The Richtersveld community was to receive more than 194,600 hectares, including a fertile strip of farming land along the Orange River, 84,000 hectares of diamond territory and the [Mining Town of Alexander Bay](#).

Approximately 69,877 hectares of the land that was claimed by the Richtersveld community has been targeted for the siting of a Boegoebaai port and rail development, and an adjacent green hydrogen Special Economic Zone (SEZ), storage infrastructure, transmission grids and pipelines. The site that has been targeted for the green hydrogen project² is a greenfield site owned by the people of the Richtersveld through the communal property association (CPA). The land is currently under an outstanding land restitution claim which was lodged by the Richtersveld CPA, also known as Sida! (Our Land), which is the legal custodian of the assets won by the community.

Although the estimated R13,8 billion investment in [green hydrogen development](#) will create 2,971 direct construction employment opportunities, 400 operational employment opportunities and 13,819 indirect employment opportunities, the project has the potential to significantly undermine the Richtersveld community's access to its land and related benefits of employment and livelihood, and non-economic benefits of identity, belonging, place of residence, sacred space, memories and ancestral connections, land and cultural succession. The project will greatly increase the risks to cultural heritage and indigenous languages of the Richtersveld communities unless the terms on which the project involves the indigenous community meets the provision of protocols that allow full indigenous consultation and decision-making authority. The host indigenous community needs secure land tenure (as provided for by the existing laws, policies and institutions) to derive economic, social, cultural and political benefits from the Boegoebaai investment.

The successful resolution of the Richtersveld community's land restitution claim would not only enable the community to benefit from the development and contribute to the just energy transition global goals but also to contribute to the success of the South African Land Reform Programme by specifically reducing poverty and addressing colonial- and apartheid-era spatial injustice issues. Conversely, failure to conclusively settle the land claim will perpetuate historical land injustices and push the community and their descendants deeper into poverty.

² <https://www.globalafricanetwork.com/investment-projects/port-rail-infrastructure-development/>

Dispossession of the indigenous people of the Richtersveld

The indigenous or ‘first people’ inhabited South Africa prior to the arrival of Europeans. Their identity recognises the international movement of some [370 million](#) indigenous people advocating for their rights across the world. The SDGs 1, 2, 4 and 5 have indicators that refer directly to indigenous people, who are acknowledged under the South African Bill of Rights. The country has also endorsed the [United Nations Declaration on the Rights of Indigenous Peoples](#). There is no clear [data](#) about the population of South African indigenous people. If they are included with ‘coloured’ people, they make up 8 per cent of the population and if they are counted as ‘other’ then it is 0.4 per cent. [Indigenous people](#) of South Africa include the Khoe-San/Khoisan, which comprises the San and the Khoekhoe.³³

The [Richtersveld community](#) include people of Nama (Khoekhoe) descent – approximately 3200 people living in the four villages of Kuboes, Sanddrift, Eksteenfontein and Lekkersing. The Nama’s land dispossession started in 1847. In the 1920s, mining licences were granted over the area. In 1957, high quality diamonds were discovered and the state seized the land. [The Group Areas’ Act](#) of the 1950s classified the Nama as ‘coloured’ and institutionalised the loss of their identity. In the 1990s, the land was vested in Alexkor Ltd., a government-owned diamond-mining company. This series of dispossessions disrupted the Nama people’s livelihoods and forced them to live in reserves.

Notwithstanding the 1998 Transformation of Certain Areas Act (TRANCRAA) that transferred the land back to the communities, the loss of their land and successive exclusions have undermined the Nama people’s autonomy, citizenship, dignity, health and social status. They have not benefited from land assets as they live in remote areas. Their life expectancy is lower than their non-indigenous counterparts and they rely mostly on government grants, fishing and subsistence farming. The loss of their land undermined their livelihoods, traditional skills and way of life. The Nama remain excluded from the benefits derived from the exploitation of their natural resources which include the Richtersveld resource abundance of biodiversity, diamond fields, zinc, copper, manganese and agricultural land that has attracted substantial investment. The corporate interests include [De Beers](#), [Alexkor](#), [Transhex](#) and now the green hydrogen [mining and port infrastructure interests](#) in Boegoebaai. While these substantive investments have generated enormous wealth, the indigenous community of the Richtersveld have not received any substantial returns on their assets. Studies of the indigenous community’s experience over the years have highlighted that they have not only become poorer, but their livelihoods have become increasingly vulnerable and disenfranchised. The indigenous people bear the disproportionate burden of the [negative impacts](#) of large-scale renewable energy projects which include displacement and land alienation, marginalisation, discrimination in employment, lack of social protection, low income, loss of production from their traditional activities, biodiversity and contamination of natural resources. The Boegoebaai renewable energy infrastructure project will threaten the Richtersveld community’s ancestral lands and environmental biodiversity, as exemplified by the concurrent threat to a colony of seals.

³³ The spelling varies between *Khoe-San* and *Khoi-San* in the National Traditional Affairs Bill, 2013.

Table 1: Protocols Framing Indigenous Rights to Land in South Africa

<p>Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (in respect of indigenous people)</p>	<p>Recognise indigenous people's rights to land and natural resources. Encourage states to define roles and responsibilities of agencies dealing with land and natural resource tenure; ensure coordination between implementing agencies and indigenous people; establish frameworks to promote sharing of spatial and other information on tenure rights; provide legal and technical support to indigenous people; recorded and unrecorded land rights holders; include Indigenous peoples in consultation process and provide appropriate recognition and protection of tenure rights of indigenous peoples and obligations under national, international law, and voluntary commitments.</p>
<p>Equator Principles</p>	<p>Voluntary Guidelines adopted by private financial institutions to determine, assess, and manage environmental and social risk in projects.</p>
<p>United Nations Declaration on the Rights of Indigenous Peoples</p>	<p>Establishes a universal framework of minimum standards for the survival, dignity and wellbeing of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.</p>
<p>Guiding Principles on Large Scale Land Based Investments in Africa</p>	<p>Encourages member states and investors to explore large-scale land-based investment models which empower indigenous people and minimise negative impacts.</p>
<p>Constitution of the Republic of South Africa 1996</p>	<p>Section 25(6) entitles persons or communities 'whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices' to tenure which is legally secure. Section 25(7) entitles a community whose tenure of land is legally insecure due to past racially discriminatory laws or to tenure which is legally secure or to comparable redress. The Bill of Rights in South Africa recognises indigenous people.</p>
<p>Restitution of Land Rights Act (No. 22 of 1994)</p>	<p>Imposes a duty on the state to provide for the restitution of rights in land in respect of which persons or communities were dispossessed historically. Section 2(1) entitles the Richtersveld community to restitution of the right to exclusive beneficial occupation and use, and ownership of the land, minerals, and natural resources.</p>
<p>Interim Protection of Informal Land Rights Act (No. 31 of 1996)</p>	<p>Provides for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law. IPILRA recognises the use occupation and access to land in terms of indigenous law or practise. IPILRA recognises the rights of land users to be consulted on a proposal that may deprive them of their rights. The land-rights-holders are also eligible for compensation.</p>
<p>Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (Act 19 of 1998)</p>	<p>The main aim of the Act is to protect both occupiers and landowners. The owner or landlord must follow the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) (except in areas where ESTA operates) if they want to evict a tenant.</p>
<p>Extension of Security of Tenure Act (Act 62 of 1997)</p>	<p>Provides measures to facilitate long term land tenure security, regulates conditions for residence on certain land, regulate conditions under which to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated and regulates conditions under which persons, whose right of residence has been terminated, may be evicted from land.</p>
<p>Communal Property Associations Act (No 28 of 1996)</p>	<p>Enables communities to form Communal Property Associations through which they may acquire and possess land that belongs to the community. No member of a CPA may be excluded from the association's property, The CPA needs consent of members to dispose of the property.</p>
<p>Framework for a Just Transition in South Africa</p>	<p>Advances principles of distributive justice, restorative Justice, and procedural justice to underpin a just transition in South Africa. Includes fair apportionment of costs and benefits from the transition; addressing historical damages especially for disenfranchised communities, and the empowerment of communities, workers and small business development and livelihoods.</p>

Challenges to the Richtersveld indigenous communities' participation in the Boegoebaai green hydrogen production

The policymakers' failure to deliver tenure security and disregard of indigenous customs and institutions, undermine progress towards achieving the SDGs.

South Africa has failed to enforce legal and policy frameworks that recognise the sovereignty of indigenous sacred spaces and territories. The overreliance on soft laws to uphold land rights of indigenous communities is inadequate as the frameworks are voluntary and cannot be enforced when violated. Thus, indigenous communities are rendered powerless to retain control over their territories.

Since the right to land includes owning, possession, use, control and management of the resources according to their traditional practices, the delays to conclude the land claim which was awarded in 2003 means that the Richtersveld community does not have an effective claim to the site targeted for the Boegoebaai port. As a result, the community is not recognised and engaged as the legal custodian of Richtersveld land who exercise self-determination and self-governance.

An added impediment to potential investors in Boegoebaai to engage effectively is a lack of internal coherence in the Richtersveld community. There are contestations about their identity, and the membership and leadership of the CPA. There are contestations around the legitimacy and relevance of other formations like the Nama Traditional Council and others who claim to represent the indigenous community. This has resulted in conflict, disruptions and litigation. This obstructs their ability to have coherent discussions, appoint representatives and put in place other structures and institutions to manage their natural resource endowment. In 2011, the land-holding entity, the CPA, was placed under [administration](#) by the High Court of the Northern Cape and again in February 2020 under case [number 961/19](#).

Thirdly, South Africa does not have a template for consulting with indigenous communities and effectively recognising their claim to land. As a result, communities whose land has attracted the interest of commercial and extractive industries have resorted to the courts to defend their rights. Unfortunately, communities like the Richtersveld lack resources to engage in expensive and protracted legal battles with the state. The [SAREM Masterplan](#) developed in 2023 and the Presidential Climate Commission's Report on [Stakeholder perspectives on South Africa's Just Energy Investment Plan](#) did not have evidence of engagement with indigenous populations in the country. Table 2 summarises a protocol developed by the International Land Coalition to inform community engagement.

There is power and information asymmetry between the Richtersveld community, the state and investors in the renewable project in the Boegoebaai. There is a lack of frameworks and mechanisms to be followed to inform communities about the Boegoebaai development. The lack of transparency and information makes the community vulnerable to [elite capture](#) and exploitation.

So far, the existing legislations and policies passed and/or drafted to support the South African energy transition lack template and/or guidelines on the just inclusion of communities and indigenous people. The absence of a framework to inform the mainstreaming of indigenous people into the development of the proposal for the Boegoebaai means that communities are incorporated into the green hydrogen production process on adverse terms and are treated as project beneficiaries.

Table 2 highlights the alternatives of incorporating indigenous people into renewable energy projects as owners, partners, developers or equity partners.

Table 2: Five general classifications of project partnership arrangements that can contribute to an inclusive, just energy transition process

Indigenous ownership	Fully indigenous-owned projects are enabled through access to developers and favourable financing agreements. This model offers indigenous communities full decision-making power and control over a project’s planning, management, jobs, profits, revenues and can strengthen indigenous people’s self-determination.
General partnership	Ownership is split equally between partners.
General partnership–indigenous developer	Ownership is shared equally between an indigenous community and a renewable energy developer with shared decision making and equally distributed earnings. The division of responsibility regarding construction, and operations and maintenance are addressed depending on individual circumstances. The generated energy is sold to a utility through a power purchase agreement
Limited partnership	Formed between utility partners and indigenous communities. The terms of such co-ownership are usually agreed upon prior to the project and are highly flexible models that can distribute liability and risks.
Equity ownership	Indigenous communities purchase equity in a project and act as shareholders. The indigenous communities may not actively participate in the project’s planning or administration. The indigenous partner often controls a maximum of 25% of the project.

The table presents options that have been used in Canada to increase indigenous participation in the energy sector. The models illustrate options for developing that build energy-development partnerships with indigenous communities. The models offer greater flexibility for financing, sharing responsibility and improved collaboration between industry players and communities. They provide a platform that stakeholders involved in South African renewable energy investments can explore locally to facilitate the Richtersveld indigenous community’s participation in the Boegoebaai renewable energy development on terms that advance the country’s renewable energy goals without undermining the government’s Constitutional obligations and indigenous people’s land rights. This includes upholding the legal provisions that exist to secure community land rights, developing guidelines and policies to domesticate the soft law provisions and collaborating with civil society organisations who are working with communities in the Richtersveld to secure indigenous land rights.

Towards an inclusive framework for community engagement into land-based renewable investments

Land tenure security is a precondition for the recognition and effective participation of the indigenous communities of the Richtersveld in the just energy transition and renewable energy initiatives in the country. The conclusion of the restitution land claim is the precondition: indigenous people in the Richtersveld have nationally and globally recognised rights to participate in all stages of the proposed green hydrogen production project in the Boegoebaai. Although these indigenous land rights are enshrined in the Constitution and international protocols and policies, it is necessary for the state and private sector institutions working on the proposed Boegoebaai green hydrogen project to ensure that the terms of engagement with the indigenous communities of the Richtersveld are compliant with the national regional and global provisions for the governance of developments on indigenous territories. Although

the legal victories scored in the Constitutional Court’s recognition of indigenous land rights in South Africa are evidence of the legal recognition of the Nama people’s claims, more needs to be done to ensure that indigenous communities benefit from their territory and are not further impoverished by the investments in the production of renewable energy. These include but are not limited to the mobilising and organising the indigenous communities in the Richtersveld; finalising land claims and outstanding court cases around the indigenous communities’ land claims in the Richtersveld; establishing clear terms for engaging indigenous communities in the renewable energy initiatives in the Richtersveld; setting mutually agreed, measurable milestones with reporting mechanisms; developing tools, institutions and mechanisms to complement the legal interventions underway; establishing inclusive multi-stakeholder mechanisms to facilitate indigenous people’s participation; domesticating and deploying existing tools and protocols to hold the state and investors accountable. Table 3 summarises the expected outcomes from the [International Land Coalition’s toolbox](#) aimed at securing Indigenous People and Local Communities’ Land rights.

Table 3 [International Land Coalition’s toolbox](#) aimed at securing indigenous peoples’ and local communities’ land rights.

A defined community engagement strategy.
A defined government engagement strategy.
A defined investor engagement strategy.
Recognising collective land rights of indigenous peoples for long-term community land-use planning.
Enforcing free, prior and informed consent of indigenous peoples before engaging in the process of granting concessions to investors.
Protecting the culture, religion and sacred lands of the indigenous peoples.
Preserving customary collective land ownership and uses.

Interventions to secure land rights and livelihoods of indigenous communities in South Africa’s energy transition

1. Generate information on land use, claims and claimants, and a resource portfolio on the Richtersveld to inform decision making and resource transactions. This should extend beyond economic claims on land and natural resources.
2. Proactive implementation of existing frameworks that recognise sovereignty of indigenous territories targeted for energy transition. This includes the interpretation of soft law provisions into tangible mechanisms that can be enforced when violated, complemented with existing national protections. This includes a guide for local authorities and renewable infrastructure developers targeting indigenous land for renewable energy infrastructure.
3. Conclude outstanding land claims to enable indigenous communities to take effective control of their territories. This will enable the indigenous communities to make autonomous decisions about their territories.
4. Institutionalise the use of inclusive multi-stakeholder platforms to strengthen the voices of indigenous people and address power and information asymmetries.

5. Law-based reporting and monitoring mechanisms that are binding on the investors.
6. Support and empower indigenous communities to develop coherent structures and legal entities to manage their land resources and participate in decision making. This includes:
 - Community verification, information on their land rights
 - Develop legal entities and guidelines for engaging with investors. This includes mechanisms to safeguard the indigenous communities from elite capture, corruption, and manipulation by the powerful.
 - Develop templates to inform consultation with indigenous communities which ensure that all eligible members of the communities are included in the decision-making processes. [Free, prior and informed consent](#) should be domesticated institutionalised and all stakeholders supported to uphold this.
 - Develop frameworks to mainstream indigenous people into development proposals of renewable energy production.
 - Recognise their claim to a land and safeguard their interests to ensure that they are participating fairly in transactions that involve their land.
 - Generate business models that are inclusive and compensation mechanisms that are fair and consider the non-economic valuations of indigenous territories.
 - Develop complementary mechanisms to support the land claims to ensure that costs and benefits are apportioned progressively between investors and indigenous landowners.