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I.P.A. Manning

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I.P.A. MANNING*

The Landsafe Socioecological Development Model for the Customary Commons of Zambia: Evolution and Formalization

ABSTRACT

Zambia is either customary land (94%) under some measure of control by chiefs and headmen, or state land (6%), comprising protected areas and land held under 99-year leasehold. Protected areas and their resources are prone to alienation by the state for mining, forestry, fisheries and wildlife exploitation. Customary land comprises villages and their surrounding agricultural land, the remainder being the customary commons that is harvested and plundered for its natural resources by residents, non-residents and criminals. It is also subject to alienation to leasehold by chiefs and government officials, and appropriated by the state for agriculture and agribusiness, forestry, fisheries, mining, tourism, wildlife conservation and game harvesting. Customary area residents with significant wildlife populations are 30% poorer than those living elsewhere. Customary residents have no ownership or harvesting rights to game animals. To counteract the open-access harvesting and plunder of customary land and the protected land associated with it, it is proposed that statutory trusts be established by customary communities, that customary land be vested in them, and that they enter into co-management custodial and harvesting agreements with the state in respect to fisheries, forestry, water and wildlife. Between 2003 and 2011, the author attempted to implement his model, called Landsafe, in two adjoining chiefdoms in the Luangwa Valley. This article proposes that the successful implementation of Landsafe would assure customary residents secure access to land and lasting benefits from renewable natural resources, essential to biodiversity conservation and to the socioecological and cultural integrity of Zambia.

I. INTRODUCTION

Statist governance in Zambia has failed to decentralize powers and responsibilities over land and renewable natural resources. Indige-

* Ian Manning, Ph.D., c/o The Center for Wildlife Management, University of Pretoria, South Africa—to whom all correspondence should be directed.

nous cultural and religious systems, when allied with the 94% of land under the *de jure* control of chiefs i.e., customary land, require institutionalized protection and management support. This article adheres to the Landsafe model, which suggests that a rediscovery of a peoples' evolutionary and adaptive success offers hope to failing patrimonial states such as Zambia.

September 23, 2011, marked the accession to power of a political party with an avowedly Christian ethical framework that encompasses stewardship of nature and a determination to reduce the size of government and decentralize.¹ A national network of customary areas provides fertile ground for an alternative cultural and socioeconomic development model to that of purely acquisitive capitalism and chronic donor dependency.

However, the state has demarcated parts of many of the customary areas as protected Game Management Areas (GMA) now under the control of its parastatal organization, the Zambia Wildlife Authority (ZAWA).² There are 36 GMAs all located within chiefdoms that have significant wildlife populations, most of which border protected areas. The Wildlife Act allows the minister, in consultation with the local community and ZAWA, to declare a GMA for the sustainable utilization of wildlife and for the "economic and social well-being of the local community."³ The Act also allows for the co-management of GMAs between ZAWA and their proxies, Community Resources Boards (CRB), to whom ZAWA may devolve authority for wildlife and natural resource management.⁴ In customary areas containing GMAs, land falling outside that classification is designated as open area.⁵

The Wildlife Act impinges upon the rights of customary residents in GMAs and open areas by requiring that they conform to the provisions of a management plan developed by "an appropriate board."⁶ It also empowers ZAWA in GMAs to extract tourism concession and land-user right fees to harvest game animals. Yet, biodiversity is unprotected, and villagers do not have the resources to protect themselves from animal depredations. Communities do not earn their share of income from these rentals and have few essential services. The state conservation

1. PATRIOTIC FRONT PARTY, OFFICE OF THE SEC'Y GEN., MANIFESTO 4 (2011), available at <http://www.scribd.com/doc/52257938/Patriotic-Front-2011-16-Manifesto>.

2. Zambia Wildlife Act No. 12 (1998) GOVT. GAZETTE (Acts), at Part V.26.1.

3. *Id.* at Part III.9.1.

4. *Id.* at Part III.

5. *Id.* at Part I.2 ("'open area' means an area other than a National Park, Game Management Area, bird sanctuary or wildlife sanctuary where wild animals are found.")

6. Zambia Wildlife Act No. 12 (1998) GOVT. GAZETTE (Acts), at Part V.28. See also *id.* at Part III.6.2.

agents criminalize and often abuse, imprison, and occasionally kill villagers seeking a subsistence living from renewable resources on their customary land.⁷

Given the control exerted by the state over natural resources and customary communities, the misconception that GMAs are state land is understandably widespread.⁸ Adding to this misconception is the state's addition of another protected area category within customary areas called Community Partnership Parks (CPP) where safari hunting is allowed.⁹

Indicative of the dangers of customary land alienation to state control was a proposed intensive development by ZAWA's Community Resource Boards in nine GMAs surrounding the Kafue National Park.¹⁰ In December 2008, Zambia became eligible to receive funding from the Millennium Challenge Corporation (MCC), initiating the Greater Kafue National Park Economic Development Project (GKNP Project) and overtaking plans to develop a number of Joint Management Concessions (JMC) with multiple investors in the National Park.¹¹ In September 2011, the Movement for Multi-Party Democracy (MMD) government canceled the JMC block-system proposal, for which ZAWA had recruited the services of a brokerage company funded by the World Bank, and handed it to the MCC, a bilateral U.S. foreign aid agency established in 2004. The GKNP Project of the MCC had the following broad aims:

7. Christopher Miti, *Police Nab Nyimba Villagers for Burning ZAWA Camp*, THE POST NEWSPAPERS (Zambia), Sept. 26, 2009; STUART A. MARKS, ON THE GROUND AND IN THE VILLAGES: A CACOPHONY OF VOICES ASSESSING A "COMMUNITY-BASED" WILDLIFE PROGRAM AFTER 18 YEARS (Mipashi Associates 2005); Phone Interview with Anonymous Community Leader (Oct. 2009) (A Chinambi villager, Peter Siyani, was killed on September 20, 2009—the fourth villager, in the same area, in the previous nine years.).

8. See, e.g., MARTIN MBEWE, THE ROLES OF TRADITIONAL LEADERSHIP AND COMMUNITIES IN COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT IN ZAMBIA 19-21 (2007), available at http://www.remnpas.org.zm/index2.php?option=com_docman&task=doc_view&gid=16&Itemid=57.

9. ZAWA Draft Act (2008) GOVT. GAZETTE (Acts), Part IV.10 (amending Zambia Wildlife Act No. 12 (1998)). "[T]o provide for the establishment, control and co-management of Community Partnership Parks for the conserving and restoring the native elements of biodiversity and their underlying ecological structure for non-consumptive forms of recreation and environmental education." *Id.* at 2.

10. CHEMONICS INTERNATIONAL, SITUATIONAL AND LIVELIHOODS ANALYSIS STUDY IN NINE GAME MANAGEMENT AREAS, SURROUNDING KAFUE NATIONAL PARK, ZAMBIA: PHASE 3: DRAFT LIVELIHOOD ANALYSIS REPORT FOR SELECTED GMAs AND PRELIMINARY RECOMMENDATIONS FOR MCC INVESTMENT IN GMAs (DELIVERABLE NO. 3) (2011).

11. PETER DE VERE MOSS, THE FEASIBILITY OF ESTABLISHING BLOCK TOURISM CONCESSIONS (NON-CONSUMPTIVE) IN KAFUE NATIONAL PARK, ZAMBIA WILDLIFE AUTHORITY, FTC:ZAWA/C/12/08 (2007).

To promote sustainable economic growth and poverty reduction in the greater KNP area through increased nature-based tourism, improved park and wildlife management capacity, and greater participation in tourism and diversified livelihood activities by the rural communities in the surrounding Game Management Areas (GMAs).¹²

The consultants recommended that the alienation of land to leasehold be allowed in the GMAs so that they would be able to maximize consumptive and non-consumptive tourism, citing the fact that private sector companies had already done so.¹³ Instead of an independent and decentralized customary community statutory structure, they recommended that the CRB be registered as a trust and that they carry out the development with a single nongovernmental organization (NGO) partner.¹⁴ These recommendations to the MCC raised considerable concerns of the possibility of yet another appropriation of customary land by ZAWA, acting in consort with a single outside agency. The recommendation for strengthening of CRBs and conversion to trust status so as to deliver Community Based Natural Resource Management (CBNRM) was a reversion to a notable CBNRM failure in Zambia, the Administrative Management Design for GMAs program (ADMADDE).¹⁵ Fortunately the MCC canceled the proposed project.

The Landsafe model is proposed to empower people of the customary commons¹⁶ through the formation of statutory trusts in which they may vest and secure customary land. Trusts would be empowered to negotiate and sign Co-Management Agreements (CMA) with the government in respect of wildlife, protected areas, forests, fisheries, and water resources. This model would protect forests, water resources, and vested lands in chiefdoms with significant wildlife. Furthermore, it would allow for controlled low-impact use by investors, such that they would not impinge unnecessarily on traditional rights or on the reestablishment of traditional guardians of nature. It would also give customary

12. CHEMONICS INTERNATIONAL, *supra* note 10, at 1.

13. *Id.* at 125.

14. *Id.* at 136.

15. I.P.A. Manning, *Wildlife Conservation in Zambia and the Landsafe Customary Commons* 61–65 (2011) (unpublished Ph. D. dissertation, University of Pretoria, South Africa) <http://upetd.up.ac.za/thesis/available/etd-06162011-151649/> (last visited July 10, 2012).

16. Customary Commons – all customary land, but in particular those natural resource elements outside of villages and village agricultural land - forests, atmosphere, rivers and lagoons, fisheries and wildlife that are shared, used and enjoyed by all the people residing on customary land under the authority of a chief; Commons – the elements of the environment enjoyed and shared by all.

communities greater powers of protection from alienation of their land to 99-year leaseholds, uncontrolled usufruct handouts by chiefs, or state appropriation.

The customary commons of Zambia are increasingly plundered for their natural resources. Burgeoning urban populations provide a market for the customary commons' bushmeat, charcoal, and fish stocks. Investors in industrial agriculture, in consort with the political elite, take over their customary land and force out the commons' traditional owners, destroying forests and water resources in the process.¹⁷ Mining companies dislocate villagers, imperil their health and pollute their ecosystems.¹⁸

Part I of this article describes the current condition of the customary commons. Part II describes the evolution of Landsafe. Part III outlines the procedural requirements to formalize and implement the Landsafe model.

II. THE CUSTOMARY COMMONS

De facto customary control of Zambia covers 94% of the territory,¹⁹ while *de jure* control is total in both the cultural and moral sense. In Zambia, land is either state (leasehold and protected land) or customary land. The prevalent system on customary land allows resident villagers to obtain usufruct²⁰ land rights, i.e., the rights to its use, for cultivation from a headman, in consultation with a chief.²¹ Once acquired, the community protects the land. Should the individual leave the land, it reverts once more to the control of the headmen and their chief. A chief usually

17. Ernest Chanda, *Zambia: Nansanga Bloc Farmers Face Homelessness*, THE POST (Aug. 17, 2011), <http://farmlandgrab.org/post/view/19090>; I.P.A. Manning, *The Kazangulu Land Clearance in Zambia*, FOOD CRISIS AND THE GLOBAL LAND GRAB (Apr. 17, 2011), <http://farmlandgrab.org/post/view/18458>.

18. COUNCIL OF CHURCHES IN ZAMBIA, PROSPERITY UNTO DEATH: IS ZAMBIA READY FOR URANIUM MINING? 13 (2010), available at <http://www.scribd.com/doc/38650866/Prosperity-Unto-Death-Is-Zambia-Ready-for-Uranium-Mining>.

19. MARTIN ADAMS, LAND TENURE POLICY AND PRACTICE IN ZAMBIA: ISSUES RELATING TO THE DEVELOPMENT OF THE AGRICULTURAL SECTOR 5 (2003), available at <http://www.aec.msu.edu/fs2/zambia/resources/Land1.pdf>.

20. AN INTRODUCTION TO LEGAL SYSTEMS: AFRICAN LAW (J Duncan M Derret ed., 1968) (Usufruct is "[t]he principle of customary tenure whereby anyone can have access to and the use of a piece of land but cannot claim any form of ownership of it." The latter implies in English jurisprudence—from which Zambia's laws are derived—title to the lands and full rights of management including the rights of alienation (ownership at law) but not necessarily possession or enjoyment of benefits which may belong to the owner at equity.); HUMAN PROBLEMS IN BRITISH CENTRAL AFRICA 1–3 (Max Gluckman & J.M. Winterbottom eds., The Rhodes-Livingstone Institute, 1945)

21. See generally Chiefs Act (1965) GOVT. GAZETTE (Acts) (Zam.).

does not extract taxes or food from individuals or headmen, the society being generally egalitarian. Less common are instances where lineages control land rights: where people able to trace their heritage from a common ancestry reserve the exclusive right to use and access agricultural land. In some areas, heirs of a matrilineage or patrilineage may sell land to people outside of their common ancestry.²² However, both systems allow for land not under usufruct in a chiefdom to be accessible to all residents for the subsistence harvesting of renewable resources such as those fisheries, forests, and wildlife which are not under the direct control of the state.

With the agreement of chiefs—and of ZAWA in GMAs—local District Councils may award a provisional certificate of title of 14 years.²³ This provisional title automatically expands to a 99-year renewable leasehold period after the completion of cadastral surveys and other requirements, unless the chief lodges a caveat. The chief can agree to alienate land, but the Commissioner of Lands, as lessor, controls the lease and extracts ground rents.²⁴ The amount of these ground rents is at the mercy of arbitrary decisions taken by the Ministry of Lands and issued in the form of statutory instruments.²⁵

Chiefs are now once more in the ascendant, despite their marginalization under the United National Independence Party (UNIP) and the subsequent removal of their administrative and business development roles. Chiefs were elevated, and in many cases, created, by the colonial provincial administration under the policy of Indirect Rule.²⁶ At a workshop in June 1997, the 50 attending chiefs recommended to institute the House of Chiefs as an upper legislative chamber.²⁷ The MMD

22. Charles Matthew Newton White, *A Preliminary Survey of Luvale Rural Economy*, in RHODES-LIVINGSTON PAPERS NO. 29 (1959), cited in Gear M. Kajoba, Land Use and Land Tenure in Africa: Towards an Evolutionary Conceptual Framework 2–3 (unpublished manuscript), available at <http://codesria.org/IMG/pdf/Kajoba.pdf>.

23. Bastiaan van Loenen, Land Tenure in Zambia (1999) (unpublished manuscript) (on file with the University of Maine Department of Spatial Information Engineering) 5, available at <http://www.spatial.maine.edu/~onsrud/Landtenure/CountryReport/Zambia.pdf>. A Provisional Certificate of Title is a certificate that a district counsel issues in accordance with the Lands and Deeds Registry Act No. 38 (1994) GOVT. GAZETTE (Acts) Part I.2.a.

24. Lands Act No. 20 (1996) GOVT. GAZETTE (Acts), Part II.11 (Zam.).

25. Jervis Zimba, *Press Statement on the Recent Increase of Ground Rent by the Ministry of Lands*, ZAMBIA NAT'L FARMERS UNION, http://www.znfu.org.zm/index.php?option=com_content&view=article&id=201:press-statement-on-the-recent-increase-of-ground-rent-by-the-ministry-of-lands&catid=46:press-statements&Itemid=67 (last visited Nov. 25, 2011).

26. FRANK MELLAND & CULLEN YOUNG, *AFRICAN DILEMMA* 39 (London, United Soc'y for Christian Literature eds., 1937).

27. LIISA LAAKSO, *MULTI-PARTY ELECTIONS IN AFRICA* 320 (Michael Cowan & Liisa Laakso eds., 2002).

government appointed the Clerk to the House of Chiefs, and the House merely served the bidding of the President, as revealed by the recent *volte-face* over the removal and reappointment of Senior Chief Luembe of the Ambo people, despite the recommendations of the House.

To some, “this continuation of the chieftaincy’s rule is an instance of undemocratic despotism.”²⁸ To others, Zambia needs to conjure up its own idea of development:

In the end really we will never achieve political or economic independence until we develop a distinctly Zambian idea to solving our economic problems. We are struggling to achieve local development because there’s no local idea of development and no vision of what institutions can deliver a more harmonious route to getting there.²⁹

A. Avoiding the Tragedy of the Commons

The alienation of customary land and untrammelled open-access to customary areas threatens the customary tenure system. The state and some chiefs alienate parts of customary land for mining, agribusiness, and game ranching.³⁰ Residents of the customary commons must also contend with outside plunderers in search of charcoal, fish, bushmeat, timber, and ivory, a state of affairs often described as the “tragedy of the commons.”³¹ Fears of this anarchical state are often used to justify interventions by external forces or greater centralized government control.³²

One reviewer defined three variants to state ownership and control of natural resources in Zambia as being either controlled open-access, regulated common-property regimes or private property regimes. This same reviewer complained of government’s failure to provide se-

28. Rohit Negi, “We Are the Implementers of Development”: Chiefs, Capital, and Politics in Zambia 1 (2008) (unpublished manuscript), available at <http://www.scribd.com/doc/9377824/We-are-the-implementers-of-development-Chiefs-Capital-and-Politics-in-Zambia>.

29. *A Cultural Approach to Zambia’s Development*. . . , ZAMBIA ECON. (Aug. 26, 2007), <http://www.zambian-economist.com/2007/08/cultural-approch-to-zambias-development.html>.

30. I.P.A. Manning, *Corrupt Use of Provisionally Alienated Customary Land*. . . , ZAMBIA LANDSAFE INVESTMENT (August 14, 2007), <http://zambialandsafe.blogspot.com/2007/08/corrupt-use-of-provisionally-alienated.html>. (Archived by WebCite® at <http://www.webcitation.org/5m9kBg7RT>, search date 2009-12-20).

31. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

32. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION*, 182 (1990).

cure property rights to local communities.³³ However, while regulated common-property regimes exist under usufruct, all customary land outside of that is *de facto* open-access.

There is a view within institutional economics literature that common-property resources evolve towards private property once land becomes scarce.³⁴ This may suggest that land should be privatized if the “tragedy of the commons” is to be avoided. While the lack of ownership rights over renewable natural resources does encourage resident “free-riders” to join in irresponsible harvesting, this should not encourage conversion of customary areas to private property, i.e., alienation to leasehold.

Open-access regimes greatly foster the natural human proclivity of time preference; people prefer to consume now, rather than later.³⁵ Residents of the present customary commons are essentially subsistence and peasant forage-farmers with the typically high time-preference rates evident in pre-industrial societies. Encouraged by the absence of ownership rights, it is extremely common to find instances of behavior that show scant regard for future benefits: fruit trees being cut down for a handful of fruit and the use of mosquito nets, as well as poison, to kill all age classes of fish. Clearly, this is in part a function of the destruction of traditional systems intended to manage natural resources. It is also a result of the removal of the authority of the chief over wildlife and the near total decline of the traditional guardians of nature, such as hunting guilds (*aChiwinda*). In short, it is a weakening of the authority, incentives, and controls necessary for maintaining the customary commons.

Since attaining independence, the state has used the customary commons and protected areas as sources of income from hunting concessions and photo tourism leases—such that they all but resemble leasehold alienations. This is well-documented in other parts of the world for forests that were once communal forests, and for inshore fisheries when national agencies presumed that they had exclusive jurisdiction over all coastal waters.³⁶

33. SAMUEL MULENGA BWALYA, CRITICAL ANALYSIS OF COMMUNITY-BASED WILDLIFE RESOURCE MANAGEMENT IN SOUTHERN AFRICA: CASE STUDY FROM ZAMBIA 3–4, http://www.cbnrm.net/pdf/bwalya_sm_001_zambiabwm.pdf (last visited Nov. 25, 2011).

34. E.g., Jean-Marie Baland & Jean-Philippe Platteau, *Division of the Commons: A Partial Assessment of the New Institutional Economics of Land Rights*, 80 AM. J. AGRIC. ECON. 644 (1998).

35. GREGORY CLARK, FAREWELL TO ALMS 171 (2007) (describing the time preference rate, which measures the strength of this preference as the percentage by which the amount of consumption of a good next year must be higher than consumption this year for people to be indifferent between consuming now rather or later).

36. OSTROM, *supra* note 32, at 23 & 144.

The current theory is that coercion or some other special device is required to make rational self-interested individuals act to achieve their common or group interest.³⁷ Chiefdoms largely disprove this theory. Traditional authority does curb some “free-rider” activity. However, it has yet to overcome state eco-imperialism, capitalist raiders, crime syndicates, and, in some cases, venal chiefs operating within an open-access regime.

B. Uncertainty and the Growing Alienation of Customary Land

In 1985, the Ministry of Lands set out the procedure to alienate customary land to a private person or body.³⁸ This was later incorporated in the Lands Act. The Lands Act leant this substance.³⁹ However, if land is alienated, and bankruptcy subsequently declared by the owners, the land reverts to the state and not back to customary ownership.

All land is vested to the President, who cannot, according to the Lands Act, alienate customary land unless it is with the consent of the chief and local authority, and then only after consulting affected bodies—in the case of GMAs, ZAWA.⁴⁰ The Zambian Constitution forbids the compulsory seizure of state land (which includes leasehold land) or of acquiring it in the absence of authority under the law. The Lands (Compulsory Acquisition) Act allows the President to acquire any property, i.e., leasehold land, supposedly in the public interest.⁴¹ However, if it is for agricultural development, the Constitution allows the President to take or acquire state or customary land from its owner or occupier.⁴² The state also has the right to carry out petroleum production.⁴³ Although all petroleum is vested in the President,⁴⁴ for petroleum operations in GMAs, national parks and protected forests, it requires the consent of ZAWA, the Department of Forestry and the chiefdoms in which the GMAs and forests are contained.⁴⁵ The Minister may also de-

37. OSTROM, *supra* note 32, at 6 (citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 2 (1971)).

38. Administrative Circular No. 1, Procedure on Alienation: Introduction (1985), reprinted in MARTIN ADAMS, *LAND TENURE POLICY AND PRACTICE IN ZAMBIA: ISSUES RELATING TO THE DEVELOPMENT OF THE AGRICULTURAL SECTOR* 63 (Jan. 13, 2003), available at <http://www.aec.msu.edu/fs2/zambia/resources/Land1.pdf> (Zam.).

39. Lands Act No. 20 (1996) GOVT. GAZETTE (Acts), at Part II.8.1 (Zam.).

40. *Id.* at Part II.4.

41. Lands Acquisition Act No. 13 (1994) GOVT. GAZETTE (Acts), at Part II.3 (Zam.).

42. *Id.* at Part IV.17.1.

43. Lands Acquisition Act No. 13 (1994) GOVT. GAZETTE (Acts) (Zam.).

44. Petroleum (Exploration and Production) Act No. 10 (2008) GOVT. GAZETTE (Acts), at Part I.3.1 (Zam.).

45. Mines and Minerals Act No. 7 (2008) GOVT. GAZETTE (Acts), at Part III.26.1 (Zam.).

clare an Environmentally Sensitive Area through statutory regulations allowing local authorities to so declare any area environmentally sensitive.⁴⁶ The powers of the President appear excessive. As Professor Hansungule in his report to the Zambia Land Alliance observed:

In his bid to pursue the ends of a comprehensive land policy, the President can dispossess any occupier or owner of land, including the Chief, who enjoys rights in that land and person claiming through and under them of the rights in that piece of land. It is remarkable these extensive provisions have not been used before by successive Presidents in customary areas. Nevertheless, the policy theme behind the clause is that in the interests of the public, the State should have higher hierarchy than the individual or even group of people as in customary areas.⁴⁷

In theory, customary law does not give chiefs the same powers; the chief can only request a landholder to return land to customary authority.

Land may also be alienated to foreign investors (subject to the normal processes and procedures) who obtain an investment certificate from the Zambia Development Agency within the Ministry of Commerce.⁴⁸ With suitable investment pledges in an application, the Ministry may issue an investment certificate to a noncitizen.⁴⁹ However, the pledges that make possible the alienation are rarely enforced.

The Fifth National Development Plan (FNDP), which commenced in 2006 and concluded in 2011, was a medium term planning instrument intended to focus government policy. Where land was concerned, it concentrated on the issue of attaining land, saying little about customary land and the culturally grounded rights of its people.⁵⁰ The plan also failed to respond to the House of Chiefs' statement to the FNDP workshop that: "We should be allowed to retain absolute title to our land while giving investors and non-subjects renewable lease rights under various chieftdom trusts." Hansungule commented:

And then where is the value system? A Plan that is tailored to work in Zambia should articulate Zambia's values. The title

46. Environmental Management Act No. 12 (2011) GOVT. GAZETTE (Acts), at Part III.24.3 (Zam).

47. MICHELO HANSUNGULE, ANALYSIS OF ZAMBIA'S FIFTH NATIONAL DEVELOPMENT PLAN: REPORT TO THE ZAMBIA LAND ALLIANCE 8 (2007).

48. Zambia Development Agency Act No. 11 (2006) GOVT. GAZETTE (Acts), at Part IX.64.1.

49. *Id.* at Part X.69.

50. REPUBLIC OF ZAMBIA, FIFTH NATIONAL DEVELOPMENT PLAN (2006), available at <http://www.imf.org/external/pubs/ft/scr/2007/cr07276.pdf>.

deed, which the Plan advocates proposes to fast-track land delivery, is good but it is still not the main value system to the majority of people in Zambia. Most people still share land and therefore de-emphasize individuality which is why there is relative security in the country. Even as they develop and adopt new ideas and systems, a Plan should plan for people based on their civilization. You can't impose alien ideas on people and expect to succeed. There is serious need to contextualize the Plan so that it can reflect the society it is going to operate. It must not only aim to attract money as the sole motive for the land reform. More than that, to create, recreate and deepened the value system in land as in society generally as the primary objective.⁵¹

The Land Alliance, a civil society organization made up of a number of NGOs, weighed in with the following:

In relation to the over ambitious aim to promote title deeds in rural areas, the policy should consider leasing of land under customary tenure system directly without first converting such land to the state land. Such lands must continue to be in the hands of traditional rulers without the local communities losing their customary rights to the leased land. Failure to do this could perpetuate whole selling of agricultural land by speculators to the rich minority, as has been the experience in the last seven (7) years under the 1995 Lands Act.⁵²

There have been many delays in the lands policy, in part because the Ministry of Lands was waiting for finalization of the ongoing constitution review process before proceeding to adopt draft land policy.⁵³ Fortunately, the proposed Constitution of Zambia (Amendment) Bill 2010 did not receive the mandatory two-thirds majority in the National Assembly in March 2011, as it would have greatly compromised the security of customary land. However, it did delay the issue of the Lands Policy, now awaiting action by the Patriotic Front government.

C. Problems Arising from Game Management Areas (GMA)

The Wildlife Act makes certain legal assumptions about the control of GMAs and customary land.⁵⁴ These assumptions contradict cus-

51. HANSUNGULE, *supra* note 47 at 18.

52. CIVIL SOCIETY LAND POLICY REVIEW COMMITTEE, ZAMBIA LAND ALLIANCE, INITIAL POSITION PAPER ON THE DRAFT LAND POLICY §3 (2003).

53. E-mail from Henry Machina, Executive Director, Zambia Land Alliance to author (May 18, 2009, 16:15) (on file with author).

54. Zambia Wildlife Act No. 12, *supra* note 2.

tomary law, the Lands Act of 1995, and such traditional practices under common law as contracts of agistment,⁵⁵ whereby owners of livestock are obliged to rent grazing rights. Few management plans of any substance have been forthcoming for GMAs and national parks under ZAWA's management.

ZAWA, as the "owner" of wildlife, pays no agistment or rental for its game animals that feed on customary land, though it extracts concession rentals and game trophy fees from the same animal stocks. Originally, ZAWA paid half of all hunting concession and trophy fees to CRBs, but an ad hoc ZAWA committee later reduced concession fees to 20 percent—in both cases 5 percent going to the chief. At a meeting in late 2006, CRBs and ZAWA agreed to share income equally. ZAWA has not honored this agreement.⁵⁶

The state of biodiversity in GMAs has seriously deteriorated under ZAWA and the MMD government with increasing brittleness of rangelands, deterioration in carrying capacity, and greatly diminished wildlife and forests.⁵⁷ Critically, the people of GMAs are denied ownership or proper access to the benefits of the natural resources on their customary land, and are criminalized in their subsistence hunting.

A report on GMAs summarized its findings as follows:

This report paints an alarming picture of Zambia's GMAs in terms of economical, sociological and ecological benefits. Chapter 2 reveals that the commercial flow to GMAs is probably decreasing. Chapter 3 illustrates that natural habitats and wildlife are decreasing at an alarming rate in most GMAs. Chapter 4 shows that GMA communities are 30 percent poorer than the average Zambian rural communities. Chapter 5 shows that 31 out of 36 GMAs fail to meet the requirements for minimum management effectiveness.⁵⁸

Whilst mandated to protect a very large protected area estate, ZAWA had since 2001 spent a mere 7–18 percent of its total expenditure on op-

55. AN INTRODUCTION TO LEGAL SYSTEMS, *supra* note 20.

56. I.P.A. Manning, *Chief Kasempa Complains of the Lack of Benefits from Tourism in His Area*, ZAMBIA CONSERVATION (Feb. 4, 2007), <http://zambiaconservation.blogspot.com/2007/02/chief-kasempa-complains-of-lack-of.html>. (Archived by WebCite® at <http://www.webcitation.org/68pLtapuA>, search date 2012-07-01).

57. ALLAN SAVORY & JODY BUTTERFIELD, *HOLISTIC MANAGEMENT: A NEW FRAMEWORK FOR DECISION MAKING* 21 (1999).

58. PHYLLIS SIMASIKU ET AL., *THE IMPACT OF WILDLIFE MANAGEMENT POLICIES ON COMMUNITIES AND CONSERVATION IN GAME MANAGEMENT AREAS IN ZAMBIA* vii (2008), available at http://www.aec.msu.edu/fs2/zambia/Impact_of_Wildlife_Mgt_Policies_on_Communities_and_Conservation.pdf.

erations, i.e., biodiversity research and protection.⁵⁹ Another consultant recorded that, “over the three years 2003 to 2005 the HQ budget increased by 46%, while the global regional office and AMU budgets (where the real work is done) decreased by 4% and 19%, respectively.”⁶⁰

Furthermore, the rural elite capture—by way of travel allowances, accommodation, and meeting stipends—most of the money received by CRBs from ZAWA.⁶¹ In the midst of this corruption, most CRBs remain unpaid. In May 2009, for example, the Nyalugwe and Luembe CRBs, with 41 Village Scouts, were owed 14 months’ salary on average.⁶² Some of them had waited more than three years to be paid. Therefore, ZAWA and the CRBs are a significant factor in this poverty differential.

Of concern in Zambia is the plight of women in general, and widows in particular, with 28 percent of GMA households being female-headed compared to 22 percent in non-GMAs. Female-headed households living near national parks on average enjoy 19 percent less per capita consumption than male-headed households.⁶³ In addition, land grabbing is a pernicious custom, whereby on the death of her husband, a woman is descended upon by her husband’s family and other parasites and divested of land and chattels. A revolutionary socioecological change in GMAs is necessary in order for the customary community to see any improvement in its life prospects. Conservation of wildlife and other natural resources must be part of a sustainable solution.

D. Strategies for Customary Community Resource Ownership

Given the threat to the customary commons, it is essential that customary communities court cabinet offices and make inputs into parliamentary subcommittees to regain natural resource ownership on their lands.⁶⁴ However, customary communities are presently incapable of

59. CHANGA MGMT. SERVS., DRAFT TECHNICAL REPORT: ASSESSING THE CURRENT STATUS OF ZAMBIA WILDLIFE AUTHORITY STRATEGIC PLAN IMPLEMENTATION 49–51 (2006). The percentage allocated to operations greatly increased in the final Changa report, though there is no explanation for this change. I.P.A. MANNING, A BRIEF COMMENT OF THE FINAL CHANGA REVIEW OF THE ZAWA STRATEGIC PLAN (PHASE 1) 63 (Nov. 3, 2006).

60. ADAM POPE, A PRELIMINARY EXAMINATION OF PUBLIC PRIVATE PARTNERSHIPS IN NATIONAL PARK MANAGEMENT IN ZAMBIA 15 (2006), available at http://www.aec.msu.edu/fs2/zambia/resources/Adam%20Pope%20PPP%20evaluation%20rev%2027%207%2006%20final%20report_.pdf.

61. SIMASIKU ET AL., *supra* note 58, at 17–19.

62. Letter from Nkhoma Goods Andrew of ZAWA/SLAMU Nyimba CBNRM Unit to The ZAWA/SLAMU Unit Leader (May 26, 2009) (discussing salary arrears in respect of Luembe and Nyalugwe CRBs) (on file with author).

63. SIMASIKU ET AL., *supra* note 58, at 20.

64. CMTY-BASED NATURAL RES. MGMT. & SUSTAINABLE AGRIC. (CONASA), POLICY AND LEGISLATION REVIEW OF THE FISHERIES, FORESTRY, WILDLIFE AND WATER SECTORS VIS-A-VIS

taking on this role. To do so would require a large funded program with considerable political and legal force. The secretary general of the Patriotic Front Party suggested that the author assist in the formation of a foundation dedicated to rural development, one having the mission of reviving and protecting the Zambian cultural heritage in areas of land, participatory community development, and sustained natural resource management.⁶⁵

Such a mechanism may assist Zambia in avoiding such eventualities as the 1994 Zapatista movement in Mexico that fought the alienation of the peasant commons (the ejido) and the awarding of land to agribusiness. The legacy of the Zapatista movement revealed two irrefutable facts: 1) power should not be concentrated at government level, merely changing hands between political elites at election time; and 2) it is foolish to expect government to hand down power of its own accord.⁶⁶

III. THE EVOLUTION OF LANDSAFE

The Landsafe model developed from an earlier model, developed by the author, called the Chipuna. This was a simple investment mechanism model symbolized by the traditional African stool (Chipuna in Bemba) with three legs representing the chief, the community, and the investor. The Landsafe model subsequently emerged. The principal objectives of Landsafe are to safeguard customary land and its associated protected areas, as well as to conserve wildlife and natural resources for the benefit of the chiefdom. To achieve this, it is first necessary to create chiefdom institutions into which to vest land. These institutions may also enter into contracts with the government over land and renewable natural resources, in conformity with a number of laws.⁶⁷ All other objectives concern the incremental raising of living standards while respecting national culture and traditions. A critical aspect of the Landsafe model is to safeguard and utilize trust funds under common agreement.

COMMUNITY BASED NATURAL RESOURCE MANAGEMENT 20–21 (2002), available at www.rmportal.net/library/content/nric/3478.pdf/at_download/file.

65. Interview with Wynter Kabimba, Secretary General of the Patriotic Front Party of Zambia (Feb. 23, 2010).

66. PAUL KINGSNORTH, ONE NO, MANY YESES: A JOURNEY TO THE HEART OF THE GLOBAL RESISTANCE MOVEMENT 20 (2004)

67. See The Fisheries Act (1974) GOVT. GAZETTE (Acts) (Zam.); Fisheries (Amended) Act (2007) GOVT. GAZETTE (Acts) (Zam.). See also Forestry Act No. 39 (1973) GOVT. GAZETTE (Acts) (Zam.); Forestry Policy (1998) GOVT. GAZETTE (Poly.) (Zam.); Forestry Act No. 7 (1999) GOVT. GAZETTE (Acts) (Zam.); Local Forests (Control and Management) Regulations No. 47 (2006) GOVT. GAZETTE (Stat.) (Zam.); Lands Act (1995) GOVT. GAZETTE (Acts) (Zam.); Water Act (1948) GOVT. GAZETTE (Acts) (Zam.); and Zambia Wildlife Act No. 12 (1998) GOVT. GAZETTE (Acts).

A. Categorization of Stakeholders in Landsafe Chiefdom Development

Following a community's preparation and provision of a land-use plan, the community may draw up and make available specific and appropriate development options for investors. In addition, donor assistance on specific needs requirements is invited, but at the micro level and working through the statutory community structure. In order for Landsafe to advance, it is important to describe clearly the hierarchy of stakeholders involved in the process. The most important are primary stakeholders—the chief, the headmen, and the customary community itself. They are then followed by a secondary stakeholder group comprising the appropriate government ministries and departments.⁶⁸ These two categories are then complemented by the key stakeholders, who have direct responsibility for developing and implementing an area development plan.⁶⁹ This group might also describe formally established institutions formed amongst the local population, which have as their main interest conservation and development of their area.

B. Statutory Institutions Supporting Primary Stakeholders

To both protect land from alienation and to ensure responsible use of natural resources on customary land, it is necessary to form statutory community institutions for collective action. The establishment of a cooperative is an entry-level legal mechanism for binding a small or large group of people having a similar intent and interest, one not necessarily bound up with the sale and purchase of goods.⁷⁰ However, a community should ideally form a society under the Societies Act, Chapter 119. A society must be drawn from the customary community itself, with its elected representatives sitting as members. Registration of a society in a rural area requires a written endorsement for the society application from the Chief, the District Community Development Officer, the District Secretary, the Zambia Police, and the security division of the Office of the President.⁷¹ The society may then be converted to a statutory trust. There are two options available to a customary authority. The first option is to create a trust under the Lands Act. Under this option, the Min-

68. Zacharia J.U. Malley et al., *Environmental Change and Vulnerability in the Usangu Plain, Southwestern Tanzania: Implications for Sustainable Development*, 14 INT'L J. SUSTAINABLE DEV. & WORLD ECOL. 145, 157–58 (2007) (discussing processes of policy formation and development attitudes).

69. *Id.*

70. See generally, The Co-Operative Societies Act (1998) GOVT. GAZETTE (Acts) (Zam.).

71. A requirement enforced “administratively” under the MMD government. Societies Act (1994) GOVT. GAZETTE (Acts), at Part II (Zam.).

ister of Lands formalizes the trust once a society petitions the minister for incorporation of a society as a trust. The second option is to register a trust company limited by guarantee, where formalization is by registration under the Companies Act. Such a trust should have a suitable constitution, which draws up to ten trustees from the chiefdom community, creates a trust fund, and appoints auditors.

IV. THE FORMALIZATION AND IMPLEMENTATION OF LANDSAFE

Results of a recent survey provide support for the Landsafe approach.⁷² This survey argued for recognition of a community structure as the holder of devolved rights.⁷³ It also concluded that negotiations between state and traditional authorities are necessary to confer the status of the community structure, as “holder[] of land and resource rights,” subject to agreed conditions.⁷⁴ It made clear that: “This does not imply alienation of customary land but formalizing such an allocation of land through a legal document.”⁷⁵

Persuading chiefs and their people of the merits of a particular approach to development offering greater control of their resources, as well as some protection for investors, is a slow and arduous process. The culmination of this process is the signing of contracts of agreement. The first contract is the signing of a memorandum of understanding (MOU) between the customary authority, the District Council, and a facilitator for the implementation of a Landsafe development. The second is the establishment of a chiefdom or community society, followed by that of a trust. The third is the signing of a CMA between the trust and government ministries responsible for water, fisheries, forestry, and wildlife.

A. Land Vestment and User Rights

A society under Zambian law has no legal capacity to hold land. Therefore, when a community wishes to vest land, it must, following the registration of a society by the Registrar of Societies, establish a trust and have the certificate of incorporation registered in the Registry of Deeds and upon registration then “vest in such body corporate all land or any

72. See DEV. SERVS. AND INITIATIVES, REVIEW AND SYNTHESIS OF LESSONS LEARNED CONCERNING OPTIMUM FORMS OF COMMUNITY MANAGEMENT STRUCTURES FOR MULTIPLE RESOURCE MANAGEMENT IN ZAMBIA AND SOUTHERN AND EASTERN AFRICA 38 (2008), available at http://www.remnpas.org.zm/index2.php?option=com_docman&task=doc_view&gid=17&Itemid=57.

73. *Id.* at 17.

74. *Id.* at 19.

75. *Id.*

interest therein, of what nature and tenure soever, belonging to or held by any person or persons in trust for such community, body or association of persons.” Before a Trust is registered with the Registrar of Lands and Deeds it requires prior exemption from registration by the Registrar of Societies.⁷⁶

In the case of the Nyalugwe Conservation Society, the minister was petitioned to vest customary land in the Nyalugwe Conservation Trust under the Lands (perpetual succession) Act. The minister first studied the details of the land and the purpose for which it was required, and then approved it and allowed it to be registered with the Registrar of Lands and Deeds.⁷⁷ The Nyalugwe land was not alienated to 99-year leasehold, but placed under the trust in perpetuity. This trust is now able to assign the land-user rights.

Should investors wish to make use of the land and natural resources of the chiefdom under their management and development plans, they may enter into a land-user rights re-assignment agreement with the community trust. The land-user rights process requires that the trust—as holder of land and rights to co-manage renewable natural resources—provide the overall land use and business plans for the chiefdom. The trust may then enter into leases and business concessions with investors. To develop a business, investors are required to tender a business proposal to the trust, which will lead to the compilation of a full business plan. If the intention of a chief or a trust is simply to assign land-user rights to investors, then ZAWA is not involved at all in open areas, only in GMAs.

B. Co-Management Agreements

1. *Wildlife*

For trusts to sign CMAs with the state over wildlife, they need to first elect and register a CRB for that chiefdom. The Wildlife Act provides the statutory process for registration of a CRB.⁷⁸ On application to conduct game ranching on vested land, ZAWA will carry out its own ecological and social surveys. The latter is a sample of the views of the population in order to assure ZAWA that enough headmen and villagers are in favor of the scheme. In addition, this will require the CRB/trust to

76. CHIEF MPUMBA, MPUMBA COMMUNITY CONSERVANCY, MPUMBA NATURAL RESOURCES CONSERVATION SOCIETY (2002) (on file with author).

77. Land (Perpetual Succession) Act (1964) GOVT. GAZETTE (Acts), at Part III.1 (Zam.).

78. Zambia Wildlife Act No. 12, *supra* note 2, at Part III.6.3 & Part III.9.1.

provide a game management plan based on the ZAWA template. If safari hunting is an option, then a trust can apply for a quota.⁷⁹

2. *Game Management Areas*

To formalize a CMA in a GMA, a trust may take several approaches. It could either:

- Sign a CMA with CRB/ZAWA for the management of a GMA's wildlife in the chiefdom and the retention of full tourism use; or
- Vest the GMA in a chiefdom trust and follow the procedure required for a community game ranch; or
- Follow the procedure for a Community Partnership Park by applying to ZAWA (not recommended as this is much the same procedure as followed by chiefdoms in colonial times when trust land was converted to game reserve and national park).

One of these approaches is essential if the community is to maintain the socioecological integrity of customary land, whilst allowing the state, for a bridging period only, to derive income.

3. *National Parks*

Where the chiefdom adjoins a protected area, that chiefdom, through its community structures, should persuade the state to agree to a flow of benefits to the chiefdom. Chiefs originally agreed to this during the process of converting trust land into game reserve and national park.⁸⁰ Formalization, therefore, requires a CMA between the trust and ZAWA.

4. *Local Forests and Unprotected Forest on Customary Land*

Statutory Instrument No. 47 of 2006 lays out regulations for a CMA known under forestry as Joint Forest Management Areas (JFMA). These regulations require the creation of forest trusts for proposed JFMAs. Each forest trust requires a forest committee, which comprises representatives of the chief, the local forest office, the District Council, and one representative of each village committee—the latter comprising the headman, a representative of the user group and a forestry officer. The regulations require the village committee to: 1) advise the forestry officer on the issue of licenses; 2) appoint honorary forest rangers; and 3) elect members to the forest management committee. The statutory instrument defines no such committee. Though the Forest Act defines the

79. *Id.*

80. FRANK FRASER DARLING, *Wild Life in an African Territory: A Study Made for the Game and Tsetse Control Department of Northern Rhodesia* 128 (1960).

term, it is still subject to a commencement order from the minister.⁸¹ JFMAs are bound to the Forestry Department and the trust through a CMA, which allows for management of forestry, licensing, and income under its control. The trust may also make application to the Forest Stewardship Council for certification.

5. National Forests

In national forests, the trust must sign a CMA with the Forestry Department in the form of a Joint Forest Management Agreement, though this requires the issuance of a commencement order by the minister in order for the new Forests Act to be enacted.⁸² An interim cooperative arrangement should be possible in light of the prescriptions of Statutory Instrument No.47 of 2006, which lays out regulations for Joint Forest Management Areas.

6. Fisheries

The community trust applies to the Fisheries Department for a fisheries management area CMA, the declaration of a fisheries management area, and recognition of an elected fisheries management committee.⁸³ The minister ratifies these subject to consultation with the trust or/and riparian communities involved. The committee is responsible for the production of the management plan and the creation of a fund to pay all license money beneficial to the economic and social well-being of the riparian community. The committee must prepare an annual report and submit audited accounts to the minister. Members of the committee comprise six villagers, one chief's representative, one district council representative, one from a NGO operating in the area, one each from the fishing industry and aquaculture industry, and two other persons, vetted by the minister. The minister also appoints the chairman and vice-chairman. In consultation with the director, the fisheries management committee may enter into CMAs with industrial fishing companies, or with NGOs. Aquaculture ventures must be licensed and operate only under certain conditions. To formalize a fishery, the trust must apply to the Forestry Department for a Fisheries Management Area CMA in the form of an MOU.

81. Forests Act (1999) GOVT. GAZETTE (Acts), at Part V.26 (Zam.).

82. *Id.* at Part V.35.

83. *See*, Fisheries Bill (2011) GOVT. GAZETTE (Acts) (Zam.).

7. *Water*

A trust may enter into a CMA with the Department of Water Affairs, or the catchment council when established, so that the chieftdom may best manage its water resources. Currently, Water Affairs plans to create catchment and sub-catchment councils.⁸⁴ The trust may sign a CMA with the Department of Water Affairs to provide basic water management plans. Any water project applications submitted to the Water Board should be guided by the plan.

C. Appointment of Chieftdom Advisory Committees

As the Landsafe model evolves under field conditions, it is important to test its assumptions. Trusts formed under perpetual succession require an advisory committee, as the trust itself is a wholly community organization set up under the Ministry of Lands. Where trusts fall under the Companies Act, they already partially mirror the proposed advisory committee due to representation on the trust by the District Council as well as the CRB. The Customary authority and the District Council should appoint advisory committee members from all stakeholders. They should comprise national and district members.

V. CONCLUSION

The expected outcomes of the Landsafe model are fivefold. First, the model will enable a chieftdom to operate securely as a functioning customary commons in which the land is sacrosanct. Second, it will guarantee usufruct rights of both men and women. Third, it will support collective land-use agreements over common-access rights. Fourth, it will allow for exploitation of renewable natural resources and mineral mining only under CMA land vested by the customary authority. Finally, it will place investors, foreign aid, and NGOs under the control of a land-use plan and a properly institutionalized customary commons.

84. Water Resources Management Act (2011) GOVT. GAZETTE (Acts), at Part III.17 (Zam.).