

Report No. 77959-KE

**The Inspection Panel**



**Report and Recommendation**

**KENYA: Natural Resource  
Management Project (P095050)**

**May 29, 2013**

# The Inspection Panel

## Report and Recommendation On Request for Inspection

### Kenya: Natural Resource Management Project (P095050)

#### A. Introduction

1. In accordance with the Resolution (hereinafter “the Resolution”)<sup>1</sup> establishing the Inspection Panel (hereinafter “the Panel”), the purpose of this Report and Recommendation on Request for Inspection (hereinafter “the Report”) is to make a recommendation to the Board of Executive Directors (hereinafter the Board”) as to whether the Panel should investigate the matters alleged in this Request related to the above-mentioned project. The Panel’s recommendation is based on its consideration of the technical eligibility of the Request and its assessment of other factors as reflected in the Resolution.
2. This Report begins with a description of the Project subject of the Request for Inspection (Section B) and continues with summaries of the written Request as received by the Panel on January 14, 2013 (Section C) and of the Management Response to the Request submitted on March 15, 2013 (Section D) followed by the Panel’s review (Section E). The Panel’s determination of the technical eligibility of the Request, in accordance with the 1999 Clarification to the Resolution,<sup>2</sup> is set out in Section E (1) below. Section E (2) provides the Panel’s observations on other factors considered before making its recommendation to the Board. The Panel’s recommendation on whether an investigation of the matters alleged in the Request is warranted is presented in Section F.
3. On January 14, 2013, the Inspection Panel received a Request for Inspection (hereafter “the Request”) related to the Kenya: Natural Resource Management Project (NRMP or “the Project”). The Request was sent by individuals from Sengwer communities who “*live and represent others who live*” in the following four areas of the Cherangany Hills

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<sup>1</sup> International Bank for Reconstruction and Development (Resolution IBRD 93-10) and International Development Association (Resolution 93-6), “The World Bank Inspection Panel”, September 22, 1993 (hereinafter “the Resolution”), ¶. 19. Available at:

<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf>

<sup>2</sup> “1999 Clarification of the Board’s Second Review of the Inspection Panel”, April 1999 (hereinafter “the 1999 Clarification”). Available at:

<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf>

in the western highlands of Kenya, namely the Kapolet Forest (in Trans-Nzoia District), Talau and Kaiapos (in West Pokot District), and Empopot<sup>3</sup> Forest (in Marakwet District). The Requesters have asked that their identities be kept confidential.

4. The Panel registered the Request and notified the Board and Management on January 30, 2013. Management submitted the Management Response on March 15, 2013<sup>4</sup>, after requesting an extension of the original submission deadline.
5. The Panel's Report and Recommendation was originally due on April 15, 2013 and the Panel had initially scheduled its visit to Kenya in mid-March. However, due to general elections taking place in Kenya in early March, the World Bank Country Office, through the Kenya Emergency Management Team, decided to suspend all missions to Kenya and subsequently to restrict them to essential missions. In light of this, the Panel delayed its visit and requested a postponement of its deadline for the completion of the Report and Recommendation until May 24, 2013.

## **B. The Project**

6. The NRMP is a Specific Investment Loan (SIL) approved by the Board on March 27, 2007. It became effective in December 2007 shortly before the 2007 general elections, which delayed the start of implementation until April 2008.<sup>5</sup> The Project was restructured in 2011, as described below. At the time of the receipt of the Request, the Project was 62.59% disbursed.
7. The original Project's development objective (PDO) was to enhance "*institutional capacity to manage water and forest resources, reduce the incidence and severity of water shocks such as drought, floods and water shortage in river catchments and improve the livelihoods of communities participating in the co-management of water and forest resources.*"<sup>6</sup> The Project provide for four components: 1) Water Resources Management and Irrigation; 2) Management of Forest Resources; 3) Livelihood Investments in Upper Tana Catchment, and 4) Management and Monitoring and Evaluation.
8. Component 2 – Management of Forest Resources – is the subject of the Request. This component, in its original conception, sought to operationalize the newly enacted Forest Act of 2005 by assisting in creating a transparent and accountable regulatory and institutional framework in forest resources management, from an exclusive Government conservation model to joint management with local communities and the private sector. Among the subcomponents were: supporting activities to transform the Forest Department into an accountable and semi-autonomous Kenya Forest Service (KFS) with

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<sup>3</sup> "Empopot forest" is also referred to as "Embobut". Both terms are used in this Report.

<sup>4</sup> Management Response to Request for Inspection Panel Review of the Kenya: Natural Resource Management Project (P095050), dated March 8, 2013.

<sup>5</sup> Management Response, ¶ 10.

<sup>6</sup> Financing Agreement, (Natural Resource Management Project) between Republic of Kenya and International Development Association, dated May 7, 2007 Credit No. 4277-KE, Schedule 1.

training, sensitization, equipment etc.; identifying partnership models for community participation and benefit sharing in the forest sector; realigning and demarcating boundaries in selected gazetted forests; supporting the effective implementation of the Resettlement Policy Framework and developing and implementing Resettlement Action Plans.<sup>7</sup> An Indigenous Peoples Planning Framework (IPPF) was developed because of the presence of Ogiek and Sengwer Indigenous Peoples in the Project areas (Mount Elgon and the Cherangany Hills, respectively) to ensure that they would not be adversely affected by the Project and measures would be developed to mitigate potential impacts. Management states in the Management Response that the original Project Appraisal Document (PAD) and the Financing Agreement do not refer to the Cherangany Hills as a Project area. However, given that the area was included in the IPPF “*the Bank took the position that it was part of the Project intervention area.*”<sup>8</sup>

9. On June 10, 2011, the Project was restructured and the development objective was redefined to: “*improve the management of water and forest resources in selected districts.*”<sup>9</sup> Among other things, the restructuring revised and simplified the Project Development Objectives, revised the results framework, and reallocated around 21 percent of Project funds. The restructuring also formalized the fact that the Cherangany Hills were part of the Project area and this allowed the reallocation of fund towards implementation of activities in that area.
10. Management states that the restructuring allowed adjusting Project outcomes to those that could realistically be achieved during the life of the Project. With the restructuring Management acknowledged that resolving comprehensive land issues was beyond the remit of the Project, and thus clarified to the Board that the Project “*would not be able to implement the land related commitments, i.e. 1) hasten the provision of titles for land presently occupied and used by the communities in the Project areas including support for necessary steps, such as land survey, demarcation and registration of titles; 2) establish a comprehensive strategy to rehabilitate livelihoods of evicted people to the level of December 2002; and 3) offer assistance within the land restitution process to indigenous peoples to claim all lands over which they have lost control between 1895 and 2002.*”<sup>10</sup>
11. Through the restructuring Management states that three enhancements were introduced: 1) assist the Government to implement a livelihood and rural development program focused on indigenous peoples and forest communities through Project-financed Vulnerable and Marginalized Group Plans (VMGPs); 2) provide technical assistance for a strategy to improve forest management “*to cover integration of guidelines for vulnerable and marginalized communities*” and 3) strengthen the decentralized structure of community forest associations and other local groups.<sup>11</sup> The restructuring also called for the update of the Process Framework (PF) and the preparation of the VMGPs. The

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<sup>7</sup> Financing Agreement, Schedule 1.

<sup>8</sup> Management Response, ¶ 31.

<sup>9</sup> Amendment to Financing Agreement, July 7, 2011, ¶ 1.

<sup>10</sup> Management Response, ¶ 28.

<sup>11</sup> Management Response, ¶ 13.

restructuring paper thus states that “*in accordance with the IPPF, the restructured project will support preparation and implementation of what would be equivalent to IPPs in Kenya, called Vulnerable and Marginalized Group Plans (VMGPs).*”<sup>12</sup>

**12. Financing and Implementation Arrangement.** The Project is financed by an IDA Credit in an amount equivalent to forty six million Special Drawing Rights (SDR 46,000,000) (around USD 68.5 million). It is scheduled to close on June 30, 2013. The Project is implemented through the Ministry of Water and Irrigation and the Ministry of Environment and Natural Resources. The Forest Resources Component is managed by KFS which appointed a National Project Coordinator.

### C. The Request

13. What follows is a summary of the allegations included in the written Request received by the Panel. The full Request is attached to this Report as Annex I.

14. The Requesters state that they have suffered harm as a result of the Bank’s “*failures and omissions*” in the Project. The alleged harms are described below.

15. According to the Request, KFS has burned over 500 houses and property in Empopot forest since 2007 in the process of carrying out forceful evictions. The Requesters state that the Empopot forest is part of the ancestral land of the Sengwer people as an ethnic minority hunter-gatherer people. They state that the Government planned to resettle the Sengwer from Empopot forest without carrying out free, prior informed consultations and that these resettlement plans “*go against World Bank Operational Policy 4.12 on involuntary resettlement.*”

16. In addition, KFS arrested in 2009 45 Sengwer people in the Kapolet forest because of illegal farming in the forest without permits. The Requesters state that the Kapolet forest has been Sengwer ancestral home since “*time immemorial*”, although the British government had the forest gazetted “*through discriminatory forest preservation policies [that] led to forceful eviction and displacement of Sengwer families [...]*” When the guards entered the forest to make these arrests they also shot at people and one woman was hit in the back and later treated at the Kitale district hospital. This dispute between Sengwer people and KFS staff in Kapolet arose as a result of an historical land dispute. The Request indicates that the British Government first recognized that Sengwer people lived in the forest by creating an administrative unit called Kipsirat, but later gazetted this part of the forest and evicted the Sengwer residing there. In 1997, according to the Request,

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<sup>12</sup> Restructuring Paper on a Proposed Project Restructuring of the Natural Resource Management Project, approved March 27, 2007, to the Republic of Kenya, June 10, 2011 (hereinafter “Project Paper”). The Project Paper adds that “*given particularities with respect to the term Indigenous Peoples in Kenya, the new Constitution of Kenya uses the term ‘vulnerable and marginalized groups’ (VMGs). Since adoption of the Constitution in 2010, the GoK [Government of Kenya] has requested that project instruments related to the implementation of OP 4.10 use the constitutionally-sanctioned terminology. OP 4.10 contemplates that different terminology may be applied in different countries without affecting the application or substance of the policy. It states: ‘Indigenous Peoples may be referred to in different countries by such terms as indigenous ethnic minorities; aboriginals, hill tribes, minority nationalities, scheduled tribes, or tribal groups.’*”

the President of Kenya “*directed the provincial administration to settle members of Sengwer community on Kapolet forest*” and divided this settlement in two phases. Phase I according to the Request involved 489 families that were settled in Kapolet, though no legal documents have been issued yet.

17. The Requesters state that Phase II and the demarcation of Sengwer land was stopped so 97 Sengwer families who were to be settled under Phase II moved to the land they thought belonged to them but were arrested and charged with encroachment in the forest. The Request indicates that this case related to arrested community members is pending in the Kitale Courts since 2009 and has cost the communities hundreds of thousands of Kenya Shillings in legal fees and other expenses.
18. The Requesters also argue that the Bank violated its policies by adopting the use of the term “Vulnerable and Marginalized Groups” instead of “Indigenous Peoples” without carrying out free, prior informed consultations with the people. This, they claim, is a violation of the indigenous people’s rights as stipulated in international treaties and in the Bank policy on Indigenous Peoples, OP 4.10.
19. The Requesters also believe that the IPPF prepared under the Project should be implemented but they were told by Kenyan authorities that it is merely a Memorandum of Understanding.
20. Further the Requesters feel that the Bank has not carried out its supervisory obligations even when the rights of the Sengwer were being violated. They state that they have written a number of letters to the Bank and had meetings with Bank staff but were not satisfied by the explanations.
21. The Request concludes with a number of recommendations including; that the Government recognizes the rights of the Sengwer to live in their ancestral home in Kapolet and Empoput forest, and that it compensates the families whose houses and property were destroyed, and those who were arrested in Kapolet and the woman who was shot. They also recommend that the Government recognizes the use of the term “indigenous peoples” as it did during Project preparation and that the Bank suspends funding for the REDD program to the Government until these violations noted above are addressed.

#### **D. The Management Response**

22. A summary of Management Response follows, and a copy is attached to this Report as Annex II.
23. Management does not believe that non compliance by the Bank has caused harm to the Requesters and notes that the incidents described in the Request were not caused or aggravated by the Project nor supported by it. Rather the complaints are aimed towards the GoK and related to issues beyond the Project. Management believes that, in a very difficult context and sector with many operational challenges, the Bank has helped to

address issues raised by the Requesters and has worked with the stakeholders to support a solution to such issues.

24. In general, Management notes that the Project has been “*challenging from the outset and is characterized by tension over historic land issues, longstanding grievances of indigenous communities and unresolved conflicts between those communities and the Kenya Forest Service (KFS)*”.<sup>13</sup> It adds that, because the original Project design was “overly ambitious” with respect to resolving land and forest conflicts, after the restructuring there have been difficulties in distinguishing between project activities and activities outside the scope of the Project, and the boundaries of the Bank’s safeguard obligations have become at times blurred. In fact, the Response claims that many complaints including in the Request go beyond the Project and should be directed to the GoK and are not related to the Project, including the evictions incidents described in the Request, which, according to Management, occurred before the Project became operational. Nevertheless, Management also acknowledges that the Project’s IPPF “*may have raised unrealistic expectations*” that “*may have contributed to the Request for Inspection.*”<sup>14</sup>
25. **Land rights issues.** The Response notes that the Sengwer people have asserted ancestral rights to live and use the forest without restrictions, while successive governments have prioritized the protection of forests by gazetting them. This has created conflicts that have intensified in recent years with an increasing pressure on Kenya’s forests. Many evictions of Sengwer people from the forests were carried out since 1980s. Management adds that during this period there has been an “*emerging recognition by both the Government and the Sengwer that a permanent solution to this problem will require the resettlement of forest-dwelling Sengwer to suitable land outside the gazetted forest,*”<sup>15</sup> albeit with an agreement on rules regarding access to forests. Management notes that attempts to find these solutions have so far stalled.
26. The Response states that the policy and legal framework changed in recent years with the enactment of the Forest Act in 2005 and of the National Land Policy, which are more conducive to solving the land issues. The Response indicates that the Project was originally designed in this context to support the resolution of land issues as it is described in the IPPF and the PAD through participatory boundary demarcation, clarification of land claims, support for resettlement and assistance to develop a National Resettlement Policy. However, as Project implementation started, it became clear, according to Management, that some of these activities, especially those related to solving land rights issues, were “*far too ambitious*”<sup>16</sup> and beyond the scope and time frame of the NRM Project. The restructuring of the Project, therefore, defined what kind of contributions the Project could realistically make to the larger agenda, and included activities such as the development of the VMGPs, capacity building and sensitization of KFS staff and establishment of the grievance redress mechanism.

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<sup>13</sup> Management Response, p. viii.

<sup>14</sup> Management Response, p. viii.

<sup>15</sup> Management Response, ¶ 20.

<sup>16</sup> Management Response, ¶ 22.

27. Following the elections in 2007, the situation worsened because a number of people displaced by post-election violence found refuge in the gazetted forests, including the Cherangany Hills, putting a further strain on natural resources, in particular by reducing water flows in critical water bodies.
28. **Application of OP 4.10.** The Response states that the policy on Indigenous Peoples was triggered with respect Component 2 of the Project because of the presence of Sengwer and Ogiek people in the Project area.<sup>17</sup> An IPPF was developed in 2006 to ensure that communities would not be adversely affected by the Project and measures would be developed to mitigate potential impacts. Management acknowledges that the IPPF “*posed several implementation challenges*” as it included activities that were beyond the scope of the project, would have required multi-agency interventions and were not realistically implementable during Project time. Management indicates that three commitments included in the IPPF were not implementable under the Project: 1) hasten the provision of titles for land presently occupied and used by the communities in the Project areas including support for necessary steps, such as land survey, demarcation and registration of titles; 2) establish a comprehensive strategy to rehabilitate livelihoods of evicted people to the level of December 2002; and 3) offer assistance within the land restitution process to indigenous peoples to claim all lands over which they have lost control between 1895 and 2002. Management states that “[*t]hese measures while desirable on their own account, were not related to the mitigation of anticipated Project impacts*”<sup>18</sup>
29. The Project, as restructured in 2011, would however remain committed to developing Vulnerable and Marginalized Groups Plans (VMGPs)<sup>19</sup> (equivalent to Indigenous Peoples Development Plans – IPPs) to address livelihood needs based on free, prior informed consultations. A Process Framework to address restriction of access to forests and use of forest products was also developed. Management indicates that in consultations it was clarified that the PF would not address land and resettlement issues.
30. **Community Representation.** Management states that some of the difficulties encountered by the Project related to “*a lack of clarity as to the nature of community representation and uncertainty as to how communities as a whole view the status of a number of NGO leaders who claim to speak on their behalf.*”<sup>20</sup> The Response refers to a group called “Elite and Professional Group” who has sent several letters of complaints to the Bank allegedly on behalf of communities. Management also states that when Bank staff sought to validate the Elite Group’s complaints with the communities, these were

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<sup>17</sup> Management Response, ¶ 27. As noted above, Management states in the Management Response that the original Project Appraisal Document (PAD) and the Financing Agreement do not refer to the Cherangany Hills as a Project area. However, given that the area was included in the IPPF the Bank took the position that it was part of the Project intervention area and formalized this position with the Project restructuring.

<sup>18</sup> Management Response, ¶ 28.

<sup>19</sup> Activities eligible under the livelihood program and detailed in the VMGPs include CDD-type of activities, such as livestock breeding, bee keeping, poultry keeping, fish farming etc.). This builds on the Social Assessment undertaken in 2010. Management indicates that the VMGPs supersede the IPPF in the areas they cover.

<sup>20</sup> Management Response, ¶ 33.

not aware of them. In addition, some of the members of this group have been elected into the Project vulnerable and marginalized groups coordination committees, the VMGCCs.

31. According to Management, one concern of this Elite Group is the change from “*indigenous peoples*” to “*vulnerable and marginalized groups*” (VGM) used in Project documents. The change was introduced to use terminology consistent with the new constitution of Kenya, Management maintains, but the use of this term does not diminish the benefits and protection available under OP 4.10 who still applies to the Project.
32. **Evictions.** Management indicates that it has viewed with concern the reports of evictions brought to its attention and responded with diligence. Though evictions were not caused by the Project nor the Project supported any evictions, when it became aware of these incidents Management carried out field verifications, and worked with Government and affected parties to prevent such occurrences and secured a commitment from the GoK to refrain from further evictions that are not consistent with Government’s obligations under safeguard instruments.<sup>21</sup>
33. Evictions from Embobut forest April/May 2009. When the Bank learned of the eviction of 450 families in April/May 2009 it requested information from KFS and received a letter from the community. Management notes that these evictions were not part of NRM activities and were the result of Government action in response to an ongoing dispute over water resources between communities living downstream from Embobut and those living in the forest. The GoK established an Embobut Task Force in June 2009 – not financed by the NRMP, Management notes – to help finding a solution for the evictees. The Task Force identified three categories of people living in Embobut: Sengwer and other groups, landslide victims from the 1960s and permit holders/associates. Those identified as eligible for resettlement were allowed to return to the forest (inside the areas known as glades) pending a final settlement but had to respect a number of restrictions inside the forest.
34. Burning of housing in Embobut July/August 2010. Management states that in September 2009 Sengwer representatives informed the Bank that Sengwer people’s houses and property in Embobut had been destroyed. KFS and affected people’s account of the situation were different but both confirmed the burning of the dwellings. This prompted the Bank to write to the GoK to request “*that the Government comply with social safeguard documents and refrain from carrying out or planning any evictions without following due process*” as “*non compliance could result in remedial action by the Bank*”<sup>22</sup>. Management also sent its own Fact Finding Mission, which found an unclear situation on the ground, but confirmed that the properties were inside the glades, rather than in the forest. KFS later indicated that these burning had been carried out by unauthorized individual KFS staff.

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<sup>21</sup> Management Response, ¶ 59.

<sup>22</sup> Management Response, ¶ 67.

35. In December 2010, under the proposal for the Project restructuring, Management stressed the need for a moratorium on eviction.<sup>23</sup> The Government confirmed in April 2011 that “*there would be no evictions until alternative settlement was found*” and some authorized persons, including Sengwer, could have access to the forest.<sup>24</sup> With respect to this incident, burning of houses, Management also notes that community members did not express interest in seeking compensation, rather in participating in livelihood activities under the VMGPs prepared under the NRM. They also expressed, according to Management, the willingness to be “*voluntarily and permanently resettled by the Government*”.<sup>25</sup>
36. Actions against alleged forest encroachers in Kapolet in 2009. The Response states that in 2008 Sengwer community members constructed houses and started farming activities in Kapolet forest, as they allegedly felt that “*this part of the forest should have been subdivided and given to them for settlement and for use without any restrictions.*”<sup>26</sup> KFS indicated to the Bank that evictions were carried out to prevent encroachment in Kapolet forest, which is a gazetted forest and thus neither living nor cultivating of crops in it is allowed. During the evictions, 41 members of the communities were arrested and a Sengwer woman was shot. Management states that it requested documentary evidence to verify these facts but the community could not provide any evidence, and Management was not able to meet the shot woman in spite of various attempts. According to Management, the matter is currently in court and the Kenyan judicial system is the appropriate forum for deciding such matters.
37. **Resettlement.** Management emphasizes that “*no resettlement has been planned or financed under the NRMP in Cherangany Hills or in any other forested areas in the Project area. As a consequence, NRMP has not supported the preparation of resettlement plans under the forest component, as erroneously asserted in the Request.*”<sup>27</sup>
38. According to Management Response, when the Requesters refers to resettlement responsibility of the NRM project in the Project area, they may be referring to plans of the Ministry of State for Special Programs (MSSP) to carry out resettlement in Cherangany Hills as part of the resettlement of Internally Displaced Peoples (IDPs). This resettlement, Management asserts, is not financed by the NRM nor does it involve the KFS. Management also indicates that Sengwer people living in Embobut, who have been living in very difficult circumstances for years, are waiting for an “*appropriate and consensual resettlement solution*”, but they understand that it is independent of the NRMP.<sup>28</sup>

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<sup>23</sup> Management Response, ¶ 69

<sup>24</sup> Management Response, ¶ 71.

<sup>25</sup> Management Response, ¶ 72.

<sup>26</sup> Management Response, ¶ 77.

<sup>27</sup> Management Response, ¶ 81.

<sup>28</sup> Management Response, ¶ 83.

39. Management acknowledges that the original Project design provided for the Project to have a direct role in planning and implementing resettlement of those who lived in the gazetted forests or had been subject of evictions but at the time of restructuring it recognized and indicated to the Board that this approach to resettlement was overly ambitious and not implementable under the Project.
40. Though the Project decided that it could not directly support the resettlement, Management chose to support an Inter-ministerial Task Force on Land and Legacy Issues, including indigenous groups as members, which would look at the land rights issues, and to support a Management-initiated dispute resolution approach.
41. **Grievance Redress.** The Response states that two approaches for grievance redress were adopted: a Project-level Grievance Redress Mechanism (GRM) established and managed by KFS and a Management-initiated broader dispute resolution approach parallel to KFS's GRM and managed by the Bank.
42. The Project-level GRM, described in the PF, has been active since May 2011. It is designed to address complaints quickly and at the lowest possible level. Management states that this GRM is based on ideas and opinions of affected people and was developed through consultations that involved 1500 Sengwer and Ogiek people. Its aim is to address claims related to the NRMP implementation.
43. The Management-initiated dispute resolution approach goes beyond the scope of the NRM, Management states. A "*trusted external mediator to support Project stakeholders in resolving disputes*"<sup>29</sup> was involved. This dispute resolution approach supported a Regional Consultation Workshop that took place in Nakuru in March 2012 with the aim of understanding key concerns of the indigenous communities and discuss opportunities to address long standing issues. The result of this workshop was a collective action plan being implemented by all stakeholder groups. Following the workshop, the mediator held a series of meetings in four communities.

#### **E. Panel Review of the Request and Management Response**

44. Chairperson Eimi Watanabe together with Executive Secretary Peter Lallas, and Senior Operations Officer Tatiana Tassoni visited Kenya on May 9-14, 2013. During its visit, the Panel team met with the Requesters and other affected community members in the Kapolet and Empoput forests. It also met with Government officials of the Ministry of Finance and of the National Treasury, Water and Natural Resources. Further, the Panel had two meetings with officials of the Kenya Forest Service. The first meeting in Eldoret, with local officers of the KFS involved in NRM activities. The second meeting took place in Nairobi where the Panel team met with the Director of KFS and the NRM National Coordinator.

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<sup>29</sup> Management Response, ¶ 46.

45. The Panel wishes to express its appreciation to all those mentioned above for sharing their views and exchanging information and insights with the Panel. The Panel also wishes to thank the Government of Kenya and the Kenya Forest Service for meeting with the Panel team. The Panel extends its thanks to the Requesters and other affected people who met with the Panel team, and to the present and former Country Directors and staff in the Country Office in Nairobi for meeting with the Panel team, discussing the issues and providing relevant information, and assisting with logistical arrangements.
46. The Panel's review is based on information presented in the Request, on the Management Response, on other documentary evidence, and on information gathered during the site visit, and meetings with Requesters and other affected people, and Bank Management. This review covers the Panel's determination of the technical eligibility of the Request, according to the criteria set forth in the 1999 Clarification (subsection 1), and observations on other factors supporting the Panel's recommendation (subsection 2).

### **1) Determination of Technical Eligibility**

47. The Panel is satisfied that the Request meets all six technical eligibility criteria provided for in paragraph 9 of the 1999 Clarifications.
48. The Panel notes that its confirmation of technical eligibility, which is a set of verifiable facts focusing to a large extent on the content of the Request as articulated by the Requesters, does not involve the Panel's assessment of the substance of the claims made in the Request.
49. Criterion (a): *"The affected party consists of any two or more persons with common interests or concerns and who are in the borrower's territory."* The Panel confirms that the Requesters live in the borrower's territory and share interests that may be affected by Project activities. The Panel considers the requirement of paragraph 9(a) as met.
50. Criterion (b): *"The request does assert in substance that a serious violation by the Bank of its operational policies and procedures has or is likely to have a material adverse effect on the requester."* The Request asserts that failure and omissions of the Bank in the implementation of the NRM have caused them harm. They claim that as a result of the Project activities the rights of the Sengwer people, hunter gatherers living in the Cherangany Hills have been violated. They allege that under the Project, dwellings and property of Sengwer people living in the Empoput forest, which according to the Sengwer is their ancestral home land, have been burned and destroyed. The Requesters add that in Kapolet forest KFS staff, Project implementer, evicted Sengwer people and arrested community members. The Requesters also claim that the change in terminology from indigenous peoples to vulnerable and marginalized groups is in violation of Bank policies and has caused them harm. The Requesters state that Project activities were carried out without free prior informed consultations of the affected indigenous peoples. The Panel is thus satisfied that the requirement of paragraph 9(b) is met.

51. Criterion (c): “*The request does assert that its subject matter has been brought to Management's attention and that, in the Requester's view, Management has failed to respond adequately demonstrating that it has followed or is taking steps to follow the Bank's policies and procedures.*” The Requesters brought the issues they raise in the Request for Inspection to the prior attention of the Bank Management in a number of letters and meetings with members of the Project's Task Team over the course of a couple of years. The Requesters believe that the Bank's responses to their complaints do not address their issues adequately. The Panel is satisfied that this criterion has been met.
52. Criterion (d): “*The matter is not related to procurement.*” The Panel is satisfied that the claims with respect to harm and non-compliance included in the Request for Inspection do not raise issues of procurement under the Project and hence this criterion is met.
53. Criterion (e): “*The related loan has not been closed or substantially disbursed.*” At the time of receipt of the Request for Inspection, the loan was about 63% disbursed.
54. Criterion (f): “*The Panel has not previously made a recommendation on the subject matter or, if it has, that the request does assert that there is new evidence or circumstances not known at the time of the prior request.*” The Panel confirms that it has not previously made a recommendation on the subject matter of the Request.

## **2) Observations on Other Factors Supporting the Panel's Recommendation**

55. In making its recommendation to the Board, the Panel also considers whether there is a plausible causal link between the Project and the harm alleged in the Request, and whether alleged harm and non-compliance may be potentially of a serious character. The Panel records its observations on these elements below, noting that the Panel can only make a definitive assessment of the Bank's compliance with its policies and procedures, and any adverse material effect this may have caused, through an investigation. The Panel also takes into account statements of any remedial actions provided by Management to address the matters raised in the Request.
56. The Panel fully appreciates the importance of this Project, which aims to address the critical issue of water scarcity in Kenya by conserving the country's five “*water towers*” – i.e. the mountain forests from where its main rivers originate. The Project is being implemented in the context of Kenya's exponential population growth, from just over 3 million in 1932 when forests were first gazetted by the then Colonial government, to just under 9 million at Independence in 1962, to the current 41 million, among the highest growth rates in the world. The Panel appreciates that this has put tremendous pressure on natural resources, including forests and critical water catchment areas.
57. The Panel also recognizes that this pressure has intensified the vulnerability of communities who have traditionally depended on the forests for their livelihood. Members of Sengwer communities described to the Panel how they have lost access to much of their ancestral lands, and they continue to face severe pressures not only on their

land but on their culture and identity as a people.<sup>30</sup> They also highlighted to the Panel their belief that the recognition of their customary rights should be seen as an important means to support the conservation objectives of the Project, as they traditionally as a people have helped to protect and take care of the forests on which they depend.

58. In this context, the Panel notes the challenging nature of the Project environment including inherent conflicts and tensions over land involving indigenous and local communities who are both poor and vulnerable. For its part, Management described this situation during Project preparation in the PAD, stating that “... ‘*encroachment*’ of certain forest areas and the process for reclaiming these areas has aggravated the already tense relationship between encroachers and the Government, and made enforcement challenging”.<sup>31</sup>
59. The Request has to be understood in the context of these challenges, namely how the Project has addressed adverse impacts on forest dwellers in its efforts to strengthen the protection of forest catchment areas. Such impacts can be forced eviction and/or restrictions in access to forest resources. Of importance in this case, is the recognition at the outset of the Project that some of the forest dwellers – or ‘encroachers’ – are ‘indigenous people’ with customary rights to land and resources in Project areas, including Sengwer communities. In this context, the Request raises two key claims, namely that some Sengwer have been forcibly evicted in violation of Bank policy, and that there has been lack of recognition of Sengwer customary rights in execution of the Project. Set forth below are the Panel’s observations on these two core issues of potential harm and non-compliance, including whether there are plausible links between the Project and the alleged harm.

**i) The issue of evictions and resettlement**

60. The Requesters state that “... *discriminatory forest preservation policies led to forceful eviction and displacement of Sengwer families from the forest (Kapolet) and having the forest gazetted as government forest.*” During its eligibility visit, members of the Kapolet community elaborated on these claims. They claimed, in meeting with the Panel team, that during Project implementation surveyors came to their lands but failed properly to demarcate all the lands that rightfully belong to the community. Subsequently, they contended that 45 members of their community were arrested and charged with encroachment on land which the community believes should be recognized as theirs under the second phase of demarcation, which has not yet occurred.

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<sup>30</sup> The Project IPPF provides background information on the Sengwer. It states that they are former hunter-gatherers who live in certain Districts in and around the Cherangany Hills, and describes their history, livelihoods and current living conditions in the “*operational areas*” (i.e., the areas where the project will become active), including their increased dependence on farming and livestock rearing, but on a limited scale so that it provides incomes of only about one-third of other rural Kenyan households, and lack of political representation. See Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project (IPPF), Final Report December 2006, pp. 23-29.

<sup>31</sup> Project Appraisal Document (PAD) on a Proposed Credit in the amount of SDR 46.0 million (US\$ 68.5 million equivalent) to the Government of Kenya for a Natural Resource Management Project, February 26, 2007, p. 13.

61. Furthermore, the Requesters claim that in Empoput forest, Sengwer houses have been burned and property destroyed in several consecutive years during the implementation of the Project. According to the Requesters, over 500 houses were burnt, property was destroyed (food grains, house utensils, beddings, school books, etc.), and 41 members of the community were arrested. During its eligibility visit, the Panel team met Sengwer community members in Empoput forest who have been temporarily settled in seven glades within the forest area. The Panel met them at a gathering place in one of the forest glades. Community members described in detail to the Panel's team instances of forced evictions that the community has faced. They informed the team that the latest incident of burning of houses occurred in April 2013.<sup>32</sup> The Panel was told that community members currently living in the glades are awaiting resettlement into areas outside the Empoput Forest under a program of the Ministry of Special Programmes. The Request claims that "*KFS/NRM Project and Ministry of Special Programmes made plans to resettle Sengwer families living in Empoput Forest without carrying effective and efficient free prior and informed consultations*".
62. Management responds that it "*... has viewed with concern reports of evictions and recently proposed resettlement that have been brought to its attention during Project implementation, and has responded diligently to those reports*". This involved "*carrying out field verifications, notifying Government of its obligations under Project safeguard instruments, and working with both Government and affected parties to prevent recurrences, including securing a fresh commitment from the GoK to refrain from further evictions that are not consistent with those obligations.*"<sup>33</sup>
63. However, Management states that "*any harm that may have stemmed from these evictions was not caused by the Project, nor has the Project supported such evictions*". Management acknowledges that at the time of Project design, it was anticipated that NRMP would play a more direct role in the planning and implementation of resettlement of Project beneficiaries who resided in gazetted forests or had been subject to eviction, but emphasizes that "*no resettlement has been planned or financed under the NRMP in Cherangany Hills or in any other forested areas in the Project area.*"<sup>34</sup> As a consequence, Management states that NRMP has not supported the preparation of resettlement plans under the forest component, as erroneously asserted in the Request.
64. **Panel's review.** The Panel observes that the original Project documentation addressed impacts and risks that may result from Project activities, and possible mitigation measures. The Project's Environmental and Social Management Framework noted that the types of measures under the Project that could trigger the policy on Indigenous Peoples included "*changes in rights to access to forest areas on which indigenous peoples rely on, or resettlement of indigenous peoples residing in environmentally*

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<sup>32</sup> The Panel team was informed differently by the country office staff about this incident, that the people whose houses were burnt were not Sengwer.

<sup>33</sup> Management Response, ¶ 59.

<sup>34</sup> Management Response, ¶ 84.

*sensitive areas to another location*".<sup>35</sup> The original PAD indicated that to address difficulties due to "encroachment" of certain forest areas, "... the project will provide financial resources for compensation and/or resettlement, conflict mitigation approaches and assisting such households with alternative livelihoods." Taking note of earlier evictions, the PAD also stated that the Project took it upon itself "... to assist the Government to address the resettlement issues in the project's area of influence."<sup>36</sup>

65. The Panel further notes that Project documents presented for the Project Restructuring in 2011 also address the risk of evictions and the possibility of "relocation" of forest dwellers. The Project Paper noted that "[a]lthough the GoK has assured the Bank that no evictions and relocations will take place until applicable safeguards instruments satisfactory to the Bank (including a Vulnerable and Marginalized Groups Plan, Process Framework and where displacement is envisaged a Resettlement Action Plan), have been developed and disclosed, there is still the risk that evictions may occur".<sup>37</sup> The Integrated Safeguards Data sheet at Restructuring indicated that when relocation and displacement are to be undertaken, the RPF provides the guidelines for development of Resettlement Action Plans (RAPs).
66. The Panel also notes that one of the activities planned under the Project is "[r]ealigning and demarcating boundaries in selected gazetted forests".<sup>38</sup> This component was not changed when the Project was restructured. The Panel further notes that boundary demarcation activities will "include development of biophysical, social and legal criteria for determining what areas remain gazetted forests and which are degazetted".<sup>39</sup> The Panel considers that this determination may in turn have an impact on the rights of people living inside the demarcated boundaries or in other ways depend on the forests for their livelihood, including their customary rights. It may also raise the possibility of taking actions to resettle those living within the forest boundaries.
67. The Panel views positively that Management took a number of actions when they began to receive news of forcible evictions and burning of houses. For example, Management action led to the Government issuing a moratorium on evictions in Empoput until a permanent solution is found, and to an assurance that some authorized communities, including Sengwer people, can have access to the forest. In recognition of the increasing prominence of conflicts over access to and use of forest land, the Panel further notes Management's support to the Government Inter-ministerial Task Force on Land and Legacy Issues, to provide a more solid foundation for a resolution of these issues.

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<sup>35</sup> See Environmental and Social Management Framework for the Western Kenya Community-driven Development and Flood Mitigation Project, and the Natural Resources Management Project, Final Report, July 20, 2006, p. 32.

<sup>36</sup> PAD, 20.

<sup>37</sup> Project Paper, ¶ 36 (Risks). See also ¶ 31 where it states, in relation to the Project's environmental categorization, that in spite of the complexities in addressing issues related to the indigenous peoples, "and possibly, involuntary resettlement, a change in category is not considered warranted at this time".

<sup>38</sup> Financing Agreement, Schedule 1.

<sup>39</sup> PAD, p. 41.

68. Management states that incidents of burning of houses in Empoput in 2010 prompted the Bank to write to the GoK to request “*that the Government comply with social safeguard documents and refrain from carrying out or planning any evictions without following due process*” as “*non compliance could result in remedial action by the Bank*”.<sup>40</sup> The MoF responded by instructing the line ministries responsible for implementing the NRMP to comply with the requirements set forth in the Bank’s letter. This indicates that the manner in which resettlement of forest dwellers is carried out is a matter of policy compliance under the Project.
69. The Panel further notes that the Project has also provided support to the KFS to build their capacity, including sensitization training, and to advise them on carrying out their duties. This has included support for actions to address and resolve land use issues and possible encroachment within demarcated forest lands. During its field visit, the Panel heard from government authorities who confirmed their understanding that Bank safeguard policies applied to activities relating to the relocation of affected communities living within forest areas covered by the Project, including those in Kapolet and Empoput forests. The authorities also described an evolution in their approach to addressing the issues of relocation and land use rights during the years of the Project, reflecting on the importance of both the conservation objectives of the Project (especially in light of the serious issues of water scarcity) and the objectives of addressing the rights of the affected peoples and communities.
70. The Panel further heard conflicting accounts of what is happening in the field under the Project, including an incident concerning the burning of houses in April 2013. People the Panel met in Empoput expressed concern about continuing evictions and burnings of their homes. In Kapolet forest, the Panel has received conflicting information about the extent to which realigning and/or demarcating boundaries has occurred under the Project, and may have been a trigger for actions to move or resettle Sengwer people residing inside those boundaries. The Panel was also informed that land for resettlement of the Empoput communities has already been purchased. During its meeting in Empoput forest, however, community members did not seem to be aware of critical information and facts in relation to this process.
71. The Requesters state that they feel that the Bank failed to carry out its supervisory role. They are particularly concerned about actions that occurred during the initial years of project implementation, and state that even after Management intervened to seek a moratorium on evictions the communities have continued to experience pressures and interventions which Management has not followed up on. The Panel notes that, in addition to the question of adequacy of supervision, OP 4.10 requires the Project to take measures not only to mitigate, minimize or compensate for adverse effects, but also to avoid potentially adverse effects on the indigenous peoples communities. The Policy also requires broad community support before any relocation takes place.
72. In light of the above, the Panel considers there are plausible linkages between activities under the Project and the concerns of the people relating to eviction and resettlement.

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<sup>40</sup> Management Response, ¶ 67.

The Request raises serious issues as to whether Bank safeguard policies have been met in respect to these concerns, and whether any such non-compliance may result in material adverse effects for the affected people and communities.

**ii) The issue of customary rights**

73. The Requesters ask for the recognition, respect and protection of “*the rights of Sengwer forest indigenous peoples to live within their ancestral homes in Kapolet and Empopot Forests.*” They contend that actions taken during project implementation have failed to safeguard their customary rights in these forests, in non-compliance with Bank policy. They want the Project to ensure that Government recognizes the rights of the Sengwer to live in their ancestral home in Kapolet and Empopot forests.
74. The Requesters consider that the original IPPF prepared for the Project was an important document in helping to shape the Project in a way that would recognize and protect the customary rights and access to natural resources of the Sengwer people. The team heard from the Requesters and other community members that when they first learned of the NRM Project and the IPPF, they had great hope that the Project will help them in finding a resolution to this fundamental issue of land in the forest areas in which the NRM was set to begin its work.
75. Subsequently, according to the Requesters, the Project started going wrong, and did not adhere either to the IPPF or the safeguard policies which give them protection. In this context, the Requesters claim that it was improper under Bank policy to decide not to implement fully the IPPF when the Project was restructured. They believe that this has weakened their rights, and contend that this was done without prior consultation with the affected people, and without their broad community support, as required by OP 4.10 on Indigenous Peoples.
76. Management in its Response explains that, with the restructuring, Project outcomes were adjusted and that this included “*an acknowledgement that resolving the more comprehensive resolution of land issues was beyond the remit and time-horizon of the project and would need to be addressed as part of a the broader dialogue*”.<sup>41</sup> Furthermore, Management states that consultations in preparation of VMGPs in 2010 “*included explicit discussion and explanation of the fact that the Project would not be able to support the measures mentioned in the IPPF concerning the resolution of land rights*”.<sup>42</sup>
77. The Restructuring Paper mentions that “[w]hile the project will make targeted contributions to these issues through the preparation of relevant safeguards instruments, a more comprehensive resolution of land issues will need to be addressed as part of the overall GoK - Bank dialogue. However, the restructuring will support the GoK through the testing of tools and instruments which would help to strengthen its capacity towards

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<sup>41</sup> Management Response, ¶ 15.

<sup>42</sup> Management Response, ¶ 32.

*developing country systems to deal with these issues in the future*".<sup>43</sup> In addition, it is stated that the Project prepared a "Process Framework" to "*determine an approach for management of sustainable forest uses by VMGs in and around the Cherangany Hills and Mt. Elgon areas*".

78. **Panel's review.** The Panel notes that the issue of indigenous peoples' customary rights is a subject of Bank policy under OP 4.10. Paragraph 21 spells out requirements pertaining to situations such as protection of gazetted forest areas:

*"In many countries, the lands set aside as legally designated parks and protected areas may overlap with lands and territories that Indigenous Peoples traditionally owned, or customarily used or occupied. The Bank recognizes the significance of these rights of ownership, occupation, or usage, as well as the need for long-term sustainable management of critical ecosystems. Therefore, involuntary restrictions on Indigenous Peoples' access to legally designated parks and protected areas, in particular access to their sacred sites, should be avoided. In exceptional circumstances, where it is not feasible to avoid restricting access, the borrower prepares, with the free, prior, and informed consultation of the affected Indigenous Peoples' communities, a process framework in accordance with the provisions of OP 4.12. The process framework provides guidelines for preparation, during project implementation, of an individual parks and protected areas' management plan, and ensures that the Indigenous Peoples participate in the design, implementation, monitoring, and evaluation of the management plan, and share equitably in the benefits of the park's and protected areas. The management plan should give priority to collaborative arrangements that enable the Indigenous, as the custodians of the resources, to continue to use them in an ecologically sustainable manner."*

79. Accordingly, KFS developed a Process Framework for NRMP in Mount Elgon and Cherangany Hills in July 2011, further updated in February 2013. The objective of the Framework was to establish the process for the participation of Projected Affected Peoples in planning project components, determination of measures to achieve objectives, implementation and monitoring. The Framework also aimed to establish a grievance redress mechanism.

80. The Panel met with community members currently living in the Empoput forest. During the discussions, the people informed the Panel of their reluctance to leave the forest glades, as they consider the forest as their homes, where they were born, as had their forefathers; they depend on the forest for honey, medicinal herbs, firewood, as well as for ritual purposes; the forest is where the spirits of their ancestors reside. They also informed the Panel team that if they are resettled in smaller groups in other areas surrounded by the dominant groups, they fear that they will not be able to maintain their identity as Sengwer people. The community members informed the Panel that their first wish is to remain where they are, but with security over land tenure. Some also stated that if they had to be resettled, their preference is to remain together as a community and be settled in an area adjacent to the forest. Some community members informed the Panel

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<sup>43</sup> Project Paper, p. 4.

that they have not been consulted about co-management of the forest, but if KFS comes to discuss it with them, they can help with the preservation of the forest provided land is set aside where they can settle permanently.

81. Furthermore, the Requesters explained to the Panel team that the designation as Indigenous Peoples is important to them, as they wanted to be distinguished from other vulnerable and marginalized groups, some of whom may be more dominant groups living adjacent to them and may be claiming land in their territory. The Requesters feel that other communities should not benefit in the same way from the livelihood components, which, in their view, were designed for them. The Requesters claimed that a number of non-Sengwer were beneficiaries under the VMGP.<sup>44</sup> Further, according to the Requesters, being Indigenous Peoples in the Cherangany Hills means that this is their only home, whereas other, vulnerable and marginal peoples have homes elsewhere in Kenya. To them, the designation as Vulnerable and Marginalized Group critically severs their claim to their home territory and makes them indistinguishable from other groups.
82. The Requesters concerns about customary rights of indigenous peoples affected by the NRMP and the approach taken by the Project raise two issues of potential serious non-compliance with Bank policy, namely with respect to whether the Project has adequately taken into account such rights, and the adequacy of consultation.
83. **Consideration of customary rights.** The Panel fully appreciates the sensitivity of what constitutes Indigenous Peoples in Kenya. The Panel has also taken note of Management's statement that "*the use of the term "VMGP" does not in any way diminish the benefits and protections available under the policy to the people who meet the eligibility criteria accorded to IPs under OP 4.10*".<sup>45</sup> The Panel team was further informed that the term was arrived at after much discussion at the time of the adoption of the national Constitution, and that the term, Indigenous Peoples was difficult to explain in the national context, whereas people are comfortable with the term Vulnerable and Marginalized People.
84. During its meeting with Management, the Panel Team learnt that the country office has initiated a Country Social Analysis to interpret the interface between OP 4.10 and the Constitution with a view to providing guidance to Bank teams and GoK on the application of OP 4.10. While this is not a component of NRMP, the Panel takes positive note of Management's initiative in addressing this complex issue.
85. The Panel notes that Management was forthright in informing the Board in the Restructuring Paper of its view that, in retrospect, the Project could not find a comprehensive resolution to the land issues within the remit and time frame of NRMP. The Panel wishes to emphasize that it is not questioning the determination made at the time of restructuring that it would not be feasible to comprehensively resolve the longstanding claims to land of the Sengwer within the context of the Project.

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<sup>44</sup> During discussions in the country office, it was explained that this may be due to the significant numbers of inter-marriage that has occurred over the years between the Sengwers and surrounding dominant groups.

<sup>45</sup> Management Response, ¶ 36.

86. This notwithstanding, the Panel notes that it remains an important policy issue, for the Sengwer and the Bank, whether the Project has adequately paid attention to “*the customary rights of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods*”.<sup>46</sup> Whereas Bank policy recognizes that in some situations legal recognition of customary rights (e.g. through titling of land) may not be an available option under domestic law, it is expected that an assessment of customary rights would inform any alternative approach to addressing impacts on people who legitimately can claim such rights, for example in the context of the Vulnerable and Marginalized Groups Plans.<sup>47</sup>
87. The Panel notes that the Vulnerable and Marginalized Groups Plan (VMGP) for Marakwet (dated August 2011), covering the area where Sengwer communities still live in the forest, reports several concerns with respect to the issue of customary rights, raised during consultations. The Plan is presented as an approach to “*livelihoods enhancement support*” with the stated objective “*to mitigate any adverse effects that the implementation of the project may have on these VMGs. For example, access restriction to, and utilization of forest resources may adversely affect forest related livelihoods and income generating activities of the forest dependent VMGs and should therefore be mitigated.*”<sup>48</sup> The Panel notes the Requesters concern that the VMGP does not adequately address such impacts.
88. At the same time, the Panel team heard positive comments and appreciation regarding the benefits of the livelihood program implemented under the VMGP. This appreciation was to such an extent that these community members requested the Panel team to convey to Management and KFS that the Project should be extended beyond its closure date, and that identified beneficiaries should not be penalized because of the closure date for procurement delays that have occurred at the Project level.
89. **Consultation.** The Requesters and other community members cite several phases of the Project where, in their view, consultation has been inadequate. During the meetings with community members, the Panel team enquired about their experience with consultation. While some recalled being consulted during what appears to be the Social Assessment process, others stated that they have never been consulted. “They just come to burn our houses”.
90. The Management Response refers to various instances of consultation with the communities during the process of Social Assessment as well as during the preparation of the Process Framework and the Vulnerable and Marginalized Groups Plans. These are elaborated in detail in Annex 5 of the MR. In addition, Management also organized a

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<sup>46</sup> OP 4.10, Indigenous People, ¶ 16(a).

<sup>47</sup> ‘Customary rights’ to lands and resources are defined in Bank policy as “patterns of long-standing community land and resource usage in accordance with Indigenous Peoples’ customary laws, values, customs, and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State”.

<sup>48</sup> Final Report of the Marakwet VMGP. August 2011, p. 1.

Regional Consultation Workshop with broad participation that led to the formulation of a collective action plan.

91. Management Response also refers to the difficulty in consultation process due to the stated *“lack of clarity as to the nature of community representation, and uncertainty as to how communities as a whole view the status of a number of NGO leaders who claim to speak on their behalf”*. Management adds that *“[o]n numerous occasions, Project implementation was delayed as the Project team attempted to sort out the real will of the communities, by reviewing and assessing the comments of a diverse group of self-appointed community leaders holding inconsistent or contradictory positions”*.<sup>49</sup>
92. The Panel notes that OP 4.10 sets a high standard for consultation, requiring a process of free, prior and informed consultation with the affected Indigenous Peoples’ communities at each stage of the project (particularly at Project preparation) to fully identify their views and ascertain whether there is broad community support for the Project. It also appreciates Management’s comments on lack of clarity with regard to community representation, and the challenging nature of how to carry out effective and appropriate consultations in the present situation.
93. During its eligibility visit, the Requesters informed the Panel that there was no consultation during the restructuring process, which changed activities as well as the nomenclature. In addition, the Panel team made an effort to hear the views not only of the Requesters but also of the various individual community members who had gathered to meet them in both Kapolet and Empoput. The Panel has heard different and conflicting views on how such consultations should be conducted, and with whom, in light of the nature of representation within the affected communities. The Panel’s field visit also indicated that important questions remain as to whether Management has complied with the requirements of OP 4.10 to ensure that there is “broad community support” for the approach taken to avoid or mitigate adverse impacts on Sengwer communities with customary rights to land and resources inside the project area.
94. In light of the above, the Panel considers that the Requesters raise an important issue of whether the safeguards protection envisaged in Bank policy for indigenous people was adequately ensured, and in particular with respect to consideration of customary rights and the consultations on this issue. This remains an important issue also in a situation where resettlement of Sengwer communities from gazetted forest land is being considered.

## **G. Recommendation**

95. The Requesters and the Request meet the technical eligibility criteria set forth in the Resolution that established the Inspection Panel and the 1999 Clarifications.
96. The Panel appreciates Management’s forthright approach taken during the restructuring process in recognizing the limitations of the Project in dealing with the comprehensive

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<sup>49</sup> Management Response, p. 10

resolution to land and legacy issues, as well as their intention of continuing their engagement on these issues through policy dialogue and through support to the Inter-ministerial task force. The Panel has noted positively that Management is also addressing the challenging issue of the interface between OP 4.10 and the Constitution through a Country Social Analysis. The Panel has also noted Management's responsiveness when reports of forced evictions and harassment began to emerge.

97. Nonetheless, the Panel notes that there are conflicting assertions and differing views on issues of harm and compliance with policies and procedures raised in the Request for Inspection, as evidenced by the various statements made in the Request, in the Management Response, and in the Panel's meetings with affected people and with Bank staff. These relate to whether the Project took adequate account of the safeguards protection envisaged in Bank policy for indigenous people, and in particular with respect to consideration of customary rights and the associated processes of consultation. The Panel also considers that there are plausible linkages between activities under the Project and the concerns of the people relating to eviction and resettlement, which raise serious issues as to whether Bank safeguard policies have been met, and whether any such non-compliance may have resulted in material adverse effects for the affected people and communities.
98. In order to ascertain compliance or lack thereof with Bank policies and procedures in the design, implementation, and restructuring of the Project, the Panel must conduct an appropriate review of all relevant facts and applicable policies and procedures. This can be done only in the course of an investigation.
99. In light of the observations noted above, the Panel recommends that an investigation be carried out on the issues raised by the Request that relate to allegations of harm and related non-compliance with World Bank operational policies and procedures under the Project with respect to a) the application of policies in relation to evictions and issues of resettlement of affected Sengwer people, and b) the consideration of customary rights of the affected Sengwer people, including consultations on this issue. The Panel's investigation will also report on any steps and actions taken by Management during the course of the investigation to address the issues of compliance and the concerns raised by the Requesters.