



ZAMBIA CUSTOMARY LAND DOCUMENTATION TENURE ASSESSMENT

TENURE AND GLOBAL CLIMATE CHANGE (TGCC) PROGRAM



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Cover Photo: Community Members in Sandwe Chiefdom, Petauke District, Eastern Province, discuss land use and land tenure conditions (Megan Huth)

Report Authors: Melissa Hall, James Murombedzi, Mpala Nkonkomalimba, Pamela Sambo, and Matt Sommerville

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Prepared by: Tetra Tech
159 Bank Street, Suite 300
Burlington, VT 05401

Principal Contacts: Matt Sommerville, Chief of Party
Matt.Sommerville@tetratech.com

Cristina Alvarez, Project Manager
Cristina.Alvarez@tetratech.com

Megan Huth, Deputy Project Manager
Megan.Huth@tetratech.com

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PROGRAM

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DISCLAIMER

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ACRONYMS AND ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
DNPW	Department of National Parks and Wildlife
CSO	Civil Society Organization
GMA	Game Management Area
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
MLNREP	Ministry of Land Natural Resources and Environmental Protection
MMD	Movement for Multi-Party Democracy
STARR	Strengthening Tenure and Resource Rights
TGCC	Tenure and Global Climate Change
UDHR	Universal Declaration on Human Rights
UNECA	UN Economic Commission for Africa
UNIP	United National Independence Party
USAID	US Agency for International Development

1.0 INTRODUCTION

This assessment examines the legal framework associated with customary land tenure and customary land administration in Chipata District of Eastern Province, as well as current practices carried out by traditional leaders, including chiefs, chief advisors, and headpersons. The assessment has been used to inform the design of a customary land certification program, which has the primary goal of testing the hypothesis that households with land documentation will invest in more climate-smart agricultural practices, specifically agroforestry. The program is being carried out from 2014 – 2018 through a randomized control trial including treatments related to land documentation and agroforestry extension. Interventions were carried out at the village level, seeking to include all interested community members. The agroforestry interventions were carried out by an independent organization and there was no communication between the land and agroforestry implementing organizations despite geographic overlap. The findings of the assessment were used to inform the design of the customary land documentation process in Chipata, and will be used as background for other customary land documentation efforts in Zambia.

The Tenure and Global Climate Change (TGCC) task order is funded by the United States Agency for International Development (USAID) under the Strengthening Tenure and Resource Rights (STARR) Indefinite Delivery/Indefinite Quantity. The aim of the task order is to identify and test models that strengthen resource governance and property rights as they relate to successful climate change programming.

Climate change impacts and interventions in response to climate change are significantly affecting resource tenure governance, the rights of communities and people, and their livelihoods. In turn, resource tenure and property rights issues may strengthen or undermine successful implementation of climate change-related initiatives. Interventions that strengthen resource tenure and property rights governance can help reduce vulnerability and increase resilience, as well as achieve other resource governance objectives, such as wildlife conservation and development of a rural wildlife-based economy. The task order consists of four tasks and contains a grants under contract mechanism to support these task areas. In Zambia, the task order pilots tenure interventions that strengthen land rights as an enabling condition for the promotion and adoption of climate-smart land use practices through work in the Chipata and Petauke Districts of Zambia's Eastern Province.

1.1 METHODOLOGY

This assessment integrates information from a collection of reports on Zambia's legal framework as it relates to land, natural resources, and traditional leaders in customary areas across Zambia; community governance structures in Eastern Province; the status of land documentation and administration in five chiefdoms of Chipata District; and, gender issues related to participation in land management. It also relies on data collected from interviews with 134 villages across Chipata District in 2014 and the baseline data collection findings from an impact evaluation¹.

¹ Additional documents related to TGCC's work in Zambia can be found at <https://www.land-links.org/project/tenure-global-climate-change-zambia/>.

1.2 ZAMBIA'S DUAL TENURE SYSTEM

In Zambia, as in many other countries in Africa, an enduring impact of colonialism has been the creation of dual tenure systems, freehold and customary. Generally, customary tenure systems are communal and their management is derived from customary norms and principles. Communal tenure refers to systems that combine individual/family rights to land and natural resources with group oversight and rules to keep land within the group. Communal systems are mixed regimes, comprising various bundles of individual, family, sub-group, and large group rights and duties. In communal tenure systems, land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks (see e.g. Bruce, 1998). Rights are derived primarily from accepted membership of a social unit, and can be acquired via birth, affiliation, or allegiance to a group and its political authority, or transactions of various kinds – including gifts, loans, and purchases. Land and resource rights may include both strong individual and family rights to residential and arable land and access to a range of common property resources such as grazing, forests, and water. They are thus both “communal” and “individual” in character.



There is an active demand across Zambia for documentation of customary land rights, either through customary certificates or a transition to leasehold title deeds.

The dual systems developed during colonialism allowed for the development of full property rights in land in the freehold sector, which facilitated the commoditization of land through land markets. Customary tenure, on the other hand, not only prevented the emergence of land markets but also created new forms of land governance in which all customary lands were deemed to be held in trust for the people by chiefs or other traditional authorities. As a result, in Zambia customary land cannot be bought or sold and by law has no monetary value.

Although the statistics are conflicting, the bulk of Zambia’s land is held under customary tenure. According to the Lands Act (1995), all land in Zambia belongs to the state. Customary land is held in trust by the president through the traditional authorities, Zambia’s 288 chiefs. Statutory land is governed and administered by a variety of statutory institutions including the Ministries of Lands, Natural Resources and Environmental Protection (MLNREP), the Forest Department, and municipalities and other urban authorities. Statutory land is also leased out to individuals on long-term leases of up to 99 years. There are no private titles, as these were abolished and converted to leasehold in the 1975 Land (Conversion of Titles) Act during the Kaunda administration. The definition of customary areas and state land are defined by the Lands Act of 1995 based on the status of land at the time of independence and thus are inflexible. In practice, however, land that has been converted to state leasehold tenure within customary areas often loses its relationship to the traditional authorities. Other exclusive state uses are present on ostensibly customary land, for example national parks. Game management areas (GMAs) also often have restrictions on use by smallholders. The current state of national land records, and the incentives for landholders not to complete the process of converting customary land to state land, makes this figure impossible to verify at present.

2.0 LEGAL FRAMEWORK FOR TENURE IN ZAMBIA

As a consequence of British colonialism, English common law remains an important influence in Zambia and serves as the primary basis of the country's legal system. Zambia has relied upon English common law since the 1890s; it both influences Zambian legislation and legal processes and serves to fill legal gaps. In some cases this leads to government inefficiencies, where laws that address current social and economic concerns have not been developed. Zambia has a hybrid common law system which has constitutional law at the apex, followed by statutory law enacted by Parliament, common law, case law, customary law, and authoritative texts (which are not binding). Customary law is overridden by common law and case law in the line of priority. Customary law is recognized to the extent that it is not "repugnant" to justice, good morality, and equity; however, the courts apply written English law as a preferred precedent in the determination of cases. The repugnancy clause as interpreted makes customary law inferior to common law, and requires that the validity of customary law is determined against English norms of legality, justice, and morality (Muna Ndulo, African Customary Law, Customs and Women's Rights 2011).

2.1 ZAMBIAN LAW

The Constitution: At the time of TGCC program design, Zambia's 1991 Constitution was the supreme law of the land, and all other Acts of Parliament derived their validity from it. Any act passed by Parliament that is inconsistent with the provisions of the Constitution is considered invalid. The Constitution prohibits laws that discriminate based on gender, but specifically excludes personal and customary law from this prohibition.

Perhaps the most significant portion of the Constitution with regards to land is Part III, the Bill of Rights, which offers enforceable and guaranteed protection of rights. The Bill of Rights recognizes and promotes the right of individuals to choose their language and their cultural life, and additionally upholds the right not to be discriminated against. In interpreting the Bill of Rights, Zambian courts have recognized international conventions ratified by the government and allowed private individuals to sue another for breach of their rights.

The Bill of Rights has posed challenges in the enjoyment of these customary land rights as those rights have been abrogated with crawl-back clauses. The right to deprivation of property has exception or derogation clauses, which suggest that the right may not be sufficiently protected. The relaxation of fundamental rights is stated in Article 25, Derogation from Fundamental Rights and Detention of the Constitution. This provision exposes individuals to abuse of their rights in the periods mentioned therein. In comparison with other constitutions in the region, the range of civil and political rights protected under Zambia's Bill of Rights is not exhaustive; for instance, it does not provide for minority rights or the right to self-determination.

Zambia's Constitution was under review from 2014 to 2016. The draft Constitution that guided the program design provided for (1) equitable access to land and associated resources; (2) equitable access to and ownership of land by women; (3) land tenure security; (4) sustainable and productive management of land resources; (5) transparent and cost effective management of land; (6) conservation and protection of ecologically sensitive areas; and, (7) cost effective and efficient settlement of land

disputes. In addition, it provided for the continuation of the existing dual tenure systems and called for legislation to revise existing land laws; prohibit land speculation; address imbalances in land alienation; provide for periodic land audits; provide a means for securing customary tenure; provide equitable access to state land; enable settlement of landless people; and, establish minimum and maximum holdings of arable land. The approved Constitution ultimately simplified the language in the land section, in part due to significant disagreement between chiefs and government over language on the vestment of land in the office of the president.

The Lands Act: The Lands Act was enacted in 1995 to provide a framework for the regulation and governance of land administration. The Lands Act vests all land in the president, and explicitly recognizes both leasehold tenure and customary tenure, stating that “every piece of land in a customary area which immediately before the commencement of the Lands Act was vested in or held by any person under customary tenure (Reserves and Trust land) shall continue to be so held, and recognised and any provision on the Lands Act or any other law shall not be construed as to infringe any customary right enjoyed by that person before the commencement of the Lands Act.” However, while the Lands Act recognizes customary tenure, it also states that in instances where formal law and customary tenure are in conflict, the former takes precedence.

The Lands Act also provides for the conversion of customary tenure into private leasehold tenure. The conversion can be done by the will of the customary rights-holder but must be approved by the chief and local authorities in whose area the land is situated before being notarized by the District Council and MLNREP. Where conversion is to a native Zambian, a further requirement is that the new owner accede to the authority of the chief in all matters. Once the land has been converted into leasehold tenure, it cannot then revert to customary tenure. This has been a particularly contentious element of the 1995 Lands Act, as chiefs have allocated land based on the promise of investment, but have often not seen results.

This act puts the onus on the landholder to register documents with the chief, District Council, and MLNREP. Reportedly, many individuals are getting signatures from the chief and District Council, but are not following through with full registration through the MLNREP, in some cases because it would make the land subject to ground tax and in other cases due to the effort and cost to travel to Lusaka multiple times to address the paperwork and fees.

The Chiefs Act: Given the central role that chiefs play with regard to the administration of customary land, the Chiefs Act of 1964 is another relevant piece of legislation. The Chiefs Act provides chiefs with the power to administer customary law to the extent that such law is not contrary to the Constitution or any written law and is not repugnant to justice or morality. Individual chiefs have considerable leeway in establishing general practices around land within their chieftom, and those practices can then be considered customary law so long as they do not contradict existing written law.

The Registration and Development of Villages Act: The Registration and Development of Villages Act of 1971 (commonly referred to as the Village Act) is deeply relevant to customary land and customary land management. For villages to be formally recognized, they must register in accordance with the Act. The Act defines a village as a settlement in a rural area in which there is a headperson recognized as such by all or a majority of the villagers and their chief under their customary law. The Act does not provide information on the boundaries of villages, nor does it identify a maximum or minimum size of a village. The Act provides that a headperson shall: prepare and maintain the village register, recording the particulars of the village and its inhabitants; permit the chief or his or her District Secretary to inspect and copy the entries in the village register to compile and maintain the master village register; and, at least once every six months, furnish the chief with information regarding new inhabitants settled in a village or when existing inhabitants leave.

These village registers could also be used as a source of record-keeping for land administration when read together with land records. They contain useful information on all inhabitants of a village, including updates on who is deceased or no longer an inhabitant. In practice, however, not all villages maintain their village registers.

The Town and Country Planning Act and Urban and Regional Planning Act: The Town and Country Planning Act does not apply to customary areas; in section 3(2) of the Act, it is stipulated that it only applies to state land. However, the Act further provides that the president may, by statutory order, apply all or any of the included provisions to any customary area. The Urban and Regional Planning Act of 2015 replaced the Town and Country Planning Act and for the first time established provisions for planning in customary areas. It provides a mechanism for identifying improvement areas within customary areas for planning purposes. Despite these new provisions, these Acts are used mostly within the Ministry for Local Government and Housing. As a result, the provisions are not commonly known in MLNREP; due to resource limitations, the Act is not commonly applied in rural, customary areas. Importantly, the Act provides for planning to occur in customary areas with the consent of chiefs and according to a consultation plan, but also notes that if a chief (or local authority) refuses to enter into a planning agreement, they can be overridden by the Minister through discussion with the President. However, the implementing regulations associated with the Act have not been passed and to date there are no known planning agreements in customary areas undertaken without the consent of the chief.

The Local Courts Act: Local courts in Zambia have jurisdiction to preside over customary land or property disputes provided that proceedings constitute a civil wrong (a person's act that wrongfully causes harm to another and attracts an action for damages and compensation). Section 12(1) of the Local Courts Act states that, "Subject to the provisions of this Act, a local court shall administer (a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law; (b) the provisions of all by-laws and regulations made under the provisions of the Local Government Act and in force in the area of jurisdiction of such local court." Accordingly, disputes over customary land or property should be taken to the local court which holds jurisdiction over the area in which the property is located. In practice, however, local courts generally only hear land disputes when they cannot be resolved by customary authorities.

Customary practices and rules are created by individual traditional leaders and their subjects; there is no legislation in Zambia which consolidates these varied customary rules and practices. However, local court justices are encouraged to be familiar with the customary practices and rules on land that prevail in their localities as they preside over disputes. In the event that they are unsure about a particular practice, it is recommended that they consult traditional leaders or call them as witnesses in court.

The Subordinate Courts Act: The Subordinate Courts Act confers jurisdiction to preside over cases that hinge on customary law upon all subordinate courts in Zambia. Cases that arise around customary land administration, with specific emphasis on customary land certification, would likely be presided over by the subordinate courts. Section 16 of the Act provides that, "Nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil cases and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil cases and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil cases and matters between Africans and non-Africans, where it shall appear

to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law.”

The High Court Act: Cases that call on African customary law may also fall before the High Court. Section 34 of the High Court Act stipulates that for cases in which customary law is “material to the issue,” the court may call traditional leaders as witnesses or consult with them directly. Traditional leaders who are called upon in this manner are to “advise the Court on all matters of African customary law which may arise in the cause or matter concerned, and to tender their opinion to the Court on such cause or matter generally.” However, the Act also stipulates that the court is not “bound to conform to such opinions.”

2.2 INTERNATIONAL HUMAN RIGHTS LAW

Zambian law does not fully protect the property rights of customary landholders. There are gaps in key pieces of legislation such as the Constitution and the Lands Act. Though domestic law may not fully protect these rights, there are various international instruments to which Zambia is a party that protect the interests of community members and give legal status to customary tenure. Examples of international agreements to which Zambia is a party that are relevant to land and property rights include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Universal Declaration on Human Rights (UDHR), the International Covenant on Economic, Social, and Cultural Rights (ICESR), and the International Covenant on Civil and Political Rights (ICCPR). As a member state of the United Nations, Zambia has signed and ratified these and other international and regional instruments; however, most of the provisions of these instruments have not been domesticated into national law but are considered part of a separate legal system. Domestication would require Zambia to incorporate the provisions of these multilateral and bilateral treaties into either existing legislation or to use them as the basis of new legislation to give these treaties the force of domestic law.

2.3 DRAFT LAND POLICY AND LEGISLATION

The development of a Land Policy in Zambia was stalled prior to 2014 because of the lack of a new Constitution. Due to the slow pace of constitutional reform, government began moving forward in 2014 on a new policy, using the 2006 Draft Land Policy as a foundation. Discussions on a new policy were re-established during the March 2014 Consultative Meeting on a Land Policy Roadmap, facilitated by the Land Policy Initiative of the African Union Commission, African Development bank, and the UN Economic Commission for Africa (UNECA). A draft policy was developed and consulted across the country in late 2015 and then specifically with the House of Chiefs in mid-2016. Broader communication with the public on the policy has not been widespread. There are a number of key issues that need to be addressed in a land policy:

- Conversion of customary tenure to statutory tenure;
- Processes of land administration and management;
- Legal protection of customary tenure;
- Management of common pool resources, such as forest, grazing areas and wetlands;
- Security of customary and statutory tenure;
- Land disputes;
- National land documentation program;

- Gender inequalities; and,
- Large-scale land acquisition.

In addition to the anticipated Land Policy, there are continued rumors of a Customary Land Bill. The emergence of such a bill can be traced back to a 2012 study that aimed to understand how customary land tenure security could be strengthened. The consultations for this study were not open to the



Newspaper articles from 2014 and 2015 demonstrate the active discussions over customary land issues within the constitution development process.

public, and the report has not been made publicly available. A draft bill reportedly exists, but it has not been shared and civil society is not sure where the bill is in the legislative process. However, in his address to the nation in September 2016, President Lungu announced that completion of the Customary Land Bill is one of three priorities for MLNREP, in addition to completion of the Land Policy and the launch of the National Land Titling Program.

The early drafts of the Constitution and the Patriotic Front Party’s Political Manifesto both include provisions that promote, or imply a promotion of, conversion of customary land to statutory tenure. Once land is converted to statutory tenure it cannot return to customary tenure. As a result, many chiefs and traditional authorities perceive the promotion of conversion by government as an effort to undermine the authority of traditional leaders. Amidst the continued lack of legislation explicitly authorizing documentation of customary land rights, there are some apparently active areas of contention. For example, responding to a potential tendency of some chiefs to convert large blocks of customary land to state land, and some concerns of corruption in these processes, in December 2013 the Minister of Lands placed a ban on the conversion of customary land to state land. This ban was initially planned to continue until a National Land Audit was completed. However, the Land Audit has made limited progress over recent years, in large part because it has a substantial but unclear scope.

2.4 CONCLUSIONS ON LAW AND POLICY FRAMEWORK

Zambia's laws relating to land in customary areas are currently insufficient to guide an effective administration system. Laws relating to resources, like wildlife and forests, are not well harmonized with the laws that govern customary land administration, creating ambiguities across different areas within customary land. Additionally, guidance to traditional authorities on how to manage customary land and the rights and responsibilities of chiefs on these lands is lacking. Customary land management is not necessarily contradictory to best practices; however, there is a need for customary systems to be able to be documented and used as evidence with equal weight to state leasehold titles in court. Such communication between institutions and systems would reduce conflicts and allow for a more harmonized approach. This is one objective of the current/ongoing Land Audit. There are additional measures that could be taken to better coordinate customary and state land management within the legal framework, including more explicit recognition of customary rights as equal to statutory rights, and a relaxation of elements of the Surveys Act that describe how land documentation and beaconing should occur. On the whole, however, there is nothing in the current legal framework that restricts chiefs from administering customary land certificates.

3.0 THE CUSTOMARY TENURE SYSTEM

Of the two types of land in Zambia, it is customary land which is most relevant to the work undertaken by TGCC. There is a common discourse that suggests that customary rights, by nature, are insecure and constrain long-term investment in sustainable land management. This has led to suggestions that replacing communal tenure with individual titling would lead to more investment and increased productivity². However, there is no evidence for a linear “evolution” of customary land rights towards private property. The modernization of agriculture through the creation of markets in land titles also does not have empirical support, as land markets do not necessarily lead to transfers to productive farmers. Instead, where it has happened, titling of communal lands has in many cases resulted in negative outcomes such as speculation, subdivision and conversion to unproductive uses³. These dynamics between customary and statutory land rights have been witnessed across many African countries over the past fifty years, though Zambia along with Ghana contain two of the strongest examples of statutorily recognized traditional authorities (or chiefs) with strong land administration roles.

One reason that communal land rights are often perceived as insecure is because land rights under communal or customary systems are often not secure in law (*de jure*), which can lead to vulnerability in practice (*de facto*). This happens, for instance, when predatory states, traditional authorities, and non-state actors reallocate land to local and foreign investors through conversion of land to statutory tenure systems, which tend to be costly and thus exclude the local customary rights holders. Moreover, many contemporary communal land tenure systems have been distorted by long colonial histories of “subversion, suppression and expropriation of indigenous conceptions of land rights” (Okoth-Ogendo, 2008). Hence tenure reform should not be seen as transfer of customary rights to statutory rights, but instead as a way to secure customary *de facto* rights in law and give them *de jure* recognition. Documentation of customary rights at a household or communal level provides an additional level of security that is increasingly being explored globally, for example through forums such as the Interlaken Group on Community Land and Resource Rights.

3.1 CUSTOMARY TENURE INSECURITY

While customary land is a major resource for sustainable livelihoods for the majority of Zambians, its lack of codification and decentralized administration with limited transparency or communication between state and customary systems can lead to tenure insecurity. The management of customary land is currently extremely decentralized through chiefs and their *indunas* and headpersons. Within chiefdoms it is commonly perceived that land “belongs” to the chief. Although legally all customary land is vested in the president, in practice traditional authorities exercise nearly exclusive power over customary land administration (except potentially in cases of conversion from customary to state land, which requires District Council approval). This creates complicated relationships between the government, the chief, and his or her subjects with respect to tenure security. Subjects largely claim to

² For a comprehensive discussion of tenure reform and poverty alleviation, see Ambreena Manji, 2006.

³ In a study of the outcomes of land titling and privatization in Africa, Ensminger (1997) concludes: “There is increasing evidence from anthropologists and Africanists...that even the longest running national privatization efforts are unraveling, reverting to customary rights, and show few, if any, investment and productivity and productivity benefits over indigenous systems.” (1997:167)

feel secure in relation to their rights to land because land is managed by chiefs, who generally protect the land rights of their subjects, but who retain the right to sign off on converting and allocating land to state land.



A farmer from Chipata District shows off his field with agroforestry trees that has recently been encroached on.

PHOTO: MATT SOMMERVILLE

Moreover, the relationship of customary land administration to the formal governmental decentralization process remains unclear. At the district level, the Ministry of Chiefs and Traditional Affairs is responsible for engaging with chiefs and headpersons, but its authorities related to land are largely limited to on-demand conflict mediation. MLNREP is extremely centralized, with only some functions related to the conversion of customary land into state land decentralized to the provincial level, and full-time staff only in some major districts. Likewise, District Councils currently only intersect with customary land administration in cases of land acquisition (through conversion of customary to state land) for urban

expansion or infrastructure development.

Customary tenure security is currently dependent on largely unwritten customary laws that vary by chiefdom, which creates a sense of tenure insecurity, though there are examples where customary practices have been recorded, such as in Western Province. Farmers and headpersons face a number of challenges or misunderstandings regarding laws. One example that has commonly been reported was the designation that state land extends in a 32 km radius around any government structure, including post offices and schools. The lack of awareness of this policy among traditional authorities and customary landholders has apparently led to grievances over displacements surrounding public infrastructure. Within chiefdoms, documentation of land allocations vary and as a result, following divorce or death conflicts often emerge over inheritance and rights to land, in some cases with the widow or widower being pushed off of the land. Alternatively, if a farmer or family is not seen to be actively cultivating their land, it can be reallocated by chiefs with little to no recourse. Annual boundary conflicts are extremely common.

Investments in customary lands are possible and indeed have been made without conversion to statutory tenure. For example, many “modern” houses are built on customary lands. Other significant private investments include the planting of trees and sinking of wells and boreholes. Several individuals interviewed indicated that investments on the land (such as the construction of a house), while not guaranteeing tenure security, have the effect of establishing primacy of rights over that piece of land. Planting of trees and other long-term investments are also generally seen to signal confidence that the investing individual’s rights to that piece of land are recognized by the community and will not be violated. The role of trees in securing rights received a variety of responses. Many did not see agroforestry trees as establishing rights, with disagreement among villagers about who “owns” the trees. Legal scholars also pointed to the Forest Law, which states that ownership of all trees, including on leasehold land, is vested in the president.

Nevertheless, the lack of security of private investments on the land has been one of the factors pushing individuals, particularly those returning from urban wage labor, to attempt to convert customary land to state land and acquire a lease. Interestingly, many of these individuals have also expressed an interest in

customary land documentation, as it would demonstrate acceptance by both the traditional authorities and the national government.

3.2 RELATIONSHIP BETWEEN GOVERNMENT AND CHIEFDOMS

Customary tenure systems are experiencing tension over common property resource use and lack of clarity over the roles and responsibilities of traditional authorities with respect to local government bodies. Government ministries and agencies do not appear to play a significant role in the governance and administration of most customary lands, and there is little to no apparent coordination among ministries on customary land management.

Although they receive a government salary, which was dramatically increased in 2016, chiefs still view themselves as traditional authorities. They practice their authority through custom and tradition, and acquire their positions through traditional practices such as inheritance, rather than appointment by the state. The state does legally recognize individual chiefs following succession, but generally allows tribal custom to prevail. Succession disputes are common, however (often between competing families with disputes dating back to independence), and it is not unusual for the High Court to rule on



Chief Mnu kwa of the Ngoni in Chipata District, Eastern Province
PHOTO: JEREMY GREEN

chiefdom succession issues. Headmen and *indunas* are appointed by the chiefs. This means that although nominally autonomous, chiefs and headmen are upwardly accountable to the state. Some have claimed that these salaries and appointments make chiefs less likely to be outspoken on government policies, such as on the December 2013 ban on the transfer of customary lands. The recently created Ministry of Chiefs and Traditional Authorities is the principal government entry point for chiefs. The Ministry oversees the operations of chiefs and ensures that local customs and traditions are followed, as chiefs discharge their duties. The Ministry has the authority to depose/dethrone any chief, including a paramount chief, and has indeed dethroned chiefs in the past for misconduct or improper succession. However, the Ministry largely defers to customary law of individual chiefdoms and has little to no apparent influence on land management decisions within chiefdoms. The Ministry is responsible for distributing village registers to chiefdoms and keeping track of their use, which is extremely relevant to customary land documentation processes.

MLNREP is responsible for planning land use in the country. However, there is limited land use planning in customary lands, outside of work in GMAs. A provincial land use planner explained that this is because their mandate and resources have been limited to state land. The Ministry gets involved in customary land use planning only in cases where applications for conversion to statutory are being processed, or where the state itself develops development projects that require land and thus enter into negotiations with chiefs for the acquisition of the requisite land. These include investments relating to mining, farm block development, resettlement schemes, and tourism concessions. However, these processes are generally led by the relevant ministry or government office associated with the sectoral development. MLNREP does play an active role in resolving boundary disputes between chiefs.

MLNREP is also responsible for the Forest Department, which employs District Forest Officers across the country who manage both state and local forests and also provide all licenses for commercial activities on any forest in Zambia, including on customary land. Subsistence use of forest products is generally permitted outside of state forests without permits. Similar to the Forest Department, the Department of National Parks and Wildlife (DNPW), formerly the Zambia Wildlife Authority, under the



Wildlife tourism and hunting are important revenue earners in game management areas and national parks.

PHOTO: JEREMY GREEN

Ministry of Tourism manages all non-domesticated wildlife across the country, though most activities outside of National Parks are constrained to GMAs. In these areas, traditional authorities manage the land, the Forest Department manages the trees, and DNPW manages the wildlife. These overlapping roles and responsibilities create an ambiguity over management of GMAs, state forests, and other open areas in rural Zambia, which results in some sense of tenure insecurity.

The Ministry of Local Government and Housing is responsible for carrying out the 2013 Decentralization Policy to empower provinces and districts, as well as the 2015 Urban and Rural Planning Act. However, the relationship with chiefdoms has been unclear in practice. At present, the impact of the provincial and district governments are largely limited to management of municipalities and the creation of district development plans, which have a varying, but generally limited level of input from chiefdoms. District Councils are required to sign off on transfers of customary land to statutory land, and apparently frequently do sign off. However, those acquiring the land often fail to proceed to register these signatures nationally at MLNREP to avoid taxation, and there is little evidence of coordination between the district authority and the Ministry.

Conflicts and social changes leading to change in chiefdoms: Social, political, and resource boundaries, while often relatively stable, are also flexible and negotiable to a degree, flowing in part from the nested character of social identities, rights, and authority structures. Thus while land allocations within villages appear to change significantly, the structure and location of the villages themselves is also fluid. Villages become “unviable” for whatever reason and are disbanded, while new villages are reconstituted. Village settlements are known to move, particularly to where infrastructure is based, such as new roads or clinics, while fields will remain distant. This dynamic has created cases of non-contiguous villages.

TGCC also encountered situations where villages were reconstituted in other headmen’s areas, or even chiefdoms, without the knowledge of the originating chief (interview with Chief Nzamane, 18 December 2013). In one case a local conflict between a chief and a village over the (apparent) illegitimate transfer of land led to the village reconstituting itself with a new chief and the original chief being disciplined by the paramount chief.

3.3 CUSTOMARY LAND ADMINISTRATION AND MANAGEMENT

While customary land management differs among chiefdoms, a common set of issues and/or conflicts were observed across the sites visited in Central, Southern, and Eastern Provinces. Questions of transparency and accountability in decision-making around land allocation, land management, and conflict resolution within chiefdoms, coupled with changing socioeconomic and political conditions, are leading to tenure insecurity. Many of these would be expected to impact farmer investment in land productivity, including climate-smart agriculture.

Social and demographic pressures and perceived land scarcity: At 60%, Zambia has one of the most urbanized populations in Africa. This high level of urbanization is in large part due to migration to the copper mines in the 1950s and 1960s. Nevertheless, the concentration of services and infrastructure has led to the growth of nucleated settlements and overcrowding in some regions, such as the Eastern Province, while much of the rest of the country is relatively under-populated. This concentration in turn means that areas with services and infrastructure such as roads, schools, clinics, water, and so on, experience land shortages and competition over access to land between residents and also between

current residents and new settlers. As a result, population pressure and increased demand for land constitutes a significant source of tenure insecurity.

Some chiefdoms have smaller land areas and larger populations than others, leading to local land conflicts. Weak administrative capacities and reports of corruption have been blamed for overlapping allocations of land and arbitrary reallocation within chiefdoms. As chiefs and headmen continue to allocate land, farmers are having land taken away and allocated to new settlers or finding “their” land encroached upon. This demand for land by Zambians within pockets of land scarcity is contributing significantly to land conflicts among current village residents as well as between current village residents and returning former residents, and current village residents and new settlers. The absence of proper records of land holdings in these customary tenure systems and the death of older leaders with institutional and oral memories of land holding entitlements and boundaries have led to increasingly complex land conflicts. This has raised the demand for a land registration system capable of rationalizing allocation decisions and conflict management. Almost all interviewees, from smallholder farmers to headmen and chiefs, met with by TGCC expressed the need for a system to manage these types of emerging conflicts.

Land allocation: Customary lands are under the complete control of the chief. The chief exercises this authority through his/her headmen (often more than 300), and is advised by a council of *indunas* (a dozen to a few dozen influential headmen who may be responsible for an area of the chiefdom or have a technical area of specialty). At the local level, land allocations are made by the headmen who have direct authority over the villages within their domain; allocations are symbolically formalized by the chief in return for a small token of appreciation (such as a chicken) from the beneficiary. If individuals are coming from outside of the chiefdom, or if they represent commercial investors, they are customarily required to visit the chief prior to meeting headpersons. In discussions, chiefs admitted to commonly being unaware of the precise boundaries of land allocated to their subjects. Instead, they rely on village headmen to delineate boundaries. There is a historical tendency for headpersons to point to particular areas and suggest that individuals clear new land from a current clear boundary outwards. In some cases, the individual will be granted “as much as your strength will allow you to clear.” These practices lead to ambiguities in boundaries, particularly as clearing of land may be a multi-year process. Best practices would suggest that headpersons and their representatives walk boundaries and at the very least place markers at the extent of land that is being allocated.



Land allocation follows customary traditions.

PHOTO: JEREMY GREEN

Land allocation and subsequent administration appear to be highly un-transparent and centralized in chiefs and headmen. Typical dialogue suggests that customary rules and land allocations are not documented. Chiefs and headmen rely on oral knowledge and histories of past and present allocations, and are assisted and guided by “knowledgeable” advisors (*indunas* in the case of chiefs) in land administration. However, recent data from the 2015 Rural Agricultural Livelihood Survey has indicated that over 100 chiefs use some form of land documentation practices, though these are often restricted to only a few properties, such as roadside shops, and are rarely spatially explicit. Nevertheless, approximately 6% of smallholder farmers in Zambia indicated having some form of land documentation. The absence of widespread documentation means that there are no checks and balances on the exercise of chiefly authority to allocate land, which they *de facto* own. Despite the total authority of chiefs in matters of land administration, and the ability for chiefs (and headmen) to give and take land from their

subjects at will, most individuals interviewed expressed a feeling of security of tenure over their agricultural fields, with many having received lands from their parents. At the same time, many noted cases of annual conflict over boundaries, encroachment, and unpermitted clearing of forest/bush land.

Land management: The engagement of chiefs and headmen in active management of customary lands is minimal. Once allocated, the headmen and chief appear to exercise little control over the use of the land, though some chiefs note that if a subject leaves land “idle” then the chief may very well allocate it to a new individual. The individual is largely free to decide what crops to plant on which lands, whether to build a house or infrastructure, and whether to plant trees.

Among the few common restrictions are the spatial and temporal restriction on livestock grazing. During the cropping season, livestock are herded in areas away from the cropped fields, and individual livestock owners are obliged to ensure that their livestock do not damage crops in fields. After harvest, livestock are left to roam free, with all lands in the village essentially reverting back to communal access. This practice was observed in all communities under both customary and statutory land. This practice varied, however, in “gardens” close to streams, where some communities noted that it was the responsibility of the landowner to build fences and make efforts to keep grazing animals out of the area.

Individuals with perennial crops like trees are responsible for ensuring that these crops are not damaged by the livestock during this time. Destruction of crops (including planted trees) by livestock during the growing season is compensated by the owner of the responsible livestock, through a negotiated settlement that is sometimes presided over by the headmen or chief. There do not appear to be any redress mechanisms in place for destruction during the dry season. Similarly, destruction of planted trees by fire during the dry season does not commonly attract any penalties; again, the responsibility for the protection of the trees appears to lie with the owner of the trees during this season. Interventions in the early 2000s led by the World Agroforestry Centre reportedly introduced rules around grazing within some chiefdoms in the Katete District, though TGCC was unable to identify these villages to observe whether the rules were still operational (Ajayi & Kwesiga, 2003).

It appears that all chiefs have a regulation stating that once allocated, land should be put under productive use. Although there is no clarity on what is meant by “productive use,” once a determination is made that the land is not being used productively, the chief can revoke the original allocation and re-allocate the same piece of land to someone else deemed likely to make better use of the land. Chief Chanje noted that typically a land occupier is monitored for five years and if during that time s/he persistently displays traits of “laziness,” then after five years the land is taken back. This incentive to place land into productive use is a deterrent to fallowing, as fallows can be seen as a form of laziness, and make land susceptible to reallocation. It also encourages farmers to acquire and clear more land than they need, in order to hedge against future takings. Indeed, some chiefs have encouraged “clearing the bush” in order to reduce the likelihood that unused land will be targeted by outsiders. At the same time, many communities have forest/bush land that is reserved by families for future expansion, so it is possible in some areas to claim tenure over forests/bush and wetland areas.

Administration: As noted above, there are few standard administrative practices in the customary systems of Zambia related to allocation and reallocation of land. Headmen are required to maintain a village register issued by the state. It would appear that the purpose of the register is to list the residents of each village for taxation and other administrative purposes. Indeed, village lists are often used as the basis of government agricultural subsidy activities to distribute fertilizer, though it is rare that village or chiefdom registers are considered up-to-date. The registers conform to the narrow provisions of the Village Act and do not contain information regarding land holdings. As Headman Kwaabe (Chief Mshawa) put it, “a chief has land, headmen have people.” Land administration in the customary land tenure sector consists of allocation of land parcels (including providing written consent for the conversion of land to statutory tenure for approved applicants), adjudication of disputes, and (it



Some communities keep village registers, as required under the 1971 Registration of Villages Act to track the population dynamics in the chiefdoms.

PHOTO: JEREMY GREEN

would appear) occasional issuance of rules and regulations regarding land use. Chiefs noted that land disputes are becoming increasingly common, and take up an inordinate amount of their time through cases in the traditional courts. Chiefs welcomed assistance in land administration and also welcomed the idea of documentation of customary landholdings to assist in this process. This can be seen by increasing ground level support for the efforts of District Land Alliances in Monze, Nyimba, Chipata, and Petauke Districts to facilitate the delivery of customary land certificates within chiefdoms. While some chiefs see this as limiting their ultimate discretion over issues of land management, others see land certificates as a tool to assist in dispute resolution.

There is an additional level of concern by chiefs that land documentation could be the first step in a process by which the government takes land away from chiefs, as well as longer-term concerns over how to keep a customary system up-to-date.

3.4 CUSTOMARY DISPUTE RESOLUTION

In Zambia's customary system, disputes are normally settled outside of the formal court system. The key strategies used are negotiation, mediation, arbitration, judicial recourse, avoidance, and self-help. In traditional systems, negotiation and mediation processes are aimed at reconciling individuals or groups of people with differing claims. Negotiation is a process of settling disputes between parties and restoring existing relationships by reaching a consensus, while mediation involves an independent third party who steps into the dispute resolution process to act as an intermediary between the disputing parties. In the customary system, the mediator can be a headperson, chief, or village elder.

In the event that negotiation and mediation fail, the dispute can then be taken before traditional courts for settlement. Traditional courts are established in accordance with the traditional governance system within a chiefdom; the Chiefs Act recognized the validity of traditional rulers and therefore, traditional courts (Zambia Law Development Commission, 2004). Disputing parties should exhaust other strategies of dispute resolution before bringing a matter before the traditional court. When a matter is brought to a traditional court, all parties are encouraged to be present together with their witnesses at the time of the hearing. In the event that a party is dissatisfied with the decision of the court, they are at liberty to take the matter before the local court, Magistrate Court, or even the High Court if they believe the matter is a constitutional issue.

In traditional courts in Zambia, the onus of proof is on the accused to prove his or her innocence. Sessions of traditional courts are held in public; proceedings are conducted orally and are informal. Recently some traditional courts have begun considering the importance of written records, especially documentation of cases. Areas that have considered the practice of documenting proceedings include Mungule and Mnkwa Chiefdoms, among others. A judgment given under customary law is enforceable only within that locality or chiefdom. Sanctions may be imposed on individuals or groups of individuals who are found to have come into conflict with customary laws and practices.

Within different localities, dispute resolution practices may vary. Below are two examples of dispute resolution processes.

Mafuta, Chanje villagers clash over land

By Christopher Miti in Chipata

TWO groups of people from chiefs Mafuta and Chanje areas clashed on Wednesday following a land dispute.

Both groups from the two Chewa chiefs are claiming ownership of a place called Mphofu.

Mphofu village community leader, Timothy Mwanza, claimed that the area in question belongs to chief Mafuta.

Mwanza said people from chief Chanje's area, who

were armed with hoes and axes, stormed Mphofu area to stop the people that were farming in the area.

"What happened on Wednesday is very sad because people from Chanje area came to Mphofu so that they could stop the people from chief Mafuta from farming in the area. So the two groups clashed and the situation wasn't good at all," he said.

Mwanza said Mphofu area belonged to chief Mafuta, whose subjects had been

farming there since 1942.

He said he was shocked that chief Chanje was claiming ownership of Mphofu area.

Mwanza said the matter had already been reported to Paramount Chief Kalonga Gawa Undi.

Chief Chanje confirmed that there was confusion over land in Mphofu area and that people from the area reported the matter to Gawa Undi.

He said his headmen were summoned by Gawa Undi but that the discussion did not

take place because there was a bereavement in his area.

"The story [that people clashed] is true because about four people from my area were injured and they even reported to police. At the moment I cannot say anything because the issue is before Gawa Undi. I cannot rush into saying something when the verdict has not yet been passed. We know something about those fields [in Mphofu area], and they also have their own version," said chief Chumbe.

Land disputes are commonly addressed through customary authorities, though if customary institutions are unable to solve disputes, they may be brought to the formal court system.

In Monze Chiefdom, Hamungu Village:

- The aggrieved party reports his or her case to the clan, and the clan elders meet to resolve the dispute.
- If the dispute is not resolved at the clan level, it is reported to the village committee, which is a structure under the traditional court.
- If the dispute is not resolved by the village committee, an appeal is made to the chief's committee, which is the overall dispute resolution mechanism in Monze Chiefdom.

In Petauke, Nyimba, and Sinda Districts:

- The aggrieved party approaches the village headperson, who then calls the disputing parties together for a discussion.
- The dispute is taken to the village court, which is comprised of the village headperson and their *indunas*.
- If the dispute is still not resolved, it is taken to the traditional sub-court, which is composed of five *indunas* from the area.
- The case can also be brought to the high court on a village or chiefdom level. This court is comprised of a chairperson, vice chairperson, and other *indunas*.
- If the dispute is still not resolved, it can be brought to the chief's court (also called the supreme court), where the chief sits together with *indunas* to preside over disputes.

3.5 CONVERSION FROM CUSTOMARY TO STATUTORY LAND

While TGCC does not promote the conversion of customary to statutory land, it is important to understand the role that this process plays in current land policy discussions and insecurity in rural areas. Under the law all customary lands are "owned" by the clan, and held in trust by the President through the paramount chief or chief (1995 Lands Act). However, in practice chiefs act as owners of the lands, and preside over a hierarchical land administration, which they head. The 1995 Lands Act creates a mechanism to transfer customary land into state leasehold tenure, based on the consent of the chief. However, once land is transferred to leasehold tenure, it can never revert back to customary control.

Conversion of customary to leasehold tenure is creating real and perceived tenure insecurity for smallholder farmers.

There are a variety of agents driving transfer to leasehold land though there are no reliable statistics on conversion. Both international and Zambian investors have sought conversion of substantial areas for commercial agriculture, as well as for the development of factories and other business infrastructure. Middle and upper class Zambians are also acquiring plots of land for personal farms. Retired civil servants are returning to their villages following retirement and seeking to secure property. Alternatively, some youth who have migrated to Lusaka are reportedly pressuring their families to seek more secure tenure through leaseholds. However, among these groups, there are reportedly few rural smallholder farmers striving for this statutory security, due to relatively high costs associated with land transfer and an aversion to paying taxes on statutory land, and because chiefs are likely to be reluctant to consent to land transfers for their own subjects.

Zambia's agriculture development policy is geared towards promoting commercialization in both the state and customary tenure categories. Commercialization itself favors the conversion of customary lands to statutory tenure in order to promote security of tenure for large-scale commercial farming. Historically the United National Independence Party (UNIP) government maintained customary tenure and the authority of chiefs as part of a broader political strategy of promoting national unity and harmony through allowing relative tribal and clan authority over land. UNIP allowed a limited number of conversions from customary to statutory, and then mostly along the high capability ecological zones. The subsequent Movement for Multi-Party Democracy (MMD) government introduced the 1995 Lands Act with the express intention of streamlining the conversion of customary land to leasehold as part of a conscious privatization drive, which included promoting the commercialization of land and creating a market in land titles. There is no formal market in customary land, and hence the legal status of land must be converted in order to create a formal land market. Since 1995, there appears to have been a significant increase in the rate and amount of land conversions, as evidenced by the increasing number of land-related conflicts, driven by a multiplicity of causes and contestants, and of organizations that are designed to respond to these conflicts and insecurities.

Chiefs are intimately involved in the conversion process. The administration of the 1995 Lands Act requires that the chief consent to any potential conversion before it is notarized by the District Council and by MLNREP. Chiefs have to sanction every transaction within their chiefdoms. All chiefs spoken to indicate that they first have to ascertain that the land targeted for conversion is free of existing occupants or claims to it, and that the proposed new owner would use the land for productive purposes. Where conversion is to a native Zambian, a further requirement is that the new owner accedes to the authority of the chief in all matters. Therefore, even after land is converted, chiefs retain a nominal role in land management rules.

The chief's consent is supposed to be given only in cases where conversion will not affect existing land rights holders, or where adequate compensation, including resettlement, can be provided. Chiefs have authority to sanction transfers of up to 250 hectares. Native Zambians have tended to apply for and be awarded title to smaller plots of land, usually but not always in their villages or chiefdoms of origin. This would seem to suggest that most of the transfers sanctioned by the chiefs are to indigenous Zambians, though not always those who have strong existing ties to the chiefdom. However, foreign investors have also registered lands that are under the 250 hectare limit, including land that has been sought for non-agricultural investments such as the establishment of factories and businesses.

Beyond this upper limit, consent of MLNREP must be granted before any conversion can be sanctioned. It should be noted that chiefs have been known to subvert this legal limitation by issuing multiple contiguous 249 hectare plots. Chiefs do not own the land and thus are not "selling" customary land;

however, they are known to charge fees for the issuance of letters of consent, opening the practice to abuse and corruption.

It would also appear that the guidelines on the conversion of land to statutory tenure are not always followed, and that many pieces of occupied lands have been allocated to new owners by chiefs and headmen without following procedure, leading not only to conflicts between new owners and current residents, but also between chiefs and their subjects. Some of these cases have resulted in litigation, especially in those instances where District Land Alliances have been able to mobilize support for affected farmers. It also appears that there are tensions between local government bodies and traditional



Maps provide customary land holders, headpersons and indunas with the tools to administer land. In this case a headperson in Mkanda chiefdom reviews aerial imagery.

PHOTO: JEREMY GREEN

authorities over the allocation of land for development projects such as agricultural interventions, industrial and tourist facilities, business centers and other infrastructure.

Moreover, it appears that many individual Zambian investors do not go through the whole land titling process, preferring instead to obtain the chief's consent and then register this with the local District Council. Once registered with the council, the new owners are supposed to then apply for full title from MLNREP. However, once titled, the land becomes subject to a range of taxes. To avoid paying these taxes, new landholders often do not apply for titling, ending with District Council authorization to occupy the land, which is viewed to be as secure as title without the extra taxation costs.

Large-scale conversions have been sanctioned across the country for private large-scale agricultural investment. The state has also appropriated large landholdings for itself as part of the agricultural commercialization drive. For example, the Nansanga Farmblock Scheme underway in the Central Province involves the development of 100,000 hectares into commercial farmland consisting of a designated 10,000 hectare core estate with the rest being allocated to out-grower large-scale farmers and smallholders on plots of various sizes. It is expected that the scheme will generate numerous benefits, including creating employment opportunities for displaced local farmers. There are substantial conflicts and overlapping claims that have emerged in these farmblocks, which are currently stalling investment

It is clear that the scale and pace of conversions have led to tenure insecurities among customary landholders. Many displacements have occurred and are occurring. Many are contested but ultimately it appears that customary land rights do not have *de jure* protection when a decision is made to allocate land to an investor. Records on these conversions are not readily accessible from MLNREP.

Some chiefs are using conversion as a mechanism to protect their subjects from potential large-scale land acquisitions. In these cases, tenure conversions are initiated by chiefs on behalf of the residents of the chiefdom, and this ensures that residents hold joint title to the land and thus have some legal protection in the event of large scale conversions. One such example is Chief Munyumbwe of Gwembe District, a former government minister, who initiated and led the titling of some 800 hectares of land in

his chieftom for the benefit of his subjects. He subsequently sub-leases small plots of land to the residents. There have been many cases in which land allocations and conversions have been carried out for the purpose of, or with the motivation of, privatizing the benefits. Two other emerging cases are the registration of communities as associations and the subsequent titling of community land to spur irrigation investment or community management of wildlife.

As noted above, in Zambia the conversion of land tenure status from customary to statutory leasehold is a major source of insecurity, especially for the poor and marginalized. There is no regulation that limits acquisition of land rights to the chieftom of origin, and every citizen is entitled to a piece of land anywhere in the country as long as they are legally allocated the land by the traditional authorities.

3.6 DISPLACEMENT, RESETTLEMENT, AND COMPENSATION

Zambia has recently experienced an increase in large-scale land acquisition (considered to be an acquisition of over 1,000 hectares). Such acquisitions have been driven by the interests of local and foreign investors – including government – in agriculture, mining, tourism, and peri-urban and urban development. This has led to displacement of customary landholders in various parts of the country, including Solwezi, Mphika, Choma, Mazabuka, Kitwe, Mansa, and Lusaka.

Zambia currently does not have consolidated legislation or policies that regulate compensation and resettlement for displaced communities, leaving those impacted with limited ability to negotiate and receive adequate compensation and resettlement assistance, though a Resettlement Policy was adopted in 2016. International standards such as the World Bank Guidance Note on Resettlement and Compensation, the International Finance Corporation Guidelines, and Food and Agriculture Organization Guidelines have been referred to in incidences of compensation and resettlement of communities faced with displacement.



Chiefs often open their areas to new settlers or those displaced by other economic activities.

3.7 CONCLUSIONS ON CUSTOMARY TENURE SYSTEM

Zambia is facing a long-term challenge in reconciling its customary and state tenure systems, yet a transition to leasehold tenure is not likely to be acceptable to traditional authorities, nor is government likely to be able to effectively administer the vast areas of customary land. Approaches that provide decision-making tools to chiefs and provide maps and information to communities and landholders may strengthen smallholder tenure security. Customary systems have the potential to be effective in managing both communal resources and household parcels; however, communication between government and traditional institutions needs to be increased to promote tenure security.

4.0 GENDER & CUSTOMARY LAND DOCUMENTATION

Gender is an important dimension for consideration when looking at questions of land and tenure in Zambia. Men and women face different challenges along individual, structural, and relationship levels when it comes to tenure. Additionally, Zambia has both matrilineal and patrilineal kinship systems, which have different traditions around land and resources and how they are accessed.

4.1 INDIVIDUAL CONSIDERATIONS

On an individual level, women are more likely than men to face challenges related to education and illiteracy, though illiteracy affects a broad portion of the rural population. In 2010, the national literacy rate was 70.2%, but only 60.5% in rural areas compared to 83.8% in urban areas. The literacy rate among men was 73.2%, while for women it was 67.3%. Literacy rates did increase for both men and women between 2000 and 2010 but the gender disparity remains. As a result, and based on cultural norms, women in rural communities often lack confidence to engage in public meetings, resulting in a smaller percentage of women represented than men at these meetings. Similarly, even within public meetings, women frequently suggest that “they don’t know about boundaries” or of land conflicts with neighboring villages. Yet, within a family unit, women are very likely to know the family lands and allocations well. Furthermore, they may have a different perception of various conflicts at the plot level than men.

Additionally, women in Zambia have a lower economic status and less independent access to resources than men. Although Zambia is considered a low middle income country, there are still high levels of poverty, especially in rural areas where poverty rates are three times higher than in urban areas. In 2010, it was estimated that 77.9% of rural residents were living in poverty compared with 27.5% of those in urban areas. Slightly more women-headed households (80%) live in poverty compared to men-headed (78%) and extreme poverty affects 60% of women-headed households (Central Statistical Office, 2011).

Women’s access to resources remains lower even in matrilineal systems, where land is inherited through the female lineage but men retain access to inputs and are at least the public face of land use decision-making. This lower economic status means that women frequently do not have independent access to agricultural inputs. Additionally, since all trips to the chief require the giving of a gift, the allocation of land may be limited for women who lack the resources to give a gift. Mapping of women’s land rights and documentation of their landholdings may be an important approach to help ensure women’s economic independence.

Health issues affect both women and men, particularly around HIV, though also around any disability. This is a particular gender concern, as women are often the first to come out as HIV-positive, and this can lead to a “double discrimination.” Customary traditions may not provide land for individuals with disabilities or terminal illness, because they are not able to work the land to the fullest. Traditional authorities suggest that able-bodied individuals will be able to make the land more productive and therefore create more benefit to the group as a whole. With respect to disability, many surveys underestimate the population of disabled individuals, as they are somewhat “hidden” in society. However, in a time when customary communal/safety net norms are transforming to a more

individualized responsibility of households and farmers, it is not clear that land allocation traditions are providing adequate security for those facing illness and disability.

4.2 STRUCTURAL CONSIDERATIONS



Under both matrilineal and patrilineal systems there are headpersons who may be male or female.

PHOTO: MATT SOMMERVILLE.

The intersection of gender and tenure also entails certain structural issues, particularly around matrilineal and patrilineal kinship systems and changing customs. Matrilineal and patrilineal systems have different traditions, but in many cases matrilineal traditions are slowly evolving into more patrilineal approaches. Within Chipata District, where TGCC is working, there are two tribes: the Ngoni, who are patrilineal, and the Chewa, who are matrilineal.

Patrilineal system: The patrilineal system of the Ngoni has a number of distinctive features that set it apart from a matrilineal system. The marital residence is in the man's village, and the man pays a *lobola* or bride price to the wife's parents to establish his right to take his wife and children to his own village. In this system, land belongs to the man's family. Women are not technically entitled to land ownership; descent and inheritance pass through sons

or other male relatives. Daughters are expected to marry and live in their husband's village, and so do not inherit property, including land. A woman will only access land through her marriage and cannot own or inherit it except as a proxy for her children. If she divorces, she loses access to her land and has to go back to her own village.

In a patrilineal system, a father gives pieces of land exclusively to his sons, beginning with the eldest son at the time of his marriage. Each son is allocated a portion of land when he gets married, and his wife has a field within this portion of land to use to provide for the household. By extension, the land ideally is an allocation to the family of the son because of the new responsibilities he assumes with marriage, which include ensuring that his wife has enough land to perform her familial and marital duties.

Historically, in cases where women divorce or are widowed and return to their village, they can access land through their parents or brothers but cannot claim ownership over the land as it is expected that they will remarry. However, based on village surveys and initial land documentation processes, women have registered frequently as primary landholders.

These land allocation practices are changing over time in recognition of the fact that family sizes are increasing and land available to share has become smaller. As such, chiefs are now allowing youth to approach them and make requests for land in their own right. For example, Chief Mnutwa has partnered with a local civil society organization (CSO) on a program he hopes to implement that will subdivide and allocate land to interested youth. The CSO will provide training in agriculture to participants. Chief Mnutwa has indicated that young women are eligible to participate in their program and receive land as well as young men.

Matrilineal system: In matrilineal families, the authority and power to make decisions rests with the mother and her relatives. Although there are many small differences among the matrilineal African societies, they all practice matrilineal descent combined with matrilocal residence, and although men of the matriline are often the rulers, women have a high level of authority and influence.

Though women in matrilineal systems have the legal right to make decisions about land, men still control most of the decisions as clan leaders. For example, when it comes to land sales, although women own

the land, they must consult their maternal uncles who have the final say in decisions. Inheritance of property, including land, passes through the female line.

Upon a man's death in a matrilineal system, the wife and children remain undisturbed in terms of residence and land use. Should the wife die first in a case where a man has moved to his wife's village, the man is expected to return to his village as the property he was residing on reverts to his wife's family.

In matrilineal systems, a mother gives pieces of land to both her daughters and sons when they are deemed sufficiently mature or when they marry (in the case of daughters). Sons lose their access to family land when they move out to marry, while daughters are guaranteed access even in situations where they are not physically present in their original homes. Should a son get divorced, he moves back to his native village where he is given access to land temporarily until he remarries.



Chiefs have been important advocates for social causes like reducing gender-based violence and early childhood marriage, though their engagement in land issues have been somewhat less public than these other social advocacy programs.

In theory a matrilineal system acts as a leveling mechanism in gender relations as it awards women direct land rights, both for use and control. In effect, individual women can be regarded as landholders regardless of their marital status. The reality, however, is much more complex as this form of social organization does not imply that women rule. Men generally take on

major roles of authority and responsibility. It is noted, though, that in matrilocal groups women seem to have a higher overall status and much more influence within both family and community than they do in patrilocal groups. One informant reported that in matrilineal societies, men are generally reluctant to invest more than the bare minimum on the land because the fruits of their labor would be inherited by their wives' male relatives upon the termination of the marriage.

Changes in systems: In some cases, traditions among matrilineal groups are slowly evolving to be more like those of patrilineal groups. The Chewa are experiencing this change, and there have been suggestions from amongst the Chewa that “we want to be more like the Ngoni.” Settlement systems are also subtly changing, with some women now relocating to their husbands' villages upon marriage, leading to loss of rights in their birth villages and no rights in the their villages of marriage.

Yet there may also be more pragmatic and social reasons for moving away from matrilineal traditions. Within the matrilineal traditions, children's uncles (not the father) are responsible for their upbringing and well-being; culturally and genetically this is because it is certain that they share common heritage and genes, while it may be uncertain that the father shares traits. As family groups disperse and move more broadly, and as individual and household rights take increasing precedence over family ties, there is less interest on the part of uncles in caring for their nieces and nephews. Similarly, this system relieves fathers of many responsibilities, and men generally appear to lack interest in improving the land of their wives' families. Some argue, therefore, that the matrilineal system leads to less investment in land.

Interestingly, in discussions within the matrilineal systems around land certification, some noted that even though the customs will dictate that a man will have to leave the wife's village after divorce, it is likely that a land certificate would/will be given primarily in the name of a man (it is unclear, however, whether this would be in the name of the father or the uncle). There is a risk, therefore, that the introduction of land certificates could lead to further accelerating a change in the matrilineal system to a patrilineal approach, even if space is allowed for both men and women on a certificate. These dynamics will continue to be explored to better understand the extent to which the certification process simply documents these changes or influences the change.

Inheritance in matrilineal and patrilineal systems: Inheritance plays a major role in land administration and the distribution of wealth. Under the Intestate Succession Act of 1989, the spouse inherits 20% of the deceased's estate and, together with the children, shares the house. However, the law does not apply to land held under customary law.

In matrilineal systems, property is inherited through the female line and land normally passes to the nearest matrilineal male, usually a nephew of the deceased and not necessarily the sons. In the case of the Chewa, for example in Chieftainess Mkanda's area, should a woman die, her husband has to leave the village and the children inherit the land of their mother. A man cannot permanently acquire land but may be able to access land for use, usually allocated outside of the village. In the case of divorce, where the man had moved to his wife's village, it is expected that he will move away from the village and return to his own village. He would not inherit anything.

In patrilineal communities, property goes to the sons. The daughters therefore do not inherit in their own right and can only be assigned land to use by the inheriting male (who may be a cousin, a brother, or an uncle). This is changing significantly in Chipata District. The Ngoni Paramount Chief Mpezeni has shown a preference for helping widows; he supports their inheritance of land after the death of their husbands. In the case of Chief Mnukwa, who is also Ngoni and therefore patrilineal, his view is that both the girls and the boys should be allowed to inherit land as what matters is what the land will be used for. In the case of divorce, the men interviewed in the patrilineal communities were very clear about what they expect to happen and explained that once divorced, a woman would have to move away back to her village and would not inherit anything from her husband. If they do retain access to some land, they are rarely able to control decision-making regarding land use and production. Widows who remain in their late husbands' villages are often allowed to continue using the land, especially if they have children.

Inheritance of land is a major issue in Zambia, and land conflicts around succession and inheritance are common in both matrilineal and patrilineal systems. Almost all the respondents, from chiefs to farmers, reported that inheritance and boundary disputes were the two most common land conflicts and sources of insecurity in their experiences. In matrilineal societies, inheritance is also becoming a problem as men try to wrest control over property from women. Inheritance and succession by the deceased's brothers rather than his descendants dis-privileges women and youth, and many succession cases presided over by chiefs and headmen are intra-family disputes involving relatives grabbing the property of the deceased and leaving the descendants with no option but to seek redress from traditional authorities.

4.3 RELATIONSHIP CONSIDERATIONS

With respect to gender relations within households, there are also questions and concerns over decision-making, in that in both matrilineal and patrilineal systems, men are considered the "decision-makers" though consent is generally sought from women. Yet, the potentially limited decision-making of women on land use and land use change (even if women are doing a large portion of the farming activities) remains a particular issue to be aware of. A second element associated with gender relations is seen in the realm of village committees and concerns of inclusiveness of committees. Many village

committees do not have any women represented, and even where they do, this may not represent a real engagement.

4.4 CHANGING CHIEFDOM DYNAMICS

Additionally, there is a changing dynamic within chiefdoms as younger, often more educated, chiefs come to power. These younger chiefs often have a more progressive view on gender rights and may be more likely to support individualized/household rights to land than previous generations. In many cases, they have advanced formal education and substantial work experience in other regions of Zambia. There are, however, drawbacks to this tendency, as these chiefs may be more likely to see land as a commercial investment and may actively engage in conversion of customary land to state land in collaboration with national or international investors. This can be contrasted to a more passive conversion of customary land, where national or international investors target chiefs who may not be fully aware of the national land policy provisions.

This generational dynamic is also relevant within chiefdom structures, as headpersons generally serve for life. Working with elderly headpersons, who may have mobility issues or limited formal education, presents a potential challenge within traditional authorities for administering land. There is a potential for resistance from headpersons, particularly when a new or younger chief presents a radically new model for land administration.

4.5 CONCLUSIONS ON WOMEN AND LAND ALLOCATION

All the chiefs in Chipata District have indicated they have no problem with allocating land to anyone that wants it, irrespective of their gender. However, there remain risks for women in their ability to access, own, and control land, as well as to benefit from the products arising out of the use of the land. As a result, the TGCC project and subsequent tenure activities should consider the following when seeking to integrate gender considerations into programs.

- **Understanding the context:** From the visits made to the chiefdoms and the different villages within these chiefdoms, it is clear that each village has its own unique economic, social, and cultural features and patterns of land use and landholding. This is to say, even within the patrilineal system, the cultural practices from one Ngoni village to another bear slight differences depending on the traditional leadership therein. These differences mean that a single strategy is not sufficient to ensure women are engaged with land allocation; instead, strategy must be customized to the specific circumstances in a particular village.
- **Reluctance of women to participate:** Although some chiefs and community land advocacy committees have indicated their willingness to give land to women, the women themselves may not come forth to try and access the land. This is based on their own perception that the system will not allow them to access land. Across communities, there is a contradiction between what the men said women could do and what the women felt they were allowed to do. For example, women often noted that they had never thought to ask for land because they believed the men would not allow them to access land for themselves.
- **Participation of women on the community land committees:** Women are often excluded from participation in the day-to-day processes of land tenure governance at all levels, and have limited capacity to influence decision-making. The committees need to have adequate representation from both men and women to ensure that the needs of the women with regard to land are taken care of and their concerns are being heard. In addition, women need to see that they have representation and can approach fellow women on land issues.

- **The community land committee’s sensitivity to being inclusive and to ensuring they take into consideration the needs of the women:** Community land committees must be sensitive to the needs of women if they are to ensure there is equity in the manner in which the land is being allocated. In one particular village in Chief Mafuta’s area, it is reported that the headperson believes HIV-positive people should not be allocated land as they will die anyway. In Zambia, where women are more likely to be tested and to publicly admit their status, there is a risk that this group of vulnerable women will be discriminated against. The issue of women with disabilities was also brought up with some community members noting that people living with disabilities may not be able to develop land and should therefore not be allocated land. This will potentially affect women in the sense that men, though disabled, may not be as disadvantaged as women and may even be in a better economic position to make investment. Women that are living with disabilities, on the other hand, may not have the same economic opportunities and may thus face discrimination based on their lack of capacity to show how they will develop the land in the absence of economic resources.
- **For married women, the need to have consent from husbands before land can be allocated:** According to the village land committee interviewed in Chief Mnutwa’s village, a women can only access land with consent from her husband. Consideration should be given to women who have been abused and can genuinely show a need for land independent of their husbands. In communities that are obviously patriarchal, there is an inherent risk that the attitude of the men towards women owning land may be one that will stop them from consenting to have the women own land in their own right.
- **Paying homage to the chief:** As noted above, it is customary to give a small gift when visiting a chief. Gifts are not standardized and can include groceries, a chicken, a goat, money, or even more valuable items. The practice is accepted as the norm, but the risk is that community members are not always sure about when a gift should be given and whether a different-sized gift is expected when one is asking for land. As women are less economically empowered than men, it is more challenging for them to present a gift and they may not be able to give gifts of equal value to those that men give.
- **The capacity of the women to develop the land allocated:** One of the requirements for land allocation is that the person applying for the land is clear about the use to which they will put the land. The chief can take away the land under particular circumstances which include the land not having been developed as initially planned. In view of the women’s economic capacities and experience of higher poverty levels, they stand the risk of losing the land should they not be able to develop it in a given time frame.
- **Ensuring that land allocated to women is in fact being used by the women:** The capacities of the committees to ensure equity in outcome of increased land allocation to the women would have to have them move beyond looking at just allocations to land use as well. There is a risk that although women will access the land, over time, men would potentially take over the land particularly in cases where the use to which it is being put is lucrative.
- **The cases of women in polygamous marriages:** It was not immediately clear how the committees will deal with women that are in polygamous marriages in as far as land allocation is concerned. The potential risk is in having the second wife being left out of the process and not being able to acquire land.
- **The plight of young girls:** In the Chewa culture, a young girl can access and own land and a certificate can be issued to her. Should such a girl marry, the land is still hers and remains hers whether she divorces or becomes widowed. In the Ngoni culture, the headpersons interviewed

explained that although girls can be allocated land, once a girl gets married and moves away to another village, that parcel of land is usually given to someone else to use. For the Ngoni headpersons, an 18-year-old was still too young and unsettled to have any solid plans for land and as such the preference is not to give them land at all. This is in contrast to the views held by Chief Mnkwa, who believes that even young girls should be allowed to own land on certificates as a way of helping them become independent. The risk is that his vision will not be realized as long as the structure through which land is being allocated does not believe as he believes.

5.0 SUMMARY & RECOMMENDATIONS

THERE IS A DEMAND FOR CUSTOMARY LAND DOCUMENTATION. Zambia's dual customary and state land tenure system presents a unique set of challenges to securing rural land rights. Zambia has comparatively strong rural governance institutions in the form of chiefs, *indunas*, and headpersons. This institution has the backing of legislation and locally has perceived legitimacy. There are significant challenges facing these institutions at the interface of customary and state land, particularly in peri-urban areas where municipalities and economic opportunities meet subsistence farming. Yet even in more rural agricultural frontiers, there is demand for increased tenure security. This assessment demonstrated a demand for customary land documentation and considered the legal and governance challenges associated with their deployment, as well as strategies to ensure that the process does not disadvantage any one group.

THERE IS NOTHING THAT LIMITS A CHIEF FROM CARRYING OUT AND ADMINISTERING CUSTOMARY LAND DOCUMENTS. Chiefs have established legal authority over customary land in Zambia, including allocation rights. In practice many of the day-to-day land allocation and management authorities are devolved to village headpersons. Chiefs and their advisors also have legal law enforcement authorities and land disputes represent a large proportion of cases the chiefs and their councils hear. Historically, these allocations and the results of the chiefs court have largely been undocumented, though there are a number of chiefs who keep records. While customary land documentation is not foreseen in any legislation and would not represent a standard formally recognized document, it is within a chief's mandate to document land within his or her chiefdom and use the documentation in a format similar to a contract with his/her subjects. As a result, the program to document household land allocations is on legally solid ground.

THERE ARE CHALLENGES IN COMMUNICATING OPPORTUNITIES AND LIMITATIONS OF CUSTOMARY LAND DOCUMENTS WITH ALL STAKEHOLDERS. The primary hesitancy of chiefs to allocate customary land certificates has been a fear that subjects will misinterpret the limitations of the certificates and will believe that it is a title that can be transferred or sold. Additionally, some chiefs believe that documentation is the first step toward the government taking chiefs' land. While the first issue can be addressed through close and frequent communication throughout the certification process, the second issue has become more political with the recent emergence of the National Land Policy and National Land Titling Program. The TGCC program has an objective of strengthening customary land management and therefore does not promote conversion to leasehold. These objectives need to be communicated consistently and clearly to chiefs and their advisors, as well as to community members.

PROCESS IS IMPORTANT TO CREATE SPACE FOR SOCIAL INCLUSION, BUT IT CANNOT FORCE CHANGES IN CUSTOMARY LAND ADMINISTRATION. The process for documenting customary land rights should open opportunities for inclusiveness and transparency and promote these principles. However, it will not be possible to force these concepts onto communities, for example with respect to joint registration or ensuring that members of extended families have land in their own names. TGCC should create structures for registration of rights in these forms; it is possible that people's views of the documentation process will evolve throughout the life of the program. Care needs to be taken as well that in promoting the rights of women or youth, other

legitimate stakeholders are not left behind. For example, the registration of husbands and wives jointly may take land out of family holdings and put it in a single household, thereby excluding a larger family group. These dynamics need to be observed, particularly since the work is addressing both Ngoni and Chewa ethnic groups.

LEARNING AND COMMUNICATING RESULTS IS CRUCIAL IN CUSTOMARY LAND DOCUMENTATION PILOTS. Because customary land documentation is a relatively new concept in Zambia and with the evolving policy and legal framework it is important that approaches are piloted with the goal of learning. This includes keeping communication open with government, communities and traditional leaders to ensure that they are providing feedback on what works from both a legal and cultural perspective. This approach also creates an openness and building of trust that is crucial for long-term cooperation among stakeholders.

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U.S. Agency for International Development

1300 Pennsylvania Avenue, NW

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