



POLICY BRIEF #1

GOOD LAWS, WEAK IMPLEMENTATION

USAID PEOPLE, RULES, AND ORGANIZATIONS SUPPORTING THE PROTECTION OF ECOSYSTEM RESOURCES (PROSPER) PROGRAM

POLICY ISSUE

Liberia has developed a progressive legal and policy framework that recognizes and legitimizes the role of communities in governing the nation's natural resources. The 1984 Constitution commits to managing natural resources in a way that maximizes the participation of all Liberians, and "advance[s] the general welfare of the Liberian people."¹ The 2006 National Forestry Reform Law (NFRL) recognizes communities' role in forest management and the 2009 Community Rights Law with respect to Forestland (CRL) gives communities ownership rights over forest resources. Most recently, the Land Commission and the Governance Commission presented policies that render customary land rights equal in law to private land rights (Land Rights Policy), and devolves authority from Monrovia to the counties (Draft Local Government Act).

Despite these progressive reforms, more than 50 percent of Liberia's land base has been placed under agriculture, forest, and mining concessions. The majority of these concessions were granted on customary community land, without the consultation or free and prior informed consent (FPIC) of the affected communities as required by the Public Procurement and Concession Act.² The contradiction between policy and practices clearly demonstrates the significant gap between law and reality in Liberia. This policy brief draws upon experiences in the community forestry sector implementing the CRL and its Regulations, and presents options and processes to ensure that moving forward the spirit of the law is carried out, and communities receive benefits from the land and resources already mortgaged to concessionaires.

BACKGROUND

Liberia has a dual land tenure system based both on written law derived from statutes and customary laws derived from customary systems. Statutory laws were introduced in the 1820s by Americo-Liberian settlers, freed slaves who moved to Liberia under the auspices of American-based resettlement societies. The settlers established a Western system of land tenure in Monrovia based on fee simple ownership evidenced by deeds.³ In the majority of the country, customary tenure systems prevailed. It should be noted that customary systems differ considerably depending on the location and tribal customs. In 1923, the settlers agreed to recognize

BOX 1: POLICY OPTIONS

Option 1: Business as usual. This option maintains the current *status quo*, which returns concession land at the end of the contract to the government, and allows existing social agreements and benefit sharing between concessions and communities to continue as currently written.

Option 2: At the end of a concession agreement land comes under community ownership. This option lays out a process, based on the CRL Regulations and current best practices, for communities to apply to the relevant government agency for authorized community land management status. This would facilitate concession land reverting to community ownership at the end of an agreement.

Option 3: Revisit benefit-sharing arrangements. This option provides communities, government agencies, and concessionaires with a process to guide benefit sharing and the development and revision of social agreements.

communal ownership of land according to customary boundaries, and allow local land administration to be governed by customary paradigms. This arrangement was legalized through the Hinterland Act passed in 1949.^{iv}

In 1956 the Liberian Government passed the Aborigines Law, which included reform on land ownership under the Title 32 the Public Lands Law. The Public Lands Law overturned the Hinterland Act, and designated all land not under private ownership as “public land” and property of the state.^v The GOL utilized the Public Lands Law to issue concessions to international companies to develop and/or exploit rubber, timber, oil palm, and minerals, and did not require companies to compensate communities in any way.^{vi} The Public Lands Law’s total disregard for customary tenure rights led to the widespread dispossession of community land for use by foreign investors and local elites.^{vii}

More recently, natural resources and community rights were further exploited during the civil wars from 1989 to 2003, when Liberia’s forests were used to finance war efforts. At its height, Liberia’s timber industry was responsible for widespread abuses of forest inhabitants and destructive logging in concessions covering nearly half of the country.^{viii} In 2003, the United Nations Security Council imposed sanctions that banned imports of Liberian timber until Liberia reformed its forest sector management practices to meet internationally accepted standards of transparency and accountability.

Since the end of the war, the GOL, with support from Liberian civil society and key international partners, embarked on a major effort to reform the forest sector. The GOL cancelled all timber concessions contracted prior to 2003, and enacted reforms designed to comprehensively improve land and forest governance and devolve user and ownership rights of resources and lands to communities. The most notable of these reforms include:

- **2006 National Forestry Reform Law (NRFL)** which requires community engagement in forest resource management, and requires concessionaires “to establish a social agreement with local forest-dependent communities...that defines communities’ benefits and access rights.”^x
- **2009 Community Rights Law with respect to forestland (CRL)** which conveys community ownership rights to forest resources, allows communities to sign agreements with companies for timber or non-timber extraction, and entitles communities to 55 percent of the money generated from all agreements (the key caveat is communities do not own the land where the forest resources are found).^x
- **2013 Land Rights Policy (LRP)** which as a policy does not have the force of law until supported with legislation, but does establish a framework whereby customary land ownership will be equal in all ways to private land ownership, and will not require communities to have a deed to be considered owners of the land.^{xi}

While Liberia has taken great steps forward in developing a policy framework that recognizes community rights to resources and land, major challenges still exist. The CRL and LRP are not retroactive and therefore will not apply to communities who have already lost their land and forests to concessionaires. The Mining Law and its Regulations allow harvesting of timber on concession areas, without regard to community ownership, and mining concession agreements do not make reference to the NFRL.^{xii} Communities living within concession areas, or who were forced to relocate out of a concession area, had little to no consultation prior to contract signing, did not provide their free and prior informed consent, and were not adequately compensated for their losses. It is clear that there is vast difference between the ideals outlined in the legal and policy framework and the reality for communities on the ground.

SITUATIONAL ANALYSIS

Ten years after the conflict, the USAID PROSPER program has seen a shift in land conflict issues from boundary disputes between individuals, to conflicts that increasingly pit business against community interests. There are significant implications for communities, government, and businesses in resolving these disputes and defining ownership and user rights, as well as benefit sharing.

Whose land?

Despite the legal framework that provides for community ownership and rights, the reality on the ground is quite different, and will continue to be so unless there are active choices made to initiate change and apply the

legal framework. The intent of the CRL and LRP is to give communities ownership and management rights of forests and land under customary tenure. However, the agriculture, mining, and timber concessions currently under contract are operating on “public land” as defined by the 1956 Public Land Law. The understanding supporting these contracts is that the government owns the public land, and thus has the authority to transfer user rights. It is assumed that at the end of a concession agreement the land will revert back to “public” or “government” land.

If existing concession lands automatically return to the government, communities would be further marginalized and deprived of the opportunity to claim their customary ownership over the land as defined in the LRP, and reap the benefits. Furthermore, if the land reverts back to the government, different ethnic groups would be disproportionately affected, which could heighten existing tensions over land, and ultimately fuel increased conflicts.^{xiii}

Benefit sharing through social agreements

Social agreements are only a legal requirement for timber concessions. The Public Procurement and Concessions Act (2010) calls for “social responsibility requirements,” but does not define the requirements.^{xiv} The Mineral Policy of Liberia requires that a social impact assessment be conducted, and that “plans for managing environmental and social impacts be incorporated into the assessment reports,” but there is no specific requirement for a signed agreement between the concessionaire and affected communities.^{xv} Despite the lack of legal requirement, many agricultural and mining concessions follow international best practices, and have signed social agreements with communities.

The FDA has developed a process for creating social agreements, articulated in the *Social Agreements Handbook*.^{xvi} The process attempts to ensure accurate community representation through the election of a Community Forestry Development Committee (CFDC). In theory, CFDCs are responsible for negotiating terms of the agreement and distributing the benefits. In reality, CFDCs are hastily created for the express purpose of approving the social agreement. CFDCs often do not accurately represent the diversity of actors within a community, and the social agreements themselves are prepared by the FDA or elites claiming to represent a community’s interest, and ratified without the community’s knowledge. The social agreements are vague, calling for the building of a school or hospital, but do not define who will be responsible for providing the supplies, personnel, operation costs, etc. The non-specific nature of the social agreements makes them difficult to enforce and therefore difficult for communities to receive the intended benefits (see Box 2).

BOX 2: CONCESSIONS, CONSULTATION, AND SOCIAL AGREEMENTS

In March 2013 the UN Panel visited the village of Golodee, in Bomi County, which is within the Lofa Estate concession, and consulted with the community. In 2009, Sime Darby signed a 63-year concession agreement with the GOL for 220,000 hectares of land to be developed into oil palm and rubber plantations. The community complained that the government allocated its land as part of the Sime Darby concession without their consultation or consent.

The chief said the social agreements were settled between the company and Bomi County representatives and senators, but were not agreed to by the affected communities. The communities are not necessarily opposed to Sime Darby operating in the area; but the lack of a clear understanding between the company and the communities, outlining the long-term customary ownership of the land and the benefits that Sime Darby will provide created tension. The communities’ anger in being left out of the process led to the disruption of Sime Darby operations.

With the assistance of the Civil Society Organization, Green Advocates, the 12 villages in the Lofa Estate presented a list of 19 demands to Sime Darby, including a full participatory role for the communities in the allocation of land, protection for farm land, hunting reserves, as well as guarantees of employment and local development in particular.

The UN Panel discussed the communities’ demands with the management of Sime Darby who, were amenable to negotiation, but complained that when the concession area was initially agreed in 2009, the government assured the company that all the land within the concession area was unencumbered.

(Source: Sime Darby <http://www.simedarby.com/>; Friends of the Earth (April 2013); Midterm Report of the Panel of Experts on Liberia (2013))

POLICY OPTIONS

The laws and practices governing natural resources in Liberia are out of sync, which is negatively affecting communities' access to and benefit from land and forest resources. The fundamental question is how can we improve implementation practices to reflect the spirit of the law? How can community rights be recognized in concession areas already under contract?

Option 1: Maintain the current arrangement under existing concession contracts

This option maintains the current *status quo*, where concession land would revert back to government ownership at the end of a concession agreement, and allows social agreements to stand as currently written, or not. The business-as-usual option would perpetuate a system of discord between law and practice, which favors personal or private gain over the long-term development and sustainable use of Liberia's natural resources. This option also works against the GOL's stated objectives of promoting the development for all Liberians.

Option 2: At the end of a concession agreement land comes under community ownership

On existing concession land, community land ownership should be documented before the concession period expires. Once a concession agreement expires, the land where the concessions operated should revert back to community ownership.

The process for establishing a community forest, outlined in the CRL regulations, provides a proven framework for protecting community resource rights. Briefly, the regulations require a community to apply for status, demarcate their boundaries, form a community forestry management body (CFMB), and develop community forest management plan. The Community Forest Management Agreement (CFMA) is a lengthy process that requires the full participation of the community and the FDA, but ensures that communities understand their rights and responsibilities and have the technical capacity to manage their forest in a sustainable manner. For other land types, a similar process should be followed. In fact, Namati and the Sustainable Development Institute (SDI) have developed a simplified and comprehensive process to establish community land.^{xvii}

While, there is currently no law that establishes community land rights, it is anticipated that the upcoming Land Rights Law will institute this legal process. In the interim, and for concessions already let on community land, communities with the support of civil society should begin the process of establishing community lands. The aim of a community land protection process should not only be to obtain documentation, but also to stimulate a community-wide, democratic and participatory review of community rules for governance of community lands and natural resources.^{xviii} The process described above will take a considerable amount of time. Communities should begin to work through the process now so that they are in a position to receive a community deed when the law is passed, and/or become owners of the community land covered by a concession when the agreement expires. An additional challenge includes how ownership of infrastructure and improvements remaining on the land by the concessionaire will be treated under such a scheme. However, the principle of supporting a process to return the land to the community is consistent with the stated principles of the Land Rights Policy.

Option 3: Revisit social agreements to ensure community benefit

Social agreements provide a mechanism to share benefits from mineral, agriculture, and timber concessions with affected communities. This option recommends a process to establish social agreements that ensures communities understand the value of the resources, have the capacity to analyze what benefits they want and have the time to form a representative body that can negotiate the agreement. It is recommended that social agreements become a legal requirement for mining and agricultural concessions, and that the process outlined below be adopted for all concession types:

- **Community awareness and capacity building.** A community's understanding of the value of their land and natural resources is key to negotiating a fair social agreement, but communities also need to understand how decisions made today will impact their access to resources tomorrow. Government agencies, nongovernmental organizations (NGOs), and initiatives such as the USAID PROSPER program need to work with affected communities to ensure they know what they are entitled to, what they want and have the capacity to negotiate for it.
- **Community representation.** The removal of community tenure in 1956 and the 14-year civil war have altered the composition and power dynamics between peoples in a given area. It is important that the

community itself select a group of individuals to represent them during the social agreement process, and that the elected or selected representatives vet the proposed agreement with the community before signature. Establishing these democratic principles will help improve land governance and accountability within the community. A strong representative body will also be able to help hold companies accountable to commitments made within the social agreement.

- **Specificity and enforceability of social agreements.** Social agreements tend to be vague and carbon copies of one another. Most social agreements promise a school, a hospital, and small infrastructure projects, but do not outline who will be responsible for providing the materials and workforce to make the schools and hospitals function, nor the type of materials that will be used. Each social agreement should be unique and detailed, to reflect the needs of the community and address the “who, what, where, how and when” of each benefit. Social agreements are currently legal requirements for timber concessions, and we argue that they should be legally required for mineral and agricultural concessions as well. If companies do not follow through on commitments made to communities the GOL must hold these companies to account.

The FDA is currently reviewing their social agreement template. The FDA should work closely with the Ministry of Lands, Mines, and Energy (MLME) and Ministry of Agriculture (MOA) to ensure there is a standard set of guidelines for drafting social agreements that address the concerns stated above.^{xix}

RECOMMENDATION

As the majority of Liberia's land, including customary land, has already been allocated under concession contracts, it is crucial that affected communities receive benefits from concessions in operation. Communities should begin the process of identifying customary land now, so that concession land overlapping with community land will revert to community ownership at the end of a concession agreement. In the interim, communities and concessionaires should revisit their social agreements to ensure that the benefits reflect the communities' identified needs, compensate the communities fairly, and are specific enough to enforce. The GOL must be willing to hold companies to account when they do not deliver on commitments made in their social agreements. Taking these steps would help bring the intent and spirit of the forestry legal framework into practice.

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DISCLAIMER

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- ⁱ Republic of Liberia. (1984). *The Republic of Liberia Constitution*, Article 7.
- ⁱⁱ Republic of Liberia, 2010. *Amendment and Restatement of the Public Procurement Concessions Act, 2005*. Monrovia: Ministry of Foreign Affairs.
- ⁱⁱⁱ Wily, L. A. (2007). *So Who Owns the Forest: An Investigation into Forest Ownership and Customary Land Rights in Liberia*. The Sustainable Development Institute/FERN.
- ^{iv} *Ibid* p. 114.
- ^v Republic of Liberia (1956s) Aborigines Law,; Public Lands Law, Title 32
- ^{vi} Knight, Rachael et al. (2012). *Protecting Community Lands and Resources: Evidence from Liberia, Mozambique and Uganda*. Published by Namati and International Development Law Organization (IDLO).
- ^{vii} The law did outline a process for individuals and communities to purchase public land and convert it to private ownership. The process began with claiming a Tribal Certificate and after multiple complicated steps, culminated with the attainment of a public land sale deed. ^{vii} While some communities acquired Tribal Certificates, usually in the name of a community representative, few took the required steps to obtain a deed. As a result, the government was able to lease community land with Tribal Certificates, because they did not hold the legally recognized public land sale deed. In 2013, the Liberian Supreme Court ruled that Tribal Certificates are procedural documents and do not constitute evidence of ownership or create any property rights. ^{vii} This further complicated the confusion around acquiring a public land sale deed, which can be attributed to complicated processes, weak land governance, corruption, political patronage, and discriminatory treatment.
- ^{viii} Global Witness. (September 2012). *Signing their Lives away: Liberia's Private Use Permits and the Destruction of Community-Owned Rainforest*.
- ^{ix} Republic of Liberia. (2006), *National Forestry Reform Law*. Monrovia: Forestry Development Authority; Republic of Liberia. Article 5.3.
- ^x Republic of Liberia. (2009). *Community Rights Law with respect to forestlands*. Monrovia: Forestry Development Authority. Article 3.1 and 6.
- ^{xi} Republic of Liberia. (2013). *Land Rights Policy*. Monrovia: Land Commission.
- ^{xii} Republic of Liberia. (2006). *Minerals and Mining Act*, Monrovia: Ministry of Lands, Mines and Energy; Republic of Liberia. (2010). *Mineral Policy of Liberia*. Monrovia: Ministry of Lands, Mines and Energy.
- ^{xiii} Kaba, A., Madan, G., Otto, J., and Geddeh, R. (2013). *Multi-Stakeholder Dialogue (MSD) on the Land Rights Policy: Civil Society Response to the Land Rights Policy*. Monrovia.
- ^{xiv} Republic of Liberia. (2010). *Amendment and Restatement of the Public Procurement and Concessions Act, 2005*. Monrovia, Ministry of Foreign Affairs. Part VI, Sub-Part 7.
- ^{xv} Republic of Liberia. (2010). *Mineral Policy of Liberia*, Monrovia: Ministry of Lands, Mines and Energy. Pat 7.
- ^{xvi} Lamb, J., Moore, K., Smith, R. (2009). *Pursuing Community Forestry in Liberia Environmental Policy and Governance*, Vol. 19, p. 296–308.
- ^{xvii} Namati and SDI. (2013). *Community Guide, Protecting Community Lands and Resources*. Monrovia. Namtai and SDI's process for establishing community land is as follows: 1) Define the community, and ensure the entire community participates in this process; 2) Elect an Interim Coordinating Committee to lead the process; 3) Draw a map of the community's lands and natural resources; 4) Agree on the boundaries of the community with neighbors, which may require the assistance of an outside neutral party; 5) Establish community by-laws and a land and natural resources management plan; 6) Elect the Land Governance Council to manage the community's land and natural resources; 7) Map the community land with a GPS once the boundaries are agreed upon; and 8) Apply for the community deed from government.
- ^{xviii} This process could be supported by the Draft Local Governance Act, which proposes to devolve additional authority to the county level government officials. Although the extent of the authority and ability of county and district level governance structures to assist with community land recognition will remain unclear until the Act is passed.
- ^{xix} The FDA has adopted a policy that social agreements be reviewed every five years. This policy allows communities and companies to revisit promises, assess progress, and revise the document to reflect current issues and challenges.