



LAND USE PLANNING AND COMMUNAL LAND TENURE REFORMS IN PASTORAL AREAS: THE EXPERIENCE OF KENYA

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Abstract

Land reform in the rangelands, including land use and land rights is a major government policy concern in the 21st century. Analysis of the state of land use and land rights for rangelands communities and the inconsistencies in policy and planning is therefore inevitable. Key findings are that 90% of rangelands is un-registered and less than 12% of region has had planning preceding development. In addition, there is unregulated increase of sedentarization at an annual rate of 2.4%. This leads to individualization of critical rangeland resources such as water and pasture, resulting to marginalization and incessant resource conflicts.

The government has prepared and published three policy documents; namely; the national land policy, the national spatial plan and the county spatial planning guidelines to guide the land use planning in the counties. It has also enacted two important legislation (1) County Governments Act 2012 which provides a framework for county planning and the types of plans to be prepared, and (2) Community Land Act 2016, that confers land ownership rights to registered community groups. The policy documents and the supporting legislations are meant to facilitate guaranteed rights, controlling of land use and resources in communal lands; and provide a framework for land development and investment.

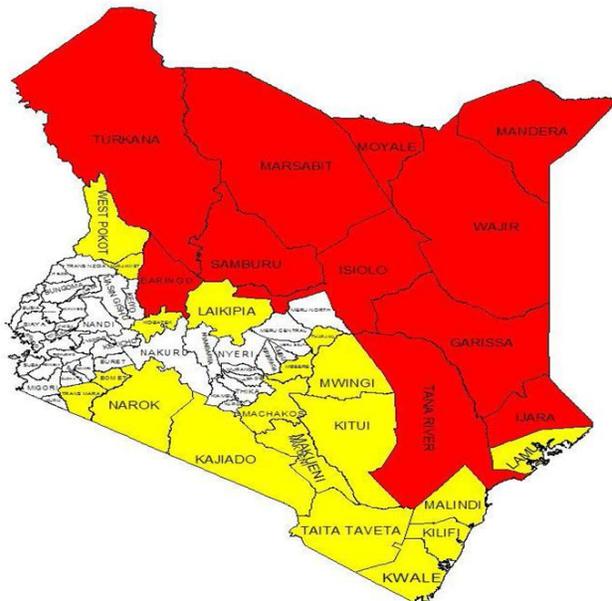
This paper analyzes the state of land tenure, land use and the policy implications Kenya. It proposes a framework to manage the dichotomy in land reforms and land use planning in a manner that yields sustainable livelihoods for the communities. The main questions answered in this paper are; (1) what are the shortcomings and deficiencies of the land management choices prevailing in Kenya and the East Africa/Horn of Africa region more generally, and what are the roles of communities, (3) how does the new spatial structure impact on the pastoralists livelihoods and the principle of “the commons” and, (4) what is the appropriate policy framework can integrate the different planning options to achieve spatial stability and sustainable pastoral livelihoods.

Key Words: community land reforms, land use planning and pastoralist livelihoods



INTRODUCTION

MAP OF KENYA SHOWING ARID AND SEMI ARID DISTRICTS



RED ARE ARID DISTRICTS
YELLOW ARE SEMI ARID DISTRICTS

Land reforms is not a recent phenomenon in Kenya as indeed in Africa. In Kenya Concern has been about land tenure rights, impact of land use change and the management of commons resources. Prior to and after independence, radical changes have been deliberately initiated in tenure arrangements which aim at improving productivity. Emphasis however was on rain-fed agriculture and the focus was in the high agricultural potential areas.

Over 80% of Kenya's land mass is however categorized as arid and semi-arid (ASAL) and land is held under communal tenure. Since independence, Kenya has managed communal land through several policies and legislation aimed at protecting communal rights.

The Trust Land Act Cap 288 was one such law meant to guarantee protection of communal land rights. It however failed to provide adequate protection for land rights and access to key commons resources used by pastoralists. The law provided that trust land vests in the county council within whose area of jurisdiction it is situated. But the Constitution then however allowed the president and the county councils powers to alienate trust lands. These powers have been used to expropriate high value pockets of land within trust lands and allocate them to private development without beneficial rights to communities. Security of tenure for the communities could only be achieved if these powers were extinguished and community rights given greater formal protection in law.

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Another legislation, Group Representatives Act (Cap 287) advocated for security of tenure as a key instrument in promoting the development of rangelands. The focus of GRA was however wrong. It was premised that granting security of tenure lead to destocking, increase incentives to invest and act as collateral for loans to invest (Republic of Kenya 1974). Group ranches were created based on this law, but within two decades, members begun to subdivide them, thereby undermining the intent of the Act to provide secure tenure while improving the productivity of pastoral lands. The result has been intensified fragmentation of rangelands lands, with many commons resources being expropriated for other land uses. This has undermined sustainability and livelihoods which depends on mobility between key resource reserves and seasonal grazing lands.



Statement of the Problem.

Kenya's ASALs and pastoral communities are threatened by changes in property rights from communal to individual tenure, and its resultant spatial instability and economic insecurity. The shift in land tenure system from communal to individual freehold has been rendered problematic by an absence of appropriate conceptual or planning strategy to guide policy formulation and interpretation of the change associated with emerging land transformation.

Currently, land tenure change process, does not take cognizance of the two tenure perspectives. This has allowed emergence of inconsistencies and shortcomings in land use planning and in directing the land use process. The essence of this study is a search for an appropriate strategy to guide policy formulation and finding of an appropriate land tenure change framework; one that brings consensus of the different concepts and an institutional integration to achieve stability in the form of function, relationship, organization, congruence, and character of ASAL spaces. The study advances the argument that currently sustainability is not a value in the land tenure change process.

Traditionally, rangelands supported pastoral subsistence economy based mainly on livestock. To ensure sustainable production, pastoralists employed the commons strategy to provide a broad, flexible and stable resource availability resulting from complementary use of range land. Over time however, the systematic land tenure changes have necessitated a change in pastoral strategies to better cope with the changing land use systems. These include sedentarization of pastoralists due to increased influence of governments and due to change in land tenure resulting from subdivision and individualization of land.

Increased sedentarization has reduced pastoral mobility and concentrated people and their livestock in fixed places resulting in increased land degradation. This has also increased their vulnerability to drought and may jeopardize their livelihoods. In addition sedentarization, has led to diminishing the commons thus losing on the benefit of cushioning against calamities such as drought. The net result has been increased resource-based conflicts

The paradigm shift in land management

The National land policy of 2009 and the Constitution 2010 introduced a paradigm shift in management of communal lands. The National Land Policy advocated for clear categorization of land and called for a guaranteed management framework for communal lands. The Constitution and the National Land Policy provide clear frameworks for securing pastoral/community land rights, access, use and ownership. Article 63(1) in the new Constitution provides for community land which shall vest in and be held by communities identified on the basis of ethnicity, culture or similar communities of interest. This community land shall consist of land lawfully held in the name of group representatives; land transferred to specific communities under any law; land declared to be community land under an Act of Parliament; and community forests, grazing areas, ancestral lands and trust lands held by counties. Article 63(4) states: 'Community land shall not



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be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.’ To give effect to this Article the Constitution further instructs

Since 2009 debate in Kenya has shifted to increased security of land tenure, access to land and sustainable land use. The question of land use and land reform in the community has therefore become a major policy issue, with debate focusing on a shift to two tenure concepts namely communal and individual. The shift is however taking place in absence of appropriate conceptual strategy to guide policy formulation. It is worth noting that rangeland communities operate on the basis of commons which calls for a policy strategies that will ensure accessibility and sustainable use of commons resources.

A review of the current literature on communal lands suggests that land policy reforms has focused mainly on anthropological and livestock issues and less on land tenure, land use and spatial transformation. The conventional view regarding communal land tenure systems is that they lead to environmental degradation and impede development. Many governments therefore embarked on land reform programmes aimed at providing more formalized tenure through individualization and hoped to create incentives for long-term investment and the most efficient users (Lesorogol 2008). The perceived problem is that communal land tenure allocates rights of ownership and access with emphasis on kinship network known as the commons and therefore impedes initiative. A proper understanding of the system of rights governing access to the land and use of the land resources is therefore indispensable to the attainment of appropriate land tenure reforms. The commons communities however hold differently. It is the kinship networks rather than individual possessions that guarantee tenure rights, access to commons and livelihood sustainability.

Obeng-Odoom (2012) observed that debate about land reforms in Africa is characterized by two schools of thought. On the one hand; there are those who advocate for land policies to be rooted in a theory of social capital, especially the traditional land tenure system and on the other hand, those who advocate for individualized tenure systems. Most African governments have attempted to replace communal land tenure systems with a modern individualized systems based on western concepts of ownership (Cousins & Claasens, 2006). Here then is the problem, how to balance between the two polarized views in a manner that leaves room for sustainable utilization of resources and realization of land potential.

The failure of the two schools of thought has led to a shift in thinking as it is now generally recognized that land policies and regulations must build on local concepts and practice, rather than importing one-size-fits-all models (Palmer 2007, Colluta and Polack 2015). Neither of the two concepts offers a panacea for sustainable land tenure, and land use, and a compromise position need to be established. The experience in Kenya attempts to fill this gap.

The Problem of Shifting From Communal To Individual Freehold Tenure.

For the past few decades the management of communal lands has come under threat due to socio economic and political changes that influence land use and land tenure policies in Kenya and



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Africa. This has led governments to come up with modernization policies which in the end however has disrupted the community's ability to manage the lands and resources they depend upon. Currently, the land tenure change process, land use planning and development control systems, do not take cognizance of the communal conceptual viewpoint of land as a commons where ownership and access is based on kinship network. Debates in Kenya focused on communities' ability to manage their lands and natural resources were part of broader land reforms.

The Community Land Act, No. 27 of 2016

The Act is an attempt to provide communities with a pedestal to manage land rights and land use in a manner that is structured and sustainable in response to various economic, social, environmental and political pressures. It provides that "Community land in Kenya shall be owned by the Community" and that County governments shall only hold in trust all unregistered community land on behalf of the communities for which it is held. The law makes clear the recognition, protection and registration of community land rights; the management and administration of community land.

Ownership of land will therefore now vest in communities to enable them plan manage and develop their own lands and resources. These changes provide new opportunities for adaptive land resource management and community-based management models. The main role of the County Government under the Act is to hold in trust on behalf of a community unregistered community land. Hold any monies payable as compensation for compulsory acquisition of any such unregistered community land. Monies shall be deposited in a special interest earning account and shall be released to the community upon registration of the community land. (Interests) A County Government is prohibited from selling, disposing, transferring, and converting for private purposes of any unregistered community land.

The Act establishes a Community Land Management Committee, to: manage registered community land, and to coordinate preparation of land use plans which shall be ratified by the community assembly. On the issue of rights and entitlements, a community may, allocate land to members but individual entitlement shall not be superior to the community title.

In terms of land use planning the operating legislation is the County Governments Act 2012 which assigns the county government roles of county planning and development, land survey and mapping; boundaries and fencing; and housing. The two legislation will apply side by side, but the community land Act guarantees the participation of the community in the land use planning process and approval of the plans.

The legal and policy shift in Kenya's communal lands becomes clear when viewed from the fact that much of Kenya's communal land is facing a transition to individual tenure system and currently the talk is about sustainability. Weller (2006) observes that in a transition scenario, it is difficult to predict the future, yet managing transition requires anticipating the different ways in which that future might unfold. For this reason current land tenure changes presents challenges that call for appropriate management framework and policy reorientation to achieve sustainability.



A key issue for the future of Kenya's communal lands will therefore be the ability to manage the interface between community's concepts of land from social spatial perspective (kinship, commons) to commodity spatial perspective (at individualized scale). What is currently witnessed is communal lands being subdivided into individual holdings which are of insufficient size to support livestock production system and large-scale pastoral movements across the land. Whereas change is an inevitable consequence of a socio economic transformation it needs appropriate policy to yield sustainable results.

Land Tenure Reforms and Land Use Planning Implications

The case studies of the land tenure reforms and land use planning implications have been drawn from three clusters (1) Turkana, West Pokot and Elgeyo Marakwet; (2) Garissa; Wajir; Mandera and Tana River ; and (3) Isiolo, Marsabit, Samburu and Kajiado. The three clusters of counties¹ provide a geographical representation of the communal lands and reflect different types of contexts including one, where communal land use is still dominant, one in a transition area where land use change has moderately taken place, and one in mixed-crop area where significant land use change has occurred.

It has been established that many pastoralists are exiting from traditional mobile nomadism and entering into sedentarisation while individualization of tenure has opened room for other sedentary communities to enter into hitherto communal lands and settle. Without proper land use planning, this new phenomenon is likely to result into instability, degradation, deprivation and dispossession of the pastoral communities. Traditionally, the rangeland communities have relied on a system of the commons which provides a broad, flexible, opportunistic and stable resource use. Over time however, the systematic land tenure changes have necessitated a change in land use systems which resulted to two human settlement pathways. One is induced sedentarization (IS) encouraged by new economic opportunities emerging in the rangelands and attracting non rangeland communities to settle. These have significantly changed the landscape (agriculture, green houses housing estates in gated communities, industrial and institutional developments as well as individual homes). This case is rampant in cluster three of Isiolo, Marsabit, Samburu and Kajiado counties.

The new land uses are not only unsuited to the region, but have opened new frontiers of conflict. The incoming settlers have fenced off their properties driven by the individual consumerist concept of land tenure and thus made them in accessible to the pastoralists who still hold on to the communalist commons concept of land. To the pastoral communities, the subdivision and sale of the land and change of tenure did not alienate their right of access to the commons property especially the land sold where there are critical resources like water and areas of wet and dry season grazing.

¹ **Cluster 1:** Turkana, West Pokot and Elgeyo Marakwet; **Cluster 2:** Garissa; Wajir; Mandera and Tana River ; **Cluster 3:** Isiolo, Marsabit; and Samburu



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The second form is residual sedentarization (RS) which involves communities exiting from nomadism and settling around water points, food relief distribution centers and along major trunk roads. This is encouraged by the government, through provision of social amenities such as health centers improved infrastructures and permanent watering sources at specific points. These communities live on two ends of the livelihood system. On one hand they keep their livestock around the new settlements, while they also engage in petty trade. This case is found in cloister two which has Garissa; Wajir; Mandera and Tana River counties.

Then there is induced involuntary sedentarization (IIS). Here, communities subdivide and sell their land driven by the desire for a better life outside of pastoral livelihoods. The resultant land parcels continue to diminish hence unable to support livestock based livelihoods. These communities are uprooted and suffer some form of dispossession. They therefore settle as workers or squatters on land that has already changed tenure, but not developed. Here they build temporary structures and keep their livestock. They continue to maintain their social spatiality concept of land tenure but exercised in lands that do not belong to them. This is witnessed majorly in cluster one of Turkana, West Pokot and Elgeyo Marakwet counties.

The national land commission actions to address land challenges

Article 67. (1) of the Kenya Constitution established the National Land Commission with broad functions, among them, to:

- Manage public land on behalf of the national and county governments
- Recommend a national land policy to the national government
- Initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress
- Monitor and have oversight over land use planning throughout the country.

The national land commission has prepared and published three instruments that will help the management of all processes of land use and development management across the country including in communal lands. These are (1) a County Spatial Planning (CSP) guidelines which is to guide high-level (i.e. county) land use planning, (2) Leaders guide to county spatial planning that provide an instrument for policy level monitoring and oversight of county spatial/ land use planning and a tool for sensitizing the citizenry on the importance of County Spatial Planning; and (3) the urban land use planning monitoring and oversight guidelines, which guide the process of preparing, approving, implementing and reviewing urban land use plans and elucidate on the process of public participation in county spatial/urban land use planning.

The County Land Management Boards (Secretariats)

Upon priority, the National Land Commission moved to formulate a structures to operationalize the “managing public land and for the specific national-interest mandate. The County Land Management Boards (CLMBs) were created by Section 18 of the National Land Commission (NLC) Act 2012. The CLMBs impacted greatly on devolution of land governance and specifically in the land management in the counties. Part of its key achievements was in resolving land disputes across the country by promoting traditional dispute resolution mechanisms and resolving of historical land injustices. This filled a vacuum created by in accessibility of formal justice systems



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by rangeland communities. The commission has subsequently developed guidelines to direct county land management particularly in the land use planning and in the processing of development applications and management of public land. These guidelines will now be used by the Commission secretariat at the counties to inform land management.

Upon the repeal of the repeal of section 18 by the Land amendment Act 2016, the commission established county land management committees (CLMCs) with specific mandates that will comprehensively see the effective actualization of the Community Land Act, the land Registration Act, Land Act, the land use policy and land use planning regulations. The committees principally have the brains and safeguarding mandate with regard to the following land use and land management functions at the county level.

- Land subdivision
- Land alienation
- Land amalgamation
- Land re-adjustments
- Change of users
- Extension of users
- Land easements

In essence, the purpose of the committee is to effect the devolution of land-management to the counties.

The land use planning and the planning paradigm shift in community land management Land tenure and land use change within the communal lands has increasingly become a matter of focus for policy makers and planners as they become the next frontiers of human settlement and development. Less than 12% of communal land areas has had land use planning preceding development. Of the 13 rangeland (arid) counties spatial planning has been initiated in three while, only two have integrated urban development plans. This has resulted in unregulated development leading to fragmentation. Sedentarization is occurring at an annual rate of 2.4% in the central rangeland counties of Garissa, Wajir Isiolo Tana River and Mandera. This comes with individualization of critical commons resources leading to resource conflicts, increased degradation, feeling of deprivation, dispossession and alienation. In Wajir County for example, there are now over 75 water points managed by non-customary groups, and they charge for use, making accessibility expensive and inequitable.

The land tenure and land use changes in the communal lands are taking place within the old management frameworks. In this, land tenure is still being equated with acquisition of title deed. The Kenya constitution however sought to change this mindset by prescribing to the principle that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable (Article 60(1)). The old dispensation ascribed to the principle of holding as the guarantor of security. The departure now is that emphasis be laid on the use and management side. This will guarantee sustainable use, poverty alleviation and live livelihoods. The principle here was to move land holding as the end state of land tenure, but rather to have land tenure as the beginning point from which radiates sustainable economy, convenience and poverty alleviation. The kind of tenure policy that ensues from this principle therefore is tenure for posterity which



allows for intergenerational use and transfers. The concept of tenure must be intertwined with the use. This is made clear by article 60 (1) a- e which states the principles of land tenure as one that provides for among others;

- (a) equitable access to land;
- (b) security of land rights;
- (c) sustainable and productive management of land resources;
- (d) transparent and cost effective administration of land; and
- (e) sound conservation and protection of ecologically sensitive areas.

The Constitution in Article 68(c) directs for parliament to enact legislation—

- (i) to prescribe minimum and maximum land holding acreages in respect of private land;
 - (ii) to regulate the manner in which any land may be converted from one category to another;
- Further Article 66 (1) prescribes that the state may regulate the use of any land, or any interest in or right over any land, in the interest of defense, public safety, public order, public morality, public health, or land use planning.

The essence of these articles in regards to the communal lands is to depress the land market and slow down the pace of land fragmentation in communal lands and particularly the rangeland areas where the net effect of unregulated land use and land tenure change is deprivation, alienation, degradation and resource use conflicts. Through the Community Land Act 2016, Communities are empowered to plan for the development, management and use of the community land and submit the same to county government for approval. The county government shall, in considering a plan submitted to it under this section comply with the relevant law relating to development planning. The law also mandates the community may reserve special purpose areas including — settlement areas; urban development; or any other purpose as may be determined by the community such as special grazing areas.

The expected benefits of the community land use plans are: (1) a spatial structure depicting the vision of each community and prescribing land use zonation and land development standards; (2) preconditions for integrating under-developed and marginalized areas to bring them to the level generally enjoyed by the rest of the county; (3) guidelines for land use management system; i.e. control, regulate use and land use changes through zoning schemes and performance standards; and (4) framework for land development and investment

Implications of spatial planning (CSPs) and county land management committees (CLMCs) for pastoral areas.

With the CSP and CLMSs in place, the county governments and communities are now obliged to carry out more systematic and integrated land use planning, and management of their land and the commons resources. Together with the provisions of the CLA 2016, communities will now be consulted and be part of the process to plan their future and decide the framework of the management of their land based resources. Further, for any resources of national interest harnessed for national development goals, the communities will be entitled to as structured benefit sharing.



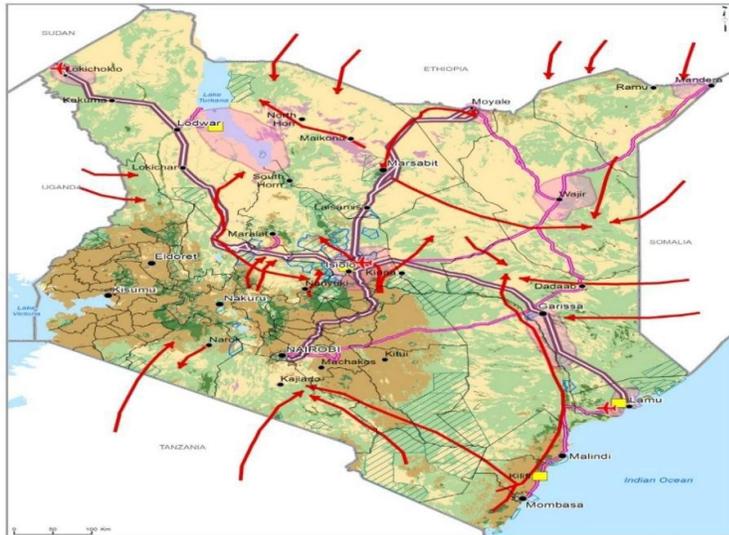
It is glaringly evident that Kenya's rangelands communities is currently experiencing renaissance in land tenure and land use. This was however not guided by appropriate planning and land use management strategies. Now the National Land Commission in collaboration with County Governments, RECONCILE, ILRI, and FAO, have focused on developing planning guidelines that addresses specific unique land tenure and land use planning challenges for the rangelands. This is in response to the fact that emerging new land use strategies are incapable of meeting the needs of the rangeland inhabitants and do not guarantee secure tenure, livelihoods, economic and social growth.



The new developments are driven by consumerist spatial concept of land tenure and thus made them inaccessible to the pastoralists who still hold on to the communal spatiality concept of land tenure.

The land use guidelines address a number of issues critical to the sustainable development and spatial stability of communal lands. These include planning, land use, management, regulation and accountability, rights guarantees and the commons including benefit sharing, human settlement, urbanization and sedentization of the rangelands. It also incorporates guidelines on climate change adaptation, enhancing community resilience against drought, accessibility and migration of livestock, and sustainability of rangeland livelihoods among others.

The guidelines also address issues of pastorals mobility, stock corridors and rights of passage. This ensures that pastoral community's movements and accessibility to commons resources are not blocked by new developments and new tenure systems.



Pastoral community's movements and accessibility to commons resources are blocked by new developments and new tenure systems
The new tenure systems do not consider rangeland socio-spatial organization and territorial control

The new land management philosophy considers the rangeland socio-spatial organization and territorial control. To the pastoralists, the subdivisions, land use change and even sale of their land did not alienate their right of access to the commons property. Thus the philosophy is to make the commons accessible and to mitigate land degradation spatial incongruence and land use conflicts.

Conclusion

The land reform program must embrace the community social structure as a basis for understanding the extent to which social relations shape the livelihoods framework. Until recently, most African planners have continued to apply borrowed planning concepts without challenging their content and relevance. The blue print planning focused on development control, permits and licenses which does not make any sense to communal land use.

They were based on the assumption that future land uses could be accurately predicted and planned for. Communal land use however demands planning at a large scale (i.e. beyond or across village boundaries), planning for multiple and overlapping uses where resources have strong connectivity and community empowerment to allow for the movement of people and livestock. Land use and development projects in rangelands therefore should aim at: enhancing community resilience, climate change adaptation, improving sustainable livelihoods, and mitigating vulnerability and; creating an investment environment based on local dynamics and internal potential. The experiences described here show that through a multi-stakeholder process land use planning and land tenure challenges in rangeland areas can be simultaneously addressed. The challenge now is to put this theory into practice and have a monitoring and evaluation mechanism to track the program.



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