

Challenges in formalizing the rights of native communities in Peru

Iliana Monterroso and Anne Larson

Key messages

- Recent changes in formalizing indigenous peoples' collective land rights in Peru have led to progress in the titling of native communities.
- Two critical problems remain, in order to consolidate and facilitate implementation: (1) the need to re-examine regulations, and standardize and simplify titling procedures, to correct inconsistencies and gaps; (2) the urgency of resolving different types of overlapping rights that arise during the regularization process, including overlaps with forest permits, non-renewable resource extraction rights and protected areas.
- The titling process, which developed as a series of initiatives linked to aid projects, now needs to be institutionalized; this means ensuring that the formalization of native communities is included in the government budget.

Introduction

Since 1974, the Peruvian government has formally recognized the collective rights of more than 1,300 native communities with titles to over 12 million ha (IBC 2016). This recognition is important for the groups in the Peruvian Amazon who depend directly on forests, but it also has implications for the condition of the forests they occupy, which represent 17% of the country's forest area (MINAM 2016)². Despite this progress, there is a considerable backlog in the process of formalizing the land claimed by indigenous peoples. According to SICNA-IBC (2016), over 600 native communities (with about 5.5 million ha) await titling. The lack of a national cadaster makes it hard to verify the size and number of pending claims (Defensoría del Pueblo 2014). For example, the Interethnic Association for the Development of the Peruvian Amazon (AIDESEP 2016) calculates that there are outstanding claims to 20 million ha of land and forest. These include demands for the recognition and titling of native community land, for expansion of native

community land that has already been titled, and for other arrangements that recognize indigenous groups' management rights over protected areas, such as communal reserves³. In addition, there are demands for new territorial reserves to be set up for isolated groups and those under initial contact with mainstream society (AIDESEP 2013).

Under the existing regulatory framework (Law of Native Communities and Agrarian Development in the Lower and Upper Rainforest, Decree Law 22175 of 1978), the process by which native communities formalize their rights to land and forest has two different outcomes: a) demarcation and titling of agricultural land; and b) the signing of a usufruct contract on forest land. Both require native communities to have been legally recognized (Ministerial Resolution 0435-2016-MINAGRI). Although recent changes in the laws and institutions involved in formalization have brought about progress in the titling of native communities (Monterroso and Larson 2018), critical problems need to be addressed to consolidate and accelerate implementation. At the same time, native communities continue to be pressured to divide up their communal land and accept individual titling (Monterroso et al. 2017).

1 We use the term "native" in this brief, rather than the more common "indigenous," because of its specific legal meaning in the Peruvian context.

2 Although not a topic of this brief, it is worth noting that the relationship between indigenous collective tenure and forest condition in titled community land has been analyzed in specialized literature (e.g. Blackman et al. 2017; Schleicher et al. 2017).

3 Communal reserves are a category of protected area in which it is recognized that communities have management rights (Special Administrative Regime for Communal Reserves, Administrative Resolution 019-2005-INRENA-IANP).

This brief is part of CIFOR's 'Global Comparative Study on Forest Tenure Reform'⁴, and sets out to analyze two critical problems impeding the formal recognition of native community land and delaying implementation. Each issue brings its own series of challenges. Recommendations are made as to how to tackle these obstacles. The analysis is based on the results of a round table workshop with key stakeholders held in November 2017⁵ as well as other discussions⁶ on titling, and on the analysis of procedures for formalizing the rights of native communities, with particular emphasis on the discrepancy between the regulatory framework and its implementation (Notess et al. 2018).

First critical problem: Complexity and inconsistencies in regulations and procedures

Despite recent changes in institutional arrangements and legislation, the process of titling native community lands remains highly regulated and is costly and time consuming for the government agencies responsible for implementation. This makes implementation very difficult, particularly if native communities and indigenous organizations are to be actively involved in the process. A review of 25 files on titling in four regions of the Peruvian Amazon⁷ illustrates the gap between procedures established in the regulations and their practical application (Notess et al. 2018). This stems from the

fact that regional governments (and sometimes the various departments within them) have their own interpretations and methods and use different templates to draw up titles and usufruct contracts⁸.

Table 1 compares each regulation and its implementation, highlighting the differences in terms of the number of steps in the formalization procedures and the number of government agencies involved⁹. This discrepancy makes it difficult to coordinate the many participating entities and highlights the need for articulation among government agencies at all levels. Meanwhile, the growing number of non-governmental organizations and projects playing a role in implementation adds to the coordination difficulties.

To address these challenges, we recommend the following:

- The Office for Land Formalization of Agrarian Properties and Rural Cadaster (DIGESPAAR) – the lead body in charge of the rural land registry, land regularization and native community titling – should continue to re-examine the overall guidelines with a view to standardizing and, most importantly, simplifying procedures, bearing in mind the experience and difficulties identified by regional governments. This review should be shared with the various departments involved, including the Regional Directorates for Physical and Legal Regularization of Rural Property.

Table 1. Comparison of number of steps in the procedure for formalizing native communities

Stage	No. of steps (according to law)	No. of government agencies (identified in regulations)	No. of steps (identified in implementation)	No. of government agencies (identified in implementation)
Recognition	8	4	11	7
Demarcation and titling	11	7	>22	>12
Usufruct contract	1	2	5	5
Total	20	7*	>38	>12*

* Column does not represent the total of previous numbers because the same agency is involved in more than one stage.

Source: Notess et al. 2018.

4 See <http://www.cifor.org/gcs-tenure/>

5 The round table discussion 'Collective tenure, interculturality and gender in the formalization of native communities' took place in Iquitos, Loreto, with the aim of (1) discussing current challenges and obstacles to implementation of the procedures for formalizing collective rights, on the basis of specific experiences of recognition and titling of native communities; and (2) discussing which existing experiences of titling by key government, aid and NGO entities are incorporating issues of gender or interculturality, and examining their scope and replicability. The results are set out in Duran et al. (2018).

6 We refer, for example, to the working group on titling (set up within the framework of the National Round Table on Reducing Emissions from Deforestation and Forest Degradation REDD+), largely comprised of NGOs working on REDD+.

7 Of these, 13 files are related to communities in Loreto, 10 in Madre de Dios, 1 in San Martín and 1 in Ucayali.

8 Some of these interpretations can be found in the descriptions of the Regional government's TUPA (unified administrative procedures text), MOP (manual of organizations and processes) and ROF (regulation of organization and functions) (CIFOR and WRI 2017).

9 A step is defined as an action undertaken by a government entity which stops when implementation requires another government entity to take over. The number of entities considers different departments within a single agency. For example, in the Regional Governments the following are treated as separate bodies: the Regional Office for Physical and Legal Regularization of Rural Property and the Legal Office of the Regional Agrarian Office. The total of 38 steps only refers to cases where there is no irregularity, overlap or conflict; in other cases, the procedure includes additional steps.



Community meeting with CIFOR team (Photo by Marlon del Aguila Guerrero/CIFOR)

- The regional governments and other non-governmental agencies that play a part in implementation should be clear on the processes and steps involved in formalization and regularization. Efforts must be made to ensure that relevant stakeholders have the same interpretation of these. This means reaching consensus on the steps, and assuring that regional offices fully understand their responsibilities and that native communities are kept informed.
- Recent changes in regulations call for ongoing communication to clarify roles and responsibilities as well as to ensure staff are fully up to date. DIGESPACR must lead the way on this, with active regional government involvement to ensure that changes are implemented. The titling plans put forward by governmental and non-governmental¹⁰ organizations play a key role in providing technical support, can facilitate coordination among the various levels and ensure that finance is available for formal recognition of native communities.
- Nevertheless, to ensure long-term sustainability of the process, the state needs to allocate funding for formalization from the national budget, so that the government officials responsible for titling at both national and regional levels can fulfill their mandates.
- To avoid conflict, the entities involved in formalizing native communities, including DIGESPACR, the regional governments and the relevant civil society and aid agencies, should have information on the goals and progress of titling and formalization processes.

Second critical problem: overlapping and superimposed rights

The second critical problem is the superimposition of rights. An examination of current legislation demonstrates at least three situations in which overlapping rights¹¹ affect native communities. By overlapping rights, we mean the situation in which more than two stakeholders claim the same or different resources in a single area. This claim may be formally recognized in law. In order to settle socio-environmental conflicts in the Peruvian Amazon, the different types of overlap need to be identified, and tools should be available to address them both legally and socially.

In native communities, this situation is exacerbated by the lack of registries and information on native community rights over land and forest, and more particularly, by the lack of a single, consolidated national cadaster with information on the distribution of land and natural resource rights more broadly. The fact that GIS technology was not available at the time when a large portion of native communities were titled exacerbates the problem (IBC 2016). This meant that native community lands were titled without reliable spatial information, such as georeferenced boundaries. In some cases, titles were registered without this information; in

9 For a list of these projects see Monterroso and Larson (2018).

10 The ProTierras Comunes project describes these overlaps from another perspective, which distinguishes between state territorial units at the national level (National Parks, Production Forests and Oil Blocks), regional territorial units (Regional Conservation Areas [ACR]) and social conflicts between neighbors over boundaries.

others, the native communities were unable to complete the process of registration due to overlaps with a pre-existing right (IBC 2016; Baldovino 2016; Monterroso et al. 2017). For example, according to regional government data in Loreto, only 547 of 715 titled communities have been registered (DISAFILPA 2017). According to local and regional stakeholders, overlaps affect native community rights because they lead to the temporary or permanent suspension of the titling process and inhibit the exercise of acquired rights (Zamora and Monterroso 2017). In most cases, the process can only be resumed when further legal provisions are met, adding to the cost of recognizing rights in both time and money.

The first type of overlap is that which exists between areas claimed by native communities and those established as some kind of natural protected area. An example is the case of the Yomibato, Tayacome, Maizal and Cacaotal communities, which are located inside Manu National Park in the Madre de Dios region. The Law on Natural Protected Areas (Law 26834, article 4) establishes that protected lands are part of the public domain and cannot be reassigned. This means that although these communities existed before the area was declared a park, they could not complete the titling process after initiating the process of recognition. If the regional governments believe this type of overlap exists in other communities, they must seek the legal opinion of the National Service of Natural Protected Areas (SERNANP). If SERNANP reports back that an overlap exists, this opinion becomes legally binding, and the process is suspended until the affected area has been 'excluded' (or officially 'removed' from the protected area). In Madre de Dios, over 1.5 million ha titled to native communities overlap with national protected areas and other types of rights, including forest concessions for timber and non-timber products (Chávez et al. 2012).

A second type of overlap occurs when the claimed area is superimposed with Permanent Production Forests. The Ministry of Agriculture and Irrigation (MINAGRI) states that over 17 million ha of the Amazon region has been classified as such. However, more than 9 million ha of this (52%) is subject to some degree of overlap with native communities¹². Although a ministerial resolution was issued in 2014 to address this (0547-2014-MINAGRI), the regional governments must ask the National Forest Service (SERFOR) to undertake a re-sizing process, which delays titling. However, it is much more difficult to do re-sizing if a concession has already been granted. This procedure has only been applied once, in the Saweto native community.

The third type of overlap occurs when a third party is granted rights to subsoil resources for gas, oil and minerals exploration or extraction in areas claimed by or titled to native communities. According to Finer and Orta-Martínez, in 2010 over 41.2% of the Peruvian Amazon was subject to some type of overlap involving oil and gas concessions, 52 of which were active. Over half of these concessions were superimposed on titled native community lands; 20% overlapped protected areas; and 60% overlapped territorial reserves for peoples in isolation or under initial contact (Finer and Orta-Martínez 2010; Haselip 2011). In the case of mining rights, data provided by the regional government (GOREMAD 2015) indicates that in Madre de Dios over 786,000 ha are affected by overlaps. In some native communities, as much as 100% of their lands overlap with mining rights. According to data published by CRS et al. (2013), this affects the native communities of Azaire (100% of territory superimposed with 18 mining permits), Boca Inambari (80% of territory covered by 35 mining permits), Tres Islas (80% of territory superimposed with 137 mining permits, 17 of which are owned by indigenous people), El Pilar (80% of territory affected by 17 mining permits) and San Jacinto (80% of territory affected by 81 mining permits).

To address this critical issue, we make the following recommendations:

- DIGESPACR should be enabled to design and update a single national registry that includes information on the process of regularizing native communities. There are currently at least three government bodies that hold official registries with information on native communities (as established by RM 0589-2016-MINAGRI and DS-003-79-AA): (1) SUNARP (National Public Registry Office), covering the registry of land titles, which should contain georeferenced information; (2) the National Registry, MINAGRI-DIGESPACR (as the body in charge of the National Cadaster); and (3) the Regional Registry, managed by regional governments. The information on native communities held in these registries should be consistent and up-to-date.
- DIGESPACR and the regional governments should discuss the option of adopting a 'One Map' initiative to consolidate the various national registries. This should include the registry of mining and hydrocarbon rights, which is the responsibility of MINEM (Ministry of Energy and Mines), the cadaster of forest permits held by SERFOR and the National Registry of Native Communities, to avoid new overlaps. The various sectors and levels of government involved (DIGESPACR and SERFOR, in MINAGRI; SERNANP, in the Environmental Ministry (MINAM); MINEM; regional governments) should be encouraged to produce this single cadaster through multisectoral round tables, with a view to fostering political commitment, coordination and interaction.

11 For more information on this case see the reports prepared by MINAGRI-DIGNA/DISPACR/JOCH/JLVDLR.

- SERFOR should be encouraged to play a leading role in the discussion and re-examination of guidelines for re-sizing Permanent Production Forests, in coordination with regional governments. Under Ministerial Resolution 0547-2017-MINAGRI (article 4), SERFOR must approve “complementary measures on resizing”; but the regional governments have reported that this has stalled because guidelines do not yet exist. It should also provide support for the initiative launched by DIGESPACR to ensure that the working group comprised of DIGESPACR, SERFOR and DGAAA (Office of Agricultural Environmental Affairs) is kept active to address this issue.

A central feature of the challenges raised in this brief is the need to institutionalize the process of formalizing native communities, so that it is more than a series of initiatives linked to aid projects. At the national level, this means that the Ministry of Economy and Finance, in coordination with MINAGRI, must include the issue of regularizing native communities in the state budget. This would both ensure continuity for the initiatives currently underway and secure the resources needed to guarantee that there are enough government officials with the skills and understanding required for the future, at both national and regional level.

Conclusion

Although new titling opportunities are emerging from initiatives related to REDD+ and climate negotiations, certain problems must be addressed to consolidate progress in the formalization of native community rights and to facilitate implementation. The first critical task is to review the regulations, standardize and, above all, simplify procedures, resolving inconsistencies and gaps. The second is to address the different problems of overlapping rights that come to light during the process of regularizing native communities.

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References

- [AIDSESEP] Asociación Interétnica de Desarrollo de la Selva Peruana. 2016. *Las demandas territoriales de los pueblos indígenas amazónicos del Perú*. Lima: AIDSESEP.
- [AIDSESEP] Asociación Interétnica de Desarrollo de la Selva Peruana. 2013. *Territorialidad y titularidad en la Amazonía Norte del Perú, Alto Amazonas y Datem del Marañón – Pueblos Achuar, Kukama, Shapra, Kandozi, Shiwilo*. Lima: AIDSESEP/CORPI.
- Baldovino S. 2016. *Una primera mirada: Situación legal de la tenencia de tierras rurales en Perú*. Lima: SPDA.
- Blackman A, Corral L, Lima ES and Asner G. 2017. Titling indigenous communities protects forests in the Peruvian Amazon. *Proceedings of the National Academy of Sciences of the United States of America* 114:4123-4128.
- hávez A, Guariguata M, Cronkleton P, Menton M, Capella J, Araujo J and Quaedvlieg J. 2012. *Superposición espacial en la zonificación de bosques en Madre de Dios. Implicaciones para la sostenibilidad del recurso castañero*. InfoBrief 58. Bogor, Indonesia: CIFOR. Available at http://www.cifor.org/publications/pdf_files/infobrief/4034-infobrief.pdf
- [CIFOR] Center for International Forestry Research and [WRI] World Resources Institute. 2017. *Report analyzing formalization of native communities and company procedures in Peru*. Technical report. Lima: CIFOR.
- [CRS] Catholic Relief Services, [USAID] United States Agency for International Development and [CEAS] Comisión Episcopal de Acción Social. 2013. *Conflictos sociales en Madre de Dios: El caso de la minería en pequeña escala de oro y la ilegalidad*. Accessed 1 Sept 2018: http://www.ceas.org.pe/publicaciones/0000045_REPORTE%202.pdf
- [DISAFILPA] Dirección de Saneamiento Físico y Legal de la Propiedad Agraria. 2017. *Titulación de tierras en Loreto*. Presentation by Warren Guerrero, Dirección Regional Agraria, Regional Government of Loreto, during the roundtable discussion ‘Tenencia colectiva, interculturalidad y género en la formalización de comunidades nativas’, Iquitos, 22-23 November 2017.
- Defensoría del Pueblo. 2014. *Análisis de la política pública sobre reconocimiento y titulación de las comunidades campesinas y nativas*. Informe No 002-2014-DP/AMASPPI-PPI. Lima: Defensoría del Pueblo.
- Finer M and Orta-Martinez M. 2010. A second hydrocarbon boom threatens the Peruvian Amazon: Trends, projections and policy implications. *Environmental Research Letters* 5(1):014012. doi:10.1088/1748-9326/5/1/014012
- [GOREMAD] Regional Government of Madre de Dios. 2015. *Unificación de la plataforma catastral en un solo DATUM del Departamento de Madre de Dios*. Puerto Maldonado: Gobierno Regional de Madre de Dios.
- Haselip J. 2011. Transparency, consultation and conflict: Assessing the micro-level risks surrounding the drive to develop Peru’s Amazonian oil and gas resources. *Natural Resources Forum* 35:283-292.

[IBC] Instituto del Bien Común. 2016. *Tierras comunales: Más que preservar el pasado es asegurar el futuro. El estado de las comunidades indígenas en el Perú*. Report. Lima: Instituto del Bien Común.

Monterroso I and Larson AM. 2018. *Avances del proceso de formalización de derechos de comunidades nativas en la Amazonía peruana (2014-2018)*. InfoBrief. Bogor, Indonesia: CIFOR.

Monterroso I, Cronkleton P, Pinedo D and Larson AM. 2017. *Reclaiming collective rights: Land and forest tenure reforms in Peru (1960-2016)*. Working Paper 224. Bogor, Indonesia: CIFOR.

Notess L, Veit PG, Monterroso I, Emmanuel Sulle A, Larson A, Gindroz A, Quaedvlieg J and Williams A. 2018. *The scramble for land rights: Reducing inequity between communities and*

companies. Washington, DC: WRI, CIFOR, AsM Law Office, UCRT, RFUS.

[SICNA-IBC] Sistema de Información sobre Comunidades Nativas de la Amazonía Peruana – Instituto del Bien Común. 2016. *Sistema de información sobre comunidades nativas de la Amazonía Peruana*. Perú: IBC. Accessed 1 September 2018. <http://www.ibcperu.org/servicios/sicna/>

Schleicher J, Peres C A, Amano T, Llactayo W, and Leader-Williams N. 2017. *Conservation performance of different conservation governance regimes in the Peruvian Amazon*. Scientific Reports 7:11318.

Zamora A and Monterroso I. 2017. *Visiones regionales y locales sobre la inseguridad de tenencia en Loreto y Madre de Dios*. InfoBrief No. 198. Bogor, Indonesia: CIFOR.



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