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LAND TENURE AND PROPERTY RIGHTS ASSESSMENT:

THE NORTHERN RANGELAND AND COASTAL CONSERVATION PROGRAMS OF USAID/KENYA



AUGUST 2008, UPDATED MAY 2009

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ACRONYMS AND ABBREVIATIONS

ASAL	Arid and Semi-Arid Lands
CBNRM	Community-based Natural Resource Management
dNLP	Draft National Land Policy
FAO	Food and Agriculture Organization
FD	Forest Department
GOK	Government of Kenya
IDP	Internally Displaced Person
KFS	Kenya Forest Service
KPS	Kenya Police Service
KWS	Kenya Wildlife Service
LTPR	Land Tenure and Property Rights
MoL	Ministry of Lands
MWRMD	Ministry of Water Resources Management and Development
NGO	Nongovernmental Organization
NRM	Natural Resource Management
NRT	Northern Rangeland Trust
SOW	Statement of Work
USAID	US Agency for International Development
WCMA	Wildlife Conservation and Management Act
WCMD	Wildlife Conservation and Management Department

PREFACE

Globalization of the world's economies, the increasing and sometimes violent competitive demands for scarce and valuable natural resources, and the (re)emergence and expansion of important nations in the world economy create new economic and political opportunities and challenges for the United States. The way in which nations define property rights—such as private, public, state-held—and permit citizen to hold property (e.g., private, leaseholds, etc.) and defend those rights through the rule of law or administrative procedures, greatly influences the processes of globalization, national economic growth, and the development of democratic society. Indeed, property rights are seen as a critical factor in economic growth, nation-building, governance, and political stability in the U.S. Foreign Assistance Framework.

While there is a need in every society for state-held and public land, “private rights,” whether individual, corporate, or community, have been shown to be the most robust, facilitating investment, economic growth, and more sustainable use of natural resources. These private rights can be administered and secured through formalized systems, including land registration and titling, or through less formal systems, such as customary, “traditional,” or other non-statutory systems as seen in many parts of Africa and Asia. The degree of formalization needed depends on the development of national markets; the needs of the country; its administrative capacity; and other social, political, economic, and cultural challenges and opportunities. It is not uncommon or necessarily problematic to have both formal and informal or less formal systems operating in one country at the same time.

When these dual systems exist, the challenge is not to eradicate one in favor of the other—the informal in favor of the formal—but to create linkages between these systems that will provide security of property rights and allow individuals, communities, and corporate structures opportunities to make transactions between these systems, and opportunities to upgrade or transform property rights (from less formal to more formal) when economic conditions are right, and institutions exist to administer, record, and adjudicate more formalized rights.

From the inception of the organization, the United States Agency for International Development (USAID) has focused on fostering the development and promotion of property rights in countries where it works. Over the years, critical thinking from within USAID, U.S. universities, and the Agency's domestic and international partners has led to new programmatic approaches to foster property rights around the world. These programs have contributed to economic growth and increased private investment; fostered political stability, improved governance, and mitigated violence; and improved sustainable and profitable management of natural resources. The lessons learned from these programs have, in turn, led to new strategies and sequencing in reforms to promote property rights in diverse economic, political, and cultural settings.

In 2003 and 2004, USAID embarked on a small-scale program to develop (a) a more uniform methodology to understand and address property rights issues, and (b) measure the demand from USAID missions for technical assistance to address property rights reforms and institutional development in our partner countries. This led to a much more ambitious program beginning in 2004 to develop a comprehensive framework and tools to conceptualize, programmatically address, and promote property rights around the world. This program was implemented as a Task Order (Lessons Learned: Property

Rights and Natural Resource Management) through the RAISE¹ IQC. The results of both sets of work have defined the conceptual framework for land tenure and property rights (LTPR) as part of USAID foreign assistance and tools for USAID's engagement in LTPR programming internationally.

¹ Rural and Agricultural Income with a Sustainable Environment (RAISE).

Under the **Property Rights and Resource Governance (PRRG) task order, implemented through the PLACE² IQC**, USAID seeks to expand upon the LTPR Framework, and refine existing and develop new companion tools to augment the Framework. This task order focuses on the promotion of the Economic Growth objective, within the new U.S. Foreign Assistance Framework, by promoting property rights and natural resource governance. The task order has the following goals:

1. **Improve Knowledge Management and Best Lessons:** develop and transfer lessons learned/best practices regarding land tenure, property rights and resource governance to development practitioners including partner institutions, USAID, and other USG partners.
2. **Improve Economic Growth:** through the development of methodologies promoting property rights (including private individual and “group,” corporate, shareholder, and community rights) through such tools as land titling and registration, community demarcation, and the development of new models for enterprise property rights. An emphasis will include tools to promote land and natural resource markets.
3. **Promote Governance and Mitigate Conflict:** through development of methodologies and tools to improve transparency in land and natural resource access, to broaden civil participation in decision making, and in the development of tools to resolve disputes and conflicts over natural resources (including land, forests, wildlife, and coastal and mineral resources such as diamonds and oil).
4. **Improve Natural Resource Management and Biodiversity Protection:** by promoting methodologies to link property rights for land, forest, water, wildlife, and other resources with natural resource management practices (particularly in protected, buffer, and corridor areas, and in areas adversely impacted by conflict).
5. **Address Gender and Vulnerable Populations Needs:** by developing best practices/lessons for access and rights to land and natural resources by women and vulnerable populations’ (e.g., indigenous groups, minorities, displaced and disadvantaged groups). This will promote economic growth and equity for frequently disenfranchised populations. It could also create options, through access to productive resources, which would mitigate the transmission and/or economic impacts of HIV/AIDS for women and vulnerable populations.
6. **Provide Technical Support to USAID Missions and operating units:** by providing evaluation, design, and technical support for activities related to property rights and natural resource governance. These activities may include (but are not limited to) property rights in privatization, economic growth, finance, governance, conflict resolution, post-conflict reconstruction, conflict resources, natural resource management, biodiversity, gender, and resettlement of displaced and vulnerable populations.³

The PRRG Program is managed for USAID by ARD, Inc., of Burlington, Vermont, USA. Key partners on this task order include the Rural Development Institute, the World Resources Institute, and Links Media.

The Program’s CTO is Dr. Gregory Myers, Senior Land Tenure and Property Rights Specialist, EGAT\NRM\LRMT, United States Agency for International Development; gmyers@usaid.gov.

² Prosperity, Livelihoods, and Critical Ecosystems (PLACE).

³ Gregory Myers, EGAT\NRM\LRMT, excerpt from Property Rights and Resource Governance Global Task Order.

EXECUTIVE SUMMARY

In March 2008, USAID/Kenya commissioned a desk review of Kenya's draft National Land Policy (dNLP), and two field assessments of USAID programs in Kenya – one focused on agricultural and agroforestry enterprises, and the other on natural resource management (NRM) and conservation. This report represents one of three documents prepared under the initiative.⁴

USAID/Kenya has supported numerous, innovative, conservation initiatives that work with communities to create commercially viable enterprises to promote the conservation of wildlife and their habitats while improving rural livelihoods. The land tenure and property rights (LTPR)⁵ arrangements of these conservation enterprises vary across USAID's geographic areas of focus. The mix of LTPR arrangements, local institutions, governance systems, and contract agreements between communities and private sector entities have a bearing on the success of these initiatives.

This assessment attempts to provide knowledge, particularly on the land and property rights arrangements, and implications for natural resource management, tourism and income generation. To that end, the assessment examines the following themes and how they constrain or enhance performance at targeted sites:

- Land ownership and control - customary and statutory land tenure systems, and the changing nature of these systems;
- Land redistribution and rights formalization – legal and illegal land allocation, settlement programs, compulsory acquisition, land sub-division/ privatization;
- Land and natural resource use and management - customary/statutory rights to natural resources, common property resource management, land and resource conflicts, constraints to investment, and benefit sharing;
- Land administration institutions - adjudication processes, land registration, and planning.

The assessment takes a critical look at the various models of conservation (tourism) enterprises being promoted, establishes a framework for the analysis of these models, and identifies implications for the Kenya draft National Land Policy (dNLP). This assessment was conducted in collaboration with a parallel team conducting a field assessment of agricultural enterprises from the LTPR lens, and a team reviewing the dNLP. Field visits were conducted between 5-21 March, 2008 in the northern rangeland areas and the northeast coastal region of Kenya for the conservation program assessment. Findings from two parallel field assessments were shared with Kenyan stakeholder groups including representatives from the Kenyan government, donors, NGOs, professional organizations and researchers specializing in land tenure issues, in a workshop held in Nairobi from 27-28 March 2008.

The document presents the findings in four broad categories: (i) the legal framework that provides a background on statutory laws regarding land and natural resources in Kenya; (ii) the LTPR systems in northern rangeland region, including an overview of conservancy initiatives for natural resource governance and biodiversity conservation, issues associated with prevailing land tenure systems in the region, community based tourism and implications for biodiversity conservation and income generation; (iii) the LTPR arrangements in the coastal region, including the land tenure context, issues associated with the particular land tenure system in

⁴ The other two documents are as follows: Bruce, John. August 2008. Kenya Land Policy: Analysis and Recommendations; and Ekin, Tim, Odenda Lumumba, and Beatrice Wamalwa. August 2008. Land Tenure and Property Rights Assessment: Agricultural Enterprise Initiatives of USAID/Kenya.

⁵ Land tenure may be defined as the institutional (political, economic, social, and legal) structure that determines how individuals and groups secure access to land. Property Rights refers right to the use and transfer (through selling, leasing, inheritance, etc.) of natural resources. Different rights (strands of the bundle) may be distributed in various combinations among natural and legal persons, groups, and several publics, including many units of government.

the coast, and implications that has for tourism and biodiversity conservation; and (iv) implications of field findings for the dNLP. This executive summary captures the key conclusions and recommendations for programming related to LTPR within the context of USAID natural resource and biodiversity conservation existing and possible programming.

Kenya was one of the first African countries to undertake a comprehensive land tenure reform. This controversial land reform involved the large-scale conversion from customary land tenure systems to private, individualized ownership of land. The hope was that privatization would increase agricultural productivity and create a market in land. These hopes were not fully realized and Kenya's land reforms did not result in the level of tenure security⁶ anticipated. Many small farmers lost rights to wealthier and better connected individuals. While disputes decreased immediately after the reform, they soon rose and exceeded pre-reform levels. Conflicts between farmers and pastoralists increased, and violence resulted as indigenous communities demanded the return of historic landholdings. Land information was poorly managed and contributed to problems with the land registry, resulting in rent seeking and inefficient collection of land revenues. Land fragmentation and landlessness continued to rise as small holders, compelled by poverty sold their landholdings. Kenya's forests and wildlife resources continued to be depleted (ARD, 2007). The government has been responding to these problems through various land tenure reform initiatives, including adjudication and settlement, squatter regularization, and land registry computerization programs. However, the impact of these programs has been limited. This assessment presents specific LTPR issues that were encountered in the field sites.

KEY FINDINGS

I. LTPR Issues in the Northern Rangeland Region

- A vast area of the northern rangeland regions, in some cases, 80-90 percent of entire Districts, falls under the Trust Land status, managed by elected County Councils for the resident (mostly pastoralist) communities.
- There is little or no management of Trust Lands by the County Councils; whatever decisions are made by the councilors regarding alienation/adjudication of Trust Lands are often done without consultation of the local communities who they represent. This is in violation of customary and statutory laws.
- Rampant allocations of rural Trust Lands took place in the 1960s and 1970s in the districts visited, however, these indiscriminate allocations have halted in the recent years.
- Direct breach of customary rights on Trust Land appears to be an exception than the norm; and resident communities do not appear to face threats of outright eviction; however, there other severe forms of violation of customary rights are not unheard of, as for instance, in one case, the central government through the Department of Mines and Geology/Ministry of Energy, authorizing oil exploration activities adjacent to homesteads without consulting or even informing the resident populations.
- Conflict over pasture and water resources between the various pastoralist groups remains very high. In addition, the region is characterized by very high level of insecurity with frequent cases of cattle raiding and banditry. Meanwhile, dispute resolution systems, both customary and formal, are highly ineffective in resolving disputes. The USAID and other donor supported Northern Rangeland Trust (NRT) program is providing a critical contribution in bringing security and reducing conflict over resources in this region.
- Local communities rely on customary rules of land and resource use in this region, however, authority to manage lands/negotiate rules of resource use with neighboring and transient communities remains low.

⁶ "Tenure security" refers to the breadth, duration, and enforceability of rights in land by the state in law or perceived by society.

Most Trust Lands suffer from typical challenges associated with common property resource governance. This is posing significant limitations on sustainable land and natural resource management.

- Formation of group ranches is serving to provide tenure security to local communities, and enhancing authority to manage lands, and negotiate rules of resource use with neighboring communities. While group ranches and collective ownership is a highly preferred tenure system for pastoralist communities in the region, the process of formation of group ranches is complex and expensive. In the meantime, existing group ranches in this and other regions of the country are experiencing significant challenges in governance of land and natural resources.
- Customary rights are not recognized in forests under statutory law. The Forest Policy and Forest Act (2005) create space for decentralized and participatory forest management with local communities, non-governmental organizations and private sector entities; however, under the Act critical decision-making powers continue to be vested within the Kenya Forest Service and consultation with local communities and other stakeholders remains discretionary.
- Under statutory law, rights to wildlife are vested in the state, with the Kenya Wildlife Service responsible for managing all wildlife in Kenya.
- In terms of tourism enterprises, private sector partners are investing substantial sums of money, despite a lack of tenure, and without doing due diligence. Even where the group ranch status is providing for strong tenure, allowing for a formal lease registered against the title, investors are continuing to accept legally weak agreements. It appears that the reason for parties to engage in weak agreements is because there is no guarantee that strong legal agreements will be upheld in the courts, and because of the uncertain political future in Kenya and hence focus on short term investments based on trust. Where trust has not already been established through long-term relationship, the Northern Rangeland Trust is serving as a trusted intermediary.
- Conservancies are providing, in some cases, significant and/or much needed income at the community and household levels. Whether or not income is being distributed equitably remains a question, and should be looked into carefully. They are serving to reduce conflict over cattle, pasture and water; and bringing some security in this region. Many of the conservancies have also developed grazing plans and grazing committees to try to use natural resources more efficiently with some natural resource benefits. The contribution to wildlife conservation is questionable and should be monitored.

2. LTPR Issues in the Coastal Region (Lamu District)

- The prevailing land tenure regime in the Lamu District is government land. Statutory law on government land does not recognize customary rights to land and resources, rendering all long time established communities (Boni and Bajuni) in the region “squatters” on their ancestral lands.
- While it appears that the local communities were displaced in the 1960s and 1970s because of creation of the forest reserves and the Shifta war, no recent displacement has taken place. Elimination of customary land and resource rights in reserve remain uncompensated. Meanwhile, some internally displaced people particularly from the Shifta war, have not returned to their ancestral lands and continue to reside in Lamu and other town and urban areas.
- Other land tenure regimes existing in Lamu include settlement schemes supposedly for the landless poor, which have historically been used for settling communities not native to the coastal regions. This is creating resentment among local populations as outside groups acquire freehold titles on these lands while they themselves are not able to acquire titles to ancestral lands because of the highly centralized process for obtaining titles on government lands, and the expense of titling. Settlement schemes are diminishing influence of long-term residents in addressing local issues with increase in outside representation in local government.

- Illegal and informal sale of islands and beach plots is rampant in the region with no public notice of these sales as required under the Law. There were allegations that the Commissioner of Lands, district officials, KWS, and local chiefs, all have a hand in these illegal land sales. KWS noted, on the other hand, that it is inventorying all such illegal sales. Further investigation is needed to determine the accuracy of these assertions.
- Given the National Reserve status of the Kiunga marine and Boni and Dodori forest reserves (where USAID-supported Kibodo program operates), KWS retains the legal authority to manage these areas. County Councils have no legal authority over these coastal areas, inside or outside of the reserves due to the government land status of these lands. Meanwhile, there is limited evidence of land use planning in and outside of the reserves. Where land use plans have been developed for reserves (although not necessarily implemented), resident communities have not been consulted on land use related decisions.
- Customary rules of use are being applied by resident Boni and Bajuni communities in regard to shifting cultivation, mangrove harvesting and fishing adjacent to park areas. With the exception of the banned activities in the reserves, these rules of land and resource use are not being challenged by outsiders in part due to the remoteness and relatively low population density of the region. However, given that the land and resource rights are not formalized, rights may be challenged as illegal land sales continue.
- While some tourism enterprises are in place on islands and coastal regions of Kiunga Marine Reserve, tourism is limited in this region. Tourism in the terrestrial region is limited by the few wildlife viewing opportunities due to the thick bush that dominates the coastal habitat. The marine areas promise greater potential for tourism for the undisturbed beaches, well managed coral reefs that are attractive for snorkeling, and diving and good sport fishing opportunities.
- It is very difficult for communities to enter into effective partnerships with commercial tourism operators. The two key problems are: i) communities lack formal tenure rights over their (ancestral) lands; ii) communities lack formal rights of management, access or use to natural resources within the reserves, and hence have nothing to offer in exchange for rights of access.
- Insecure tenure of local communities, illegal land purchases by (often outside) elite, and empty promises of delivering land tenure security by GOK and other organizations has left local communities distrustful of potential partners in the region where USAID supported Kibodo Trust operates. This poses critical challenges for future opportunities to create effective partnerships for natural resource management and income generation.
- Overall, land problems in the Kibodo region, and remaining coastal areas, remains potentially highly explosive. Early interventions can prevent further illegal land sales, and the worsening land tenure situation in this region.

3. Implications for the Kenya draft National Land Policy (dNLP)⁷

- Natural resource management: The dNLP makes reference to natural resources in various places in the document. Overall the dNLP appears to provide incentives to invest in conservation activities. It proposes participatory and co-management models for natural resource management including protected areas. However, it remains unclear whether the right to use natural resources is fundamentally vested in communities, or whether this is a right that can only be granted by the State. The dNLP also gives importance to formalizing and recording secondary rights which may or may not include rights to natural resources, but the Policy does not clarify what these secondary rights might be. Legal recognition of secondary rights may not be received favorably by group ranch members who have exclusive rights to resources within the group ranch boundaries with authority to negotiate resource use with adjacent communities.

⁷ See Kenya Land Policy: Analysis and Recommendations by John Bruce, April 2008.

- Group ranches and communal lands: The dNLP calls for the repeal of the Trust Land and the Land (Group Representatives) Acts. It also calls for a “communal lands” tenure regime. However, the Policy makes no mention of how existing and half formed group ranches will fare under the proposed tenure regimes.

RECOMMENDATIONS

The recommendations below are for USAID programming in light of the natural resource management and biodiversity conservation programs ongoing in the two regions where the assessment was conducted.

I. The Northern Rangeland Region

- Support should be given towards accountability, transparency, and equitable resource distribution at the group ranch and conservancy levels. Group ranch management in particular requires a critical review in terms of institutional strengthening in terms of common pool resource governance (and in light of problems being faced by group ranches in other parts of the country). Alternative models of communal tenure may be explored that secures each household’s (including women’s) share within the communal holding. Identify and pilot system ensuring equitable livestock quota distribution that is cognizant of the carrying capacity of the ranch.
- Conservancies are proving practically effective in resource governance and dispute resolution, however, alternative stronger structures for these community organizations should be explored for delivering sustainable natural resource management and accountability to its members.
- Support should be given to true collaborative models of resource governance and management of Trust Lands (notwithstanding propositions in the dNLP) where local authorities are amenable to such efforts. This may include systematic planning in regards to formation of group ranches, and development of collaborative land use plans.
- Build upon ongoing initiatives towards forest co-management between local communities and the Kenya Forest Service (KFS). The co-management plans would provide formal recognition to customary tenure to resources, assess these from the sustainability point of view, arrive at some agreement on what level of resource use will ensure sustainability of the forests and meet local needs, and formalize joint or third party arrangements for monitoring forest resource use.
- Support should be given to institutional strengthening of land dispute tribunals or other alternative dispute resolution system. This may require legal reform, such that the relevant law (existing or new) recognizes community based conflict resolution mechanisms. Support the creation of special division in the High court decentralized to the lowest court in the districts to handle land cases in a consistent manner.
- Ease accessibility to land administration by building awareness among public officials on the high cost of formalizing (group) tenure. Support changes in regulations as necessary. Support the development of guidelines providing clarity on the legal processes for formation of group ranches. Use these guidelines to support education and awareness campaign among communities and local authorities.
- Support the NRT to come up with model agreements for future private sector/community tourism partnerships that are stronger than the existing ones and provide greater protection to commercial partners. These should cover more key issues, including measures of performance for both sides in the partnership, dispute resolution, how to deal with non-performance as a result of external factors, due diligence, liability and asset ownership and replacement. It would be good to consider the possibility of strengthening existing agreements. Efforts should be made to clarify rights, such as through demarcation of forest boundaries, and collaborative development by-laws that formalize customary resource use.
- Support development of partnerships that create direct linkages from revenue to biodiversity outcomes. Ideally this should be through trying to ensure that community funds are used in an equitable way and in a

way that allows people to understand the connections between benefits and the biodiversity values. If expectations have been raised that make these linkages difficult, then consideration should be given to establishing separate funds.

- There should be continued monitoring of the uses of community funds and other benefits (such as employment) to ensure that equity and biodiversity linkages are maintained.
- There should be more investigation of the linkages between livestock numbers and patterns of management (both cattle and small stock) and different aspects of biodiversity, particularly range quality.
- More support should be given to monitoring of biodiversity outcomes, particularly range quality, creation and persistence of mosaics, and species assemblages rather than just single species, or small groups of charismatic species. Aerial surveys are important to create a baseline of large mammal populations. Excessive reliance on line transect/event book type monitoring may lead to errors in the kinds of habitat most common in the NRT area, particularly in the early stages as observers become more proficient and wildlife becomes more habituated.

2. The Coastal Region

- Support should be given to a full inventory of land ownership and particularly illegal land acquisition in the Kibodo area.
- Direct support should be provided to community based organizations seeking to challenge these illegal allocations of land. This may involve investigation of illegal sale of plots, raising awareness at the national level through media, push for revocation of illegal sales, and support checks and balances to prevent further illegal land sales as well as on illegal sale of letters of allotment.
- Support civil society organizations working with governments, communities, and legal experts to promote awareness on land rights and issues (e.g., violation of customary law, advocate for statutory recognition of customary law in coastal regions, indiscriminate alienation of property such as islands for sale, identify legal means of securing tenure in coastal regions).
- There should be a review of which communities (inside and outside the Marine Reserve) have well-established traditional rights that have not been formally recognized.
- For communities living within or with well-established rights in the Kiunga Marine Reserve, there should be a process of negotiation with KWS for how to recognize these. This may involve some mutually agreed modification to the gazette notice clarifying the extent of the Marine Reserve (perhaps explicitly including the smaller islands in return for recognition of community rights in certain areas).
- Establish best mechanism for proceeding with recognition of land rights under existing legislation (e.g., individual title or company).
- Provide direct support on a trial basis with formalization of land rights for selected communities.
- Advocate for legal reform for devolving powers over government lands.
- With KWS develop test cases for linking tourism with community-based natural resource management (CBNRM) through fisheries management, allocating rights to communities, and controlling fishing with in exchange for a share of benefits from sport fishing and snorkeling. This will include the development of co-management agreements with KWS as well as with commercial operators, and can be best mediated by the Kibodo Trust.
- Establish monitoring programs on the impact of these initiatives on marine biodiversity, on livelihoods, and on tourism.

- Consider promoting co-management of forests in the Kibodo region that are currently experiencing degradation from slash and burn cultivation. Appropriate incentives, including tenure security, are required to improve resource management in the two forest reserves in the region.

IMPLICATIONS FOR LAND POLICY

Both for land policy and wildlife bill, there should be more devolution of rights from the state to landowners, rather than needing to seek approval for the exercise of any rights. The issue of where rights are vested needs much more discussion across a whole range of natural resource management issues. USAID could play a very positive role by bringing forward and promoting models which provide benefits from bio-diversity for local populations, models under which NRM involves the direct participation and even control of reserves by local communities, with some traditional uses accommodated.

In view of the support for group ranches, it would be better to allow more flexibility rather than abolishing a flawed but well-supported system in favor of something new that might be unworkable. This may require further investigation of what current and potential group ranch members and communities residing on Trust Lands actually want from their land tenure system and feed back into the policy process. Discussions can be promoted, both at the community level, and at the local and national government levels on best practice examples and lessons from other countries.

More specifically:

1. Promote further discussions on the notion "communal tenure" promoted in the dNLP. This may involve reengaging the Working Group responsible for drafting those sections of the dNLP to clarify the vision for communal tenure in the Kenyan context, and what it might mean for communities living on group ranches, Trust Lands and government lands. Promote review and discussions of options for Kenya in light of how collective customary rights have been formalized in other parts of the world (e.g., customary tenure of pastoralist communities in West Africa, or models of group ownership in southern Africa or the Pacific).
2. Conduct additional assessments similar to the kind presented here on specific land policy issues that need clarification (including communal tenure). Alternatively, hold town hall meetings with communities and local authorities on these specific issues. Capture feedback and regional differences to inform national level debates suggested above.

I.0 PURPOSE, BACKGROUND AND METHODOLOGY

I.1 PURPOSE AND BACKGROUND

Land tenure and property rights issues are of key importance in Kenya where land-related conflicts, institutional deficiencies, and overlapping customary and formal laws are leading to tenure insecurity over land. Development theory and experience both show that accessible and secure land resources and rights are central to poverty alleviation, economic growth, and increases to social equity throughout the developing world. In countries where land access rights are distributed more equitably, and tenure security has been strengthened, there have been related and measurable improvements in investment and growth, transition to democratic government, and improved use of resources. Conversely, where rights to land are limited, land distribution is skewed, or where land rights are insecure or otherwise fragile, poverty levels are frequently at their worst, marginalized groups are often egregiously excluded from social and economic opportunity, and the seeds of violent conflict are often present.

USAID/Kenya over the years has supported numerous conservation enterprise initiatives (e.g., conservancies and trusts) that have developed innovative mechanisms to work with communities to create commercially viable enterprises that conserve wildlife and its habitat while improving the livelihoods of people. The land and resource tenure arrangements of these conservation enterprises vary. The tenure and property rights arrangements, local institutions and governance systems, and contract agreements between communities and the private sector entities all have a bearing on the success of these initiatives. There is a critical need to assess the various models of conservation enterprises being promoted, to establish a framework for the analysis of these models, and to share lessons learned with Kenyan stakeholder groups in the context of the dNLP, as well as with stakeholders in neighboring countries where similar conservation enterprise arrangements are being developed.

The purpose of this assignment, therefore, was to review the current status of the LTPR situation in Kenya, and analyze conservation programs being supported by USAID/Kenya, in the broad context of the dNLP. The assessment was conducted to determine how USAID/Kenya programs might lend assistance to the government and civil society to address land-related issues relative to an emerging set of lessons learned and best practices for LTPR, resource governance, and enterprise development linked to specific USAID/Kenya natural resource management (NRM) investments in the country.

This report provides a brief overview of LTPR issues in Kenya, specifically the legal and institutional framework, issues of land ownership and control, land access and distribution, land administration, land/resource conflict, land use and management, natural resource governance, community-private sector partnerships, and related contract agreements. It provides specific findings from field assessments conducted in the northern rangeland region and Lamu District in the northeast coastal region of Kenya. The report assimilates a set of recommendations and identifies next steps for future programming.

I.2 METHODOLOGY

This assessment was carried out March 8-20, 2008. Two field sites were selected for field assessment by USAID/Kenya. One included a set of conservancies (community-based organizations), and conservation enterprises in the Samburu, Marsabit, Laikipia, and Isiolo Districts in the northern rangeland region, and the other in Lamu District in the northeast coastal region of Kenya.

The assessment team consisted of Safia Aggarwal, LTPR and Natural Resource Governance Specialist (ARD); Chris Thouless, Conservation and Public-Private Partnership Specialist (ARD consultant), Charles Oluchina,

Natural Resource Specialist (USAID/Kenya), and Gregory Myers, LTPR Specialist (USAID/Washington) who accompanied the team in the Lamu district. The team was assisted by the East Africa Wildlife Society who handled all logistics associated with these field visits.

The overview is based on a review of laws and secondary literature on land and natural resource issues in Kenya. The case studies are based on the team's two-week visit to the field sites, and a review of background documents. The team interviewed key informants from local government including district officials, Ministry of Land representatives, and County Councils in Samburu and Isiolo; representatives of the selected conservancies; some members of the resident communities; representatives of Kenya Forest Service; representatives of Kenya Wildlife Service; representatives of the Kibodo Trust, and selected private investors. It was only possible to meet two employees of the Northern Rangelands Trust, and none of the board members were available for the scheduled meeting. The team was unable to cross-check information gathered from communities and investors in some instances. Future opportunities should seek to cross-check information presented here, including review documentation on partnership agreements. A list of groups and individuals interviewed during the field assessment is provided in Annex 2.

2.0 THE LEGAL FRAMEWORK

2.1 LAND TENURE

The Kenyan land tenure system comprises of three tenure regimes: government lands, Trust Lands, and private lands. These land tenure systems originate from statutes dating back to the early colonial period. Prior to colonial rule, land was owned on a communal basis by community groups; households and individuals within them acquired use and access rights to land according to customary practice and by virtue of membership to a social unit, such as a clan (Mumma, 2007). The customary leaders (typically, council of elders) had the authority to allocate land and resources within the group, regulate use, and exclude or negotiate rights with outsiders (Waiganjo and Ngugi, 2001).

Following the declaration of protectorate status over Kenya in 1895, the British colonial government passed the Crown Lands Ordinance to provide a legal basis for alienation of land to white settlers. The Ordinance declared “all waste and unoccupied land” to be “Crown Land”. By a 1915 amendment of the Ordinance, Crown Lands were redefined to include land that had—until that point—been occupied and owned by the natives. In 1938, the Crown Lands (Amendment) Ordinance created native reserves, which became vested in the Native Lands Trust Board (under the Native Land Trusts Ordinance, which also provided for the control and management of “Trust Lands”). After independence, these lands became vested in County Councils (Mumma, 2007).

In 1959, the Native Lands Registration Ordinance was passed, authorizing the alienation of native areas (Trust Lands) to individual members of native communities. This required the ascertainment of individual land claims, the registration of the claims in the names of the claimants, and the issuance of titles. The Land Adjudication Act (Cap. 284) was enacted to facilitate the ascertainment and recording of existing rights and interests in Trust Land. Unalienated lands within the native areas (Trust Lands) remained Trust Lands, while unalienated lands outside of Trust Lands remained “crown land,” later becoming government lands (Mumma, 2007).

Today, the statutory laws grant the Ministry of Lands and Settlement the responsibility for land adjudication, survey, registration, settlement, land administration, and land use planning. More than 20 statutes guide land administration; this makes the process confusing and expensive. Formal land administration is highly centralized, and the various land administration functions are handled by relatively independent departments of the Ministry. At the local level, various boards and committees administer the functions of the Ministry. Land transactions on freehold land are regulated by the Land Control Boards. Plot allocation committees are responsible for dealing with issues regarding allocation of public land for development purposes, while local adjudication committees and arbitration boards facilitate adjudication of land (Swallow et al., 2003).

2.1.1 Trust Land

Trust Lands that remained of the native reserves are predominantly in the arid and semi-arid areas of Kenya are occupied by semi-nomadic pastoralist communities (Mumma, 2007). According to the Constitution and the Trust Land Act (Cap. 288), Trust Land consists of land held by County Councils on behalf of, and for, the benefit of persons ordinarily resident on that land (Njonjo et al., 2002). According to the Act, County Councils hold the land and should manage it according to the interests of the local people. However, Trust Lands are administered by the Commissioner of Lands on behalf of County Councils, and are ultimately controlled by the Commissioner (Njonjo et al., 2002).

The Trust Land tenure system recognizes the role of customary law in managing land and resource use, and sets procedures for alienating Trust Land for purposes that are likely to benefit local people. However, the government can also require that a parcel of land is set apart for the purposes of the government. The Constitution gives the County Councils power to allocate Trust Land to non-residents and extinguish

customary rights in that land.⁸ Under the Trust Land Act, when the government instigates setting apart (alienation) of land, a notice should be given to the County Council and the public should be informed by publishing a notice in the Gazette.⁹ When the County Council instigates setting apart of land, the Act requires that the County Councils consult the proposal with resident communities.¹⁰ In practice, Trust Lands have been routinely alienated without consulting or notifying resident communities.

The County Council is authorized to grant licenses to any person for the purpose of livestock grazing, removal of forest products outside of forest areas designated under the Forest Act, and the taking of common minerals.¹¹ The County Council is also authorized to grant any person license for public infrastructure projects, such as the laying of pipelines, electric power, aqueducts, canals, dams, and the like.¹² Under the Act, the County Council has no legally binding obligation to consult with resident communities in granting these licenses.

2.1.2 Government Land

Government land consists of all unalienated land in the country including gazetted forests, national parks, rivers and lakes, public roads and road reserves, marine reserves, the territorial seabed, protected areas, and land occupied by government or quasi-government institutions. This category also includes all land held under private title (i.e., freeholds, government leaseholds and some absolute proprietorships created under the Registered Land Act [Cap. 300]) (Njonjo et al., 2002). Also, per the Land Titles Act (Cap. 282), all land not already alienated, is deemed to be government land.¹³ This particular clause has enormous implications in depriving long-time residents of their ancestral land rights, transforming them into squatters on their own land (Njonjo et al., 2002).¹⁴

The Government Lands Act is vested in the president, who has the authority to make grants or dispositions of any estates, interests or rights in or over this land.¹⁵ The Act regulates all leases and licenses for the occupation of government land.¹⁶ The Commissioner of Land is responsible for administering these lands on behalf of the president.¹⁷ The Government Lands Act does not require the government to respond to any public obligation as regards the stewardship or utilization of these lands. Vesting of these powers of land alienation has often been interpreted by public officials as “private” to the government, and that they may be used and disposed of at the government’s discretion (Njonjo et al., 2002).

⁸ Constitution, sections 118 and 119

⁹ Trust Land Act, Section 7

¹⁰ Trust Land Act, section 13

¹¹ Ibid, section 37

¹² Ibid, section 38

¹³ Land Titles Act (revised 1982), Section 17

¹⁴ In the coastal areas, ancestral lands became vested in the government by default and customary rights were extinguished without compensation or due process. These lands then became unalienated “Crown Land” which could be disposed of under the “Crown Land Ordinance” by the colonial authorities. Lands were thus indiscriminately sold or leased to non-indigenous people, particularly Arabs, Europeans, and Asians. The indiscriminate granting of free- and lease-hold titles to often non-resident elite continued in the post-independence period.

¹⁵ Government Lands Act, section 3

¹⁶ Ibid, section 4

¹⁷ Ibid, section 7

The process of sale and lease of government land is spelled out in the Act.¹⁸ It requires that all agricultural and urban land available for allocation be advertised and sold by auction. Various categories of land are exempted from this procedure but the Commissioner is expected to put the public interest first in exercising his discretion.

2.1.3 Private Land

Freehold Tenure—Individual. Private land is registered under the Land Titles Act (Cap. 281) or the Registered Land Act (Cap. 300). The Registered Land Act provides for the issuance of title deeds to landowners, and certificates of leases to leasehold interests (Mumma, 2007). The Registered Land Act provides that the registration of a person as the proprietor of the land vests in that person absolute ownership of that land together with all associated rights and privileges.¹⁹ In theory, freeholds confer unlimited rights of use and disposition of land (Njonjo et al., 2002); however, in practice, freeholds are often conditional and use is restricted for specific activities such as agriculture or ranching. To date, most of the high potential agricultural areas have been completely adjudicated and registered (Waiganjo and Ngugi, 2001).

Freehold Collective—Group Ranches. For the vast arid and semi-arid parts of the country, where agricultural potential was low and pastoralism was the dominant form of land use, the government instituted a different registration system. This became known as the Land (Group Representatives) Act (Cap. 287), instituted in 1968 (Waiganjo and Ngugi, 2001). Implemented within the framework of the Act, the scheme led to the establishment of group ranches as a form of tenure that gave recognition to the customary tenure of pastoralist groups. The short-term objective of the Act was to secure land rights of pastoralists (Maasai in particular) by removing their lands from the crown lands status that they had at independence. It appears that the long-term objective, however, was to see the emergence of modern ranching among the Maasai, to individualize tenure, and gain access to commercial loans and promote commercial production (Mwangi, 2005).

With substantial donor support, group ranch formation began soon after the passage of the Act.²⁰ For the pastoralist Maasai, it afforded protection against further land appropriation from government, against the incursion of non-Maasai, and from a land grab by the elite Maasai (Mwangi, 2005). The Department of Land Adjudication and the Registrar of Group Representatives, both in the Ministry of Lands and Settlement, were extensively involved in the initial establishment of group ranches (Mwangi, 2005).²¹

Under the Land (Group Representatives) Act, a group is defined as a tribe, clan, family, or other group of persons that holds land under recognized customary law. Under this Act, every member of the group is deemed to share in the ownership of group land in equal, undivided shares.²² Each group ranch is required to elect group representatives who act as legal trustees of the ranch. The group representatives are authorized to hold land and other assets on behalf of the group, and to act on behalf of and for the collective benefit of all group members.²³ The representatives have the powers to sue and be sued in the corporate name; and to acquire,

¹⁸ Ibid, part IV, sections 19-24.

¹⁹ Registered Land Act, section 27.

²⁰ In 2004, there were 401 Group Ranches with 54,452 members, covering an area of about 7 million hectares (Wayumba, 2004; Katila, 2008).

²¹ Motivated by the Kenya Land Commission of 1932 and Swynnerton Plan of 1955, individual ranches were also established from the early 1960s to early 1970s in an effort to commercialize land and livestock production in Maasailand, and to serve as models for the rest of the Maasai follow. These Maasai individual ranch owners included politicians, local chiefs, government officials as well as cattle traders (i.e., wealthy and/or influential individuals with ties to the administration). Low-interest credit for purchase of superior breeds and construction of infrastructure such as boreholes and water pans were made available to these ranches through the Agricultural Finance Corporation to ensure their success (Mwangi, 2005).

²² Land (Group Representatives) Act, revised 1970, subsidiary legislation, second schedule.

²³ Ibid, section 7.

hold, charge, and dispose of property of any kind; and borrow money with or without security. They are expected to ensure that the rights of any person under recognized customary laws are safeguarded, and that group members are consulted “fully and effectively” when making decisions on behalf of the group.²⁴ The Act empowers the group to craft its own rules regarding the running of their affairs, such as procedures for the administration of the group’s property, registration of new members, and disbursement of funds for group projects. Members are entitled to reside free of charge and make exclusive use of grouped ranch resources.

An elected “Group Ranch committee” is responsible for managing day-to-day affairs of the group ranch. The committee comprises a chair, vice chair, treasurer and three other members of whom at least two are elected from the group representatives.²⁵ The committee is to be elected by open ballot each year at the group’s annual general meeting. The committee is required to assist and encourage members to manage the land or graze their stock in accordance with sound principles of land use, range management, animal husbandry, and commercial practice.²⁶ Each group is required to hold a general meeting of its members every year, and all group members are entitled to attend and to vote. Business may not be transacted at a group meeting unless at least 60% of the group’s members are present. Further, a resolution of the group must be supported by the votes of at least 60% of the group members present.²⁷

Leasehold Tenure. Leasehold is an interest in land that may be granted by a freeholder for a specific time period subject to the payment of a fee or rent, or certain conditions relating to development and use. Leases are also granted by the government for government land, the local authorities for Trust Land, and by individuals or organizations owning freehold land. The maximum term of government leases granted in Kenya is 999 years for agricultural land, and 99 years for urban plots. There are few cases of 33-year leases granted by government in respect to urban Trust Lands (Waiganjo and Ngugi, 2001).

2.2 PROPERTY RIGHTS TO NATURAL RESOURCES

As with land, a prominent feature of Kenya’s environmental law is its diffused nature. Environmental provisions such as forests are contained in over 77 statutes (KFS, 2007). A similar problem exists for other natural resources such as fisheries, water, forestry and wildlife.

Historically, since the beginning of the colonial era, management of resources such as wildlife, forests and water has been vested in the state. Customary use was not officially recognized and community utilization, protection and development of these resources were generally outlawed. Access to resources was granted by the state through a complicated system of licenses and permissions (Njonjo et al., 2002).

2.2.1 Wildlife, National Parks and Reserves

In Kenya, formal wildlife management began with colonialism. In 1945, the colonial government passed the National Parks Ordinance that sought to promote wildlife conservation and tourism through designation of national parks, game reserves, and game conservation areas. Wildlife ownership was vested in the crown (Sifuna, 2006). Setting up protected areas often resulted in appropriation of huge tracts of land for conservation through eviction of local communities, or elimination of customary rights to natural resources, or both. This trend continued in the post-independence era.

In 1976, the government decided to establish the Wildlife Conservation and Management Department (WCMD), amalgamating the Game Department and the National Park Service functions and responsibilities.

²⁴ Ibid, section 8.

²⁵ Land (Group Representatives) Act, subsidiary legislation, third schedule.

²⁶ Ibid, subsidiary legislation, third schedule.

²⁷ Ibid, subsidiary legislation, third schedule.

In 1977, in an attempt to control widespread poaching in the country's national parks and reserves, the government established the Wildlife (Conservation and Management) Act, which banned all forms of hunting and limited the use of wildlife to tourism (Akama, 1998). Pressures on wildlife remained however, and in 1989, the Kenyan government abolished the WCMD and established the Kenya Wildlife Service (KWS) as a parastatal (quasi-government) institution under a board of trustees. The KWS had the mandate to manage wildlife in all areas of Kenya, both terrestrial and marine, and inside and outside of the 55 national parks and reserves. KWS was given the responsibility for preparing and implementing integrated management plans for national parks, enforcing activities such as anti-poaching operations and wildlife protection, and undertaking commercial and other activities for the purpose of conserving biodiversity.

Today, Kenya's protected areas fall under two major categories: national parks and national reserves. The Department of Wildlife advises government on the establishment of national parks, national reserves, community conservation areas and sanctuaries; and grants wildlife user rights, licenses, permits and set fees on KWS recommendations. National parks are owned, funded, and managed by the central government through the KWS. National reserves, on the other hand, are managed by local authorities or County Councils (group of elected leaders) within which the reserve is located. The local authority or County Councils are responsible for preparing and implementing integrated management plans for national reserves, licensing and regulating development activities in the reserve in collaboration with the KWS, monitoring compliance with by-laws, regulations and rules; and collecting revenue.

In 2007, the new Wildlife Bill was drafted. Under the draft Bill, as in the earlier Wildlife Conservation and Management Act (WCMA), all wildlife in Kenya continues to be vested in the state on behalf of and for the benefit of the people of Kenya. The Minister of Wildlife continues to hold discretionary powers to declare 'any land' a national park, game reserve or sanctuary, in consultation with the competent authority.²⁸ The 2007 Wildlife Bill makes provisions for the development of wildlife on privately owned land; however, land owners may promote wildlife conservation and tourism activities on private lands only with ministerial approval. The bill gives draconian powers to KWS—opening the door for KWS to charge game-viewing fees on private and community land, establishing 'ecosystem management plans' without any legal requirement for public consultation, and sanctioning land owners for noncompliance. While in the spirit of the wildlife policy, the 2007 bill provides for decentralization of wildlife management by creating decentralized structures, but powers remain centralized with KWS and the minister. While the bill provides for community participation in wildlife management, it proposes new governmental committees, giving no recognition to existing grassroots organizations managing wildlife. The bill does devolve rights to the Constituency Wildlife Association, involving game ranching and farming, culling, cropping and bird shooting—thus providing a radical departure from the tradition where tourism was the sole source of wildlife-related revenue. However, as in the past, no customary use of wildlife is recognized under the bill.

Presently, protected areas constitute approximately 7% of Kenya's total land area (Sifuna, 2006). An estimated 10% of all Kenya's wildlife is found in national parks and 25% in national reserves. In comparison, more wildlife is found on privately protected areas (40% of Kenya's total) than nationally protected areas (35% of Kenya's total) (Western et al., 2006). Given that protected areas in Kenya are under numerous pressures due to purchases of large tracts of former game ranches (as in Laikipia District), subdivision of lands for settlements and farming in wildlife migration routes and corridors (as in the Mt. Kenya region), expansion of land under cultivation into areas previously used for grazing and as wildlife dispersal zones (in Narok), the need for facilitating wildlife conservation on private and community lands remains critical (Sifuna, 2006).

2.2.2 Forests

Kenya's Forest Act Cap. 385 of 1962 (revised 1982 and 1992) was implemented by the Forest Department (FD) of the Ministry of Environment and Natural Resources. The Act addressed preservation, protection management, enforcement, and utilization of forest resources on forest reserves. However, the government

²⁸ Draft Wildlife Bill, 2007.

periodically degazetted forest lands to make way for new settlements. Concerns about the continual loss of forests led to the drafting of a new Forestry Bill (Swallow et al., 2003).

Until recently, Kenya's forest policy and legislation have not encouraged local communities to participate in forest management. Indeed, the policy had effectively served to alienate local people from forest management (Katila, 2008). With the recent passage of the Forest Act—as with the new Wildlife Bill—Kenya is advocating a shift away from exclusive government conservation and management of forest resources. However, there does seem to be only limited enthusiasm for this process from the authorities. The Act constitutes a new Kenya Forest Service (KFS) and the dissolution of the Forest Department (FD). KFS is responsible for managing all state forests, drawing or assisting in drawing up management plans for these forests and plantations. No mention is made of public consultation in these processes.

The Forests Act (2005) distinguishes state forests, local authority forests, and private forests. All forests other than private and local authority forests are vested in the state and subject to use rights granted under the Forests Act or other written laws. Local authority forests are any forests on Trust Land, which the local authority has set aside as forest according to the Trust Land Act or Forests Act. The minister retains the authority to gazette any unalienated government land to be state forest. Upon the recommendation of the board, the minister also holds the authority to declare any local authority forest or private forest deemed as mismanaged or neglected by the board, to be a provisional forest. A provisional forest is to be managed by the KFS in collaboration with the landowner until adequately rehabilitated.

Similarly, upon the recommendation of the KFS, the minister may (by notice in the gazette) declare any forest area, or woodland or any part thereof, which has a particular environmental, cultural, scientific or other special significance, to be a nature reserve for the purpose of preserving its biodiversity and natural amenities. If a nature reserve is declared on private forest, compensation is owed by the state to the forest's owner. The 2005 Forests Act does not recognize customary forest use, and bans all forest use such as cutting, grazing, removing forest produce, hunting, or fishing in nature reserves.²⁹

The Act introduces new forms of cooperation in forest management, including joint management by local communities and the private sector (Katila, 2008). Under the Act, KFS may enter into a joint management agreement for the management of state forests with any person, institution, government agency, or community forest association.³⁰ The agreement may include revenue sharing and management issues. The management of state-owned plantations can also be arranged through management agreements. For local authority forests, partnerships may be developed between the local authority and a nongovernmental organization (NGO), company, forest community or individual, for example (Katila, 2008).

2.2.3 Water

Until 2002, the focus of water management in Kenya was on the provision of water for domestic use, agriculture, livestock development, and industrial utilization (Swallow et al., 2003). A number of organizations were involved in the provision of water and sanitation services, including the Ministry or Department of Water, the National Water Conservation and Pipeline Corporation, local authorities, local communities, self-help groups, NGOs, the private sector, regional development authorities, and the Office of the President (in the ASAL region). There was little focus on water resource management. This led to the deterioration of water monitoring systems. In the late 1990s, concerns about rising water scarcity, low coverage of water services, and declining water quality led to a new water policy, new legislation, and a set of reforms of the water sector (Swallow et al., 2003).

The ministry's current policy (1999) calls for decentralization, privatization, commercialization, and stakeholder participation; however, under the 2002 Water Act, ultimate decision making remains centralized. The Water Act

²⁹ Forest Act (2005), section 31.

³⁰ According to the Forests Act (2005), "a member of a forest community may, together with other members or persons resident in the same area, register a community forest association."

vests all water resources (including any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin and other body of flowing or standing water whether above or below ground) in the state (Swallow et al., 2003) and overall responsibility for water management with the Ministry of Water Resources Management and Development (MWRMD) (FAO, 2006). Management of water resources as well as provision of water and sewerage services are vested in state systems. The Act makes limited provisions for reliance on non-state institutions. The right to use water from any water resource is also vested in the minister. The Act imposes a permit requirement on any person wishing to acquire a right to use water from a water source, with the exception of minor use for domestic purposes (FAO, 2006; Mumma, 2007). The minister shall have, and may exercise, control over every water resource; and has the duty to promote the investigation, conservation, and proper use of water resources throughout Kenya. This has far-reaching implications for the management of water resources and provision of water services to the rural poor. Problems are made worse due to the inability of the Kenyan state to implement the Water Act (Mumma, 2007). Unlike under the previous Act, the local authority is given power to impose a charge for the use of water.

Grant of permits is connected with landownership. Individuals and communities who hold land titles will be able to meet the requirements for acquiring a permit. The right to provide water services is also subject to licensing requirements (beyond provision to 20 households). Existing community groups or NGOs in charge of supplying water must obtain a license and or approval of the Water Services Board, and prove technical and financial competence, to be able to continue supplying water to their members. The law should be amended so that customary rights of use are a legitimate basis for provision of a water permit (Mumma, 2007).

3.0 THE NORTHERN RANGELAND TRUST REGION/PROGRAM

3.1 CONSERVANCIES

The Northern Rangelands Trust (NRT), headquartered at Lewa Conservancy in Meru District, was created in late 2004 to facilitate community conservation efforts in the northern rangeland areas of Kenya. Working in six districts—Isiolo, Marsabit, Samburu, Likipia, East Pokot, and Ijara—this multidonor-supported organization provides assistance to the communities to form “conservancies”, primarily focused on wildlife conservation and natural resource management.³¹ At the same time, however, the NRT is organized around important livelihood needs such as grazing pastures, water access, and regional security. Conservancies engage in a wide range of activities (see box) with the purpose of creating commercially viable enterprises that conserve wildlife and its habitat while improving local livelihoods.

Conservancies are owned and managed by local communities. A typical conservancy consists of a board/council of elders who are responsible for high-level decisions; and an executive arm/management team responsible for running the conservancy and overseeing a community officer, radio operator, head of security (scouts), and accountant. In addition, grazing committees are responsible for creating and enforcing by-laws related to pasture and water use by resident and other communities that may migrate to the area. Conflict resolution committees comprised of a chairman and village elders help mitigate and resolve conflicts over livestock and resource access.

Each conservancy is responsible for decision making regarding the use of land for grazing and managing land for conservation. Each has a core conservation area and a buffer area where seasonal or emergency grazing is permitted during the drought season.

It is worth noting that this region is characterized by a high level of conflict between the pastoralist groups (mainly the Samburu, Rendille, and Borana), over water, pasture, land, cattle rustling, and tribal animosity. Armed banditry is not uncommon on major roads and highways. Scouts (or community policing systems) are helping respond to these issues, through monitoring and radio networks linked to law enforcement agencies. Disputes are resolved according to customary law, but use the formal justice system is used when necessary.

Conservancy Functions:

- Security of persons, property, domestic and wild animals;
- Conflict monitoring, prevention, mitigation and resolution;
- Natural resource/wildlife conservation;
- Sustainable income generation (e.g., tourism, livestock development/marketing, natural resource enterprises);
- Sustainable community development;
- Public-private partnerships;
- Women’s micro-enterprise funds, youth engagement;
- Civic education; and
- Support and collaboration of GOK institutions including KWS and Kenya Police Service (KPS).

³¹ See table in Annex 3 for listing of the conservancies and the land tenure associated with each.

Land and resource tenure arrangements associated with the conservancies vary. In some cases an individual group ranch has formed one conservancy, in other cases a conservancy comprises multiple group ranches, and in still other cases a conservancy may comprise communities from various Trust Lands and group ranches.³²

Legal Entity of Conservancies

“Conservancy” is not a legal entity in the Kenyan legal system. Thus, the formal body associated with each conservancy varies as does the land tenure situation. The younger, newly formed conservancies are typically self-help groups or community-based organizations, while the older ones have chosen to establish Trusts instead under the Trustee (Perpetual Succession) Act (Cap. 14). Self-help groups are registered bodies under the Ministry of Culture and Social Services, and renewable every year. The registration of a self-help group is relatively simple and inexpensive; however, it does not provide the group with any legal status; neither does the group acquire corporate identity under statutory laws (Mumma, 2007).

Under statutory law, communities may choose other systems for registering organizations which grant groups legal status, categorized as membership- and nonmembership-based organizations. Membership-based organizations include the society, also known as the association, formed of 12 or more persons. The Societies Act (Cap. 108) provides for the registration and control of societies. Societies are registered by the Registrar of Societies based in Nairobi, making it difficult and expensive for rural communities to register (Mumma, 2007). Alternatively, communities may form a “cooperative society” under the Cooperative Societies Act (Cap. 490), which is regulated by the Commissioner of Cooperatives. The objective of a cooperative society is to promote the economic interest of its members. Many rural communities perceive community projects more as advancing social welfare than as advancing the economic interests of members. Thus, cooperative societies have not been commonly used for rural community-based projects, with the exception of farmer’s organizations (Mumma, 2007).

Non-member organizations include NGOs, trusts, and companies.³³ NGOs are set up under the Nongovernmental Organization Registration Act of 1990. This provides for the registration of an organization whose objective is the advancement of economic development. It requires three directors, an identified project, and a source of funding. NGOs have been favored mostly by persons external to the community who have received funding for a community project and wish to implement the project themselves, rather than through the community members. NGOs are often urban-based (Mumma, 2007).

3.2 TRUST LAND ISSUES

In Kenya, three-fourth of the land surface comprises of rangelands (Western et al. 2006). In the northern rangeland districts, significant areas of the land fall under the Trust Land status. While the precise area under Trust Land is unknown, in Isiolo District an estimated 90% of the district’s lands fall under the Trust Lands tenure regime.

Historically, Trust Lands have been subject to many cases of violation related to the setting apart and alienation of Trust Land contrary to the provisions of the Constitution and the Trust Land Act. County Councils have failed to respect principles of customary tenure; on other occasions Trust Lands have been subject to abuse of power by the Commissioner of Lands beyond those allowed by the Constitution and the Trust Land Act. Government officials have viewed Trust Lands as a transitory domain to be phased out through privatization of ownership rights (Njonjo et al., 2002). This perception may have contributed to expropriation of Trust Lands in many parts of the country.

The 1960s and 1970s saw rampant allocations of Trust Land in rural areas; however, according to County Councils and resident communities in the three districts, no further allocation of rural land appears to have taken place in recent years. It appears that resident communities feel that any recent direct breach of rights on

³² The list of 14 conservancies being supported by the NRT and their land tenure status is provided in Annex 3.

³³ Companies could be member based, if member hold single shares.

Trust Lands was an exception rather than the norm. Allocations in town areas appear to be continuing, through proper procedures and public notice. However, County Councils do not appear to be actively managing Trust Lands. Whenever decisions are made by local authorities and County Councils regarding management and use of Trust Lands (such as designation of trading centers), consultation of resident communities are not made as is prescribed in the Trust Lands Act. In one case in Isiolo, the representatives of the Biliqo-Bulesa conservancy noted perhaps the most severe breach of customary rights encountered during the interviews. This involved the central government (via the Ministry of Department of Mines and Geology/Ministry of Energy authorizing exploration of oil on Trust Land adjacent to resident homes. The resident community was not informed of the deal, until one morning when they found large machinery adjacent to their homes. The company continues to be present after five months. County Councils are likely generating revenues from this arrangement.

Trust Lands: Key Issues

- Little or no management of Trust Lands by County Councils over these vast areas;
- Violation of customary and statutory law on Trust Lands by local authorities (County Councils, District Officers and Central Government)
- Inadequate consultation with communities on any decision making regarding land use or exploitation of resources on Trust Lands;
- Formal dispute resolution systems are ineffective in resolving community-level disputes in Trust Lands, fostering ongoing conflict over pasture and water rights;
- Weak authority of communities to manage lands/negotiate rules of use with neighboring communities;
- Customary rights not recognized in forest reserves under statutory law; and
- Most Trust Lands suffer from typical challenges associated with common property resource governance.

Despite the wording in the Trust Land Act, perceptions varied on ownership of Trust Lands. Some community members and County Council representatives feel that the Trust Land belongs to the communities, others that it belongs to the County Councils. This confusion may originate from the ambiguity surrounding the concept of trusteeship, and the way County Councils and local authorities have managed these lands—that is, without any consultation with local communities.

Typical governance problems associated with management of common resources are at play here. Trust Land boundaries are not always clear or properly demarcated. While customary rules apply and are being practiced, local communities lack the authority to exclude other communities or enforce rules within the Trust Land boundaries. Lack of clarity on geographic boundaries adds to confusion regarding jurisdiction over natural resource governance and management. Given the mobile nature of pastoralist communities and specific households, membership associated with a particular Trust Land is not always clear. Although people appear to retain some sense of core and transient communities, membership retains its fuzzy qualities.

The vast areas involved pose challenges for monitoring and enforcement in the region, although NRT activities are helping address this problem. Additionally, customary and formal dispute resolution systems appear to be ineffective in resolving community-level disputes over Trust Lands, fostering ongoing conflict over pasture and water between the various pastoralist communities that have had a long history of tense relations. This is evident from the continued conflicts that are characteristic of this region.³⁴

Customary rights are not recognized in forest reserves. This contributes to encroachment from adjacent communities, who seek to meet their livelihood needs; outsiders accessing forest resources for commercial use; and (allegations of) KFS or County Council staff abusing their powers and illegal harvesting forest resources. KFS and County Councils are authorized to manage these forests; however interviews suggest they lack the

³⁴ The government has designed special dispute mechanisms for customary land, in particular the present Land Dispute Tribunals Act of 1990. However, it remains ineffective. Under the Act, competent elders from local communities are elected as members of tribunals. The Act empowers tribunals to hear all cases involving i) a dispute as to the division of, or the determination of land boundaries including the commons; ii) a claim to occupy or work land; or iii) trespass to land. Any party aggrieved by the decision of the tribunal may apply to the Appeals Committee constituted for the province. Parties not satisfied with the decision of the Appeals Committee can then appeal to the High Court. The Act does not take into account traditional dispute resolution institutions. The tribunals are also dominated by members who have poor understanding of the law. There is also a perception that this act has been used as an avenue of backdoor appeals by those defeated in due process of the law (Njonjo et al., 2002).

capacity and financial resources to do so. With its current parastatal status, KFS is under greater pressure to generate its own revenues to meet operating expenses. This is further constrained by, and contributes to, the lack of willingness to allow community rights as specified in the Forests Act, or comanagement arrangements for fear of losing revenues.

Community members and conservancy representatives expressed dissatisfaction with the Trust Land status of their land and felt that the County Councils who hold these lands in trust did not take into consideration interests of local residents. Given the functions and operations of the County Council, local communities have limited authority to enforce customary rules, and negotiate rules of use with neighboring and transient communities—particularly those with historic conflicts. This poses a challenge to sustainable management of land, pasture, and forests.

3.3 GROUP RANCH ISSUES

There was unequivocal interest among Trust Land residents in forming group ranches, and group ranch members appeared to be satisfied with the tenure status. Perhaps this reflects the perspective of the leadership than other community members. Group ranches provide communities with a sense of tenure security and control that Trust Lands cannot. People feel that they can control land-grabbing, use of resources such as wood and sand, grazing and so on, and that it allows them to deal more equally with outside entities such as the Army, KWS, investors, etc. It also allows them greater power to negotiate rules of resource use with neighboring or transient pastoralist communities and households. Following customary practices, customary leaders are generally willing to allow certain defined people from outside the group ranch grazing rights, particularly in times of good rain, and with the understanding that there will be reciprocation when conditions are reversed.

The Samburu District was perhaps the farthest in terms of forming group ranches. According to the County Council in Samburu, 31 group ranches are in the process of formation within district lines. Three of those had obtained title deeds, and 20 were undergoing adjudication process. This implies that eight of them are registered but do not hold title deeds.³⁵

In Isiolo District, no group ranches had been formed. The Isiolo County Council claimed that they had not received any formal requests for formation of group ranches. When discussing the issue with the survey office of the Department of Lands in Isiolo, the surveyor explained that communities in the region have mixed populations of varied ethnic groups, and that membership of group ranches would be difficult to define in this environment. However, discussions with community representatives of the Biliqo-Bulesa conservancy in Isiolo suggested that the elders had repeatedly had dialogue with the County Council and local authorities to form a group ranch. When asked about the problem of defining membership, they noted that they have a defined community with members already identified, and that defining membership does not pose a problem for them. In general, it appears that there is high resistance from local authorities to the formation of group ranches in this district. Also, it is important to note that the County Councils' clerks, as well as the district-level authorities are typically not from the area and do not necessarily represent local interests. Thus, even where local Councilors may support their communities in the idea of group ranch formation, they may not be able to cater to the request. This was evident from the community representatives of Biliqo-Bulesa, one of whom was a former Councilor, who had been actively advocating for group ranch formation for his community for some time.

Forming group ranches was not easy even where local authorities are not resistant. In some cases, resident communities and local authorities seemed unaware of the laws and procedures for forming group ranches, as several different laws apply at various stages during the formation of group ranches. In some cases, defining membership may indeed be difficult, but mainly because of lack of clarity of resident communities on what a group ranch means. This was noted by one elderly representative of the Melako conservancy, which is currently on Trust Land. When asked if they had considered forming a group ranch, he explained that they were

³⁵ These figures should be cross-checked for accuracy.

concerned that in doing so, they may exclude certain people from accessing resources who may not be part of the core community, but have seasonal customary access to pasture and water. These include relatives and other clan members with whom the community has close ties. They did not find it difficult to identify core members. When informed that group ranch status will solidify land rights of the core members, and that they can retain the authority to allow others access to resources within their boundaries, the elder found the group ranch idea more acceptable. Evidently, the pastoralist communities are more concerned about access to pasture and water than of ownership rights to land. Perhaps it is for this reason (and the fact that there had been no direct breach of customary rights by the County Councils or local authorities in recent years) that in some cases, the terms ‘Trust Land’ and ‘Group Ranch’ were synonymously used—particularly by conservancy leaders on Trust Lands; and resident communities on Trust Lands were occasionally unaware of whether they resided on Trust Land or an adjudicated group ranch. Nevertheless, group ranch communities were very aware of their land tenure status and take great pride in their tenure security.

Another challenge to group ranch formation is conflicts with adjacent communities or within the communities. With adjacent communities, the typical problem was agreeing upon a boundary. While this was not the most serious problem encountered in Samburu District, the NRT is experiencing this problem in forming other group ranches. In other cases, certain households within the identified community may, and have, objected to group ranch formation, preferring individual titles instead. This has stalled the process of the group ranch adjudication process for 15 years, and the cases were still pending in the High Court.

Local systems of resolving these disputes, either via the customary system or via County Councils seems to be ineffective. A formal system for resolving disputes appears to be inaccessible, inefficient, and otherwise ineffective, delaying the process of adjudication and registration of adjudicated land. It is also possible that formal courts are backlogged with such appeals, delaying the land rights formalization process.³⁶

Finally, the expense of titling remains high. With the exception of one, none of the group ranches visited had been able to obtain title, even though many had been registered for some time. The cost for titling per unit of land is the same for individual holdings. While communities appeared keen to get title deeds, there is a real problem with the cost of the survey, registration, and titling of such large areas of land.

Despite the positive response associated with group ranch status, existing group ranches continue to face numerous challenges. Most group ranches are unable to hold annual general meetings as prescribed in the Group Ranch Act. This may be because their leadership does not want to be held accountable by the members, or because the membership is too dispersed to allow a quorum, or the membership is too large to be able to operate as a single unit. Some groups do not maintain basic records as required by the Act, for example, the register of members,

Group Ranch Formation: Key Issues

- Resistance from local authorities;
- Lack of awareness of laws and procedures for formation of group ranches;
- Lack of clear understanding of what a group ranch means and the implications of secured tenure;
- In some cases, defining membership may be difficult, or communities may be reluctant to define membership;
- Both customary and formal dispute resolution systems are ineffective in resolving community-level disputes in regard to group ranch formation, particularly where some households demand individual holdings; and
- Process to obtain land title for group ranches is complex and expensive.

Existing Group Ranches: Key Issues

- Maintaining and updating membership;
- Lack of transparency; elites capture resources and dominate decision making;
- Mechanism of resolving disputes inefficient and ineffective;
- Greater control over natural resource management than on Trust Lands, but weak governance system (especially monitoring and enforcement); and
- Lack of awareness of community on rights, and on procedures of group ranch operations; inability to hold group ranch committees and representatives accountable.

³⁶ This issue regarding dispute resolution systems needs to be investigated further, as the team did not have the opportunity to do so in the limited time in the field. See Njonjo Commission (2002) observations regarding backlog of appeals in formal courts.

books of account, and the like. Hence, the problem remains of doubly registered individuals whose names appear in adjacent group ranches.

While each group ranch may define its own criteria for membership, most group ranches tend to register the male household heads. Women are registered only if they are widowed. In some cases, youth may be registered when they are 18 years of age. It appears that despite the criteria, and perhaps because of lack of awareness of the group ranch members and the elite taking advantage of the system, some households may have more members registered than others, including wives and young children.

There is a long history of entrenched leadership monopolizing group ranch resources, and of corrupt practices continuing even when the leadership has changed. Leaders have been better able to insert themselves into the membership of multiple group ranches, and to ensure that their families are well represented. In some instances, group ranches have also been seen as a way station on the road to full subdivision and individual ownership of land, and this process of subdivision has been used as a further opportunity for land grabbing by the leadership. Indeed, there are many other instances where pastoralists have been dispossessed by their own elite, especially committee members of the group ranches (Njonjo et al., 2002). Additionally, there appears to be lack of clarity on roles and responsibilities of group ranch representatives versus the group ranch committee at the local level. Thus, in practice, many group ranches lack the transparency and accountability necessary for well-functioning governance systems. In some cases, this weakness of the group ranch model is more obvious where conservancy structures and the associated trusts with devolved election systems have superseded the group ranch governance structure in terms of managing land and pasture resources (e.g., Namunyak Wildlife Conservation Trust in Samburu District).

In other parts of Kenya, many disputes continue over the disregard of the principles and procedures for administration of group ranches as established under the Land (Group Representatives) Act. The numerous case studies of group ranches from other parts of the country suggest there are problems with tampering with the register through registration of non-members; some members engaging in illegal sale of “shares”; and dispossession of other group members through illegal allocation of “shares”, resulting in internal conflicts and sometimes law suits (Njonjo et al., 2002). Other problems are related to inequity and resource use; examples include the uncontrolled accumulation of livestock by some group ranch members, the committee unable to enforce grazing and settlement patterns within the group such as some individuals grazing livestock or even constructing homesteads in areas allocated for dry season grazing, some group members inviting kin and friends to graze on group land without consulting the committee, others setting off wild fires to decimate tick infestations and to improve pastures, and others not contributing toward financing of group projects such as water and schools (Mwangi, 2005).

In addition to these difficulties in governing group ranches, preferential treatment in allocation of resources by the management committees based on blood relations, age group and the like (Ng’ethe, 1992), rising human population, and heightened perceptions of scarcity combined with inability or lack of willingness to hold general meetings, and when held, the failure to reach critical decisions led to the inevitable push for subdivision (Mwangi, 2005; Dyson-Hudson, 1982).

Given the considerable pressures for subdivision of group ranches in other parts of the country,³⁷ the team discussed the issue with community leaders in the northern rangeland regions. The group ranch members and representatives in each district expressed a distinct preference for retaining collective ownership of land, rather than viewing it as a step toward subdivision and individualization of parcels. This may be because herding remains a primary source of livelihood for most of the population in the region. There appears to be little interest in moving to other means of livelihood. Also, the ecology of the rangeland areas is such that rainfed or irrigated arable farming is not viable there. The creation of conservancies and promotion of tourism appears to be the only viable significant additional source of livelihood. There was only one case of group ranch division

³⁷ The issue of group ranch subdivision in particular has been widely studied. See cases from Narok and Laikipia Districts (Waikanjo and Ngugi, 2001), Kajiado District (Mwangi, 2005; Ng’ethe, 1992), and Transmara District (Pander, 1996). In particular, in Kajiado, the subdivision process began 10 years after the formation of the first group ranch in the mid-1970s and early 1980s, with an increasing number of group ranches subdividing between 1984 and 1996.

that was noted in this region, by the County Council in Samburu. This was a group ranch in the highlands which was in the process of subdividing, largely driven by the fertility of the land, and the move toward farming as a means of livelihood.

The fate of group ranches, particularly their subdivision and the subsequent impact on the local population, is a matter of ongoing debate. Some have ascribed the drive for subdivision to government policies (Kameri-Mbote, 2002), and pressures from various arms of the government encouraging people to develop individual farms. Others, as suggested above, have linked it to poor governance and administration of these ranches, transition from pasture to cultivation, population increase, and perceived land scarcity. Regardless, studies suggest that subdivision in some areas has led to dispossession of a large number of peasants at the hands of the local elite, and in other cases, compromised the viability of the range for pastoralism, leading to the sale of individual plots, and a move to trading centers or urban centers in search of alternative opportunities (Rutten, 1992).

Finally, whether or not group ranches have a beneficial effect on NRM compared with Trust Lands is also debatable. However, it appears that group ranches have a much greater sense of ownership and control over their land and resources than do communities on Trust Lands—at least when it comes to exclusion of outside groups. Also, group ranches and resident communities are not subject to the whims of County Councils and local authorities, theoretically enabling better planning and management **if** appropriate governance systems are in place.

3.4 COMMUNITY-BASED TOURISM

Community-based tourism is a term that is widely used, but poorly understood or defined. Sometimes it is taken to mean tourism run by communities under an essentially socialist management approach, but this has seldom succeeded and is becoming less common. Here, community-based tourism is used to mean tourism that makes use of communally owned resources, and provides benefits to the managers of those resources. In most cases, the actual management of the tourism enterprise is carried out by a commercial partner in a more or less equitable relationship with the managers of the land. Many tourism operations in the Maasai Mara and Amboseli areas take place on communally owned land, but the benefits typically go to individuals who do not bear any responsibility for land management and conservation.

Elements of community-private partnerships:

- Type of land tenure,
- Ownership of facility,
- Management of facility,
- Payment system and risk-sharing, and
- Management of wildlife resource.

Donor support for community-based conservation is generally based on the assumption that it is making a significant contribution to biodiversity conservation. While there is no doubt that in some cases biodiversity conservation has benefited from the development of community-based tourism, there is still considerable debate about the extent of these benefits, and whether, and under what circumstances, it is possible to cover the entire cost of conservation in communally owned areas through nature based tourism.

Over the past few years in Kenya, a number of different models of relationships between communities and private tourism partners have developed (see box). There are a large number in the area covered by the NRT, operating mainly in Samburu, but also in Laikipia, Isiolo, Marsabit, and other districts.

The assessment team visited six tourism operations in the northern rangeland region, which included all the major current and planned enterprises. With the exception of one (Il Ngwesi), all involved some level of partnership with the private sector (see Table 3.1).³⁸ All but the proposed project at Sera depend on natural resources belonging to group ranches, although two happen to have the actual lodge sites outside the group

³⁸ Sera conservancy involves two Trust Land communities (Sero Lipi, Losesia); Namunyak Wildlife Conservation Trust involves two communities including two group ranches (Sabache and Sarara), and two Trust Land communities (Doinyo Uasin, Ngelai). West Gate is a conservancy as well as a group ranch; Kalama is a conservancy and group ranch; Lekarruki/Tassia is a conservancy and group ranch; and Il Ngwesi is a group ranch. See also Annex 4 for more detailed description of these conservancies.

ranch. They are mostly small exclusive lodges and camps, with less than 20 beds. The older ones (Il Ngwesi, Tassia) were paid for with donor funds, while the newest operational enterprise (Sasaab) was built by the commercial partner. Another is under construction (Saruni in Kalama), and proposed development (Sera) will be paid for by commercial partners.

TABLE 3.1. TOURISM OPERATIONS IN THE NORTHERN RANGELAND

	Sera (Samburu)	Namunyak (Samburu)	West Gate (Samburu)	Kalama (Samburu)	Lekarruki/Tassia (Laikipia)	Il Ngwesi (Laikipia)
Land Tenure						
Unalienated Trust Land	x	x				
Group Ranches		x	x	x	x	x
Forest Reserves		x				
Allocated Trust Lands						
Private land (ranch)						
“Ownership” of Facility³⁹						
Group Ranch		x			x	x
Operator	x		x	x		
Management of Facility						
Community						
Commercial Partner	x	x	x	x	x	
Payments/risk-sharing						
Fixed fee	x					
Per visitor		x	x	x		
Wildlife Management						
Community	x	x	x	x	x	x
Investor						

3.4.1 Type of Land Tenure

Unalienated Trust Land. Some tourism operations have been established on **unalienated trust land** (for example the proposed Sera camp). As noted above, County Councils are responsible for this land, but do little active management. Most trust land is still managed using customary systems. County Councils and local authorities are generally happy to give a degree of responsibility to local communities in their dealings with commercial investors, usually through approval by the district development committee. The local communities generally are organized as self-help groups or community-based organizations, endorsed by the Ministry of Social Services, or as trusts. As noted above, these entities differ in duration, their ability to carry out legal activities, and how representative they are of local communities. There is a particular problem that trusts, which otherwise are fairly strong institutions, do not readily accommodate themselves to a system of defined membership and elections of representatives. The key thing that these community structures have in common is that none of them have been granted any real rights to manage the land—for natural or other resources. Their ability to manage land is dependent on consent from the County Councils, which could be withdrawn or challenged at any time.

Group Ranches. Some tourism operators have been established on group ranches. Group ranches provide communities with a strong legal basis for entering into negotiations with commercial partners compared to communities residing on trust lands. Agreements with group ranch representatives, who hold land and other assets on behalf of the group ranch members, allow a formal lease to be established with the tour operators. This provides, in theory, high level of protection to investors. In practice, however, few if any partnerships are built on formal lease agreements.

Forest Reserves and Allocated Trust Lands. In addition to the above, some agreements between communities and the private sector are on other land tenure types. These include Sarara, where the camp is

³⁹ This is perceived ownership, rather than formal legal ownership of the assets.

believed to fall just within the Forest Reserve.⁴⁰ Here, the Namunyak Wildlife Conservation Trust has an agreement to pay a proportion of revenue with the Forest Service. Another case is West Gate, where the camp is on Trust Land allocated for irrigation. The West Gate Conservancy has gained permission from the Samburu County Council (granted after the camp was built) to use the site.

Private Land. In other parts of Kenya, another type of land tenure arrangement exists in community-based tourism. This is where land is owned by land-buying companies, and local residents are shareholders in the company. Examples include the LUMO community wildlife sanctuary in the Taita area, and the Malewa Conservancy. Although there could be some debate about whether a commercial, for-profit company can be considered as a community, particularly in view of the possibility of the sale of shares on the open market, LUMO has been strongly supported by donors.

3.4.2 Ownership of Facility

Group Ranch Communities. In the majority of tourism facilities situated on group ranches, the facility is owned by the group ranch communities. The facilities typically include tourist lodges, with permanent structures, and tented camps with a mixture of semi-permanent accommodation and permanent central facilities. The Il Ngwesi and Tassia are two such examples. In these cases, the group ranches acquired the facilities with donor funds, in the understanding that any commercial operator will act simply as a management agent. In other cases such as the Kalama Group Ranch and conservancy, an investor is supporting the building of a lodge, but without a formal lease. This means that legally the facility belongs to the group ranch, and it is possible for the community to evict the investor without compensation. This occurred at the Malewa Sanctuary in the Rift Valley where the community entered into a deal with a new commercial partner, and evicted a former partner who had raised donor funds for construction. Although many of these lodges are owned by the community, rather than the investor, it is not how the value of the assets is entered on the books of the two partners. It is most likely that the costs of construction will be expensed by the commercial partner, but then disappears into a void.

Private Operator. It is relatively unusual for a commercial operator in community areas to actually own the fixed assets, since this would require a formal lease with some agreement on the fate of the assets at the end of the lease. In typical **lease agreements** on private lands or in protected areas, the leaser would agree to any improvement to the land (such as lodge construction) and then compensate the lessee on an agreed-upon basis at the end of the contract. This would allow the lessee to treat the assets as his own property, and depreciate them on his books. However, there do not appear to be such cases on community land in Kenya.

In some cases in the northern rangeland region, lodges have been constructed on trust or government land (e.g., Sera, West Gate, and Sarara). It seems that technically these assets belong to the 'people, held in trust by the County Council' or the agent of the state responsible for that land, but this is by no means clear.

3.4.3 Management of Facility

By the Community. In the 1990s there was a tendency to assume that community-based tourism enterprises in countries such as Namibia and Kenya would not only be owned by a community, but managed by the community as well. This essentially socialist business model likely emerged from a tradition of running campsites, which required relatively limited business skills. Despite this many of the community run campsites in Namibia had an appalling record, with confused management, misappropriation of funds, poor service standards etc.⁴¹ In the northern rangeland region, the Il Ngwesi, established in 1995, adopted the community managed model. A similar model was adopted by the Namunyak conservancy/Sarara Group Ranch, but this

⁴⁰ Although there still seems to be some doubts about the exact location of the Forest Reserve boundary.

⁴¹ Walpole, M.J. & Thouless, C.R. 2005. Increasing the value of wildlife through non-consumptive use? Deconstructing the myths of ecotourism and community-based tourism in the tropics. Pages 122-139 in *People & Wildlife: Conflict or Coexistence* (Eds Woodroffe, R. Thirgood, S. & Rabinowitz, A.). Cambridge University Press, Cambridge.

was unsuccessful because of problems with marketing, and controlling costs and the community reverted to a private sector partnership arrangement.

Disadvantages of these models are that management is unlikely to be insulated from interference by group ranch leaders who do not have direct tourism management responsibility, and therefore resources of the tourism facility will be used for other purposes. There is a danger that income for community and conservation activities will come from profits, rather than being taken at an earlier stage in the value chain, and therefore will be dependent on operational efficiency rather than on the number of guests.

Managed by the Investor. Investor/tour operator managed facilities form the dominant type of agreements in Kenya. In such cases, the commercial partner is typically responsible for services such as housekeeping, maintenance, catering, guiding, booking and marketing, while the community is often responsible for the management of the wildlife resource on which the tourism depends. Usually the commercial partner commits to providing the majority of jobs to local people.

In theory it would be possible to have a **management partnership** with shareholding from both community and private sector. However, to date all these kinds of partnerships seem to have been created for ‘ownership’ of physical assets.

Another management model is to have the facility managed by a **local entrepreneur** (from within the community) or a group of entrepreneurs. In theory this model is very attractive. It would mean that the advantages of a market driven approach could be maintained, while ensuring that as much of the revenue as possible stays within the community. However, as examples from Namibia have shown, in practice these models do not usually work because the local entrepreneurs, seeing the local natural resources as part of their birthright, do not feel obliged to pay a fair price for their use of the resources, and end up in an exploitative relationship with the rest of the community. However, as communities become more aware of the issues involved, there is no reason why this model should not become capable of adoption.

3.4.4 Payment System

There are a number of different ways in which partners can **share the risk** in a business arrangement. In principle it is best if the partner that has control over an element of risk takes a disproportionate share of the consequences of that risk. In business partnerships communities usually have little or no control over the way that the business is run—how it is marketed, how tight the control of overheads is—and it is not reasonable to expect them to share in either the potential profits if the business does exceptionally well, or in the losses if it fails to do so. On the other hand it is unreasonable to totally isolate communities from risk, since through their management of natural resources they will generally have some control over the attractiveness of the destination. The following are the main systems that partnerships have adopted to spread risk.

The **fixed concession fee** is the simplest approach where a single fixed monthly or annual payment is made regardless of the profitability of the business. This is the most common way that rents are paid in the commercial sector, but not widely adopted in the community conservation sector. This is mainly since there is no effective mechanism for determining the commercial value of an opportunity, nor is there competition between potential investors in community areas. Also, it is difficult to work out how a fixed fee should increase over time.

One of the most common approaches being used in Kenya is to pay a fixed amount **per fee-paying visitor**, usually split into a conservation fee and a bed night fee. Part of the reason for this split may be for tax purposes, since conservation fees do not currently attract value-added tax (VAT) or agents’ commissions and can be charged separately to the clients. This variable fee is usually combined with a fixed minimum, so that the community will receive payment regardless of whether the anticipated occupancy is reached. One problem of this system is that inability to track changes in the type of business. Thus, if an enterprise starts off as a mid-market product, and moves into the high end market, increasing its price and profitability at the same time, the community may not capture any of this improvement, even if part of the reason is the improved status of natural resources.

In national parks and reserves, payment from lodge owners usually includes a ground rent and a **percentage of the tariff paid by the guest** (as well as the park fees, which usually make up the bulk of the income). Turnover payments have many advantages for long leases since they can track changes in success of the business, inflation and exchange rates. However, in order for them to work effectively, such agreements need to be clearly defined. In recent agreements made in southern Africa, the gross tariff usually defined as ‘net to lodge’ which means all payments for food, accommodation, activities etc (usually excluding alcohol and shop purchases) but not including commissions etc. However, in Kenya these agreements are usually based on accommodation only, which gives the operators the opportunity to load costs onto activities such as game drives, thus reducing payments to the landlord. In view of these complications, this type of payment should only be recommended when the community partner has the capacity to produce a watertight agreement and to ensure compliance.

Some cases involve more complex partnership arrangements, with an element of **profit sharing**, but with the commercial partner being responsible for managing the facility and doing marketing and bookings. This kind of arrangement carries with it a number of disadvantages and cannot be recommended.

- Communities are being asked to take a larger share of the risk than they can manage.
- Profits from new tourism facilities are likely to be low and there is a danger of actually making a loss.
- Community members with little experience of business may not understand the difference between ‘gross’ and ‘net’ income. They are likely to be disappointed when they find that even a substantial gross income for the business may provide little or no net income for the community.
- There are likely to be conflicts of interests for the commercial partner because of the control of bookings and pricing (including commissions which do not form part of the profit).

3.4.5 Management of Wildlife Resource

In almost all cases, **communities** are responsible for managing the natural resources on which tourism is dependent. On group ranches, this management is sometimes carried out by the group ranch itself, sometimes by sub-committees, and sometimes by ‘Conservancies’ that are usually set up as Trusts. On trust land, management is usually carried out by ‘Conservancies’ which are either Trusts, or the much weaker Self-help Groups or Community-based Organizations. On trust land, right to manage and benefit from income generated is based on approval by the County Council, and could potentially be withdrawn.

To date in Kenya, active natural resource management by communities has been fairly limited. Some have systems of game guards to protect against poaching – although typically they are better able to control elephant poaching, rather than small-scale meat poaching. There may be customary systems in place for controlling exploitation of non-wildlife natural resources, and the formal structures may assist this. Efforts are being made in some areas to use the ‘conservancies’ to rationalize and harmonize livestock grazing, but this attempt is too new to know how successful it will be.

The Northern Rangeland Trust has promoted the establishment of no-grazing zones, or at least zones that are only to be grazing during times of extreme hardship. In some cases, such as Ol Lentille in Laikipia, tourism related payments to communities are in theory tied to their performance against certain resource management milestones, although no payments have yet been made because the milestones have not been reached.

There are a limited number of partnership arrangements where the **commercial partner** also takes responsibility for the management of natural resources. The most notable examples in Kenya are in Eselenkai near Amboseli and Ol Kinyei near the Maasai Mara. Here the operator pays a lease fee not only for the lodge site, but also for the land used for game-viewing purposes. So far, these models seem to have worked well, and they have the advantage that they clarify the pay-offs to be made between natural resource conservation and other forms of land use. The danger is that the community may lose a sense of ownership over the natural resources, and protect them less well as a consequence. However, overall this is a model which is worth looking at for other areas.

3.4.6 Implications of Land Tenure for Tourism Partnerships, Biodiversity Conservation and Income Generation

Partnership Agreements. Most agreements between communities and investors in the northern rangeland regions involve informal documents, even where the partners are making substantial investments. They have a short duration (typically five years renewable). Generally issues such as legal liability, dispute resolution, insurance, ownership of fixed and movable assets are not spelt out clearly. In general the risk is weighted in favor of the communities and against the commercial partners. There is a fixed payment per guest bed-night with a minimum guaranteed payment.

There are some surprising aspects to these agreements.

1. Private sector partners are investing substantial sums of money, despite a lack of tenure to land and resource, and without doing due diligence.
2. Where the developments are taking place on group ranches with title, so that the strong tenure of a formal lease registered against the title would be possible, investors are still accepting legally weak agreements.
3. Despite the recent court case involving a client injured by an elephant on Il Ngwesi and the court ruling against Il Ngwesi (still subject to appeal) the agreements are unclear on liability issues.
4. The status of assets is unclear. If a partnership went wrong it seems very unlikely under these kinds of agreements that the investor could obtain any compensation for the value of his investments.
5. Although the investors are given minimum performance requirements, the communities are not obliged to provide very much in return. The agreements typically include small exclusive areas, usually with some requirement for exclusion of livestock, but do not have any more substantial environmental performance indicators linked to payments.

One of the main reasons for the weak agreements may be that in Kenya there is no guarantee that strong legal agreements will be upheld in the courts. Also, general uncertainty about the political future means that people will only invest for the short term, and only on the basis of trust. Unless investors have been engaged with a community for a long time prior to making substantial investments, they are unlikely to have built up such a trust. In this case the position of a trusted intermediary such as the Northern Rangelands Trust is absolutely essential, and presumably without the NRT these investments would simply not take place.

The absence of formal leases may also be a result of community suspicions of land grabbing by investors, and the complications involved in registering a lease. However, these are not fundamental objections to the use of leases, rather issues that need to be considered and aired with communities as part of the process of trying to create stronger partnership agreements.

Given that formal land tenure and strong legal agreements seem to be much less important to investors than the presence of a trusted intermediary, does land tenure matter? It is hard to tell, because one has to compare the current situation with a theoretical alternative.

However, there is a strong argument for having agreements that are as strong as possible. One concern is that if the agreement is not absolutely clear there may be misunderstandings, which could lead to the collapse of the partnership. If a single investor was forced to withdraw, having lost the value of the investment, this would send a very damaging signal to current and future investors. Although NRT should in most cases be able to assist in preventing partnerships from following this route, their task would be easier if the agreements were stronger, and covered a wider range of eventualities.

For instance one possible addition to an agreement would be the need for an investor to take out insurance against failing to achieve the minimum required number of bed-nights. This would guard against the possibility which must be quite real in the light of the current tourism downturn of a commercial partner failing to achieve the required occupancy and having insufficient reserve funds to cover the guaranteed figure.

Finally, at the moment, community wildlife areas are failing to attract the kind of partners who could actually provide a significant investment. There is no significant competition for investment opportunities in the northern rangeland areas, and the only operators investing there are small scale individuals, rather than public companies. These large investments that are currently only going into formal protected areas and private land

might provide the kind of returns that would allow wildlife tourism to compete with grazing livestock as a land use in community areas. This is a complex issue that involves concerns about what kind of tourism is most desirable and what provides the best returns. There is a general feeling in Kenya that mass tourism and large lodges are bad for the image of the country, and for environmental protection and that it is better to develop the high end, low volume sector. However, the majority of KWS tourism revenues come from the mid to low end, high volume sector, and this sector actually makes a bigger contribution to conservation than the high end. The same argument might be applied to community owned areas.

Tourism and Biodiversity Conservation in Community Areas. The main assumption behind donor support for tourism developments in community areas is that this is an effective way of promoting biodiversity (and/or natural resource) conservation in these areas. It is usually not clear what the mechanisms, degree of benefit, and cost effectiveness of this approach is expected to be.

In order for tourism to benefit conservation then the following conditions would need to be fulfilled.

- Enterprises must generate significant net benefits to communities – enough to cover the opportunity costs of conservation.
- Benefits must go to the people whose actions can influence biodiversity conservation
- There must be an understanding of the linkages between biodiversity and benefits, and an ability to influence those linkages

Generation of Net Benefits. In order for the revenues from tourism to impact on conservation, the enterprise must be sufficiently profitable for the desired conservation benefits to be justified to the community. Some conservation actions may have relatively low opportunity costs associated with them: in this case all one needs to do is to cover the direct costs of the activities. Other conservation actions may require a modification to people's lifestyle, and in this case there needs to be a sufficient incentive to make this modification worthwhile. The larger the area over which these opportunity costs need to be overcome, the larger the costs. This obvious statement lies behind an often overlooked conflict between tourism and conservation. The requirement for good quality habitat and wildlife numbers for tourism enterprises may be quite limited, whereas from a conservation perspective, the larger the area managed, the better.

In the northern rangeland region, the conservation actions which carry the lowest opportunity costs (since they only affect the small section of the community engaged in illegal hunting) are those involving the provision of security for wildlife. One of the first actions in most conservancies within the area has been the employment of game scouts, purchase of vehicles, creation of a road networks, building airstrips, offices and housing, and establishing a communications system. This is generally seen as positive by the community. It creates employment, the transport often brings real social benefits, and the security for wildlife usually means enhanced security for people, particularly in the face of cattle-raiding pressure. The immediate conservation benefits are usually seen in the form of improved security for large mammals, particularly for elephants. Smaller scale illegal hunting for meat is less easy to control, and while it is likely that the creation of game guard networks will have some effect, there is little direct evidence on this. Education programs on the importance of conservation, not poisoning lions etc. are also likely to have a beneficial effect without carrying very substantial opportunity costs.

One of the most important issues in biodiversity conservation in the northern rangeland region is the question of to what extent wildlife and cattle are compatible. In the Maasai Mara there is some evidence that cattle may provide some benefits to wildlife through grazing facilitations, and there seems little doubt that cattle can be used in a selective and limited manner to improve habitat quality. However, in northern Kenya, it has been shown that only a few resilient wildlife species, such as plains zebra and gazelles, can persist in the presence of high densities of domestic livestock⁴². If reasonably intact assemblages of large mammals are to remain in these community areas it seems that either large areas from which livestock are fully excluded, or areas where they

⁴² Georgiadis, N. J, Nasser Olwero, J.G, Ojwang, G. & Romanach, S.S. 2007. Savannah herbivore dynamics in a livestock-dominated environment: I dependence on land use, rainfall, density & time. *Biological Conservation* 137, 461-472.

are kept at densities close to those in the mixed livestock/wildlife ranches in Laikipia will be needed. It is likely that some form of grazing control would also be important for other aspects of biodiversity. Although non-mammalian biodiversity has been relatively little studied or considered, it is almost certain that it will benefit from a mosaic of different habitats from woodland to open grassland, but all with reasonable ground cover of forbs, and particularly grasses.

At the moment, restriction of livestock grazing is taking place in two main ways. Most of the lodges have small (generally low hundreds of hectares) total or near-total grazing exclusion areas around them. Although this may be sufficient for some immediate game viewing and aesthetic purposes, it does not serve any very substantial environmental goals. Many of the conservancies have now developed grazing plans and grazing committees to try to use natural resources more efficiently. In some cases this is linked with more efficient marketing of livestock. It is possible that this may improve the range quality enough to provide real biodiversity benefits, but this remains to be demonstrated.

Equitable Distribution of Benefits. If one wanted to maximize the conservation benefits of revenues generated, then the ideal way to do it would be to direct the benefits towards those people whose direct actions have the most potentially positive or negative impact on biodiversity, and try to ensure that the payments are directly linked to biodiversity benefits. This ideal is of course not possible in the real world, particularly where a community is in charge of the process. However, it is important to try as far as possible to avoid the kind of situation in the Maasai Mara, where there is an almost no connection between the people who make money from the wildlife, and the people who live on the land where the wildlife resource occurs.

In most of the conservancies supported by NRT, 40% of revenue goes back to the conservancy to support its conservation work. This money is generally well managed and accounted for, and is likely to provide fairly direct biodiversity benefits. The other 60% is earmarked for community development. This is potentially more problematic, since there is generally less oversight by NRT and the donors. There may be opportunities for leaders to steer benefits such as school bursaries and health care in the direction of their families or supporters. This may mean that the ordinary members, and the youth (who may not be members of the group ranch or conservancy) whose activities may have the most impact on biodiversity may feel excluded from the system of benefits. This also may apply to the provision of employment. The lack of direct linkages between the benefits received and the biodiversity from which the benefits are derived may also be a disincentive to modify behavior in the direction of improved conservation.

4.0 THE KIBODO CONSERVATION PROGRAM

The Kibodo Trust is a community conservation and development trust, encompassing three National Reserves: the Kiunga Marine National Reserve (KMNR), bordered inland by the Boni and Dadori National Reserves. The combined land area of the three exceeds 2000 km². The Kibodo project area is located in the Lamu and Ijara districts adjoining southern Somalia. The goal of the USAID support to Kibodo Trust Program is community mobilization and development on the one hand, and biodiversity conservation on the other. The Trust aims to develop a collaborative partnership with the local communities to protect and conserve the area's natural resources via sustainable management practices; enhance the livelihoods of the communities through nature based enterprises and improving security within the area to enable conservation and development in the region.⁴³

The Kiunga Marine National Reserve, designated as a UNESCO Biosphere Reserve, was gazetted in 1979 and registered in accordance with the Wildlife (Management and Conservation) Act of 1976. The Marine Reserve holds significant mangrove forests, fifty offshore islands, shore line and marine habitats. The Dadori and Boni Forest National Reserves are important terrestrial conservation areas, also gazetted in 1976.

The Boni and Bajuni are the two main local communities living on the islands and mainland. The Boni were hunter-gatherer group which was apparently evicted during the creation of the Boni National Reserve, and relocated along the periphery of the forest boundaries where they currently reside. The Bajuni of the Phoenician, Hamitic, and Arab decent, traditionally relied on fishing. According to KWS (1999), only two villages within the reserve had been permanently inhabited. These included the Kiwayu and Chandani. Some Bajuni were displaced by the government in 1963 at the time of the Shifta war. The Bajuni now live along the coast and on the islands, and as in the past, continue to rely most heavily on fishing, mangrove harvesting, subsistence slash and burn farming and trading in the commodities they produce.

4.1 LAND TENURE IN THE LAMU DISTRICT/KIBODO REGION

Land tenure of the local communities is highly insecure in this region. All un-alienated land in the coastal region falls under the government land tenure regime, including the marine reserve and forest reserves. This land is administered under the Government Lands Act (1948) Cap 280 by the Commissioner of Lands who has the executive power to allocate land on behalf of the President. The Government Lands Act gives the President the power to alienate unalienated government land by granting rights over this land to any person. Customary rules of resource use are not formally recognized on government lands, and the Government Lands Act does not require the government to respond to any public obligation as regards the stewardship or utilization of these lands (Njonjo et al., 2002).

Although not within the Kibodo region, nearly 5% of government lands in Lamu fall under settlement schemes. According to the local authorities, four schemes have been established in Lamu to date, beginning in 1974-75 and the latest established in 1997. These Settlement Schemes were intended to settle the landless from different parts of Kenya. Under the Settlements Act, 70% of the allocations were to be made to local residents, however in practice, as noted by the district officer in Kiunga, all decisions were made nationally, and there is no transparency around selection of beneficiaries of settlement schemes. Indeed, as noted by the district adjudication officer in Lamu, these settlement schemes were used mostly to settle people from other districts, although this has changed in the more recent settlement scheme(s). While not within the Kibodo region, the

⁴³ Under a different program, USAID/Washington and Kenya are supporting WWF for sea turtle conservation in this region.

issue of significance here is that Settlement Schemes allow freehold title to individuals; which represents one of the only mechanisms for acquiring freeholds in the region. Most other allocations in rural areas tend to be leaseholds.

As noted by the Lamu County Council, in some parts of Lamu district, outside of the reserves, large ranches (ranging from 2000-5000 ha in some cases) have been, and are still being, allocated to politicians and other influential people, and to multinational companies. Allegedly, many of these lands remain idle, or in some cases set aside for wildlife conservation purposes.

4.2 LAND TENURE ISSUES

Given the highly centralized administration of these lands, government lands in coastal areas have come under massive abuse, as government officials have indiscriminately disposed of properties to non-resident elite who are able to afford purchase of these lands. The Government Lands Act elaborates procedures for allocation of agricultural land that the Commissioner of Lands is required to follow, including proper notification to the public of land available for grant and for the assessment of applications, the advertising, and sale of lands by auction. However, these procedures are rarely followed or by-passed by public officers in the Commissioner's office. Instead, the Commissioner of Lands has allocated and continues to allocate land using procedures not provided for in the Act. This has threatened tenure security of the already marginalized local communities, and at the same time it is adding to their sense of injustice associated with disregard for their ancestral claims.

Today, lands are being illegally alienated within and outside the marine reserve. These include illegal sale of beach plots and entire islands located within the Kiunga Marine Reserve, in violation of reserve status.⁴⁴ Many of the deals are made secretly in Nairobi (Ministry of Lands) with no formal gazettelement or public notice. However, there was indication from the County Council in Lamu that local administrators including officials in the local Ministry of Lands, and even KWS may be colluding with the investors, along with local chiefs. KWS noted, on the other hand, that it is inventorying all such illegal sales and taking investors to court. Meanwhile, the marine reserve, and particularly beaches, the foreshore reserve, fish landing sites, coastal forests, mangrove forests and other sensitive ecosystems remain under threat as increasing number of private titles are granted within the reserve boundaries.

Customary rules of use are being applied in regard to shifting cultivation, mangrove harvesting and fishing adjacent to park areas. Population pressure is relatively low, and so is competition for resources. However, customary rights of local communities in National Reserves are still not recognized. There is a strong sense from one of the Bajuni communities visited that they should be compensated for the lost rights.

On government lands, unlike on trust lands, County Councils have no formal role in land administration and management. Thus County Council in Lamu is sidelined in terms of decision-making related to land outside as well as inside the National (forest and marine) reserves, the reserves being managed solely by KWS. While a Memorandum of Understanding (MOU) for co-management agreement exists between KWS and County Council, it remains unsigned, possibly with KWS realization that County Councils have no authority over land matters in the region. Indeed, under the Wildlife Act, KWS has strong legal basis for management of the reserve. Although, with little visible evidence of management, and allegations of colluding in land sales with the reserve, the resident communities questioned whether KWS can legitimately claim that they are indeed managing the reserves. While a management plan was developed for the Kiunga Marine Reserve in 1999 for implementation by the KWS, it is unclear to what degree it is being followed. Local communities in the meantime, continue to retain the perception that County Councils have management authority in the reserves, and that it should represent their interest and deliver upon them.

⁴⁴ There is some legal ambiguity as to whether or not the islands are part of the marine reserve, as the gazettelement notice makes no mention of the islands.

The County Council feels threatened by settlement schemes. They feel that settlement schemes are increasing representation of outside groups in local government (most local authorities, including some councilors in any case are not from the district) is diminishing influence of long term residents in addressing local issues. Local communities remain wary of these schemes, and there is continued perception that future schemes will continue to settle people from outside the district. With no information being received directly from the government, the reason for caution persists.

Insecure tenure and weak position of communities in Kibodo area has led to mistrust of potential partners. Illegal and informal transactions involving islands and beach plots have created feelings of resentment against outside individuals/groups, and curtailed future opportunities for communities to create effective partnerships for NRM and income generation. Furthermore, there is perception that previous projects have failed to deliver on promises.

Overall, land problems in the Kibodo, and remaining coastal areas, remains potentially explosive. Both County Councils and communities are angry and eager to find any means of securing local land rights. Councilors felt that the best way of securing land rights would be through legislative reform that would convert all government land to trust land status. This would allow greater local control over decisions over land management and use. Local communities, the Bajuni in particular, preferred on the other hand to gain direct control over their lands; communal over reserve land, and individual/household ownership over house and farms. Both communities (the Bajuni in particular) and County Councils were strongly against formation of additional settlement schemes.

4.3 IMPLICATIONS FOR TOURISM AND BIODIVERSITY CONSERVATION

It is very difficult for communities in the Kibodo area of operations to enter into effective partnerships with commercial tourism operators. This is for two linked reasons: i) the communities lack formal tenure rights over their (ancestral) lands; ii) the communities lack formal rights of management, access or use to natural resources within the reserves, and hence have nothing to offer in exchange for rights of access.

There are three existing and two potential tourism enterprises in the Kibodo area of operations : Kiwayu Safari Village, Munira Island Camp, Kassim's Camp, Kui and Coastal Shompole. There are also two private camps, owned by Peter Barclay and Tahir Sheik Said on Kiwayu Island. The former has a title deed; the exact status of the latter is unknown.

There is little tourism in the Kibodo area, and there is a general feeling from the local people that more tourism would bring benefits in terms of jobs and other revenue generating activities. However, because of lack of secure rights to land and resources, local communities are unable to engage effectively with current or future investors. There is a serious danger that investors may enter into one-sided agreements with a relatively small portion of the resident communities and as a result disenfranchise other local people, and gain access to the resources at well below their true value. Of course this is better than the other option which is being pursued by some potential investors, of getting absolute control over the development plots through illegal means, without involving the local communities at all.

The best solution to the problem of ownership over, and rights to, the actual development plots, might be as follows:

- Establish current illegal, legal but inequitable, and legal and equitable ownership of land in the area.
- Establish genuine customary rights to land and resources both within and outside the reserves.
- Investigate the best mechanisms for formalizing these rights (individual title, formation of companies etc), and for reversing illegal allocations of land.
- Implement this program, and ensure that deals between investors and communities follow this process, rather than entrenching inequitable allocation of land resources.

The other issue is how to ensure that local people are involved in natural resource management in a way that enhances both their own livelihoods, and in the quality of the tourism. In the marine areas the main resources that local communities might be able to manage are undisturbed beaches, well managed coral reefs that are attractive for snorkeling, and diving and good sport fishing opportunities.

The most high-value sport-fishing is for billfish in open waters, and the sustainability of this will be more dependent on government control of offshore long line fishing than on community management – although shark fishing may be partly dependent on their spawning in shallow waters. However, a growing up-market tourism opportunity is fly fishing, particularly for tarpon, in shallow water. There is a significant conflict between local artisanal fishing and this kind of sport fishing, as local fishermen may deplete the resources, while generating far less revenue than using the same resource for sport fishing. There are significant opportunities for co-management, and for tourism operators to make payments in exchange for reduced and rationalized fishing in certain areas.

The immediate opportunities on the terrestrial side are more limited. Most of the coastal habitat is thick bush with limited game viewing opportunities which would not appeal greatly to the general tourists. There will be some opportunities for specialists such as bird-watchers, but this is a low priority at the moment than the marine environment. There are more tourism development opportunities further inland, around the Boni and Dodori Natural Reserves, and the possibility of comanagement arrangements between KWS and the communities, represented by the Kibodo Trust, should be actively pursued.

5.0 IMPLICATIONS FOR LAND POLICY

The Ministry of Lands has prepared the “final” dNLP, in May 2007. The Policy was drafted through a broad consultative process involving government, civil society, NGOs, donors, and land tenure experts. It is believed that the Policy reflects broad consensus among Kenyans on issues of land reform and administration. Interviews in assessment field sites suggest, however, that the general public remains unaware of the dNLP. The few who were aware did not adequately understand it.

The dNLP has a number of potential implications for the northern rangelands areas.⁴⁵ The following clauses are the most significant.

Section 3.3.1.2 states that the government shall:

- Document existing customary and non-customary communal tenure.
- Repeal the Trust Land Act
- Define in the Land Act, the term ‘community’ and vest ultimate ownership of community land in the community.
- Lay out in the Land Act framework and procedures for inter alia recognizing, protecting and registering community rights to land and land-based resources.
- Invest in capacity building for communal land governance institutions
- Facilitate cross-boundary access among communities.

Clause 85 says the government will bring ongoing processes of adjudication and consolidation to completion.

5.1 NATURAL RESOURCE MANAGEMENT

Section 3.3.4 deals with natural resources. It states that the government shall develop a comprehensive resource tenure policy, vest renewable resources such as wildlife, water and public forests in the state; provide incentives for communities and individuals to invest in income generating conservation programs and secure the rights of natural resource dependent communities to access, co-manage and derive benefits from those resources.

There is an apparent contradiction between some of these clauses. Under present arrangements a land-owner’s rights to make free use of the natural resources on his or her land are limited by the Environmental Management and Coordination Act and by the Water Act. Consumptive use of wildlife is covered by the Wildlife Act. However, this does not restrict in any way the non-consumptive use of wildlife. Under the Land Policy and the draft Wildlife Bill, it is proposed to vest wildlife in the State, and to license non-consumptive use of wildlife such as game viewing. This will add an additional administrative burden and essentially take away a right from communities that they already enjoy. This appears to conflict with the part of Section 3.3.4 that seeks to provide incentives to invest in income generating conservation activities.

Section 3.3.4.1 deals with benefit sharing from land-based natural resources. It talks about the rights of communities to own and use natural resources, and says that government shall establish legal frameworks to establish these rights, and put in place compensation mechanisms for loss of land and for damage caused by wildlife. Government shall also make revenue sharing mandatory where natural resources are managed by the national authorities.

⁴⁵ See also Kenya Land Policy: Analysis and Recommendations by John Bruce (April 2008).

This section also seems unclear about whether the right to use natural resources is fundamentally vested in communities, or whether this is a right that can only be granted by the State. It would be preferable if the clause on revenue-sharing was made clearer. There are well established principles for using revenue sharing with protected areas that are based on principles of equity and improved biodiversity conservation which would be good to state in the policy – rather than assuming that revenue sharing will take place under all circumstances. The most important justifications for revenue sharing are if communities are providing dispersal areas for wildlife from protected areas, if they are suffering from the proximity of the protected area, and if they have given up certain rights as a result of the creation of the protected area.

Section 3.4.3 deals with environmental management. There are a large number of recommendations, based around the Environmental Management and Coordination Act. The most relevant to the northern rangelands are the proposal to gazette wildlife movement corridors, to encourage development of conservancies, to encourage co-management of protected areas, and to review forest and protected area boundaries.

5.2 GROUP RANCHES AND COMMUNAL LAND

Section 3.6.3 addresses issues concerned with pastoral land. It starts from the premise that the problems of pastoral land tenure are derived from the dispossession of pastoralist communities of their land⁴⁶ and other resources. The most significant clause in this section is 183(b) which says that the government shall repeal the Land (Group Representatives) Act, and institute alternative methods of registration of pastoral land.

Section 4.2 describes the proposed new land management institutions. This includes the establishment of the National Land Commission which shall hold title to and manage public land on behalf of the government. Public land is all land that is not either Community Land or Private Land, and it is reasonable to assume that this will include all National Parks and National Reserves. Under the National Land Commission will be District Land Boards, and at the third level Community Land Boards. These shall comprise elected representatives of the people ordinarily resident in an area, but respecting all aspects of diversity. The functions of these Boards shall be to hold and manage community land, document all community lands, regulate all transactions relating to community land, and facilitate the recording and issuance of title by the District Land Boards.

It seems fairly clear from this that no more group ranches will be created, since the Act allowing their establishment will be repealed. However, it is possible that group ranches in formation will continue to be registered under Clause 85.

The Policy is unclear on what might happen to group ranches under the new Land Policy. Will they be dissolved and transformed into Community Land under Community Land Boards? Will the governance system prescribed under the Land (Group Representatives) Act govern Community Land under Community Land Boards? Part of the reason for this understanding is that in the list of Acts (clause 67 of the Policy) from which Private Land is derived, the Land (Group Representatives) Act is not included. Furthermore in Section 3.3.1.2 on Community Land there is a clause saying that there will be a need to review and harmonize the Land (Group Representatives) Act with the proposed Land Act, indicating that existing group ranches are to be considered under this section.

It is likely that this proposal will be treated with concern by the pastoral communities. At present they feel like absolute proprietors of their land if they are members of group ranches. If their freehold titles are to be replaced with what seems at the moment a less well defined institution of Community Land Board (that may be seen to ultimately report to the National Land Commission) and there is an obligation to formalize secondary rights (clause 183) it is likely that there will be strong objections from these communities. A better approach might be to set up new structures, and allow communities to migrate to these structures if and when they feel more comfortable with them than with existing arrangements.

⁴⁶ Rather than massive increases in human populations, which are seen by some authorities as contributing to problems in pastoralist areas.

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ANNEX I: SCOPE OF WORK

Scope of Work (SOW):

An LTPR Assessment of Conservation Enterprises in Kenya

March 1- March 31, 2008

1.0 Purpose

Provide USAID/Kenya with an assessment and analysis of land tenure and property rights (LTPR) related to conservation enterprises in the broad context of Kenya's dNLP as well as related aspects of the draft Wildlife Management and Conservation policy (2007), the Forest Act (2005), the Water Act and the draft Arid and Semi-Arid Lands (ASAL) policy (2007). The assessment will focus in two of USAID's natural resource and biodiversity conservation program sites. Findings will be presented at a USAID/Kenya-sponsored workshop relative to an emerging set of lessons learned and best practices for LTPR, resource governance and enterprise development linked to specific USAID/Kenya NRM investments in the country.

2.0 Background

Despite the social, economic and political importance attached to land in Kenya, the country has lacked a clearly defined and codified dNLP since independence. The absence of such a policy has resulted in a haphazard land administration and management system. To resolve the myriad land administration and management problems afflicting Kenya, the Government of Kenya (GoK) committed itself to developing a dNLP through a consultative process, with the objective that it should provide a platform for: i) ensuring all citizens with opportunities to access, beneficially occupy and use land; ii) systematic land use planning; iii) efficient and transparent land dispute resolution mechanisms; iv) effective and transparent operation of land markets; v) socially acceptable and environmentally sustainable allocation and use of land; and vi) reforming outdated legal and institutional frameworks in the administration of land and property rights

The Ministry of Lands (MoL) prepared a 'final' dNLP in May 2007, and submitted it to Cabinet. Prior to preparing a Sessional Paper and tabling the dNLP in Parliament, Cabinet referred it to the Ministry of Finance (MoF) with the request that it include i) a cost schedule for its implementation that was linked to GoK's medium term expenditure framework (MTEF) and ii) an indication of funding sources. MoF had not undertaken these tasks by the time Parliament dissolved in October 2007 prior to Presidential and Parliamentary elections in December 2007.

It should be noted that although MoL is satisfied that the dNLP reflects broad consensus among Kenyans on issues of land reform and administration, there are other entities that have raised questions about provisions in the May 2007 draft; e.g., i) wording relating to restitution, repossession and sanctity of title; and ii) the effect of the policy on economic growth and private property rights. Several development partners preferred additional analyses of the dNLP prior to committing support to activities in the land reform program. In particular, USAID desired a review of the policy's potential impact on and support for: i) opportunities for improving community and corporate livelihoods with high value natural resources (wildlife, forest and marine/coastal resources); ii) community/government natural resource management partnerships; iii) diversification of livelihood in customary pastoralist economies; iv) the need for regularization/ formalization of community-based resource tenure; and v) a sound land administration system accessible to all. USAID planned to undertake further policy review in January - March 2008. In addition, development partners were quite frustrated by MoL/GoK's apparent lack of commitment to addressing the recommendations of the "*Commission of Inquiry into the Illegal / Irregular Allocation of Public Land*" (Ndung'u Commission, 2004). It is

generally believed that GoK's inertia on the Ndungu report is because it implicates powerful interests in the previous and current government in the illegal and irregular acquisition of land. Finally, there are concerns that the reforms in land administration, use and management proposed in the dNLP are not anchored in Kenya's current Constitution. While this is no fault of the dNLP, some believe the policy's adoption and certainly its implementation would require constitutional amendments to be properly legally grounded.

Though these concerns formed a backdrop to the advancement of the dNLP, the MoL and development partners prepared an 'Implementation Project Document' (September 2007) to guide and budget the land reform process over a two-year period - October 2007 to September 2009. Even though the project document has been accepted by MoL, enthusiasm has waned among development partners for rapid implementation of the land reform program.

January 2008 marked the beginning of a political crisis that rocked the nation – the result of a bitterly disputed outcome of the Presidential election process. It intensified Kenya's polarization along ethnic and political lines. Post-election violence resulted in over 1,000 deaths, over 350,000 internally displaced people (IDPs), the establishment of over 300 camps to accommodate IDPs and a massive humanitarian relief effort. Virtually all Kenya's development partners have adopted a 'No Business As Usual' approach to program implementation. Development activities have ground to a halt in most disturbance-affected areas, and partners have minimized their contacts with GoK entities. In many instances development partners have slowed program implementation. All are hopeful the political crisis will pass, but it is accepted that any program for its long-term resolution must address land reform in the areas of: i) distribution and access, ii) utilization and planning, iii) understanding the basis for conflicts in land and property and in iv) administrative procedures and institutions. Certainly in USAID's geographic focal areas for natural resource management, biodiversity conservation and agricultural development it is apparent these four critical issues of LTPR affect nearly all program interventions.

Once relations among GOK entities and development partners become more 'normalized', it's obvious that approval of the dNLP and the workings of the land reform 'Implementation Project' will move at a 'certain' pace. USAID believes it might be able to address the four critical issues noted above at its project sites to complement the dNLP adoption process and the land reform 'Implementation Project'. To do so will require that USAID and its partners understand these land-related influences and use this knowledge to shape project activities to address constraints where practicable and to scale-up results. To that end, USAID/Kenya will support a 'LTPR Assessment of Agricultural Enterprises' and two other studies/activities that are linked to it as described below. Further, it is hoped that relevant findings and recommendations from these and other assessments may be used to enrich the dNLP, the Land Reform Support Program and the 'Implementation Project'.

1. **'LTPR Assessment of Conservation Enterprises'**. USAID/Kenya has supported numerous, innovative, conservation initiatives (*e.g.*, conservancies and trusts) that work with communities to create commercially viable enterprises to promote the conservation of wildlife and their habitats while improving rural livelihoods. The LTPR arrangements of these conservation enterprises vary across USAID's geographic areas of focus. The mix of local institutions, governance systems and contract agreements between communities and private sector entities have a bearing on the success of these initiatives. There is a critical need to assess the various models of conservation enterprises being promoted, to establish an analytical framework for the analysis of these models, and to share lessons learned with Kenyan stakeholder groups in the context of the dNLP, as well as with stakeholders in neighboring countries where similar conservation enterprise arrangements are being developed.

This assessment will examine the following themes from a conservation enterprise development and value-chain management perspective and determine how they constrain or enhance performance at targeted sites:

- Land ownership and control - customary and statutory land tenure systems vis-à-vis socio-cultural equity considerations; state and individual rights; review of historical and intergenerational claims; and women's rights to land;
- Land redistribution – adjudication processes demographics; settlement programs; land market systems; compulsory acquisition;
- Land use and management- customary/statutory rights to natural resources; common property resource management; resource mapping; constraints to investment; sustainable use systems; benefit sharing; land sub-division/ privatization; land conflicts; and
- Land administration institutions - land registry, survey, planning and valuation.

Further, the assessment will examine and document the range of conservation enterprise models operational at the sites and formulate 'lessons learned' and recommendations for the development of future partnerships that: i) promote secure and clear property rights, ii) improve natural resource governance, iii) tend to conserve biodiversity and iv) lead to wealth generation for all parties of contracts and agreements.

The assessment will require collaboration with a parallel team conducting a field assessment of 'LTPR and Agricultural Enterprise' (described in a separate SoW) and with the team reviewing the dNLP (under component 2, below). **An important dimension of the conservation and agricultural enterprise assessments and of the 'programming roundtable' (below) will be issues related to land administration, conflict, and women's rights to land and resources.**

2. The second activity is a Desk Study and 'Programming Roundtable' of the dNLP. This component will involve a review and analysis of the dNLP, comments of donors and of a 'Peer Review Committee', and consultancies linked to the Policy in the context of USAID/Kenya programming. This analysis will pay specific attention to how the dNLP could impact the investments of USAID/Kenya in its portfolio of programs in economic growth, natural resource management and biodiversity conservation, conflict management and mitigation, governance and institutional development, and HIV/AIDs. Thus, it is a broader review than the site-specific focus of the 'LTPR Assessments of Agricultural and Conservation Enterprises'. This assignment will take place in two phases – a desk-study off-site in January/February 2008, and a two-week assignment in Kenya in March.
3. Kenya 'Lessons Learned' Workshop. USAID/Kenya will sponsor a lessons learned workshop bringing together the findings and recommendations of the 'LTPR Assessments of Agricultural and Conservation Enterprises' and of the Desk Study/Programming Roundtable to discuss results and findings with GOK counterparts and key stakeholders. The results of these discussions will be summarized in a 'Land Policy Investment Options Paper' that USAID/Kenya can use to guide its future investments, programming and strategic partnerships.

3.0 Scope of Work

The 'LTPR Assessment of Conservation Enterprise' team will undertake the following tasks:

- Conduct preparatory work involving: i) Consultation with USAID/Kenya, the 'LTPR and Agricultural Enterprises' team and the locally-procured logistical coordinator (the East Africa Wildlife Society-EAWLS) to finalize logistics for field visits, including arrangements for all necessary meetings and interviews; ii) Review literature relevant to the case studies, including documents provided by USAID/Kenya and also sourced independently; iii) Finalize roles and responsibilities within the team, a methodology for conducting the field assessments, and procedures for communicating with the 'LTPR Assessment of Agricultural Enterprises' team, USAID/Washington and USAID/Kenya as needed;

- Travel to specific biodiversity and natural resources conservation enterprise sites within Kenya as identified by USAID/Kenya and assist in conducting an assessment of the specific cases/models based on agreed upon methodology guided by the themes/issues in Component 1, above;
- Develop an analytical framework for the findings and ‘lessons’ of Component 1, as related to property rights negotiation and establishment, governance, and transaction and the impacts investors, managers, communities, benefit sharing and equity, land and resource use. Work closely with the ‘LTPR Assessment of Agricultural Enterprises’ team and with the ‘Desk Study and Programming Roundtable’ team in these efforts;
- Inform the land policy review, and identify important legal and policy changes that are needed to support the success of conservation enterprises;
- Work with the ‘LTPR Assessment of Agricultural Enterprises’ and the ‘Desk Study and Programming Roundtable’ teams to develop a preliminary set of lessons learned that can be used to contribute to a USAID/Kenya hosted workshop noted in Component 3, above;
- Work with the ‘LTPR Assessment of Agricultural Enterprises’ and the ‘Desk Study and Programming Roundtable’ teams to present lessons learned at the USAID/Kenya sponsored workshop;
- Finalize report based on comments received from USAID/Kenya, USAID/Washington and participants in workshop. The report may be finalized upon return to the US.

4.0 Duty stations

- Nairobi
- Lamu District – Kiunga, Kiwayu, Doodori National Reserve, Lamu town
- Samburu/Marsabit Districts – Il Ngwesi Group Ranch; Sera, Namunyak and Melako Conservancies

5.0 Deliverables

1. A final report (not more than single spaced 30 pages) including an executive summary, introduction and background for the overall evaluation, detailed findings, conclusions, and recommendations. The report will incorporate comments from USAID/Washington and USAID/Kenya.
2. Presentation and participation at the Kenya lessons learned workshop.

The Team Leader will submit electronic copies of final report to USAID/Washington and USAID/Kenya by the end of April 2008.

6.0 Schedule

This assignment will begin with preparatory work in the US on or about 1 March 2008 with arrival in Nairobi o/a 3 March 2008 and end o/a 30 March 2008. The consultants will work six-day work weeks.

7.0 Costs

Costs for this assessment form part of USAID-EGAT’s investment in biodiversity conservation, and contribute to its earmark. Therefore, the costs for this assessment team will be paid from USAID’s RAISE IQC, Lesson’s Learned Task Order, and are therefore subject to the Fixed Burden Daily Rates that govern this IQC and Task Order.

ANNEX 2. LIST OF GROUPS/ INDIVIDUALS INTERVIEWED

County Council, Samburu
Participatory Education, Awareness and Resources (PEAR)
Ministry of Lands, Maralal
Kenya Forest Service Representative, Maralal
Samburu Wildlife Forum
Sera Conservancy Representatives
Melako Conservancy Representatives
Namunyak Conservancy Representatives
Sarara Camp Operators
Kalama Conservancy Representatives
Il Ngwesi Group Ranch Representatives
Lekarruki Conservancy
Northern Rangeland Trust Representatives
Private Investor, Charlie Walker
County Council, Isiolo
Ministry of Land, Survey Office, Isiolo
Biliqo-Bulesa Conservancy Representatives
Private Investor, Extreme Africa, Hillary Bastard
Giles Davies
Kibodo Trust Representatives
County Council, Lamu
District Commissioner, Lamu
Lands Office Representative, District Settlement Officer, Lamu
Kenya Wildlife Service, Lamu
Kenya Forest Service, Lamu
Kenya Marine Forum
Shungwaya

Lamu Safi Group

Tushauriane Youth Group, Lamu

Kiunga Community

Boni Community Representatives

Mkokoni Village Community

Kiwayu Safari Lodge Owner and Manager

ANNEX 3: CONSERVANCIES SUPPORTED BY NRT

The Northern Rangeland Trust is currently supporting 14 Conservancies. The table below provides a list of the Conservancies and the land tenure status of each.

Conservancy ⁴⁷	Group Ranch	Trust Land
Baringo District		
Ruko		x
Ijara District		
Ishakbang		x
Isiolo District		
Biliqo-Bulesa		x
Marsabit District (now Laisani District)		
Melako		x
Laikipia District (now Doldol District)		
Il Ngwesi	x	
Lekarruki/Tassia	x	
Samburu District		
Kalama	x	
Meibae		
Naibungo	x	
Namunyak ⁴⁸	x (2 Group Ranches)	x (2 Trust Lands)
Ntungui	x (2 Group Ranches)	
Sera		x (2 Trust Lands)
West Gate	x	
Other		
Kipsing	State land	

⁴⁷ Needs confirmation for final draft.

⁴⁸ No conservancy structure formed. NRT works with the Group Ranch representatives and committee.

ANNEX 4: TENURE ISSUES AND TOURISM OPERATIONS IN USAID PROJECT AREAS

NORTHERN RANGELANDS TRUST

Sera

Sera lies to the east of the Mathews Range in northern Kenya. The name is used to describe an area within the Samburu District, bordering the (former) districts of Marsabit and Isiolo. The area has a history of insecurity, partly because it lies on the edge of land claimed by the Samburu, Rendille and Boran people. There are several sources of permanent water, particularly the natural springs at Kisima Hamsini or '50 wells', which support both resident and migratory populations of wildlife, and this area was used for grazing during droughts by all three communities.

The aim was to initiate conservation activities over the wider area, although there was no specific design on how this would be achieved. Conservation activities began with Sera Conservancy and then expanded to include Melako and Biliqo-Bulesa conservancies, all operating as independent entities. Support from USAID and other donors has provided a headquarters, radio system, vehicles roads, airstrips etc. Thirty seven jobs have been created. A small guesthouse was built close to the headquarters with support from the BBC. Some land use planning has taken place, with demarcation of a core conservation area and buffer zone, and grazing by-laws being established. The controlling body is a Board of Trustees consisting of 12 members, with a larger Council of Elders of 30.

The Sera Conservancy falls within parts of two group ranches in formation – Losesia and Serolevi. Losesia has been under adjudication for more than 20 years. The registration of members has recently been closed, but there is still a dispute about the list. Serolevi went under adjudication in 2007. Night-out allowances have been paid to the council surveyors but the survey has not been carried out. An adjudication committee has been established but the group ranch has not yet been gazetted. The two group ranches in formation have equal representation on the Board and are to derive equal benefits. This may become problematic given the Serolevi makes up a larger proportion of the total area.

Given that these group ranches have not been fully established, the area of operations for the Conservancy is on trust land, under the control of the Samburu County Council. The Conservancy operates on the basis of a letter of approval from the Council to manage the area and to carry out tourism activities.

There is a proposal to build a 16 bed lodge near Kisima Hamsini. This would be built by a consortium of tourism investors, who will then use it on a self-catering basis. Currently being discussed is a \$150 per person conservation fee with a minimum annual guarantee. This would be a relatively basic facility with few staff, and the operators will bring in supplies and specialist staff each time that they make use of it. The advantage of this model is that it provides a guaranteed income. The main disadvantage is that it will provide relatively little employment. There is currently a signed interim memorandum of understanding between the investors and the Sera Conservancy Trust.

This agreement provides little protection to the investors since the communities involved do not have formal tenure. In theory the fixed assets of the lodge/camp will belong to the County Council. The Sera

Conservancy Trust has been granted certain rights by the Council, but it is not clear how binding this is, and whether it would be possible for the Council to reverse this decision.

Namunyak

The Namunyak Wildlife Conservation Trust was established in 1995 and is located in the Mathews Range of northern Kenya. Namunyak formally operates on Sarara and Sabache Group Ranches.

Sarara and Sabache Group Ranches were both registered in the late 1990s, after a long period of unresolved disputes. However, title deeds have not been issued, because of the very high cost associated with the full survey that is required before deeds can be issued. Perhaps partly as a result of the success of Namunyak, the management of the two group ranches has become essentially inactive.

Namunyak also carries out operations further north, in trust land around Doinyo Uasin and Ngelai West. Although some interest has been expressed in the creation of group ranches, it seems that little if no action has been taken. Although, according to an NRT representative, Ngelai West is under the process of adjudication.

Namunyak is an active conservation organization, with a significant security and anti-poaching presence, employing 33 staff (of whom 28 are game scouts). There has been considerable development of the system of governance since the first set of Trustees was hand-picked. There are now 11 elected trustees (elected through village committees of 5 members each) and three co-opted trustees in addition to representation from the Kenya Wildlife Service, Northern Rangelands Trust and the Administration. Although there is no current membership list it is believed that there are about 3,000 families including perhaps 18,000 individuals who are beneficiaries of the Trust.

Sarara Camp is the main tourism enterprise within the Namunyak area of operations. This is a 10 bed tented camp that was originally set up in 1995 by an external operator. Later, Acacia Trails took over operations for his own clients, and other self-catered guests. However, in 1998 a fire burnt down the main mess area. The camp was reconstructed using donor funding, and operated by the Trust. However, this proved unsuccessful and Acacia Trails returned in 2000 to manage the camp as a fully-catered operation. Acacia Trails (later changed to Extreme Africa) is responsible for marketing, camp management (including hiring and firing staff), hosting guests, and fund raising. Namunyak is responsible for security, and for maintaining infrastructure such as roads. All fixed and most movable assets belong to Namunyak, although Extreme Africa covers the cost of maintenance. Any infrastructure upgrades are the responsibility of Namunyak, and funding was recently received from significant individual donations and the EU-funded Tourism Trust Fund to pay for new staff quarters, office and kitchen, honeymoon tent and the manager's house. However, there may still be a problem when it comes to deciding whether to replace or repair tents.

Fourteen community members are employed at the camp, mostly on a casual basis. According to the agreement 80% of employees should be local.

Each overseas client who visits the camp pays \$95 per night (of which \$60 is considered a conservancy fee and \$35 is a bed-night fee). Three hundred overseas bed-nights per year are guaranteed. In 2004 a new agreement was signed when Acacia Trails transferred its management to a new company (under the same ownership) called Extreme Africa. A further agreement was signed in November 2006 for another three years with the option of renewal. The conservation fee was increased from \$20 to \$65 in 2007.

In 2007 there were 1,200 bed-nights at the camp, and a total of \$114,000 was paid to Namunyak for bed-night and conservation fees. It was estimated that there were an additional \$36,000 in benefits from camp staff wages, the camp shop, beadwork sales, and visits to cultural villages. Although there is also some revenue from other activities such as walking trips up Olololokwe Mountain (about \$4,000 in 2007), helicopter landings in the area (about \$3,000 annually) and bird shooting, by far the largest portion comes from Sarara Camp.

There is a problem with the location of the camp. Although it was assumed at the time of construction that it was within Sarara Group Ranch, the Forest Department (now Kenya Forest Service) has insisted that it actually falls within a gazetted Forest Reserve. In order to regularize this situation, Namunyak signed a 10 year license agreement with the Forest Service on 24 June 2003 to 2013, granting them permission to operate on forest land. Payment is made by Namunyak. There is a complex payment schedule, including a ground rent, an annual fee, a gate fee and a percentage of turn-over. It may be questioned whether this is an entirely fair deal, given that almost all tourism activities are carried out on land belonging to the group ranch. Once forest user groups have been registered under the new Forestry Act, it will be an interesting test case to see whether the agreement can be modified in favor of the community⁴⁹.

As in many other conservancies, Namunyak tourism revenue is split on a 60/40 basis between community projects, and Trust running expenses. Community funding covers activities such as school bursaries, medical assistance and a wildlife consolation scheme to those injured or killed by wild animals. There is still a need for donor funding since the money for the Trust is not enough to cover all operating expenses.

There may be further tourism development opportunities in the Sabache and Doinyo Uasin areas, and there are plans to build a 6-10 bed camp higher in the forest provided that agreement can be reached with the Kenya Forest Service. Namunyak has applied for a license for this site, but has been advised to form a forest users group.

There is a relatively small core conservation area from which cattle are excluded, although the size of this was increased in 2006. Grazing by-laws and land zoning have been established. The operators feel that wildlife numbers have increased during the period of their operations, with more elephants, buffalo, giraffe and impala visible. However, they are not certain whether this is a genuine and widespread increase, or if it is more localized, or the result of increased visibility. Comparison of aerial surveys in 2003-4 with one done in 1996 tended to show declines in most wildlife species.

West Gate⁵⁰

The West Gate Conservancy lies within Ngutuk Ongiron, which is a registered group ranch without title, and was established as a Trust in 2004. It lies to the west of the Samburu National Reserve along the Ewaso Nyiro River. The Trustees of the conservancy are also the committee members of the group ranch, and are elected by the group ranch members at Annual General Meetings. There is a relatively small core conservation area of 880 ha. The group ranch is very important for the conservation of the globally endangered Grevy's zebra.

Tamimi Limited operates an 18 bed tented camp on the banks of the Ewaso Nyiro, called Sasaab. There is agreement between Tamimi and Westgate which was signed on 16th June 2006 for 5 years, with the possibility of a 5 year extension. 75% of staff members should be local, and the West Gate Conservancy will buy the fixed assets if they can secure donor funding.

The proposed fee structure is for an initial bed-night payment of \$11, with a conservation fee of \$20 and a capital maintenance fee of \$14, which will rise to \$24 once payment for the lodge is completed⁵¹. Minimum bed-nights have been agreed. In year 1 the minimum will be 400 nights (equivalent to \$12,400), rising to 600 in year two and 800 in year three. It is intended to use the money in a similar way to the other projects, with 40% going back into the Conservancy's running costs, and 60% into community projects.

⁴⁹ There also still seems to be some uncertainty about whether the camp is within the forest. There was some discussion about a 'stop line' below the camp which might or might not have been the Forest Reserve boundary. The Forest Department did not do a proper survey when they said that the camp was inside the forest.

⁵⁰ We were unable to visit West Gate or meet community members so this section is based on discussions with NRT staff and limited consultation of documents.

⁵¹ This has apparently not been paid to date, because the maintenance has all been done by the operators, but they will pay from 1st May.

During construction it was realized that the site was not on the group ranch, but was actually Trust Land, designated for the development of an irrigation project. This situation has been addressed through communication from the group ranch Chairman to the County Council. The Council has passed a resolution that the group ranch should be able to make use of the land; this has been approved by the District Physical Planning Committee, and the Commissioner of Lands has been asked to endorse the decision.

Kalama

Kalama Community Wildlife Conservancy is a registered Trust established in 2002 that manages a core conservation and buffer area totals 14,795 ha within the 95,000 ha Girgir Group Ranch. It lies to the east and north-east of the Samburu National Reserve. Its main conservation importance is as a corridor for wildlife movements between the Reserve and adjoining conservation areas such as Namunyak. The Trust has a 12 member elected board, which includes some of the members of the group ranch committee.

Donor funding has provided some infrastructure development, including a headquarters, roads, airstrips and water supply for wildlife.

Girgir is a group ranch with 700 members, apparently with a title deed issued in 1970⁵². This early establishment was apparently because of the creation of the nearby military training area, and a concern that if the residents did not act quickly there might be a problem with their land. Girgir seems to be moderately functional as a group ranch, although sometimes annual general meetings do not take because of a lack of quorum. At present the register of members is closed, and members are only replaced by heirs if one dies. There is an active Grazing Committee of 16 people that also deals with other natural resources such as sand and trees.

Currently Kalama's only direct source of income from tourism is three camping sites, booked through 4x4 Safaris Ltd, with each client paying \$40 per person per night. Last year this generated approximately \$5,500.

Kalama has now entered into an agreement with Saruni Ltd who are constructing a lodge on a hill-top 7 km from Samburu National Reserve. This lodge is expected to open in mid 2008. There will be six houses (two of them are large family villas with two separate bedrooms and bathrooms), a swimming pool and a spa.

The renewable 5 year agreement which was signed in May 2007 grants Old Bomen Ltd the opportunity to build a 12 bed lodge which may be increased to a 30 bed facility. In the first year, according to an NRT representative, Saruni will pay approximately \$40 per person fee to Kalama as well as \$40 per person entrance fee to Samburu National Reserve whenever clients visit the Reserve. There is no ground rent, rather a minimum guarantee.⁵³

Construction costs are estimated at \$1,000,000⁵⁴. Detailed accounts of these costs will be kept, and NRT is looking for a donor to buy the fixed assets so that they can belong to the community⁵⁵. Saruni will continue

⁵² However, the agreement with Saruni says that if title is granted to Girgir and payment for the lodge (by donor) is not completed, Girgir will grant a lease, license or other document confirming security of tenure to Saruni. This suggests that there may not actually be a title deed.

⁵³ There is discrepancy between these and figures provided by NRT representatives. In the meeting with Kalama conservancy, the representatives noted \$10 bed night fee and \$25 conservation fee for the first year. Also, in year one the guaranteed minimum payment was noted as \$14,000, rising to \$21,000 in the second year and \$28,000 in the third year.

⁵⁴ There is a clause in the agreement about Saruni pre-financing for water \$87,815. Per this clause, a loan was provided for the installation of water supply to the lodge site (in an annex to the agreement). The loan is expected to be paid back to Saruni within 16 months of the provision of the loan.

⁵⁵ Although technically they do already belong to the Group Ranch since they own the land, and there is no formal lease agreement.

to have the right to manage the lodge for five years even if this purchase takes place. There will be a limited exclusive area, but camping groups will still have access to the conservation area. Bookings for the camp sites will be taken over by Saruni. 50% of staff members are to be from the local community in the first year, and 80% thereafter.

Although some game viewing will take place on the group ranch, it is anticipated that clients will want to visit the nearby National Reserves, and this may cause a problem with payment of double fees. A request has been made to the Samburu County Council to reduce the fee for visiting the National Reserve to \$20 per night. If this is agreed, then the conservation fee to Kalama will rise by any saving plus 5%. Therefore the conservation fee may rise to \$45 per night.

Kalama also adopts the principle of dividing revenues on a 60/40 basis between community needs and operational costs. Community money has been used for schools, hospitals, helping poor people, and restocking after droughts. In 2005/6 a dividend of 5,000/- was paid to members to assist with restocking.

Girgir is also a beneficiary from revenue sharing with the National Reserve, which currently pays 1,000,000/- per year to the group ranch. It has been agreed to increase this figure to 1,500,000/-, but because of the downturn in tourism, recent payments have been withheld.

Lekurruki/Tassia⁵⁶

Lekurruki Group Ranch was registered in 1999 (when it split off from Mumonyot Group Ranch) and covers approximately 7,000 ha of land in Laikipia District north of Il Ngwesi Group Ranch and to the east of the Mukogodo Forest Reserve. It forms a contiguous conservation area with the forest, Il Ngwesi, Borana Conservancy and the Lewa Wildlife Conservancy, which is very important for the movement of wildlife, particularly elephants.

With assistance from Borana Ranch and the Laikipia Wildlife Forum, Lekurruki built a 24 bed eco-lodge called Tassia in 2000. It was initially operated on the same basis as Il Ngwesi, with self-catered, exclusive bookings of the entire property. It did have reasonable occupancy, and provided jobs, but generated very little revenue for the community. Typically no more than \$5,500 was generated per year.

As a result Lekurruki Group Ranch decided to enter into a commercial relationship with Northern Frontier Ventures (NFV), a locally based operator which had already made use of the area through camel safaris. Under this agreement, NFV are responsible for the management and marketing of the lodge. It has changed from a self-catering to a fully serviced facility. In the first six months of operations

Northern Frontier Ventures provided about \$17,000 in benefits to Lekurruki.

Under the agreement in the first year there is a bed night fee of \$25 and conservation fee of \$20, rising to \$35 and \$40 respectively in the third year. There is a guaranteed minimum income of just under \$10,000 in the first year (which was already exceeded in the first six months), rising to about \$36,000 in the fifth year⁵⁷.

Although the fixed assets belong to Lekurruki, NFW have made a substantial input – perhaps \$50,000 in capital development since their partnership started. In theory major capital work should be done jointly, but this may need more clarification in the agreement.

Conservation work in Lekurruki had been done more as an extension of what happens in Il Ngwesi than an independent operation. Although, with the creation of the Lekurruki Conservation Trust, and the Trust

⁵⁶ The team did not have a formal meeting with Lekurruki Group Ranch members. Therefore this section is based on short discussions with the lodge manager and investor

⁵⁷ Although the minimum returns are specified in Kenya shillings, while the fees are specified in US\$ in the agreement.

entering into a joint venture over Tassia, there has been revitalization and restructuring to manage all conservation operations within Lekurruki. Also, the strengthening of the community and group ranch has allowed people to deal with the issue of uncontrolled grazing by outside groups, and it is likely that the presence of game scouts, and support from the Lewa Wildlife Conservancy has helped to control poaching, particularly of elephants.

Il Ngwesi

Il Ngwesi lies to the south of Lekurruki, to the north of Borana Conservancy and east of the Mukogodo Forest Reserve, so forms a key part of this extended wildlife area. It is a registered group ranch with a title deed. Elephant poaching and banditry were rife during the 1980s, and although small amounts of money were being made from camel safaris operating through the area, there was very little economic activity. During the 1990s the neighboring Lewa Wildlife Conservancy helped to develop a system of game scouts, communications and transport, and to build one of the first community owned lodges in Kenya. The Lodge was built in 1995 and run by Il Ngwesi Company Ltd., which has 5 elected and 2 co-opted directors. There are apparently 40 full time members of staff. Other conservation-based enterprises such as a cultural village, camel safaris and camp sites have also been developed.

The lodge continued as a self-catered operation which groups could book for their exclusive use until two years ago, when it converted to a fully catered operation. This has resulted in a reduction in occupancy, but Lodge managers consider that the revenues have increased. Apparently in February profits of approximately \$10,000 were declared. Last year's revenue was used to buy a rental property in a nearby town. Community income has also helped with cattle dips, water projects, schools, education scholarships and health services.

There are a number of conservation initiatives at Il Ngwesi, in addition to the anti-poaching work of the game scouts. There is a small fenced area with an orphaned black rhino and two white rhinos in it. There is a no-grazing zone around the lodge, where grass cover has increased, and it is believed that wildlife populations have increased. The greater ability of the Il Ngwesi people to control their own land means that the area is a relatively good environmental condition compared to the heavily denuded sections of Isiolo District on its eastern boundary.

TOURISM AND BIODIVERSITY ISSUES IN THE KIBODO AREA

Kiwayu Safari Village

Kiwayu Safari Village (KSV) is a tourism lodge with a maximum of about 60 beds on the mainland north of Mkokoni Village, opposite Kiwayu Island, which has been in operation since 1973. It was originally on government land, operating under a Temporary Occupation License. A Letter of Allotment was issued for a 13 ha site in 1984, with the Title Deed (99 year leasehold) issued to Mr. Pelizzoli, the owner of the lodge, in 1994.

KSV has apparently been working with the Bajuni community in the nearby Mkokoni Village to help them gain title to the land in their village. The exact process by which this is taking place is not clear – whether the objective is individual titles or some kind of communal title. However, a Partial Development Plan has been prepared by the District Physical Planning Office, it has been gazetted and approved by the Minister of Lands, and a letter of allotment is being awaited since December 2007. The cost for surveying and registration is expected to be quite substantial - \$35,000 or so. There is also a plan to claim land rights for the corridor area between the village and the Doodori Reserve. Although connectivity between protected areas is

always a desirable outcome, it does not appear that this has particularly high conservation importance, and it is complicated by having formerly been occupied by other communities who left because of insecurity.

A number of beachfront plots south of Mkokoni appear to have been sold to individual developers through an illegal process, and this is a source of concern to the owners of KSV.

KSV charge a \$20 per day conservation fee. This money may go partly to KWS who wish to charge fees to all client snorkeling (rather than just swimming off the beach) but do not have the capacity to supervise this. KSV has apparently tried to negotiate a single reduced rate for all visitors, regardless of activity, but this has not yet been achieved. There is also a \$5 per person per day fee paid by KSV to Mkokoni Village under a Memorandum of Understanding. It seems that the community is responsible for cleaning a section of the beach area. They also receive benefits in terms of employment, sale of mats and fish, and support from private donors who visit the lodge.

Munira Island Camp

Munira Camp was started by Mr. Michael Kennedy in 1991 and is situated on the western side of Kiwayu Island. It is a much smaller operation and less formal operation than KSV and includes approximately 8 bandas. Munira Camp was established with consent of the local community, and has more recently been approved by KWS. Mr Kennedy rents the land from members of the community recognized locally as having a reasonable claim to the area. It is not clear whether they have title or not. Mr Kennedy has tried to buy the land but has not been successful.

Kassim's Camp

Kassim's Camp is in Kiwayu Village (hence inside the Kiunga Marine Reserve according to KWS) and was started in the early 1990's by Mr. Kassim Shahare from Mkokoni Village. It is not very active, and only has occasional visitors. There has been enormous disagreement amongst the villagers as to the true ownership of this piece of land and there is a long standing dispute between Mr Mohamed Kombo and Mr Shahare, who claims to have a Title Deed for it, possibly now in the possession of Mr. Joe Brunleiner, a coastal property speculator.

Kui

Kui Island is a 10 acre island within the Marine Reserve to the north of Kiwayu. It is currently uninhabited, although it has a long history of occupation by the Mbore people who now live on the mainland, now having been displaced to Kiunga because of the Somali troubles.

Two established tourism operators, Mr. Richard Bonham and Mr. Lars Korschen entered into an agreement with the community recognized as having ancestral rights over the island. They helped to register a Self Help Group for the community and a Trust to oversee the relationship between investors and community, and entered into a 30 year agreement. They have made a relatively small down payment and continued annual payments in order to maintain this option, but have not started development for two reasons.

- KWS insistence that all islands within the boundaries of the Marine Reserve belong to KWS, and therefore community claims are not recognized.
- A probably fraudulent title has already been issued and is in the possession of Mr Joe Brunleiner. This island is advertised for sale on the internet (at <http://www.privateislandsonline.com/kui-kenya.htm>) for €1.85 million.

Coastal Shompole

Mr. Anthony Russell, who owns Shompole Lodge near Lake Magadi in the Rift Valley, is planning to build a lodge on the mainland in the northern part of the Marine Reserve. Since he is planning to build above the 30 m mark this does not involve KWS and the status of the Reserve. The original plan was to build a formal lodge, but because of the proximity to the Somali border, it has been decided to build three ‘villas’ instead.

Mr. Russell has signed a 45 year agreement with the local community – which apparently includes about 150 people, some of whom have moved as far away from the area as Lamu and Mombasa. There are thought to be no more than 15 people actually resident in the area. Mr. Russell is apparently helping the local people to get title to the land, although again we do not have information on the exact process being followed. Presumably once this is done, he will be able to create a more binding agreement.

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