

INDIGENOUS NEGOTIATIONS CASE STUDY

Crocodile Jaws Dam in Laikipia County, Kenya

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1. The Negotiation Challenge

The government of Kenya is proposing the construction of the Crocodile Jaws Dam along the Ewaso Ngiro River in Laikipia County, Kenya. The proposed dam is part of the government-backed LAPSET Project (Lamu Port Southern Sudan Ethiopia Corridor) under the government's 2030 vision. The dam will have a negative impact on the Koiya community, a community of indigenous Maasai residing near the proposed dam site in Laikipia County. Anticipated negative impacts of the dam include a loss of two thousand acres of grazing land, the submerging of important cultural sites and a loss of income generating activities like bee keeping, ecotourism facilities and traditional medicinal plants useful for both human and livestock treatment along the Ewaso Ngiro River. A distinct lack of community participation and consultation, as well the absence of a transparent compensation strategy, mark the developing plans for the dam's construction so far.

Article 10 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) states that "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." In addition to these international protections for indigenous peoples' rights, at the national level, part two of the Kenyan Constitution gives citizens fundamental rights and freedoms, and Chapter 27 provides them the protections of equality and freedom from discrimination. The intended construction of the Crocodile Jaws Dam will force the Koiya community to be relocated from their territory, losing their grazing land and other sources of livelihoods. This project will violate the community's rights to land ownership and the principal of consultation and public participation for indigenous peoples.

2. Context

People and Communities

The Koiya community is composed of a population of approximate 4,000 people whose livelihood are purely pastoralist, meaning they rely on livestock to supply nearly all of their needs. The Koiya community consists of indigenous Maasai pastoralists, who are recognized as indigenous peoples under the United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP). The Koiya community is located in Kenya, Laikipia County, along the Ewaso Ngiro River north of Mt. Kenya, towards the northern region of Kenya. The survival of the Koiya community and their livestock is predicated on the vitality of the rangelands, whereby in most cases they are severely affected by droughts and conflicts related to natural resource use, such as instances when other pastoral communities move into their land to graze cattle. These days, the Koiya community has adapted a new lifestyle of settling families in strategic places where they have access to services like health and education for their children, as opposed to the old lifestyle when families moved with their livestock, bringing children and households in tow. During droughts, livestock move away in search of water and pasture with the young men, while women and children are left behind. Men can sometimes be gone with livestock for about one year before they come back after

the rains have come. The movement of these men and their cattle is also affected by diminishing land space and conversion of land into private individual holdings. The erection of electric fences for private conservancies is also posing challenges to the ability to graze cattle. Livestock of the Koiya community die in large numbers during drought, reducing the community's economic development and putting stress on the community.

Like all indigenous peoples, the Maasai have a right to Free, Prior, and Informed Consent (FPIC) on all development proposed within their territories. The pastoral communities were marginalized during Kenya's colonial era, and this marginalization persists even after independence, which has adversely affected indigenous education levels. The Koiya community are not exceptional to this and 50% of this community are illiterate, unable to read or write. The youth are beginning to have access to educational opportunities and some of them are joining public universities in the country. Members of the Koiya community still keep their culture and traditions, whereby communities elders give direction on cultural practices like ceremonies and naming of age sets. (An age set is a group of people of the same age with their own leader who is respected. There is a span of about ten years between one age-set to another. Every age-set has its own leadership structure and they follow directives from their leader who get advice from the community elders. This structure is very important in the community because all decisions relating to community issues are made according to various age set.)

Governance and Decision-Making

Within pastoralist communities like Koiya, traditional governance systems exist where every age set has its own president, deputy and other leaders who form a consultation team. Elders give direction to the president of the age set, who then consults his team and thereafter calls general meetings of the whole age set, where all issues are discussed and agreed upon. Any information that is to be delivered to any age set in the community has to follow this procedure.

In addition to the traditional governance system, there is also the administration hierarchy of the government, where at the county level, there is a county commissioner, deputy county commissioner, assistant county commissioner, the chief and the assistant chief. Such people working under the administration are appointed by the government. The government system is more powerful than the traditional system, but the two have a way of working in tandem and consulting one another when it comes to issues of peace and security. In conflict resolution, the traditional system is highly consulted by the government and has proved to be an effective way of resolving conflict in the community.

Legal Framework

The land of the Koiya community is owned communally, as allowed for under the Community Land Act of 2016, which gives powers to the community themselves through community assembly to make any decision pertaining to all development in that land. Any decision made without following this law will not be valid and can be challenged in Kenya's courts. Kenya's Environmental Management and Coordination Act lays out procedures to be followed when conducting environmental impact assessment of any project in the community, and further, it guarantees community consultations for any proposed development. Any environmental impact assessment (EIA) will not be valid if it doesn't follow such procedures and it is challengeable in law.

3. Key Actors in the Negotiation

The key actors in this case study include:

- The LAPSSET Authority: The LAPSSET Authority is the holder of the entire project and delegates duties to various other bodies to carry out various functions and oversee the project. LAPSSET is an infrastructural development plan supported by the Kenyan government, with an aim of opening up development in northern Kenya and opening linkages with neighboring countries of Ethiopia, Sudan and Uganda. LAPSSET is intended to help the country take advantage of its resources like oil and other extractives.
- NEMA (National Environmental Management Authority): NEMA is a government body that carries out an Environmental Impact Assessment (EIA) on proposed project sites to understand the environmental and social impacts of a proposed project. NEMA generates these reports and advises the LAPSSET Authority.
- County Physical Planning Department: This government body identifies land to be allocated to particular projects. From time to time, they will also inform affected parties of the anticipated impacts of a proposed project.
- National Water Conservation and Pipeline Corporation (NWPC): The National Pipeline and Water Corporation is a government body tasked with ensuring that water resources are being adequately shared. They ensure that water is safe for consumption and that substances discharged into the rivers does not endanger aquatic life.
- Koiya community: As detailed above, the Koiya community is a Maasai community whose communally held lands would be submerged with construction of the Crocodile Jaws Dam.
- IMPACT (Indigenous Movement for Peace Advancement and Conflict Transformation): IMPACT is a Kenyan organization that exists to build, support and strengthen grassroots social movements. The mission of IMPACT is to address deep underlying causes of social exclusion, discrimination, marginalization and poverty that undermine the indigenous peoples' right to livelihoods, healthy environment and social cultural rights. IMPACT envisages an inclusive society where diversity and the rights of indigenous people are recognized, respected and protected. IMPACT has been a key supporter of the Koiya community and is helping them to gather information and make their voice heard about the proposed Crocodile Jaws dam.

It is of note that there is no government institution concern with the construction of the proposed crocodile jaw dam that is **based in the** community, therefore making it difficult even for the community to consult and look for information.

4. [The Negotiation Process](#)

The Crocodile Jaws Dam, as proposed by the National Water Conservation and Pipeline Corporation (NWPC), will be constructed near Oldonyiro at Crocodile Jaws Bridge (Nkutuk Olkinyang) along the Ewaso Ng'iro River in Isiolo County. NWPC identified the dam as necessary to facilitate the supply of water to the proposed Isiolo Resort City (part of the LAPSSET development), as well as to regulate the flows of River Ewaso Ng'iro. Though the dam will be constructed in Isiolo County, the bulk of the reservoir will be in Laikipia County.

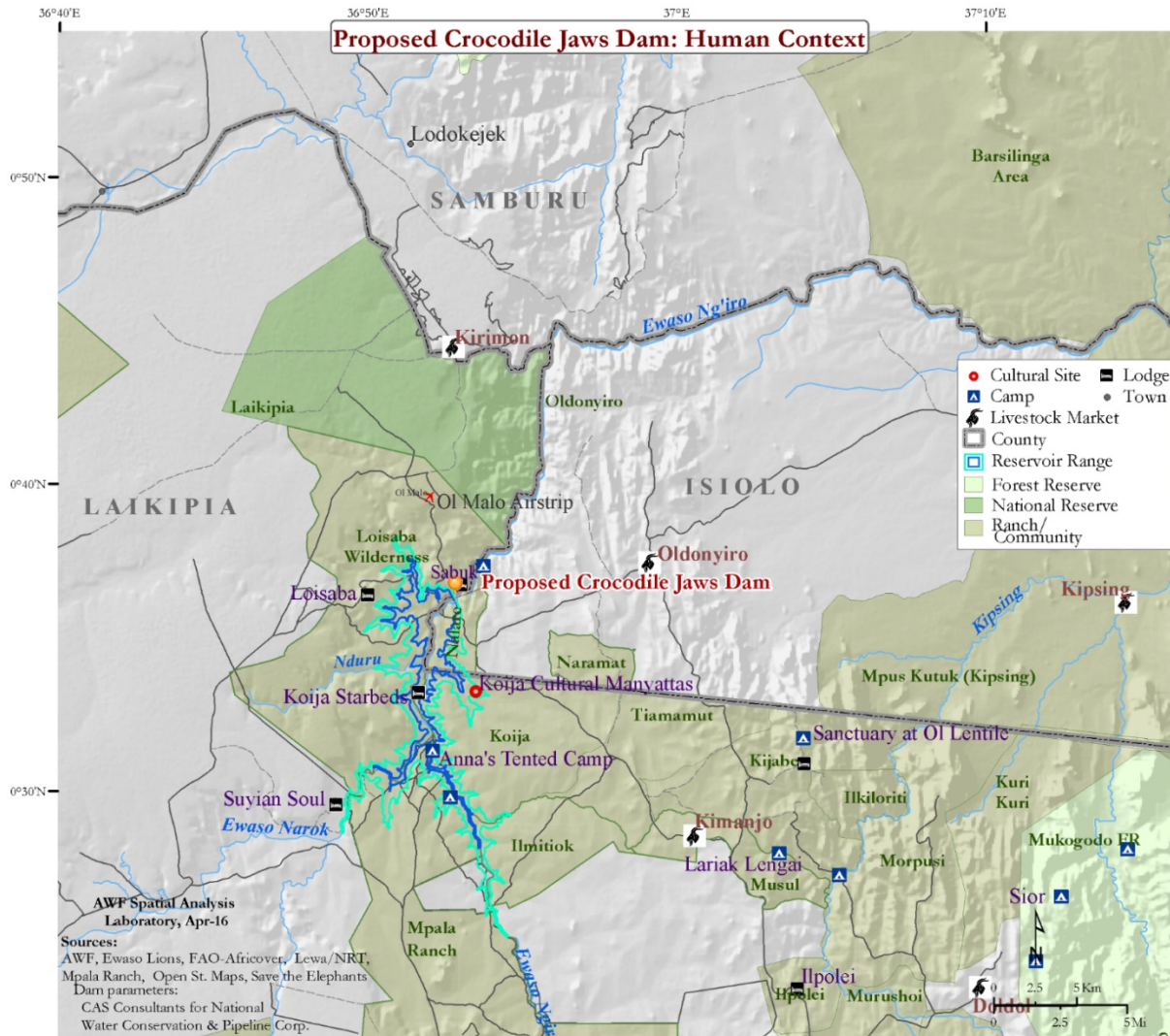


Figure 1: Crocodile Jaws Megadam proposed site. (Source: African Wildlife Foundation)

The NWPCPC hired a consulting firm to carry an environmental impact assessment (EIA) and strategic environmental assessment (SEA) around the proposed dam, the the report that was produced did not consider community public participation, nor did it consult or involve stakeholders. Upon this realization, the pastoral communities affected by the proposed dam presented joint a memorandum to NEMA to challenge the validation of the report. The report was accessed by IMPACT by a request that was made to the NEMA office headquarters.

The community raised the following concerns about the impact of the dam on the people of Koija:

- Land acquisition and displacement – flooding caused by the reservoir created by the dam would displace cattle from their grazing lands, would destroy cultural sites and would cut off access to lands traditionally used for medicinal plant gathering, bee-keeping, and honey production.

- Destruction and loss of property without a proper definition for compensation – the impacted communities were not consulted during the impact assessments and no compensation schedule has been outlined for them in regards to the losses they will incur if the dam is built.
- Relocation of people without their consent – International mechanisms like the UN Declaration on the Rights of Indigenous Peoples, as well as Kenya’s own Constitution, prohibit involuntary displacement of peoples from their lands, yet this project would cause displacement and loss of access for Koiya community members.
- Denial of downstream communities’ access to water as basic human right – The proposed dam would cut off access of downstream communities to adequate water resources.
- Environmental degradation – Alteration of water flows can cause environmental degradation and other unknown environmental impacts.
- Reduced access to land and natural resources as a catalyst for inter-community conflicts and human-wildlife conflict – As Koiya community grazing lands become submerged, community members will be forced to encroach on other communities’ lands or encroach on protected areas, increasing likelihood for inter-community conflicts or increased exposure to dangerous and protected wildlife.
- Social fabric interference – Reduced grazing lands and loss of income generating activities will introduce new stressors into the social fabric of the community.

Understanding that the dam project may not be something they are able to resist entirely, the Koiya community has come together to outline several desired outcomes from the project. Specifically, they are looking for:

- Certainty in terms of the acreage lost due to flooding;
- Specific numbers for the compensation they will be offered due to lands lost from flooding; and
- Clearly defined location of the dam, as well as definition of the activities that will be needed to implement the project (drilling, digging, construction, etc.)
- The community also demands access to skilled labor positions in the construction and operation of the dam – they want young people from the community to be able to take full advantage of the development happening.
- The community also demands that there must be development of a conflict resolution mechanism, to resolve disagreements peacefully.

With these community concerns, IMPACT has assisted the community to write a memorandum to the Director of the National Environmental Management Authority to clarify issues they felt were missing in the initial assessment, including a lack of community participation, lack of clarity of compensation structures, their desire for NO resettlement. IMPACT facilitated community representatives to meet with the Director of NEMA at their national office. That director received the memorandum and promised to come to the community. They followed through on that promise by later coming to the community for a meeting and promising to incorporate community concerns in the final report. This process was publicized by media.

5. Current Situation On the Ground

So far, construction has not begun on the Crocodile Jaws Dam. No activities are happening at the dam site, and the Koiya community has not been informed of any planned progress, but they are still eager to be informed on the status of their concern. Despite meeting the Director for NEMA to address gaps in their report, it remains a challenge for the community to meet with the LAPSSET Authority, which is the owner of the project and makes major decisions regarding the dam. Unfortunately, the biggest challenge

facing the community is access to information regarding the progress of the dam. The community now expect that the LAPPSET authority will agree to begin dialogue with them, to pave a way for agreement on how the community concerns around the dam shall be addressed and the benefit of the project will flow to the community. This will determine whether the community will negotiate a signed agreement with them or seek legal redress from the relevant court.

6. Broader Implications

In Kenya, community participation in all development projects is a constitutional requirement that must be adhered to, both because of the legal mandate and also to ensure communities have a voice in planning for their development. Not many communities in Kenya are aware that it is their right to participate in such forums, which leaves them vulnerable to being taken advantage of during government project implementation. The government has not been conducting public participation for the Crocodile Jaws Dam in the right manner, as laid out in its own Constitution, and hence the community lacks information on the proposed dam and has not been able to come together to outline community priorities in project development.

Many challenges face the Kojia community in opposing this project. A lack of clarity on who holds authority over the project, where to access information, and with whom to lodge concerns persists. This illustrates the importance of being well-researched and having as much information as possible on the other party when making a decision to enter into negotiation. Well-informed communities can leverage information as a resource when considering negotiation. In addition, the community doesn't have much access to people who can advise them well – IMPACT is one of the few organizations making a difference for them in this regard. This illustrates the importance of information exchange and horizontal linkages – a lack of allies and partners to help them gather information is hindering the Kojia community's ability to find out more about the dam and have their concerns heard. Also, government technocrats understand urban life, but not pastoralist lifestyles. They don't have any idea how to quantify the benefits of things like a beehive or of pasture. It is also difficult sometimes to access information from the LAPPSET Authority due to complicated bureaucracy. Any information accessed by IMPACT is communicated to the Kojia community through meetings, where leaders are informed to mobilize communities to convene in one venue.