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STRATEGIC ISSUES: GETTING PASTORAL RIGHTS ON THE AGENDA & INTO DELIVERY

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19 November 2005

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Introduction

This represents a short mission report, following a couple of weeks in Kabul (8-22 November 2005). The purpose of the mission, requested by the Pastoral Adviser to the Ministry of Frontiers & Tribal Affairs (Frauke de Weijer) was primarily to present on the tenure issue at a Pastoral Conference. This was hosted under the aegis of RAMP/USAID and held on 15-17 November 2005 (*Annex A* provides the text of the presentation). I was also requested to discuss tenure concerns with the National Kuchi Shura (*Annex B* provides the text of the pre-discussion presentation). In addition, I have worked with the Pastoral Adviser towards framework formulation of piloting to learn by doing on this issue. Relevant documentation will be forthcoming in due course from the Pastoral Adviser. I was also requested to assess the policy and institutional situation for such developments.

I will confine my comments below to these matters:

1. The Pastoral Conference and Kuchi Shura meeting
2. Pastoral Tenure Strategy
3. The Policy Environment
4. Points on Piloting.

I will not repeat (as far as possible) points made at the conference and shura meetings. Nor will I elaborate the background as plenty of information on pastoral tenure and conflicts may be found previous work as published by the Afghanistan Research and Evaluation Unit (AREU) as listed below. Copies are directly obtainable from the AREU Office in Kabul or may be downloaded from www.areu.org.af. The most important on pastoral issues are asterisked and were made available in hard copy at the Pastoral Conference.

1. Land Rights in Crisis: Restoring Tenure Security in Afghanistan (December 2003)
2. Land and the Constitution (September 2003)
3. Land Relations in Bamyan Province: Findings from a 15 Village Study (January 2004)
4. Land Relations in Faryab Province: Findings from a Field Study (June 2004)
5. Rural Land Relations in Conflict: A Way Forward (August 2004)*
6. Looking for Peace on the Pastures: Rural Land Relations in Afghanistan (November 2004)*¹

¹ Two other papers of direct relevance to Afghanistan include *Land Conflict and Peace in Afghanistan*. Paper presented to The World Bank Land Thematic Group
<http://Inweb18.worldbank.org/ESSD/ardext.nsf/24ByDocName/LandMeetings> and

1. THE CONFERENCE & KUCHI SHURA MEETING

Participants of the Pastoral Conference derived from a broad range of agencies, Government and non-Government, and my presentation was accordingly broad. In respect of Kuchi participants and the meeting with the National Kuchi Shura, a main objective was to ascertain how willing they are to negotiate directly with settled communities as to summer pasture access. From a technical point of view I was also interested to detect support for new strategies in these areas –

A. *Process*: Kuchi capacity be self-reliant, to seek to resolve disputes through self-initiated negotiation rather than relying upon documents on the one hand and the paternal power of Government to secure their rights for them on the other: both documents and heavy reliance upon State organs and decision-making have demonstrably faltered since 1978 and especially since Bonn (2001) to resolve longstanding conflicts over pasture ownership and access.

As background, documents (‘deeds’) in respect of pasture purchase, allocation, grant or other issuance are often –

- (i) vague as to area implied
- (ii) corrupted, and
- (iii) even where genuine issuance, contested on the basis of having been unjustly allocated or obtained.

Courts, central commissions of inquiry and ministries are important actors but have not been up to the job of making real headway, especially since Bonn. Main reasons include

- (i) the significant and possibly growing might of some commanders in parts of the country;
- (ii) a significant shift in the balance of power during and since the war among ethnic groups and within which non-Pashtuns now feel able, for the first time in a century, to challenge what they consider to have been wrongful appropriation of especially non-arable resources in their areas, either by Government or by individuals of stronger ethnic groups;
- (iii) loss of public confidence in the integrity of the courts to fairly resolve land disputes;
- (iv) inability of government or court actors to enforce such decisions as they arrive at given weak rule of law; and
- (v) heavy reliance in the first place upon out-dated and unsuitable paradigms for decision-making, stemming mainly from longstanding failure to give customary common property rights and arrangements the legal support they deserve (see below).

Conference participants were offered an approach that is designed to enable tangible groups of pasture-dependents to unpack overlapping and contested rights and come to agreements themselves, with the political and administrative support of Government and under the guiding hand of neutral expertise. *Inter alia* (see later) this would shift

the *core* burden of responsibility for making and upholding agreements from State to people.

B. Paradigms: I was also interested to determine if there was any resonance or interest on the part of Kuchi with new ways of recognising, ordering and upholding land rights. Most important among the ideas presented were –

1. *Devolving Governance over Natural Resources:* The notion that natural resources could or should be governed (managed) at the local level, enabling those with vested interests in those resources to be the primary decision-makers, and recognised in law as such (local land authorities, pasture committees etc);
2. *Common Property:* New provision to formally recognise *community property*, customarily existing around settlements, and much of which has been either appropriated by Government on the assumption that it is un-owned and made Public Land or reallocated to pastoralists by different regimes under a range of inconsistent and opaque arrangements (e.g. vague Land Grants gifted by Kings, Grazing Permits, Allocations) or co-opted by wealthier and powerful members of the local community (today mainly ‘commanders’). Recognition of the existence of customary commons requires clear definition of its perimeter boundary;
3. *Bringing Public Pastures under Localised Management:* This would relate to shared pasture domains - areas of Public Land beyond the limits of Community Areas which are customarily more accurately the shared property of two or more groups (usually specific groups of pastoralists and specific local residents); the current climate of highly entrenched notions of Public Land, it is not likely that such domains would be formally registered as the private property of those groups, again held in undivided shares. However, there is plenty of scope for an interim step: the definition and registration of these named, described and mapped areas as Pasture Domains and the establishment of a relevant local management body accordingly; with the formal handover (initially on a trial period) of custodianship for the estate in an environmentally sound and fair manner, using a Custodial Agreement. Such a construct would be an important step towards devolved resource governance. Establishment of a simple and agreed use plan for the area, rules, mechanism for regulation and system for dealing with breeches of the rules, would be a natural prerequisite to any hand-over. Such a construct would –
 - i. empower the user group (including both seasonal and local pasture users) to take control of the area in a constructive and conservationist manner with destructive trends limited (and unsustainable cultivation in particular);
 - ii. be a small but important step towards devolving governance over natural resources;
 - iii. represent a cohesive socio-spatial and institutional platform from which the interest group could adopt pasture improvement of pastoralist support measures; and
 - iv. offer a logical framework for attention to related water and forest resource issues within or next to the domain.

4. *The Nature of Public Land*: Clarifying distinctions between Government and Public Land, and in particular the powers of State over the latter;
5. *Clarifying distinctions between ownership and access rights*: this is particularly important for Kuchi, who often claim only use rights to summer pastures, accepting Government as owner, but who would reasonably claim substantial ownership rights of winter pasture areas (as Common Property as appropriate).

Findings

I think it is fair to say that it took Kuchi participants some time to move towards constructive discussion in relation to the above, mainly delivered in this particular subject on the last conference day. There are several likely explanations for this:

1. A very long history of reliance on the State to solve all problems, deliver services and to protect the interests of the dominant ethnic group – of which they are part. The post-Bonn regime takes some getting used to, both in its efforts not to favour one group above another and in its orientation towards more inclusive and participatory government;
2. Government itself (i.e. Government representatives) are still very uneven in the extent to which they have absorbed the new (or intended) *modus operandi*; where they do *not* need to have all the answers at their fingertips and claim that everything is under their good control and easily solved (with more resources). Even though self-evidently failing, interventions from the past are held onto tightly and promoted. Adopting a process approach to policy development is particularly difficult, given that the ends are not already known and familiar. Assisting senior actors to be more open-minded is probably best achieved on the basis of specific proposals;
3. Nomadic Kuchi are at the poorer end of their own society and like poor people in all circumstances appear to see large meetings with participants from Government, donors, etc. as a fine opportunity to remind everyone of their oppression and poverty. In such settings they fear to be seen as compromising or capable of compromise for this could weaken their case. Such matters are probably best first explored in smaller and more local settings;
4. ‘Conscientization’ (or ‘politicization’ or ‘awareness raising’) towards self-reliance and constructive analysis of their plight and ways out of it, has been fairly limited thus far, and in any event is best absorbed in relation to a specific situation in the field rather than generalities;
5. There are genuine fears (and in some parts of the country entirely justified) that negotiation with local communities will fail, or is simply not possible; Kuchi accordingly look to not just high State power to solve their problems but believe the international community, ISAF and such other bodies will be necessary. It took some time for Kuchi participants to fully take on board that the logical place to begin making changes through community-based

approaches are areas where contention and threat are least, and that success in these will strengthen the chance for resolution more widely, in an incremental manner.

A primary objective of the conference was achieved

Ultimately however, enormous progress was made. Although wary of being over-optimistic, I believe many Kuchi left the conference with more open minds and even excited at the prospect that there could be new ways forward. I also believe Kuchi (and their representatives in Government?) began the meeting with very patchy analytical grip upon the fact that many of their problems stem from the insecurity of their pasture tenure. Interventions for health, education and veterinary services vied actively with the tenure discussion of the first day. By the last day of the conference many were self-evidently aware that many of their concerns will only be able to satisfactorily tackled once the foundation of stable access to pastures has been secured. This was demonstrated in their dispute as to which area should be the site of first implementation for a pasture tenure security pilot.² Quick follow up with modest, practical proposals will be helpful.

2. PASTORAL TENURE STRATEGY

At the risk of repeating points made to the conference, key points are -

1. Land relations as a whole are in a mess in Afghanistan with breakdown in norms and rules, rampant land grabbing and rising insecurity of tenure by the institutionally weak and poor widespread (although least evident in the rural house and farm-plots sector).
2. The knee-jerk reaction to this is to put it right by strengthening the same norms especially in the form of reissued laws. "Everything will be alright if people just followed the rules".
3. *Not everything* will be alright if people just follow the rules, for the rules themselves are deeply flawed and often the core source of contention, whether this be in the unsatisfactory definition of pasture (and therefore Public Land) or the rights of rural populations to resources other than arable plots. Nor will simply re-formalisation of existing rights acquired or gifted through a new rural (farm)land registration programme do more than further entrench the thorns that so drive dispute.
4. A complete rethink of strategies is required including rethinking how resulting new norms and rules (laws) can be genuinely upheld (not the case currently). The Administration accepts this and has an inchoate policy process underway in the form of the Land Commission under the Ministry of Agriculture. Aside from the question as to how this can better operate, is the question as to how policy is best made, addressed below.

² It is also significant that Kuchi leaders privately urged the Pastoral Adviser to not spent the precious last hours of the meeting on animal health and range improvement issues, but to focus on the primary issue of pasture access; "once we get that sorted out we can manage the other matters ourselves".

5. On substance, the main point is simply that the outstanding pool of tenure insecurity in the rural domain is the pastures. The de facto policies and legal norms that are least well-crafted, most opaque, and least well supported across ethnic groups are in regard to the pastures.³ Accordingly, pastures are today the most contested domain. This is being delivered on the ground in uncontrolled expansion of cultivation into lands legally declared and historically controlled as not available for cultivation.
6. Finding more workable and acceptable norms in respect of the pastures is critical, along with more workable and sustainable ways to regulate and manage these over the longer term. These can to an extent be drafted right now, but will be even more attuned to complex requirements if this is achieved on the ground, in real cases, with real parties involved. This is because in the current environment of extremely heated dispute, such new solutions and norms must demonstrate a significant degree of acceptability by all contesting positions. It is also because uptake of any social change or new ideas is much, much better where at least some public ownership of the decisions exists.
7. Tackling the pasture issue becomes the logical entry point for experiential rural land policy development and action. From this foundation a series of related problem areas may be fairly easily addressed: the internal dynamics of common property relations which has much to do with historical inequities between rich and poor families, and the land rights of the landless labourers (to use common property for grazing their own stock, often their only capital asset). It also provides an important stepping stone to rethinking how rural land relations are best administered, ideally with a devolutionary approach slowly exemplified and adopted. The movement of so-called Public Land out its current status as 'free for all land' is an equally critical requirement, mainly achievable through more effective (and therefore necessarily more localised) guardianship.⁴
8. A final general point is the need to locate resolution of pastoral tenure issues as a primary stepping stone to other developments in the extensive livestock production sector. Sustainable uptake of interventions towards either livestock or rangeland productivity will be much higher once stable access to pasture is secured. This has implications for the overall pastoral development strategy.

³ In contrast, notions about who owns farms and how, or who owns rural houses and how, are not in serious flux. This does not mean there are no disputes over these properties, only that the disputes are resolvable within existing norms, which disputes surrounding pastures, are not.

⁴ It should perhaps be noted here that the plight of the Public Lands is equally a source of main tension in urban areas (and proportionately higher levels of land grabbing and conversion of land use (to housing). Whilst ultimately the legal principles and prescriptions affecting rural and urban Public Land will have commonality it is strategically important that in both cases, the remedies are contextually (i.e. separately) developed.

3. POLICY ENVIRONMENT

Returning to the issue of sound policy process, I have these observations to make –

- Interest in the donor community towards supporting sound land tenure policy process is significant, but insufficiently delivered so far, or coordinated;
- Commitment by the Administration to develop a new land policy is also significant, but possibly incorrectly structured thus far, and hardly activated;
- The timing is right for moving forward on both counts.

To elaborate -

1. As noted above, rural land policy development is underway, mainly in the hands of ADB which has produced a first policy paper and proposes to host a larger initiative towards this. Discussions with the Deputy Director suggest willingness to restructure the process along more process approach lines, with a relaxed time-line to enable this to occur.
2. USAID, at this point mainly through the EMG-implemented land project also have interests in supporting this process, with a Rural Land Adviser recently fielded to undertake reviews which will have direct bearing mainly on institutional issues (Land Administration, with the Amlak Department currently lodged in the Ministry of Agriculture).
3. USAID, through its capacity-building programme also has interests to see the policy process well-founded and implemented.
4. Other donors, and most notably The World Bank, have resources and will to see land policy swiftly and correctly developed and entrenched. Donors with resource-based projects (e.g. FAO and EC in rural areas and UN-Habitat and The World Bank in urban areas) also have strong interests in sound policy development.
5. The Land Commission exists mainly in name. It is an inter-ministerial committee, currently chaired by a Deputy Minister of Ministry of Agriculture. It has a low profile and low activity mainly because it is under-resourced. The ideal resources to trigger action are provision of international expertise, partnered with national expertise, forming a Working Secretariat and backed up administratively. The terms of reference of each expert would need clear definition as would the necessity to root their work in shared and cooperative responsibility to assist the Commission to receive and deliver satisfactory policy and, developed in the best possible manner. This will be doubly essential in the likely event that not one, but several agencies contribute technical expertise and operating funds to the Land Commission. A Chief Land Policy Adviser will ideally be charged with coordination of respective work programmes and inputs and for organising the reporting to the Commissioners and guided decision-making. This should not be difficult for interested donors and the Ministry to work out and sustain.
6. Given that ADB proposes to field a team consultancy to further the land policy process, it would be logical that that team be mandated with responsibility of

less developing the policy itself immediately than laying out the path towards sound policy development. Based on existing ADB policy products, there is plenty of scope to imminently produce an *Outline Policy*, containing essential principles. The fleshing out of strategies to achieve those broad policy principles is a more iterative process (necessarily drawing upon learning by doing pilots in respect of key parts of the policy) with a significantly longer time-line (e.g. two years for the first *Comprehensive Rural Land Policy*). A broad consultative process will be helpful at that time.

7. Two other constraints face the Commission, both of which will be most easily overcome simply through its activation.
 - (i) Its mandate includes all land policy, rural and urban. This has historical origins in the removal of the Land Administration Department (Amlak) from the Ministry of Finance to the Ministry of Agriculture during the 1970s land reform period. Separation of policy development into rural and urban areas seems practical. Key stakeholders are the Ministry of Urban Development and Housing, and supporting donors in the urban sphere (UN-Habitat, The World Bank, UNDP).
 - (ii) The Ministry of Justice has taken on responsibility for land policy and law development (and despite the fact that the Deputy Minister of Justice is a member of the above-mentioned Land Commission under Ministry of Agriculture). A Working Group has been formed, with diverse membership including NGOs. There is at this stage a likelihood that policy will be made through making new law, a dangerous route, and that the opportunity for exploring new paradigms will not be afforded.

I and the Pastoral Adviser will attend the Working Group meeting on Sunday November 20th at the Ministry of Justice.

The likely solution is that the Land Commission under Ministry of Agriculture loses responsibility for urban policy development, and is properly supported by donors with rural interests (USAID, ADB and The World Bank). This will enable the Ministry of Justice working group to focus on urban issues.

8. Land policies have been developed over the last decade in upwards of 60 states around the world, and many lessons present themselves. These lessons are most commonly iterated ⁵ –
 - (i) New land laws are best preceded by tangible policy development
 - (ii) Policy development is best made over a longer, rather than shorter period, and on the basis of public participation
 - (iii) Land policies and laws that are not rooted in practical exploration of proposed norms tend to lack innovation and to be un-implementable; key reasons for this include

⁵ See for example - Deininger, K. (2003). *Land Policies for Growth and Poverty Reduction* (World Bank Policy Research Report). New York: Oxford University Press for the World Bank; El-Ghonemy, M. (2003). 'Land Reform Development Challenges of 1963-2003 Continue into the Twenty-First Century', in FAO (2003a): 32-42; Toulmin, C. and J. Quan (eds) (2000). *Evolving Land Rights, Policy and Tenure in Africa*. London: DFID/IIED/NRI.

1. lack of public ownership of the proposed reforms;
 2. impracticality, with too high cost solutions proposed;
 3. through lack of grounded testing and participation in arriving at solutions, a low level of innovations that can be readily applied to overcome the constraints and failures that led to demand for new policies in the first instance; and
- (iv) Even where the final output is a single basic, comprehensive National Land Policy and Land Law, treatment of land interests and procedures in urban and rural spheres tends to be necessary, albeit conjoined in shared national policy principles.

4. PILOTING RURAL TENURE SECURITY APPROACHES

1. Points on this are elaborated in the attached conference presentation (Annex A). More general points –

- The envisaged pilots combine the following general objectives and outputs:-
 - Sound development process (participatory, bottom-up, and learning by doing)
 - Routes towards devolved natural resource governance (land and other resources)
 - An integrated approach to land tenure and land use issues
 - Logical flow from conflict resolution to decision-making to institutional building at the local level
 - An integrated socio-spatial approach which lays a local foundation for interventions to be channelled and sustained
 - Concrete guidance towards new policies and legal constructs for organising and administering land interests
 - A focus on the priority spheres: common property and public lands, the common denominator being pastures; and
 - An essential, not just desirable approach given that existing policies and legal norms are highly contested on the one hand and proving insufficient to meet requirements on the other.
2. There is growing interest in pilot testing of new approaches, for example:-
 - FAO is keen to examine common property matters of settled communities in its Eastern Hazarajat project area (Bamyan Province);
 - The World Bank has already proposed a project which will document the utility of alternative dispute resolution in respect of contested land rights (likely to be implemented by AREU and NRC);
 - The World Bank is also funding a livestock development programme which could embrace at least one component which tackles the pasture access issues, again by piloting (likely to be implemented by NGOs, working to the Ministry of Agriculture);
 - ADB, in its support for the Land Commission's policy development mandate, is showing interest in practical learning by doing and may seek to fund and field some of these; and

- USAID, via its EMG-implemented land registration project, capacity building projects and drought prediction interests has several avenues through which practical advancement of rangeland access issues could be practically addressed.

3. Ideally, a significant number of trial initiatives should be advanced, each with a different orientation or starting point. However, the utility of piloting will be curtailed should a solid institutional foundation for commissioning and/or receiving the findings of practical initiatives and dealing with these in a constructive way (into policy and law) not be swiftly entrenched.

4. At this point, an urgent requirement is elaboration of the likely process through which a pasture-centred pilot could and should be initiated. I have drafted at earlier points outlines on this (e.g. see “Looking for Peace on the Pastures” (AREU). More time is needed to elaborate the actual approach. Broadly this would fall into a series of sequential Stages and Steps (within each Stage) with estimates of timing for each step and outputs identified, against which progress could be tangibly monitored.

Broadly, these Stages are –

- STAGE ONE: PREPARATION ⁶
- STAGE TWO: RESOLUTION OF TENURE ISSUES ⁷
- STAGE THREE: PROVISIONAL INSTITUTIONAL DEVELOPMENT
- STAGE FOUR: FORMAL AGREEMENT & MAPPING
- STAGE FIVE: LOCAL LEVEL IMPLEMENTATION OF AGREED DECISIONS, NEW RULES AND SYSTEMS
- STAGE SIX: FIRST REVIEW AND MONITORING FOR POLICY DEVELOPMENT
- STAGE SEVEN: REFINEMENT AND ENTRENCHMENT OF OPERATING SUPPORT SYSTEMS AT DISTRICT/PROVINCE⁸
- STAGE EIGHT: EXTENSION OF PROCESS TO WINTER AREAS

⁶ Including for example - (i) survey as necessary to identify the pilot area (or areas); elaboration of provisional procedure, intended outputs etc (programming); (iii) securing official support; (iv) acquisition of essential capital items (vehicles, GPS etc) and establishment of linkages with service departments (mapping, security etc); (v) formation of the lead Facilitation Team (to which local level actors will be added) and other technical inputs given e.g. from a range management specialist).

⁷ Including for example, community based review of the pasture and related resources and problems, identification and resolving of conflicting uses and right-holding, arrival at compromise solutions, on-the-ground definition of precisely boundaries between farming and pastoral resources, agreement as to ownership and access rights in part of the pasture as relevant, and establishment of agreed uses, users and systems for regulation, etc.

⁸ Including, for example, establishment of provisional registration book for recording all agreements, boundaries as agreed and land use management regimes, and formalising recognition of Pasture Domain Committees as the lawful local land authority over those resources; this is ahead of legal drafting, and adds trial experience to workable (and accountable) regimes.

- STAGE NINE: ESTABLISHMENT OF SUPPORTING MECHANISMS AT DISTRICT/PROVINCIAL LEVELS
- STAGE TEN: IMPLEMENTATION OF PRIORITY INTERVENTIONS TO SUPPORT LIVESTOCK & RANGE PRODUCTIVITY
- STAGE NINE: SECOND REVIEW & MONITORING FOR POLICY DEVELOPMENT AND PROGRAMMING FOR REPLICATION.

Annex A

GETTING TO GRIPS WITH PASTORAL TENURE ISSUES

**A PRESENTATION
TO THE
PASTORALIST CONFERENCE OF AFGHANISTAN
(Sponsored by USAID/RAMP)
KABUL 15-17TH November, 2005**

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I. THE KEY MESSAGES

Let me first outline my main conclusions and then return to each main point.

Having periodically spent time in recent years examining land tenure issues in Afghanistan,⁹ and linking these findings with similar experiences elsewhere,¹⁰ it is my conclusion that –

1. A NEW POLICY PROCESS IS NEEDED

New rural land policy is best made through an iterative approach. This means it does not attempt to address all issues at once but *prioritises* key problem areas and tried to address them - *and not just on paper, but in the field*. It means that the classical approach in which a comprehensive land policy is developed at the centre and by the centre gives way to a process

⁹ For details on findings re rural land tenure refer Afghanistan Research & Evaluation Unit (AREU) at www.areu.org.af The main relevant papers are: *Rural Land Relations in Conflict: A Way Forward* August 2004 AREU Briefing Paper by Liz Alden Wily and *Looking for Peace on the Pasture: Rural Land Relations in Afghanistan* AREU Synthesis Paper Series December 2004 by Liz Alden Wily.

¹⁰ Refer these papers by Liz Alden Wily *Land Tenure Reform and the Balance of Power in Eastern and Southern Africa. Natural Resource Perspectives* Number 58, June 2000, Overseas Development Institute, London. Also available: <http://www.odi.org.uk/nrp/>; *Land, people and forests in eastern & southern Africa at the beginning of the 21st Century. The impact of land relations of the role of communities in forest future*, IUCN-EARO 2001. Also available: <http://www.iucnearo.org> *Reconstructing the African Commons in Africa Today* Issue 48 (1) Spring 2001:76-99 Indiana University Press USA; *Getting the Process Right: Land Administration as Governance* Discourse on the political economy of land tenure management. Proceedings of The World Bank Land Policy Conference in Africa April 29-May 2 2002, Kampala, Uganda; *Community Based Land Tenure Management. Questions and Answers About Tanzania's New Village Land Act, 1999*. Drylands Issues Paper 120, International Institute for Environment and Development [IIED] London, September 2003. Also available: <http://www.iied.org>; *Governance and Land Relations. A Review of Decentralization of Land Administration and Management in Africa*, Land Tenure and Resources Series. International Institute for Environment and Development [IIED] London. Also available: <http://www.iied.org>

which is much more inclusive of rural land owners and land users themselves and is founded upon their (facilitated) decision-making - what we call 'bottom-up' in process.

2. LEARNING BY DOING IS AN ESSENTIAL ELEMENT OF THE APPROACH

Second, a critical contributor to good policy (and in turn 'good law') is practical 'learning by doing' – getting out there and actually trying out new ways of defining rights in land, new ways of registering those rights, new ways of resolving land conflicts and then entrenching those new constructs and procedures that are demonstrably workable in policy and law.

Learning By Doing Engenders Public Commitment

Such an approach is actually essential in circumstances like Afghanistan where current laws and procedures are demonstrably failing to meet requirements of landholders and land users and where rule of law has broken down to the extent that those norms are in any event not being upheld and show no sign of being upheld for as long as 'public ownership' of the procedures does not exist.

Learning by doing helps lay the kind of public ownership that is needed for policies to take and hold, for laws to be upheld by people themselves, not just by force.

3. THE LOGICAL FRAMEWORK FOR LEARNING BY DOING IS THROUGH DISCRETE COMMUNITY BASED PILOT PROJECTS

In practical terms, this means pilot projects; initiatives that are structured to tackle tenure problems in a particular area and with all those who are affected: this allows new norms, new strategies – in effect, new and more workable ways of solving problems to not only be found, but to be tested.

4. RESEARCH IS NOT ENOUGH, EVEN CONSULTATION IS NOT ENOUGH

Passive investigation is insufficient. We already know a lot about rural land tenure conflicts and failures. Nor is consultation sufficient. People can tell us the problems all over again (and again and again) but they cannot be expected to come up with reliable solutions without trying out what will work, and being assisted and supporting in doing this. Only working with real people with real issues and assisting those parties to themselves arrive at conclusions as to what land ownership norms best reflect their customs, their needs and their rights and in fair ways, and then seeing how these work, will really lead to the kind of innovations that are needed to overcome the problems facing ownership of houses, farms, pastures and forests.

Let me give you an example: Kuchi participants in this meeting will almost certainly tell the rest of us about the constraints they face in the summer pastures; how their access to many of these pastures is denied and who is denying that access. They may also tell us they are ready to compromise. They may have ideas as to how this should be carried out. But like settled people, they will not know how dialogue will work and what can be achieved without trying it. In truth, we know a great deal but not, for example these important facts:-

- (i) Will representatives of settled communities and Kuchi *really* compromise in their competing interests to find a better modus operandi on the pastures?
- (ii) Will representatives *of Government* really be open to identifying and adopting new tenure constructs to better meet customary realities, and which could see reduction in the massive scope and area of ‘government and/or public lands’?
- (iii) Can clear lines between local community lands and non-community or ‘public’ lands *really* be agreed on the ground and what is needed to ensure they hold?
- (iv) Is the idea of local level pasture regulation workable in the Afghanistan circumstances? What processes are needed for these institutions to gain the confidence of all right-holders and to see their rules upheld?

For such reasons we need to do, and learn. Practical pilots suggest themselves as the obvious route, and the findings and experiences of which can help shape policy and entrench in law the kind of principles, norms and procedures that we know will be applied.

5. A CLEAR INSTITUTIONAL FOCUS AND POLITICAL COMMITMENT IS REQUIRED

An approach which involves practical learning by doing as one of its cornerstones requires an institutional framework into which the lessons may be fed. If this does not exist, then important new paradigms and procedures will not find their way into national policy or national law. Political support is also required; if only political support to (i) require policy to be built iteratively and with experiential learning as one of its planks and (ii) to support the actors in seeking out these solutions through practical trial.

6. THE OUTSTANDING ISSUE FOR RURAL LAND POLICY TO ADDRESS IS THE PASTORAL TENURE

Finally, I believe we need to get our priorities right, so we know where to focus policy investigation and testing. Having examined the rural case fairly closely I can only conclude that the class of lands that must be first addressed is NOT the family farm, not the so-called private lands – but the PASTURES.

II. WHY A FOCUS ON PASTURES?

1. MAJOR RURAL RESOURCE

This is not just because pastures represent the major rural land resource in the country (at between 45-80% of total land area) but because –

2. PASTURES ARE THE SITE OF THE MOST UNRESOLVED AND PROVOCATIVE TENURE ISSUES

- (i) First, surrounding the question as to which lands are viable rainfed farm lands now or in the future, and which lands are more properly designated ‘pasture’? How do we classify pasture? The law calls any natural fodder pasture and hands this over to Government control – even should they be found alongside valley floors and rivers. At other times, pasture is considered only high and dry zones. Policy and legal shortcomings in this area are causing a great deal of friction and dispute.
- (ii) Second, how may the reality of community owned pastures in local customary law be attended to? Currently, we have a profound weakness in both policy and law as to the distinctions between community owned pasture and other pastureland. This too is causing a great deal of discontent and dispute.
- (iii) Third, what is the nature of this community property? Is it not private property too, but property which is owned NOT by individuals, but by all members of a community, in undivided shares? How can that property be recognised and legally protected – how can it be registered? We know from international reforms in land administration that this is perfectly possible but we need to explore and test this on the ground.
- (iv) Fourth and related, we need to reassess the currently opaque nature and scope of Public Land and its relationship with Government Land. At the moment all pasture is declared public land – but what is the proper scope of public land? If all pasture is public land, this denies the existence of community-owned pasture. And WHO owns Public Land anyway? The government? The national community? And if it is the national community as the general

denotation of ‘Public Land’ implies, then in the 21st century, when decentralised governance of land is so needed, in whose hands should authority over these national assets be placed? Could it be possible that communities and use rights holders are the logical and most effective source of governance of these resources in their areas? How could this work?

- (v) And finally, we face the complex issue of drawing clearly distinctions between ownership rights over pasture and access rights to pasture. We know that nomads customarily own some pastures – especially in their winter areas – and we know that they have just as strong seasonal access rights in other pastures – the summer pastures. How may these important rights be best accounted and protected? Thus far, equitable provision in policy and law for these two levels of land right-holding does not exist. Nor is there clarity in the nature of the rights that pastoralists have been granted (Ferman or Land Grants issued by Pashtun Kings since 1890s) or acquired through purchase of other means.¹¹

3. PASTURES, NOT FARMS, ARE THE AREAS OF LEAST TENURE SECURITY

There is another profound reason why we need to focus on the pastures first. This is because it is these areas where the most profound insecurity of tenure and access is being experienced. Policy and law has traditionally ignored this, throughout the world, and focused first on the family farm – registering these for example. But how insecure really are these properties? Understanding of how houses, farms and rural shops and business sites are owned is actually very clear and fairly satisfactorily combines customary and statutory norms. This is *not* the case in respect of commonage and pasture: who exactly owns these lands, or *may* own these lands, is dangerously unclear – and contested.

4. MOST LAND DISPUTES CONCERN THE PASTURES

This unclarity provides fertile ground upon which dispute and land grabbing flourishes – and is flourishing. Dispute over the ownership of houses and farms *does* exist in plentiful degree. But disputes surrounding commonage and pasture are *even more numerous*, much more

¹¹ It is useful to refer to the following work for information on the diverse and imprecise nature of rights granted to pastoralists for example in respect of the Badakshan Shiwa pastures; *The Shiwa Pastures 1978-2003: Land Tenure Changes and Conflict in Northeastern Afghanistan* by Mervyn Patterson, for AREU (May 2004).

heated, and much more difficult to resolve. Moreover such disputes affect a great deal many more people, and usually whole villages, clans and communities, both settled and nomadic.¹²

5. THE CHARACTER OF PASTORAL CONFLICTS DOES NOT LEND ITSELF TO COURT OR DOCUMENT-CENTRED RESOLUTION

The reasons for these disputes are much more complex than experienced on the farm. They reach back to land grievances that have a century-long history, which remain unresolved and which will continue to resurface periodically, and with greater and greater disturbance until they are resolved. We need only look at the edict of King Abd 'al Rahman in 1893 forbidding Hazara to use the pastures and the reallocation of these lands to Kuchi to see some of the origins. Or to the British-assisted Pashtun colonisation of the Uzbek North in the 1890s to further understand the sources of grievance. Or, just as potently, to the decision of the 1960s land survey and registration programme to register all lands that were not held by individuals as Government Land, thus depriving several thousand communities of much of their common properties and/or encouraging landlords and other influential persons to secure commons and pastures as their own private property.

We know all around the world that failure to attend to history does not pay off. We know that entrenchment of unpopular tenure norms and procedures does not pay off. We also know from land policy reforms around the world that one of the most important breakthroughs is to pay better attention to the way in which groups of people (settled or mobile) hold land in undivided shares – common properties. Recognising this customary norm, and providing properly for it in law, is arguably the single most important new development in tenure reform worldwide today, closely followed by initiatives to devolve land administration powers and responsibilities to rural community levels.¹³

6. INEQUITY IS FOCUSING ON THE PASTURES

We also need to attend to the pastures (and associated areas of public and common land) because it is in this arena that we are seeing the most striking *polarisation*, and which is leaving the rural poor even poorer and the rich, richer. Let me explain. We know rural land ownership generally is already heavily polarised (although perhaps not yet so polarised as in neighbouring Pakistan or India) with at the very least one quarter of all rural households owning NO land at all, and at least that number again owning not enough land to survive on (the 'land poor'). We suspect that polarization is going through a sharp rise at this time, with

¹² Details on this is Looking for Peace on the Pastures (see footnote 1 above).

¹³ See documents referred to in Footnote 1; also refer Deininger, K. (2003). *Land Policies for Growth and Poverty Reduction* (World Bank Policy Research Report). New York: Oxford University Press for the World Bank.

land poor surrendering their last plots to better-off persons, under duress or otherwise. However, it is on the commons and pasture that the inequities in landholding are being most delivered: in the conversion of commons and public land to private farmland, and by the hand of those with combined political, economic and military might.

In short, review of cases and trends shows that the main focus of rural land grabbing is not the family farm or house; it is commons and pastures. The fact that the policy and legal status of common property on the one hand, and the nature of pastures as public and/or Government Land on the other, are so opaque is aiding and abetting this process. (We are of course, seeing the same wrongful or manipulated appropriation of ‘public lands’ in urban areas). It is these domains that are dwindling in size, are most hotly contested – and in general where tenure or access is most in flux, where appropriate norms are least well-developed, and where ownership and access security are least.

7. THE COMMONS AND PUBLIC LAND ARE THE ONLY ASSET OF THE VERY POOR

Moreover, this is to greatest disbenefit to the poor: those who are land poor and those who have no land at all – but who *are* customarily shareholders in the ownership of local community assets – or stakeholders at the very least in proximate pastures currently held by Government. To deprive the landless and homeless of possibly their single capital asset (other than a handful of sheep) reaches into the heart of equity concerns.

In sum, whilst all rural domains are insecure, the most dramatic tenure insecurity is not found in the family farm or homestead but in the commons and pastures. Thus, it is these domains that should focus first efforts.

8. THE VALUE OF THE PASTURES IS RISING BUT TO WHOM SHOULD THE BENEFITS ACCRUE?

There is plenty of indication to suggest that the primary objective of new land policy and legislation at this point is *not* to secure the land rights or interests of the majority poor but to make more land available for commercial and often foreign-backed investment. Even should this remain the case, it is logical to first clarify the real status of commonage and pasture – the so-called rural public lands – and which are a primary target for such investment.

Clarification and rights of ownership and access in these domains is not only important for the majority poor, but important for addressing the equally pressing question – to who should the benefits in the raised productivity of the rangeland justly accrue? Those who possess

longstanding customary rights in those domains, the root tenure of State notwithstanding, or those who have the might to co-opt those benefits to themselves?

III. THE APPROACH: WHY PILOTS AND WHY COMMUNITY-BASED?

Let me be clearer on the kind of approach I am talking about. On the hand I am referring to a *strategic approach to sound policy development*: arriving at new policies, strategies and the foundation for legal norms through an evolutionary approach *that builds at least partly upon practical experiences in the field*.

On the other hand, I am suggesting a *community based approach to the regulation and administration of natural resources*, and including first and foremost, *clarification of the tenure relations* within those discrete zones. The route towards this is the same: both demand a practical piloting approach.

That is, the resolving and reordering through local agreement of contested rights to pastureland is a beginning but does not end there. This process extends logically to all resources in the local subject domain, whether they be pastures, wetlands, forests, hill-tops, barren areas or any other non-private land resource. Thus we are talking about community-based land use planning and implementation, taking its starting point as the pastures.

What do I mean by ‘community’? When approached from a resource context, I mean all those persons and groups of persons who have clear customary rights or interests to access those resources. Those rights vary, particularly in whether they are ownership rights, seasonal access rights or product rights. These rights vary in the extent to which they have been formalised in entitlements and in the manner of those entitlements. Many founding rights will not have been accounted for at all. The pressing issue facing policy-makers is how far they are prepared to adjust current policies and laws to ensure such rights are properly accounted for.

What then, in summary, can pilots give us?

1. **HOLISTIC**: First, such projects can adopt a holistic approach to the issues: conjoining matters of land use and matters of land ownership.

2. **PRECEDENTS, AND BASED ON REAL CASES:** Second, precedents can be set for new solutions, new paradigms and new procedures – and tested.
3. **A PRACTICAL OPPORTUNITY FOR SOLVING CONFLICTS AND BY THE CONTESTANTS THEMSELVES:** The process can – and will have to – face and tackle the longstanding and bitter conflicts that most disturb land relations today. Because this will be undertaken at the local level by local disputants themselves, their eventual decisions and agreements will have a better chance of holding.
4. **CLARIFICATION OF THE NATURE OF THE COMMONS** Is it justified for example to lump all non-farmed land as pasture, or are there practical ways for communities, both nomadic and settled, to distinguish between ‘pastures’ which are solely useful for grazing, those that have multi-purpose utility, those that are more accurately ‘future farming zones’ and to delineate these in ways that are clear, agreed and upheld by users;
5. **MEANS TO ARRIVE AT INNOVATIVE NEW NORMS ACCEPTABLE TO RIGHTHOLDERS** Not all the constructs needed are provided for in current law or policy to take better account of custom on the part of both settled and nomad communities – and modern requirements, such as relating to the pressing need for nomads to clarify and secure their rights to land in home areas, and such as the need for the important distinctions between ownership and access rights in summer areas to be clarified and entrenched. Much more clarity is also needed in the recognition of common property as the private, group-owned estates of all members of a specific community, and to develop new constructs that enable Government to devolve ownership of certain pastures to locally agreed sets of customary users;
6. **DETERMINATION AS TO IF AND HOW BOUNDARIES AMONG DIFFERENT LAND USE AND LAND TENURE ZONES CAN GENUINELY BE IDENTIFIED – AND HOLD BEYOND FIRST AGREEMENT** We know already that one of the most important instruments for resolving disputes will be helping communities and nomads agree as to the limits of community pastures and public land pastures. Whether this can be safely done and how it may be done will be identified and tested.
7. **DETERMINATION OF THE SIMPLEST AND MOST EFFECTIVE MEANS FOR ENTRENCHING AGREEMENTS, THUS GUIDING REGISTRATION THE SHAPE OF RURAL REGISTRATION** it is likely that participants will look to the

substance of their agreements being registered, and at local level. They will work through how these agreements will be upheld and these systems too can be entrenched in formal agreements. This will guide policy and law as to what should be considered 'legal entitlement' and upheld by the courts.

8. **NEW, CHEAP AND LOCALLY SUSTAINED INSTITUTIONS FOR MANAGING LAND INTERESTS CAN BE PUT IN PLACE AND TESTED.** We know that in principle community based land administration is ultimately desirable – but how in these circumstances can this really work, and be accountable and fair? It goes without saying that important stakeholders like nomadic groups which have seasonal rights to the pastures must be members of these decision making and implementation bodies.

9. **LAND USE AND LAND TENURE REQUIREMENTS CAN BE NATURALLY INTEGRATED IN THESE APPROACHES.** Working within a clear socio-spatial framework and assisting those involved to appoint or elect a land committee to manage and regulate their land areas will at one and the same time provide a logical route through which important interventions can be channelled. Without such a local institutional framework and base it may prove very difficult to introduce and sustain the kind of interventions in pasture management and livestock productivity that may be suggested on the second day of this workshop.

10. **THE FRAMEWORK FOR RULE MAKING AND UPHOLDING OF RULES CAN BE DEVELOPED AND TESTED**
 Critical bottlenecks such as current failures at both local and state levels *to regulate the expansion of farming into non-viable areas* can for example be better tackled in this context and decisions, rules and systems arrived at and owned by those to whom these issues matter most – local communities and pasture users;

11. **THE RELATIONS OF STATE AND PEOPLE CAN BE FAIRLY ADJUSTED**
 This is especially important in respect of the pastures. As currently controller of the pastures, and possibly even owner, the role of government is critical. Ideally, government's role will in be able to mature in these practical projects as less land owner and land allocator than technical adviser, facilitator, mediator and watchdog of fair practice.

12. **FINALLY SUCH GROUNDED APPROACHES SHOULD RAISE MORALE** and lessen wide concerns in rural areas that Government is simply unable to resolve the

pressing tenure problems and conflicts surrounding the pastures. By simply getting out there, and modestly but systematically tackling a handful of real cases and carrying through in a thorough and holistic manner, the Administration can demonstrate that deadlocks can be overcome - and by people themselves. New and more workable systems can be set up - and with themselves as key actors. It is in such ways that public ownership of new policy - and in due course, new law - is built - an prerequisite to making new law and policy applicable - and upheld.

IV. HOW CAN THIS WORK?

Let me give you a practical example of the process in one pilot initiative, assuming the target pasture area has been identified. First a Facilitation Team is formed, comprising an experienced Tenure Facilitator and a Senior Government representative, and who take ultimate responsibility for the implementation. The time of a Range Management Specialist is secured on a periodic basis to provide specific assessment and advisory inputs. This core team finds out through local consultation with communities around the subject pasture and from the Provincial Kuchi Shura exactly who are the users of the pasture, both past and present. They call representatives of these groups together and assist them to form a combined *Local Land Review Team*.

1. This team closely examines each and every pasture on the ground and with the guidance of the facilitators, sets out to identify for example -
 - (i) *workable boundaries* between local community domains and public land pastures as may be agreed and upheld by both parties;
 - (ii) the *access rights* that exist by decree, allocation or custom over both local Community Area and adjacent Public Land Pastures, and how those that do not conflict may be rationalised and secured in formal and registrable Agreements;
 - (iii) Conflicting claims of ownership and access which cannot stand together and where compromises need to be made, with mediated assistance by the Team to achieve this;
 - (iv) Clarification of tenure, regulation and uses of Community Domains, including for example, agreement as to the exact boundary beyond which no cultivation will in future occur, together with steps to bring existing cultivation beyond that agreed line to a halt;

- (v) Definition, as applicable of domains which are not owned by single villages but by all villages jointly (e.g. by all villages in the valley or within the manteqa) and accordingly, establishment of agreed boundaries, access rights and systems for their regulation; and agreement as to sustainable uses of these greater Community Domains (e.g. only pasturing, or permitting certain tracts to be cultivated, areas where collection of winter fuel and fodder is permitted, on what basis, water collection, etc); and how those rights will be allocated fairly and regulated;
 - (vi) Unpacking as necessary conflicting notions of private and group ownership of those resources;
 - (vii) Similar clarification in respect of Public Land pastures beyond Community Domains, in terms of right-holders and user groups. This will include examination of how seasonal users subdivide their individual or shared access to these areas and how local community users exercise rights of access to those same zones; with agreement by the representing parties of acceptable norms, and how these will be entrenched and upheld;
2. Formal agreements on all the above follow, step by step;
 3. The institutional basis is established through which Agreements and Regimes for Regulating Access and Use will be sustained and upheld, and disputes arising handled;
 4. Following community wide consultation and agreement, with significant district and provincial participation, final Agreements are signed;
 5. Mapping of each domain is undertaken, on the basis of GPS readings;
 6. Arrangements for district and provincial registration of these agreements are made, including detailed descriptions of each boundary agreed, the associated rights, right-holders and rules of access and use for each area, and agreement as to the precise procedures that will be followed in the event of breach.
 7. The process is documented, including the resulting Agreements and types of tenure norms established, with a view to feeding these innovations directly into wider policy making.
- Note that likely new policy and legal constructs include –
- (i) Clearer provision for recognition and registrable entrenchment of common properties as private, group owned estates (Commonhold Tenure), and crucially, with agreed access and use plans a prerequisite to their final registration;
 - (ii) New constructs of Pasture Domains which may be declared by all user groups, with a view to these being precisely mapped as discrete estates and brought under the regulation of local Pasture Committees; these Domains would remain under

the root title of the State (Public Land) but with management of the Domain formally devolved to the Committee, pending satisfactory evidence of the following:

- agreements among customary users as to access right-holders;
- agreement as to the system for regulating sustainable use and management of the Pasture that will be followed;
- agreement as to the precise perimeter boundary of the Domain;
- establishment of the Pasture Domain Committee in an equitable and fair manner, ensuring that all key user groups (x villages and x Kuchi clan users) are properly represented, and in agreement as to how often, where they will meet, and their powers of administration and responsibility laid out and agreed;
- successful decision-making and implementation by the Committee;
- a viable system for resolving disputes arising with either members of the user groups or among them, or with outsiders;

(iii) legal provision for the recognition of Pasture Domain Committees as the local legal Land Authority, with ample procedural provision for powers, responsibilities and accountability and the right of Government to intervene where the system is failing; and

(iv) clear legal distinction between sets of ownership rights to pasture and sets of seasonal access rights, with sufficient protection of the latter.

8. Documentation of the process, the procedures that worked, the decisions that were reached, and the resulting constructs arrived at (e.g. commonhold tenure) logically follows – along with regular monitoring. These feed directly into shaping policy on the pastures.

What is achieved through these practical initiatives? Several developments, *all with workable procedures for replication* -

1. Resolution of festering disputes and even armed conflict over pasture access, including the re-opening of certain pastures to nomadic use, under new and accepted regimes;
2. Community supported break upon conversion of pasture into farmland where this is environmentally unviable or being unjustly undertaken in terms of depriving majority community members of their rights to these commons for pasturage (most expansion is undertaken by commanders or elites within the community);
3. Establishment of community based institutions for simple land use review and planning and on-site resource management and regulation;
4. New tenure frameworks which better mirror key distinctions between ownership and access rights; between individual and group-held property; between private and public land and enabling overlapping rights to be reordered and clarified;

5. A regime which enables the open access and free for all nature of Public Land Pasture to be curtailed, through consensual demarcation of specific pastures and their being brought under user-group management;
6. A platform through which other related resources (water, forest) can be brought under workable and local management;
7. A system for integrated land tenure and land use development;
8. A practical route towards devolved governance of natural resources.

V. WHAT SUPPORT IS NEEDED?

1. First, a clear and effective *institutional focus* which can both commission and coordinate appropriate pilot projects – to be there to ensure that the findings ARE fed into the policy making process;
2. Second, in principle policy support, that Government is indeed looking to resolve the problems on the pasture and *willing to adopt new approaches* in national policy and law to achieve this;
3. Third, that it endorses an iterative approach to this rural policy formulation, drawing at least in part upon practical learning by doing exercises;
4. Fourth, the political and administrative will to permit grounded and practical exploratory approaches.

With these to hand, there is no reason why Kuchi nomads, *together with settled communities* in the summer pastures areas, cannot once and for all arrive at fair decisions as to the seasonal use of summer pastures. This same process can be put to work to facilitate identification and entrenchment of rights in winter home areas.

Thus, what I have roughly outlined here for you today is both PILOT AND PROCEDURE - a community based approach to natural resource management that begins with the clarification of tenure and access rights. It is this foundation that is essential to the sustainable launching of pasture, forest and water resources.

Annex B

**MEETING OF THE KUCHI SHURA
Saturday November 12th 2005**

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**FOR PASTORAL ADVISOR PROGRAMME
RAMP/USAID**

SUBJECTS OF PRESENTATION

1. Introductory Note on Terminology:
2. What are the tenure issues affecting pastoralists *around the world*?
3. What are the tenure issues affecting pastoralists in Afghanistan?
4. What is the cause of these problems?
5. How may the problems be solved?

1. TERMINOLOGY: DO WE HAVE THE SAME UNDERSTANDING OF TERMS?

The word 'land' in English includes all different kinds of land – swamps, hills, pastures, farms, houses, shops, roads – and does not say anything about who OWNS that land, or who has ACCESS RIGHTS to that land.

In English, when we talk about LAND OWNERSHIP, we include –
How the land itself, the soil is owned and who by?
How rights to use the land are distributed, held and why by.

There are two forms of ownership:
Ownership of the land itself, and
Ownership of rights to use the land for certain purposes.

We need to find the right words in Dari and Pashtu. We may need to directly use those words, instead of attempting to translate these into English.

TERMS RELATING TO PASTURES

	ENGLISH WORD & MEANING	DARI	PASHTO	AS USED BY KUCHI
1	Land – any land, does not imply that it is owned or how it is owned	Zameen	Zmaka	Zmaka
2	Community domain, or Village area	Mantiqa Mantiqa ma (our area) Mohallah (Uzbek)	Mantiqa Or Zai	Zai
3	Kuchi area/'Home Area' (winter zones)			Zai Or Meyna
4	Summer area			Elband
5	Territory (e.g. tribal territory, clan territory, village area – i.e. “our area”)	Zamosh zai dar (our area)		
6	Pasture, rangeland	Charigarh	Mulchar	Elband
7	Community pasture (the pasture acknowledged as belonging to settled communities)	Charigarh Qaria	Deh Nashin Mul Char	Deh nashin Mul Char
8	Private pasture (owned by individuals) PRIVATE LAND	Zameen Qaballah Dar Or Zameen Shakhsi	Qalbala –e Zmaka	Qaballah-e Zmaka
9	Pasture over which use rights have been granted by Kings (Ferman) PRIVATE USE RIGHTS	Zameen Ferman Dar		
10	Pasture which is owned or used under customary arrangements (often inherited arrangements)	Zameen Orfi Dar Or Zameen Orfi		
11	Pasture used by custom or customary agreement	Zameen Padaran (‘traditional’)		Hamsaya
12	Pasture belonging to the national community: anyone can access for purposes of grazing PUBLIC LAND	Alaf Char	Mul Char	
13	Pasture belong to Government GOVERNMENT LAND	Zameen Daulati	Sultani	Sultani
14	Customary land (land owned customarily)	Zameen Orfi Or Sonati		

2. WHAT ARE THE TENURE ISSUES FACING PASTORALISTS AROUND THE WORLD?

Pastoralists are a minority:

Pastoralists number only 3% of the world's population (190 million of 6.47 billion people in 2005). Even among livestock-keepers they are few: around 20% of one billion stock raisers.

Nonetheless pastoralists are critical stock-raisers in that

- (i) they make good use of that 20% of the world's land surface which is not much use for anything else: usually very dry or very dry lands;
- (ii) income derived from pastoral systems contributed disproportionately to the numbers of persons involved and investments made; and
- (iii) extensive range production is an essential component and source of support to intensive livestock production.

Attitudes to pastoral systems are changing around the world. Experts have for a long time accepted the importance of these systems in maximising productivity of low fertility lands, and in a sustainable manner. More and more Governments (Ministries of Agriculture) are beginning to acknowledge the value of sustaining extensive, pastoral stock-raising regimes.

Pastoralists are however facing many problems.

1. Partly this is because modernization is based around settled systems of farming, living and marketing. Services are usually easier to set up for settled people.
2. Partly it is because as mobile people, they do not have a strong voice in politics and decision-making.
3. **But mainly the problems they face are to do with the resource base they use: the pastures and to do with their lack of control over what happens to these.**

Two trends are clear:

1. Pastures are dwindling in size.
2. Pastoralists do not have secure tenure over pastures, either as owners or as holders of use rights.

The reasons:

Reasons for both the above generally stem from the reality of UNCERTAIN OWNERSHIP OF RIGHTS TO PASTURE, ON THE PART OF BOTH SETTLED AND NOMADIC COMMUNITIES.

Dwindling size of the pastures

This is caused by arable encroachment, rising number of human settlements, exclusion of pastoralists from protected areas (forest and wildlife reserves, water catchment areas, establishment of commercial farming schemes (irrigation or mechanised farms), mining developments on pastureland, and loss of useful pasture through degradation (tree and shrub clearance, often in turn caused by expansion of farming).

Insecure rights to pastures

This includes unclear or uncertain access to **seasonal pastures**, and Insecurity rights over **home areas** and the pastures.

The reasons are (not thinking of Afghanistan but many other areas):

1. Pastoralists in most parts of the world have not actively sought to establish ownership of their home areas; they have not known how to go about it and the systems for establishing ownership do not fit well into their norms;
2. Governments have typically not treated pastoral rights **as ownership rights**: they think of pastoralists as owning no land and only using the land of others
3. Governments have typically not treated lands which are customarily owned or used by all members of a community **as owned land**: that is, they do not recognise that many forests,

swamps, mountains, and pastures are owned: that they are the common property of all members of a community, this ownership held in undivided shares.

4. Governments have typically treated all pastures, woodlands, arid/barren lands as 'unowned land' – as *terra nullis*. Instead these lands are often **customary common properties**.
5. Governments have typically declared all such common properties, or lands not owned by individuals, **as their own land**.
6. When they have needed these lands, they have then given out these lands to people of their choice – ignoring any customary ownership rights and ignoring any customary access rights to those lands. Not just pastures, but forests have been affected. In Sudan, for example, around 5 million acres of local common property in one state has been given out to investors for commercial farming. Both the customary owners have lost this land and pastoral communities which have customary access to that land, have lost those lands for seasonal grazing.
7. Where systems for registering owners have been set up, Governments have very often then declared all **unregistered land** as Government Land.
8. Governments have not been very clear either about the difference between lands which Government owns as a private body and lands which it only administers, on behalf of the real owners: the national community.

Land ownership reforms are well underway however.

The major reform is how traditional or customary land rights are treated.

Five common changes are beginning to occur – especially in Africa where most pastoralists live:-

1. Customary rights are being treated as private property rights, irrespective of whether they are registered or not;
2. Customary rights are accepted as including rights held not just by individuals and families, but by whole clans, villages, clusters of villages, clans, tribes, communities. Common property is being recognised in new laws as 'private, group-owned property, held in undivided shares' and registered as such.
3. A clear distinction is being drawn between ownership rights and access rights. Customary access rights are being given more respect, and
4. The chance is being given to rural communities to regulate their land rights themselves. This includes being able to make agreements with seasonal users of parts of their land, to entrench those rights. Both local owners and seasonal users are able to secure their rights in this way.
5. Public Land and Government Land are being separated: Public Land is being treated as land owned by all members of the national community, or of a State or Province within the nation. Government Land is the private property of the Government, but used for public good. What governments can do with public land and government is different.¹⁴

Expansion of Cultivation as the Main Trigger to Conflicts and Problems of Pastoral Tenure

This is not just because of breakdown of rule of law, or population expansion. It is because the tenure status of the pastures is so weak: local ownership is not recognised, right to seasonally access pastures are not properly recognised and entrenched. When law breaks down, the pastures become a free for all.

ADDITIONAL BACKGROUND –

Reasons for Problems World Wide on the Pastures

- (i) Competition with cultivation and cultivators
- (ii) Breakdown in customary norms and agreements as to which areas are to be sustained as pasture;
- (iii) Government interference, often in the form of converting pastures to commercial farms or other ways of behaving as landlord over these lands;
- (iv) Policy and legal failures -
 - To recognise pastoralism as an economic activity;
 - To recognise arid lands as productive pasture; instead Governments routinely refer to these dry lands as barren lands or wastelands;
 - To understand that land may be owned not only by individuals and families but by groups and communities: both forests and pastures around the world have been

¹⁴ In many countries the idea of Public Land is disappearing as it is realised that most of those lands do NOT belong to the national community: they belong to local communities but who also recognise them as being rightfully used by some other specific outsider seasonal users as well

treated as *'un-owned land'*. In reality these lands are usually the private property of local communities, but who own these areas not as individuals or families, but as groups or whole communities. Each member of the group or community owns the pasture or forest in undivided shares. This is called **common property**.

- To understand or legally entrench and protect customary pasture access interests: that customary arrangements almost always provide not just for owners of pastures but for non-local pastoralists to access those areas on a seasonal basis: these are seasonal access rights. They are less than ownership of the soil but they are strong customary rights throughout most of the world. Government tend to ignore customary access rights.

Governments around the world have usually done the following:

- Ignored any customary ownership or access rights in common properties like forests and pastures;
- Taken those same lands as their own and called these Government Lands;
- Even when they initially meant this to mean national land, belonging to the whole nation, Governments have tended to behave as the owner;
- Issued rights over these lands that ignore traditional or customary rights.
- Given those lands out to farmers, commercial investors and even foreigners or used those lands for new settlements or other developments.

Other reasons for the problems:

- Pastoralists have a weak political base
- Pastoralists have a weak institutional base
- Pastoralists have often not established the necessary good relations with local communities: generally pastoralists around the world despite local, settled populations and see farming as an inferior socio-economic culture
- There has also been damaging internal changes in pastoral societies: strong trends towards elite capture of pastures, including often subdivision.
- Also trends towards sedentism and adoption of cultivation by pastoralists: it is usually wealthier pastoralists who settle and adopt farming. They establish claims to lands. This in turn makes those who remain as pastoralists even less secure in their access to pastures.
- Subdivision of the pastures.

3. WHAT ARE THE TENURE PROBLEMS FACING PASTORALISTS IN AFGHANISTAN?

How different are the problems of the pastures in Afghanistan? Not very different at all. We see the same problems and the same results.

The results are:

- Pastoralists have insecure tenure in home winter areas
- Pastoralists seasonal access rights are uncertain
- Local communities are losing their common properties to elites
- Agriculture is expanding and pastures are dwindling in size.

WHY: WHAT ARE THE REASONS?

Again, the main trigger is expansion of farming into pastures.

This happens because –

There has been historical antagonism between settled and nomadic peoples as to the ownership and use of the pastures: after the war years, local populations do not want to return to situations where they feel their local community lands have been taken over by outsiders, through allocations by Government or by those users themselves.

Unclear policies and law regarding ownership and use of pastures

Breakdown in the rule of law, undermining even those provisions which have been clear and stable

Elite capture and land grabbing, affecting both winter home areas and summer pastures and from both within and without the pastoral community.

DETAILS

Conflict with local settled communities:-

Because of –

Economics: Kuchi often own farms and hold local farmers in debt.

Politics: relating especially to the Taliban era.

History: many pastoralists have only recent use of summer pastures: use of pastures in Pakistan and even India gave way around 100 years ago to use of Hindu Kush and northern pastures. This happened through land colonisation by King Abdur Al Rahman. 1893 Kuchi given the Hazara pastures.

Long history of bitter relations.

Law (poor policy and law):

Disregarded existence of local rights over pastures

Failure to understand that pastures and forests can be owned

Appropriation: took all pastures as Government Land and then proceeded to allocate rights to those of its choice. This has produced a very bitter contest between local understanding of who owns the pastures and Government understanding.

Poor law:

Not clear who owns the pasture and not even clear in the law what pasture is:

What is Pasture?

1. Agro-economically, 'pasture' may be defined as comprising anywhere from 45 to over 70 percent of the total land area.
2. Legally pasture is any land that produces edible grasses (Law of Pasture Lands (1970) defines pastures as '*the plains, hills, mountains, the skirts of the mountains, marshlands, the banks of rivers and forest areas which are covered with grass and other places that grow wild and could be used as fodder for cattle*' (Article 2)

Who Owns Pasture?

Several current laws affecting pasture:

1. 1965: typical position of governments that any land that not private is Government Land: this denied existence of community property
2. 1970: made pastures public property, with access by licence or by tradition. No purchase or sale of pasture allowed.
3. 2000: provided for private pastures, community pastures (treated as the private property of settled communities, maraa) and public pastures which could be used by anyone (including mawaat -barren lands).
4. 2003: (2 laws) (No. 83 & 89 of 1382): properties that have been under Government since 1966 belong to Government and Government may rent out or lease these. No high or barren lands may be privately owned.

Lack of clarity in:

1. Whether Government is the owner of pastures or just the administrator with the nation as owner; i.e. is this Government Land or National Public Land?
2. Whether pasture may be privately owned, or just leased from Government; i.e. is private ownership of any pasture land recognised?
3. Whether community ownership of pastures next to villages is recognised, and if recognised, is the owner the community or the landlord?
4. Do rights to pastureland which have been allocated by Governments or which have been registered by their holders, amount to ownership of those pastures or are they just licences or access rights?
5. How far customary ownership and access rights to pastureland is accepted in the law and what those customary rights consist of: e.g. who customarily owns local pastures: the landlord, all

those in the community with stock, or all members of the community, whether or not they own stock? And how far is there a distinction between local communities as owners and outsiders as not owners but customary seasonal right-holders?

There have been however certain clear stable provisions in customary and statutory law:

1. No cultivation in pastures legally permitted – but is underway
2. Pasture cannot be bought or sold – but is done all the time
3. the highest, coldest and least fertile (often barren) lands are available to all stock owners to access. These lands are classified as Public Lands.

4 WHAT IS THE WAY FORWARD?

Will drafting new laws make any difference? No. Because –

1. Rule of law limited
2. Even if new law, local communities will not change their positions just because of a new law
3. What should be in the law is not easy to determine without better understanding what will be publicly accepted
4. We may need to find new ways forward that are not easy to identify in the office.

Will discussions at the centre make any difference? No. Because –

Decision-making at the centre tends to be political with neither side budging

The practical realities on the ground are too remote

The decisions of the centre may be disputed at the periphery

The key participants in decision making must be those that are affected by the decisions: the competing interest groups

Decisions are not enough: systems for upholding the agreements are critical; these are best developed at the local level, where the pasture is located.

Therefore –

1. Need to better understand the situation before making new law
2. Need to involve the pasture users themselves, both settled and pastoral people, in decision-making about what should go into policy and law
3. Need to resolve conflicts over the pasture.
4. Need to help the different groups come to arrangements that will hold
5. Need to help the different groups set up systems that enable them to keep to agreements and to deal with those who break agreements.

How to do this?

1. By starting some practical initiatives in the field. These can –
2. Involve government representatives
3. Must involve representatives of the disputing parties
4. Must provide for guns and documents to be left at the door
5. Must be professionally mediated, to limit disputes and debate escalating into conflict
6. May begin either with the two parties together from the outset or by exploring positions of one party, then the other, and then bringing the two together
7. Should probably be begun at the summer pastures as this is the most contested pastoral resource
8. Needs eventually to be applied in winter areas as nomads also face sharp tenure insecurity in those areas.

This approach is:

1. Bottom up, participatory
2. Integrates land tenure and land use management systems
3. Leads logically to the establishment of clear and agreed boundaries on the ground
4. Requires that these agreements be described in detail and registered at the district and provincial level
5. Leads logically to the establishment of an institutional foundation for pasture centred management: committee, rule making, system for dealing with those who break the rules
6. Clearly requires the representation of seasonal access rightholders (nomads) on the committee

7. Provides critical material upon which to build policy decisions and procedures
8. Will indicate exactly what new legal paradigms for pastoral tenure is required: these are likely to include recognition of community ownership of community pastures (commonhold tenure); recognition of shared pasture zones (use rights by both communities, activated on the basis of following agreed rules) etc.
9. Repositions the role of Government from being decision-maker to being mediator, facilitator, technical adviser and watchdog of good practice – i.e. a more developmentally sound role for Government, delivered however through changing practice that a deliberate policy.

What is required from Kuchi?

1. Willingness to acknowledge that settled people have a right to pastureland also
2. Willingness to recognise that there are some areas traditionally designated as pastures that may very well be perfectly usable for arid land farming
3. Willingness to recognise that compromises will have to be made, and to make those
4. Recognise that Government cannot solve these problems easily by dictate, new law or decisions: that action on the part of Kuchi at the local level are essential to arriving at workable resolution and systems for sustaining these.

What can the Shura Do?

1. National and Provincial Kuchi Shura need to promote a bottom-up, negotiated approach with settled communities.
2. The Shura representatives need to inform their members of the need for this.
3. They should provide an appropriate representative to each negotiation.