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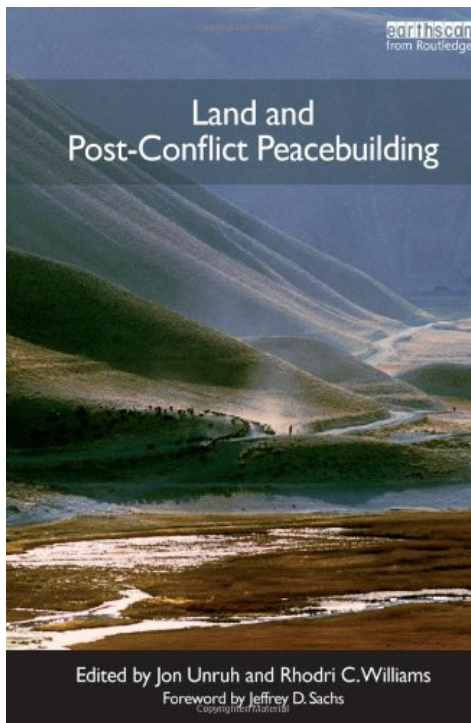
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### Community documentation of land tenure and its contribution to state building in Afghanistan

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# Community documentation of land tenure and its contribution to state building in Afghanistan

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Turmoil for the past thirty years in Afghanistan has led to widespread insecurity, including in regard to land rights. While decades of conflict have severely weakened the formal justice system, this has not resulted in lawlessness. In the absence of effective formal authority, systems of land administration based on religious and customary practices have provided a measure of security.

Even before the 1979 Soviet invasion, when the authority of the Afghan state was at its apogee, the formal government was not actively involved in resolving land disputes. But when the state did exert its authority over land issues, it did so in an authoritarian manner, often redistributing massive amounts of land from one party to another.

This chapter explores various strategies employed by the government of Afghanistan, both historically and in contemporary times, as well as by foreign development assistance programs that aim to move the country out of a state of government failure and to enable the government to provide services to its citizens. It reports on a pilot project developed to encourage a sense of community ownership of locally crafted property records that document the right to use communally held rangeland and the ownership of privately held agricultural land. It presents suggestions for linking the administration of these records with the administration of property records in government agencies to forge stronger and more harmonious relations between rural people and the state. And it argues that community-state cooperation to provide a public service—in this case the documentation of land rights—can help minimize future conflicts over these land rights and fortify governance structures in general.

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## A Foothold for State Building in Afghanistan

Informal arrangements at the village and clan levels about who has access to land, when, and for what purpose are far from perfect, but such arrangements have worked in the past, and even under the unstable conditions of the past thirty years have continued to function, particularly in rural areas, except in some places concerning use rights to rangeland. While citizens have had little contact with agencies of the state, and many view the state as hopelessly corrupt and irresponsible, informal mechanisms have provided land administration services in the absence of effective government rule (ICG 2007).

People involved in state building efforts in Afghanistan tend to view the relationship between formal and informal justice systems in zero-sum terms: the existence of legal systems based on customs undermines the authority of the formal government. Such a view is misplaced, however, in the context of Afghanistan, where the informal sector has demonstrated not only its ability to maintain records and mediate disputes in rural areas but also a willingness to cooperate with formal authorities.

The most common approach to state building focuses on creating formal government institutions, usually working from the top down and from the capital to the periphery. A key assumption is that new institutions and organizations must be created “from whole cloth [to create] missing state capabilities and institutions” (Fukuyama 2004, xi). This approach focuses on creating institutions and building capabilities that are largely absent in a failed state, beginning at the national level—with national elections, a constitution, and national policies that encourage a dynamic economy and multiparty political system for the country as a whole. Such an approach views a country like Afghanistan, which has been without a coherent central government for more than thirty years, as an institutional *tabula rasa* with no significant governing capabilities to build on.

A more productive approach is to ask which of the country’s institutions could provide a foothold for state building projects (Brick 2008b). In Afghanistan, as in many weak states, the provision of public goods and services takes place in the absence of an effective centralized system of government (Bardhan 2005). Decision making and political and economic governance do take place, but may occur without the participation, consent, or awareness of the formal government. Economic and political activity does not grind to a halt because the state does not provide adequate services with the underpinning of formal law. Groups and individuals have much to gain by developing alternative institutions for providing public goods and services, particularly at the community level (Dixit 2004). It would seem wise to build upon this resilient governance capacity at the community level with a bottom-up approach that complements the top-down nation-building approach that has emerged from the failed-state analysis.



## LAND ADMINISTRATION

An effective system of land administration is vital for the development of Afghanistan. Without effective property rights, incentives for innovation decline along with prospects for economic growth (North 1990; North and Thomas 1973). Current efforts to build an effective property and land management system go through the central government, without much regard for the far more pervasive and effective informal or customary system.

According to formal law, past and present, the Afghan judicial system is responsible for preparing and archiving deeds to land. During years of warfare, the physical state of these archives severely deteriorated, and the personnel who administered them fled or were killed. Compounding these physical challenges is the complex web of laws, regulations, and agencies administering land rights, making the system costly to utilize. As a result, court-prepared deeds document the rights to less than 10 percent of rural properties and less than 30 percent of urban properties.

Lack of a court-prepared deed does not necessarily result in acute tenure insecurity. Informal transactions, mediated by respected community leaders, are the primary mechanism through which individuals secure tenure rights. Some acquisitions involve privately drafted customary deeds, written transfer agreements that are witnessed by locally respected people but kept by the parties to

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the transaction and not recorded in any government office. Other transactions involve verbal agreements witnessed by family members and respected village elders.<sup>1</sup>

Such transactions do not occur daily in most villages, since land markets are generally not very active. The transactions that do occur are usually among family members or community residents who respect verbal agreements, particularly regarding inheritance or family or tribal transactions.

The recording of documents defining rights to real properties in public registries becomes important when there are multiple claimants to the same land and where land markets are more dynamic, such as in urban and peri-urban areas. Under such conditions, lack of documentation produces varying degrees of insecurity of tenure as perceived by the property holders or potential property holders.

Tenure is perceived to be more secure when rights to land are seen as both legitimate and legally valid:

Secure rights to land and property depend on a combination of two key elements. The rights being claimed must be seen, first, as legitimate by the local population; and second, they must also be ascribed legality by the state (Toulmin 2006, 4).

Afghan community customs provide rules that are often more effective in guiding people's everyday lives than the country's formal laws and regulations. Rights to land may be recognized as legitimate by the community, as in the customary deeds described above, even though they are not documented in accordance with legally defined procedures.<sup>2</sup> Government officials may issue documentation of rights to land that is drawn up in strict accordance with legal requirements, even though it faces strong local opposition—such as allotment of land to a developer. In such cases, land rights may be legally valid yet not considered socially legitimate. Such situations may contribute to conflict.

Bringing about the conditions under which land rights can be recognized as both socially legitimate and legally valid is of critical importance for Afghanistan's development. To this end, the Afghan government made a cadastral effort to document landholdings between 1964 and 1977. This effort focused on applying formal law to adjudicate claims to land through field teams assembled and trained by a state agency, the Cadastral Survey. In Afghanistan,

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<sup>1</sup> In many communities, illiterate villagers confirm transactions by inking their fingerprint on a document to signify agreement to a private contract not drawn up by a judge. This process is known as *shasht*. One of the greatest challenges in Afghanistan is the high rate of illiteracy in the rural population. Because of this, even if a streamlined land records system could be established, it is questionable whether many people would participate in it.

<sup>2</sup> See Sheleff (2000) for a useful discussion of the literature on customary law, and Zadran (1977) for a description of Pashtun customary law in Afghanistan.

as in some other countries, these technical field teams consulted with community leaders and landholders to identify boundaries and rights to land. However, following these consultations, the governmental agency responsible typically archived the information in centralized archives and used it in often distant governmental offices.<sup>3</sup>

Similar approaches in many countries have tended to focus on equipping and training field adjudication and survey teams. They also typically develop cadastral agencies for producing accurate parcel maps and promoting specialized government land registries for administering the legal documents that define property rights. If such an effort is attempted again in Afghanistan, the institutions carrying it out must find a new way to become connected to the people of Afghanistan. Only with a valid strategy will they be in a position to work toward their objectives and become equipped and trained to do their jobs properly, extending their services to the community typically through the use of information and communication technologies.

The court-administered system of land transaction deeds is not widely used in rural areas; instead, customary deeds are drawn up privately by the parties involved in the transactions. It is not likely that a sporadic involvement of the courts in formalizing land rights will manage to merge the legitimacy of customary transactions with the requirements for legal validity on the widespread basis needed.

## **STATE-BASED RURAL LAND ADMINISTRATION IN AFGHANISTAN**

Afghanistan has a total land mass of 64.9 million hectares, of which 7.8 million are classified for agricultural use, including 3.3 million hectares of irrigable land. About one-half of this land is under cultivation.<sup>4</sup> Even with this underutilization of agricultural land, the agricultural sector continues to be a primary contributor to the nation's gross national product and to provide the largest number of jobs. It is essential to the economic development of the country, and its growth will be an important factor in the reduction of poverty.

Accurate land use statistics for Afghanistan are difficult to obtain. A 1993 study of land use indicated that for that year about 12 percent of the total land area of the country was available for agriculture. The amount of land currently available is somewhat lower, due to the almost continuous conflict as well as periodic droughts (FAO 1999; Alden Wily 2003b).

### **Rangeland**

Millions of Afghan rural people, especially nomads, depend heavily on Afghanistan's approximately 30 million hectares of rangeland to survive. Rangeland is legally

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<sup>3</sup> For a review of various approaches to land administration, including property records administration, see Burns et al. (2006).

<sup>4</sup> This section is drawn from Stanfield (2007) and Safar and Stanfield (2007).

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defined as public land and cannot be privately owned.<sup>5</sup> Families, clans, tribes, and nomadic groups use it to feed livestock, as a source of fuel and of medicinal and culinary herbs, and to move livestock from one place to another. Rangelands are also crucial water catchment systems. Their degradation can lead to erosion and lower the level of aquifers, negatively affecting both farmers and urban residents.

In recent decades, many rangelands have become degraded, and others have been converted to rainfed agriculture. In drought years and in low rainfall areas, this severely weakens the capability of the land to regenerate a stabilizing plant cover. Rangeland has decreased at the same time as demand for it has grown, and conflicts between farmers and pastoralists have increased. Evidence suggests that pastures are the principal focus of conflict in Afghanistan because they involve and affect more people than conflicts over farms or houses. Conflicts over pastureland may also inflame ethnic or other group tensions (Alden Wily 2004).

According to the Land Management Law of 2000, villagers have the exclusive right of use of community pastureland, which is defined in article 9 as “the area from where the loud voice of someone standing at the edge of the village can still be heard.” Grazing areas that are beyond this boundary are called public pastures. In the past, village elders and tribal leaders met and agreed over the use of community pastures, and, in some cases, public pastures (Barfield 2004). In other cases, public pastures could be used by anyone at any time. These agreements were mediated informally, generally without the involvement of government authorities.

Customs and traditions relating to the use of community and public pastures are more tentative today than they were before the 1980s: due to the passage of time and the displacement of people, rights are often not clear and people’s confidence in exercising them is often not high. Such instability and uncertainty provides fertile ground for conflicts over land use and tenure.

### Agricultural land

Users of agricultural land face less confusion about their rights to the land than users of rangelands, but they typically do not have legally produced deeds to their properties. Most have either customary deeds, produced and witnessed locally, or no documentation at all (McEwen and Whitty 2006). This can create problems for rural people who return to their lands after leaving to find work or escape violence. While local knowledge can verify their land rights, lack of documentation can limit their access to credit and institutional assistance.

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<sup>5</sup> Article 84 of the Land Management Law of 2000, states: “Pastures are public property, an individual or the State may not own pasturelands, unless otherwise stipulated by sharia [Islamic law].” It also states that pastures are to be reserved for public use by the villagers (such as for cattle grazing areas, graveyards, and threshing grounds).

## **The Amlak**

During the reign of the Afghan king Mohammad Zahir Shah in the early 1960s, the Amlak Department was officially established within the Ministry of Finance to handle the government's interests in land. It was composed of the Directorate of State Properties, which was to manage state-owned land, and the Directorate for Private Properties for recording the allocation of state land to private owners. The Directorate for Land Surveying was also created, which was conventionally called the "directorate of land measurers"; measurers were assigned to prepare the sketches for land surface measurement for the calculation and collection of property taxes (Nasser 2005). During the bureaucratic reforms of Prime Minister Mohammed Daud Khan (1973–1974), the Amlak developed further and gained a great deal of independence within the Ministry of Finance.

Subsequently, to implement its plans for progressive land taxation and for an ambitious land reform program, the Daud government needed detailed information about agricultural landholdings. To this end, the Amlak was tasked in 1975 with the much enlarged responsibility of creating ownership records, based on declarations by each rural household of how much land the household owned. Updating this household-level information continues to be a task of the provincial Amlak offices.

In addition to recording landownership, the Amlak has the legal authority to administer the rights of the state in rangelands, which the law defines as state owned. This authority is only exercised sporadically, for example in response to conflicts among local users or unauthorized conversions of rangeland to agricultural land. Amlak officials do not normally get involved with local arrangements for rangeland use.

Thus the Amlak has been an instrument of the central government in land reform and taxation and has intermittently exerted the state's rights over rangeland. These efforts have had a mixed reception at the community level, due to resentment over taxes, land redistribution, and the extraction of rents for the use of rangelands. (Although the state claims ownership of rangelands, the rural population has traditionally considered them to be community lands.) Over the years, the Amlak, like most government agencies, has lost much of its authority in rural areas; it is largely disconnected from the lives of rural people.

## **The Cadastral Survey**

In an effort that was institutionally separate from the Amlak, the government staffed and equipped sixteen regional Cadastral Survey directorates from 1964 to 1986. These directorates contained the records of surveys of 5,379 tax units conducted throughout the provinces.<sup>6</sup> The Cadastral Survey was installed in the

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<sup>6</sup> A tax unit was a defined geographic area whose boundaries were established by the Ministry of Finance for property tax collection. Units normally coincided with village boundaries but could include a number of hamlets.



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mid-1970s as a department within the Afghanistan Geodesy and Cartography Head Office, under the office of the prime minister, where it remains to this day.

By 1978, these surveys covered about one-third of Afghanistan's cultivated agricultural land, or about 4 million hectares. (Although small amounts of land were added to the Cadastral Survey through 1986, data are not available on the exact amounts surveyed during this period.) This enormous effort did not, however, lead to the establishment of a nationwide land registration system or to the issuance of formal title documents for the surveyed land parcels. The entry of an owner's name on survey forms was not official confirmation of ownership but rather a statement of probable ownership based on the data collected by the survey teams.

The population has had little contact with the regional cadastral offices. Cadastral and Amlak records have not been integrated. The Amlak does not use the cadastral records, and the courts also largely ignore them when preparing deeds. Thus, these land records have gradually lost their accuracy and potential usefulness.

### The courts

The primary court system for documenting land transactions, which began in the early 1900s, continued during and after the Cadastral and Amlak surveys described above and is now the primary method of formally documenting landownership. Court-issued land documents are based on verbal descriptions of parcel boundaries; when agricultural land is involved, the court also asks the Amlak for verification of ownership. Provincial appeals courts maintain archives containing all court documents produced in their provinces, including land deeds (Stanfield, Reed, and Safar 2005). However, the judiciary and other agencies that administer property ownership information are weak. Figure 1 shows an example of extreme



**Figure 1.** Property documents in the Kabul Provincial Court Archives, 2003

*Source:* Photo by M. Y. Safar.

disorder in the archiving of property documents. Despite efforts to reorganize property document archives, the problem remains.

Given the web of people and agencies involved, formal documentation of land transactions is costly in terms of both time and money. For this and other reasons, it has been estimated that fewer than 10 percent of the owners of rural properties and fewer than 30 percent of the owners of urban properties have a court-issued deed (McEwen and Whitty 2006; LTERA 2006). Most people simply do not use this formal institutional structure.

## CUSTOMARY COMMUNITY GOVERNANCE

The authority of the central Afghan government has rarely extended to the community level. Even the 2004 constitution's call for elected village councils has yet to be implemented. As a result, there is no formal government structure that extends beyond the district level, and villages have no legal representation to the state. In the absence of effective formal authority to resolve property disputes, customary procedures at the village level have emerged throughout the country.

Customary village authorities are not perfect or fully representative of their communities. Women, for example, are underrepresented and are often absent altogether from public meetings. Nonetheless, studies such as that conducted by the Asia Foundation and field experiences of the authors support the notion that citizens view these village authorities as effective and legitimate and trust them more than any other public organization in the country (Asia Foundation 2007). In the absence of an effective government, they remain the best available solution to problems of governance throughout rural areas of the country.

The definition of community can be complicated in Afghanistan, where concepts describing rural community life include *qarya* (often translated as “village”), *qishlāq* (usually meaning “settlement,” from a Turkic root meaning “place of winter settlement”), *manteqa* (meaning “area”), and *mahalla* (meaning “neighborhood”).<sup>7</sup>

While formal governance structures may be weak or nonexistent in many areas, some customary community structures are quite resilient. Often referred to as traditional or informal structures, they are not static but evolve over time. Afghanistan is an extremely diverse country in terms of geography and culture, and it is difficult to generalize about customary community governance systems, but certain patterns are common. Such systems are characterized by three main actors, whose roles may sometimes overlap:

- *Maliks* are local leaders who represent the community to government agencies and vice versa—for example, on issues relating to land and water.
- *Shuras* or (as they are known in Pashtun areas) *jirgas* are village councils that decide on family disputes and forge community consensus about needed

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<sup>7</sup> For discussion of these terms, see Mielke and Schetter (2007); Brick (2008a); and Allan (2001).

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collective action, particularly in reference to the legitimate users of common lands and the legitimate holders of agricultural land.

- *Mullahs* are religious leaders who, in addition to providing religious instruction, interpret Islamic rules that guide behavior and dispute resolution, including those pertaining to inheritance of land and the legitimization of transfers of land rights.

The malik is a key figure in community governance in Afghanistan.<sup>8</sup> Chosen by the community but not formally elected, maliks are arguably the most important members of the Afghan national political system, although they do not hold formal political office (Nojumi 2002). In Afghanistan, community members historically have viewed their village leaders as self-made men who

achieve their position through personality, not age or genealogical position . . . they create unity out of difference, or restore a previous unity . . . they are patrons, acting on behalf of trusting clients, but use their own initiative in action, risking their followers' disapproval; they speak to government as representatives rather than delegates (Tapper 1983, 56).

The term *malik* thus does not refer to a local government official. It is a descriptive title for those who achieve positions of influence in tribal or local governance (Hager 1983). Maliks are generally responsible for holding documents required or issued by government agencies that affect the community, such as royal decrees awarding land rights to the community or to certain families. Villagers view the malik as the person who represents them in official functions and interacts with the government.

Maliks tend to be literate people from prominent or well-respected families. They usually inherit the position from a father or grandfather who was also a malik. However, it is not uncommon for a malik to be unseated and replaced if members of the community are dissatisfied with his work. Through years of conflict and displacement, several prominent families that provided maliks and other village notables have left their communities and have not returned. In these areas, villages have selected new individuals to serve as maliks. Maliks do not act on their own. They represent community interests to the government and usually work alongside councils composed of mullahs and elders.

Shuras or jirgas (councils) convene from time to time in local communities and at times in regional gatherings. They are traditionally composed of family or clan elders, and have played important roles in resolving community, regional, and national conflicts and in establishing agreements about general policies

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<sup>8</sup> Other names for malik in different parts of the country are *arbab*, *qaryadar*, *nomayenda*, *kalantar*, and *khan*. Most but not all maliks are men. During field research in 2007, Jennifer Brick interviewed a female malik in Balkh Province in northern Afghanistan. The deputy governor of Balkh Province also indicated during an interview that there were four female maliks in the province.

(Wardak 2003). They tend to support the actions of the malik, but it is highly unlikely that a malik could act unilaterally without the support of community elders. The maliks are influenced by the community councils, which serve a valuable purpose in holding the maliks accountable to the community as they deal with state institutions.

Maliks and shuras or jirgas have periodically organized to express opposition to a centralizing state (Brick 2008a). Amin Saikal and William Maley have argued that “given the difficulty of building a strong central state capable of restraining the impulses of powerful social groups, a governance system strongly based in community decision making structures has the best prospect of providing a degree of order and stability in the long-run” (Saikal and Maley 1991, 6). M. Nazif Shahrani argues that the strength of Afghan community organizations must be taken into account by the central government (Shahrani 1998). Yet, too often the central government has sought to replace these organizations rather than work with them.

Mullahs are local religious figures who have varying importance in Afghan communities; they are far more numerous than maliks. A community of 1,000 people is likely to have one malik but perhaps three or four mosques, each with its own mullah. While mullahs play an important role in adjudicating family disputes and giving advice about other family and community issues, they are also constrained in their actions by community shuras and maliks.

Maliks and shuras generally play a more important role than mullahs with regard to land administration, because land administration is seen as a more bureaucratic and procedural issue. Mullahs typically become key actors during the resolution of disputes, especially those regarding inheritance, with the support of other actors in the village. Some mullahs are influential in a wider range of community issues.

The nature of these village institutions has led Afghan village governance to be consensus-driven rather than dominated by one charismatic personality. The interactions of the three village governance institutions—maliks, shuras and jirgas, and mullahs—tend to hold separate village powers and thus prevent one from dominating. While they are far from perfect or perfectly representative, as discussed earlier, these organizations have represented community interests better than any alternative presented by the government of Afghanistan or other actors in the past century.

Maliks, supported by their village council and other leaders, meet regularly with the *woluswal*, or district governor, who is usually appointed by the provincial governor. The *woluswal* currently represents the lowest level of the Afghan state governance structure. The *woluswal* and the maliks exchange information about community and government activity. The *woluswal* also helps resolve disputes within a village or between villages when the disputants have been unable to come to a resolution themselves.

Almost every village in Afghanistan has a village council, a village leader, and a religious leader. Their names may differ, and so may the informal or customary laws they apply. In Pashtun areas, for example, *Pashtunwali* (Pashtun tribal code) may be used to resolve a dispute, while other areas may rely more heavily on

religious law. But in most areas, there is a division of authority within communities that works to increase the accountability of these informal bodies to citizens.

Settled villagers cultivating agricultural land and maintaining livestock are not the only people who get into disputes over land rights. In many areas of Afghanistan, pastoralists move vast distances with their herds and use rangelands according to seasonal availability. While the exact figure is not known, they may number nearly 2 million. Afghan pastoralists are popularly called *Kuchi*, which literally means “to move.”<sup>9</sup> The term includes not only Pashtun pastoralists but also other pastoralist communities, like the Baluch in the north. Being Kuchi, particularly for the Pashtun but also for the Baluch, refers not only to migration but to a code of dress, behavior, and dialect. Even settled Kuchi who have not migrated in several years still consider themselves to be Kuchi.

Kuchi communities are not necessarily fixed entities; families leave and rejoin as their needs dictate, depending on the availability of rangeland, agricultural land, pasture, and water and the traditions of migration. Several households typically migrate together, splitting from the community and rejoining it in the summer or winter area. This migration is not centrally organized but is determined at the household level. Communities provide security in numbers, provide support and labor opportunities for the poor, and serve as a pool of shared labor (Glatzer 1982). Kuchi-settled communities have a malik who typically represents their interests in the decision-making councils of regional gatherings of Kuchi clans, or in discussions with governmental officials.

A Kuchi community is defined in the National Multi-sectoral Assessment on Kuchi (de Weijer 2005) as a group of households that have the same winter and summer grazing area (*dasht*). One grazing area can contain more than one community. Generally, these communities have a clear, tribally based sense of identity and a clear leadership structure that includes a shura.

In Afghanistan as elsewhere, it is not uncommon for agriculturalists and pastoralists to compete over land and water rights. Groups may negotiate customary arrangements and mutually advantageous relations at one time, only to see them deteriorate when neither settled nor nomadic families have surpluses for trade or exchange. However, customary law still exists and, even when under pressure, settled and pastoral people are usually able to agree on use of pastures. Most such agreements were crafted during Zahir Shah’s reign of the early 1960s, when many informal agreements were developed that allowed migrants seasonal access to pastures in exchange for a commitment that if their livestock interfered with crops, they would pay full compensation. “What these kinds of informal agreements suggest is that the potential for pastoral and settled people to reconcile their land interests does exist” (de Weijer 2005, 10).

It is important not to idealize customary arrangements, which can break down and can themselves be sources of conflict or lack legitimacy. But these

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<sup>9</sup> In this chapter, the terms *Kuchi* and *nomad* are used interchangeably.

limitations do not invalidate the community-based approach to land administration as a general strategy.

## **THE RURAL LAND ADMINISTRATION PROJECT**

While often weak or afflicted by tensions, both settled and pastoralist communities have developed structures for producing public goods and services for their members and even for resolving disputes over rangeland access. An effective way to help rebuild and strengthen Afghanistan would be for the central government to recognize these community structures. Future governments will likely be more successful if they build upon communities as the basic unit of government rather than treating them as an afterthought of centrally based public administration. Shahrani observes that Afghanistan

must choose to build . . . [the] national state on the proven strengths of . . . “civil society,” the powerful self-governing community structures that have reemerged as part of the . . . most recent struggles. . . . A national government must be committed to . . . guaranteeing the constitutional rights of community self-governance at the local, district, provincial, and regional levels throughout the country—that is, allowing local communities to run their own local civil, judicial, security and educational administrations by themselves (Shahrani 1998, 240).

State building efforts usually focus only on creating new institutions, including local institutions like the community development councils (CDCs),<sup>10</sup> assuming the absence of coherent governance from top to bottom. In Afghanistan, however, as discussed above, myriad customary institutions exist at the local level that provide a wide variety of valued political goods, including security, property dispute resolution, conflict resolution in general, representation of community interests to the government, and water and land resource management. These local institutions have proven resilient in many rural communities, and can provide a foundation for the reconstruction of links between the institutions of the central and provincial governments and village residents, who represent over 70 percent of the population of the country.

One attempt to link state and community governance mechanisms emerged in reference to the administration of rural land records. The 2006–2007 Rural Land Administration Project (RLAP) was based on the assumption that community-based administration of property records, supported by state institutions, was appropriate to existing Afghan conditions and could contribute to long-term rebuilding of state-community relations. It was defined as the administration of property records by local people—rather than by the district office of a central

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<sup>10</sup> CDCs are sponsored by the Ministry of Rural Development and Reconstruction’s National Solidarity Program to administer funds for infrastructure projects (Brick 2008a).

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land registry receiving petitions and recording transactions or periodically sending a team to communities to gather evidence of land transactions.

The hypothesis was that if people produced and controlled access to their own land records, they would feel more secure in formal land documentation and be more likely to use it and take care of it. Liz Alden Wily describes this approach as the “empowerment of people at the local level to manage their land relations themselves” and says, “Only when land administration and management is fully devolved to the community level . . . is there likely to be significant success in bringing the majority of land interests under useful and lasting record-centered management” (Alden Wily 2003a, 35).

This emphasis on community definition of rights and community administration of the records that document these rights does not mean that formal law and the role of district and provincial land agencies can or should be ignored. The community consultation approach must include the views of all community segments about who holds legitimate rights to land. To solidify security of tenure for the long term, it must strengthen the links between local and national systems of land records administration.

### **Community-based administration of rural land property rights**

As discussed above, earlier attempts by the Afghan government to document rural landownership—through the Amlak, the Cadastral Survey, and the courts—failed to win the confidence of the general public. All three attempts started from classical conceptions of the government’s role in providing the public with an integrated land registration system to identify the true owners of rural land.

The RLAP started, instead, by asking what rural people actually want in terms of information about property rights and how to satisfy this demand. Its experience suggests some practical components of a community-based administration of property rights in land.

The project began in June 2006, primarily focusing on community consultations to define legitimate rights to rangeland (Stanfield, Safar, and Salam 2008). Procedures were developed for documenting rights to communal pasturelands in four test sites through consultations with leaders such as maliks, village shuras, mullahs who are knowledgeable about traditional rangeland use patterns, and representatives of nomadic groups who share the same rangelands during certain times of the year.

The project developed a precise methodology for these village and nomadic entities to agree among themselves about who has the right to use what rangeland, for what purposes, during what times of the year. This approach to defining the operational rules for managing rangelands relies on decision making that is structured and regulated by the local community, within the broad legal framework of the state.

During this process, participants were able to resolve most differences of opinion, though this sometimes required lengthy discussions. In the few cases

in which agreement was not possible within a reasonable amount of time, the disputants were referred to nongovernmental organizations for continued mediation. The RLAP searched for agreements and found them or helped craft them on the spot, documented their features, and validated them through consultations with neighboring community leaders and district government officials.

### **Legitimate rights and valid rights**

The RLAP distinguished between legitimate rights (supported by custom) and valid rights (supported by law).<sup>11</sup> A legitimate right to land is reached by consensus of the village shura, elders, maliks, mullahs, nomadic maliks, and heads of families. It could be called a customary right in other contexts, one which by tradition and custom is considered correct and acceptable by the community. Alden Wily suggests the following defining characteristics of legitimate or customary rights to land:

- Customary rights are often called informal rights, because they usually have not been formalized in writing.
- They change over time, and recognizing customary land tenure today means recognizing the norms and practices of today.
- One critical element of custom, which never changes, is that the frame of reference for decisions is the local community, not the government. Any practice or rule that is agreed on by the local community can be considered customary (Alden Wily n.d.).

By contrast, a valid right to land is described in a document prepared or validated according to a process established in state legislation and administered by state agencies. A valid right can also be legitimate, but if, for example, it was acquired through force or corruption, it might not be legitimate even if it was supported by legally valid documentation. The goal is that these two concepts will someday become equivalent, but that is not the case now. For now, the sorting out of legitimate rights to land is best centered in the community, while efforts are made to improve as quickly as possible the relations between communities and the state.

Following success in agreeing on rangeland rights in the RLAP's four test sites, villagers in the Naw Abad test site in Chardara District, Kunduz Province, suggested that the private holders of agricultural land in their village would be interested in using the same consultation and documentation procedures to document their rights to their irrigated agricultural land parcels in ways that would be recognized as legally valid by state institutions. Community elders and leaders invited the field team to work with them to reach consensus on the legitimate holders of private ownership rights to agricultural land.

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<sup>11</sup> For rangelands, which are by definition public, the focus was on use rights and not ownership.



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Naw Abad is a Kuchi settlement based on irrigated agriculture and on large, tribally managed pastures close to the settlement as well as public pastures in the distant mountains. Village leaders were initially interested in working with the RLAP to document the legitimate rights of use of pasturelands, but then saw the relevance of the same methodology to the clarification of ownership of agricultural land, housing, and commercial parcels. This interest came in part from the difficulties experienced by some families in the recent past with returning migrants or their children or grandchildren, who claimed land in Naw Abad that had been used for many years by other people.

Regarding both communal rangeland and privately held agricultural land, the hypothesis gradually emerged that community interest in documenting land rights could be substantially increased if the documentation remained in the village, accessible to local people and under their control.

The project aimed to improve customary practices for administering rights to both types of land, based on the following hypotheses:

- A local consensus can be reached about the rights people that have to rangeland and agricultural land.
- This consensus can be strengthened through documentation witnessed by respected people from the community.
- This documentation can and should be maintained by the community.
- Information about rights to land, produced and maintained by the community but linked to government land administration agencies, can make a significant contribution to land tenure security under present Afghan conditions.

The use of a community-based property rights system does not make government agencies and the legal framework irrelevant. On the contrary, the reestablishment of positive community-state relations is critically important for a stable and resilient administration of property rights. The RLAP started with the community as a locus of rural land administration and management. However, a national program must be developed to strengthen the capacity of both communities and state agencies to carry out these functions if Afghanistan is to achieve a viable and effective governance system.

### Community

The RLAP defined a community as a settlement with a locally known name that is served by a functioning CDC.<sup>12</sup> Most of the selected communities also had

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<sup>12</sup> The RLAP selected villages that had at least two years of experience with a CDC, because it did not have the resources or time to work with village leaders to call a special shura together or to train shura members in formal record keeping. Elected village councils, as called for in the 2004 constitution, have not yet been established, but numerous villages have CDCs.

the services of an *arbab* (the equivalent of a malik in the project area), although the function of linking the community with outside agencies also is frequently carried out by an influential mullah.<sup>13</sup>

The RLAP did not invent the idea of community administration of land rights. The Ministry of Urban Development and the municipality of Kabul developed a similar approach for regularizing the tenure of some informal settlements in Kabul (LTERA 2006). Afghanistan's draft land policy states in section 2.2.4: "The government shall promote land tenure regularization in [informal settlements] in collaboration with relevant communities based on standards to be established by law" (Islamic Republic of Afghanistan 2007, 6). A 2007 review of land registration options for Afghanistan makes the following recommendation:

Any future system for land registration should be rooted at the community level. The system will be able to draw upon community knowledge, practical understanding of local issues, and tried and tested (if sometimes imperfect) systems to resolve disputes. By directly engaging the community, the system will be viewed as transparent, equitable and legitimate. Also, implementation costs can be kept to a minimum and public access to records will be improved (McEwen and Nolan 2007, 23).

In other countries, similar ideas are being tested. For example, in Benin, village land tenure management committees have been adjudicating titles and administering the resulting property records (Delville 2006). And Tanzania's 1999 Village Land Act calls for village land committees to validate claims to land and village land registries to administer the land records, in coordination with their district counterparts.

### **The ADAMAP process for documenting land rights**

Project staff and villagers held discussions on the viability of the community approach for documenting land rights and recording those rights in community land files. Discussions covered both rangeland (usually communally managed) and agricultural land (usually privately owned). Once village leaders agreed to the benefits of this activity, and the shura invited RLAP staff to move forward, documentation procedures were developed using a method called ADAMAP, which involved the following steps:

- A: Ask for community cooperation.
- D: Delineate the boundaries of different types of lands.
- A: Agreements are prepared.
- M: Meet, discuss, and approve the agreements and delineations.
- A: Archive the agreements and delineations.
- P: Prepare for the continual updating and security of property records.

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<sup>13</sup> See Wardak, Zaman, and Nawabi (2007) for a discussion of the importance of local and regional religious leaders.

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ADAMAP builds on and formalizes traditional rules based on sharia (Islamic law) about land access and use that have eroded during years of conflict and disruption. The objective is to secure agreements, document legitimate use rights, and allow ready public access to these documents. For documenting rights to rangeland, the community's responsibilities include the following:

- Initial recording of traditional rights of access and use by both settled people and nomads.
- Mapping of rangeland parcel boundaries on large-scale satellite images (RLAP 2007).
- Preparation of appropriately witnessed agreements by relevant stakeholders.
- Storage of agreements and images in village-administered storage cabinets.

With slight modifications, this process is also feasible for certifying private ownership of agricultural land.<sup>14</sup> The village team prepares parcel specification forms, in consultation with the owners or their representatives, which are then reviewed and approved by a group of village elders. The team also delineates the boundaries of each parcel on a satellite map and gives it a unique identification number.

Copies of the documentation are filed with the provincial government. Parcel maps are digitized and copied into a geographic information system (GIS) for incorporation into appropriate databases and for cross-referencing at the community, district, province, and national levels. Procedures are also established to change these agreements when there is local consensus to do so.

In Naw Abad, the field team selected a block of one hundred privately owned parcels by inspecting satellite imagery and verified that the Cadastral Survey had maps and parcel cards available for those parcels (albeit from thirty years earlier). Through consultations with the owners of the parcels, boundaries were delineated on high-resolution Quickbird satellite imagery (provided by the National Geospatial-Intelligence Agency through the International Security Assistance Force in Kabul) plotted at the scale of 1:2,000. Each was assigned a unique number, and ownership and use information were noted for each on a parcel specification form. The names of subsidiary users, sharecroppers, or other users were also noted. A parcel-based information system emerged, using the model shown in figure 2.

To limit the likelihood of unauthorized modifications to the forms or maps, two procedures were devised:

1. A log book listed all parcel forms in sequence, with basic information about each, including ownership. Any subsequent modification of a form must be authorized by the shura and so indicated on the forms and in the log book.

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<sup>14</sup> See McEwen and Nolan (2007) for suggestions for private parcel tenure recording.

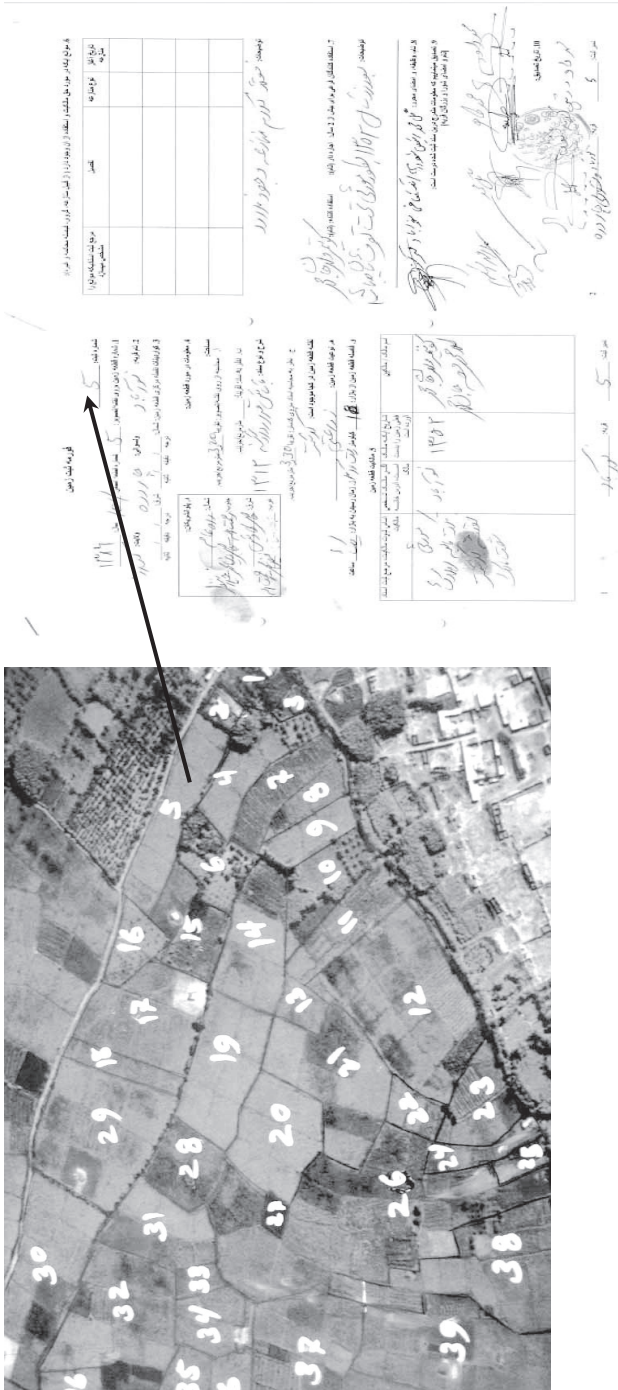


Figure 2. Sample land record from the village of Naw Abad in Kunduz Province  
Source: Photo by J. D. Stanfield.

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2. The delineated parcel maps were digitized, and the forms were digitally photographed. Subsequently these digital records were combined into a simple GIS and archived in an appropriate government agency.

Shura members from Naw Abad asked for satellite images of the village's remaining agricultural land and blank copies of the parcel forms, so that they could complete the file of maps and forms for all of the privately owned agricultural land.

### The legal basis for community-based land administration

Community-based land administration should be supported by clear national policies and laws. At this point, such a comprehensive framework does not exist in Afghanistan. In its absence, the RLAP has drawn on three key documents.<sup>15</sup>

The 2004 Policy and Strategy for the Forestry and Range Management Sub-Sectors, approved by the Ministry of Agriculture, Irrigation and Livestock in 2005, states:

The sub-sector partners shall adopt a community-based approach in forestry, range and wildlife management. This approach shall involve the transfer of effective management responsibilities for forestry and range resources within defined community geographical areas to communities in a manner which (i) creates value for community members (both in the form of productive resources—timber, firewood, better pasture, and as means of protecting natural resources from erosion), and (ii) develops within communities the capacities to organise, operate and sustain the improved measures with a minimum of support from outside (MAIL 2005, 2).

A clearer statement of land issues and policies needed to address them was contained in the draft 2007 Multi-ministerial Land Policy, produced by a commission in which the Ministries of Agriculture, Justice, and Urban Development and Housing were represented:

2.2.7 Issue: Proof of Rights to Land: In most cases, proof of land rights is based upon tax records, Amlak registration, customary deeds, formal deeds and local knowledge. Some formal deeds are suspect or fraudulent; in some areas registered deeds have been destroyed during the years of conflict. Under such a chaotic property rights situation, it is imperative for the government to establish a realistic and effective method of property clarification process. Best practices and the reality in the country inform that community-based property adjudication processes that utilize local knowledge can be effective vehicle [*sic*] to re-identify local ownership.

2.2.7 Policy

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<sup>15</sup> The draft 2007 Multi-ministerial Land Policy and the 2008 Afghan National Development Strategy, both published subsequent to the RLAP's completion in 2007, were drawn upon by RLAP when the documents were in their draft forms.

- It is a national policy that landownership may be documented through a process of property clarification and certification process conducted at the community level.
- It is a national policy that recognition be given to customary documentation and legitimate traditional property rights affirmed by local knowledge, in accordance with a law to be issued to govern the regularization of property rights (Islamic Republic of Afghanistan 2007, 7).

Finally, the 2008 Afghan National Development Strategy calls for Afghanistan to

create the capability to record and archive information about the customary deeds, if not actual copies of such deeds, at the local level in villages or combinations of villages, where local elders and respected people can oversee and verify the continuous accuracy of the locally archived property rights information (Islamic Republic of Afghanistan 2008, 29).

Even more important for the RLAP were the opinions of provincial appeals court judges in Kunduz and Herat provinces, who reviewed the ADAMAP procedures and resulting documentation.<sup>16</sup> These two judges advised that should such documentation be presented to them during a court case, they would treat it as significant evidence of rights. Both judges said that when they hear village land disputes, their first step is to require that the disputants get the opinions of their village shuras. The ADAMAP process includes documentation of the shura's views.

## **RESPONSES TO THE ADAMAP PROCESS**

Villagers, community leaders, and district government staff have reacted positively to the ADAMAP method in three provinces (Kunduz, Takhar, and Herat), welcoming the help it offers both in verifying use rights (for communally held rangeland) and ownership (for privately held agricultural land) and in archiving the resulting documentation.

Villagers expressed satisfaction with the work done by the field teams, which included both project specialists and villagers. People saw that the process can lead to stable land relations and agreement about the legitimate users of rangeland, how these lands should be managed, and the responsibilities of communities and the state for the administration of documentation of both rangelands and agricultural lands.

Especially important for villagers is the preservation of documents in the village itself, which will enable them to address land problems that may arise in the future without the expense of traveling to consult distant government agencies. Several villages have established what they call a land administration room, located in the shura compound or in a mosque or cooperative office, where

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<sup>16</sup> The author interviewed the appeals court judge in Kunduz in May 2007 and the appeals court judge in Herat in November 2006. Both individuals requested to remain anonymous.

the parcel maps are put on public display and all records of rights to land are archived.

Community leaders in the Kunduz site appreciated the work on private land, as it gave landowners additional documentation beyond that which may have already existed, such as tax receipts from the Amlak. For pastureland, such documentation had not existed before, and the community agreements were perceived as an important means to formally register user rights.

Villagers have expressed confidence that they can now carry out the entire ADAMAP process—not only administering documentation that has already been produced, but also delineating pasture parcels, producing agreement forms, and producing a community register of private lands—and have expressed willingness to volunteer to teach the process to other villages.

A concern remains as to the government's involvement. Some villagers fear that in spite of documentation perceived as legal under sharia and customary law, the state may use for state projects some pasture areas that are presently used by community groups. This concern motivated villagers to urge the government to formally recognize the community rangeland agreements as legal documents. Villagers have also asked the government to recognize their shuras as responsible for local land administration. Shuras have asked the government to clarify which government entity is responsible for which type of land, so that they can effectively carry out this role. A clause in the rangeland agreement form states that villagers must not convert pastureland to agricultural use,<sup>17</sup> and the government must not implement projects on communal pastures without the community's consent. This clause was easily accepted by villagers in the test sites, and they expressed hope that the government will respect it as well.

Villagers have described the ADAMAP approach as a viable means to resolve conflicts between communities and the state over land. They have emphasized that formal documentation of user rights will provide the incentive to protect their pastures better and to invest in pasture improvement.

## NEXT STEPS

The search for a community-based administration of property records is in part a recognition of the incapacity of the central state to effectively administer property records. This incapacity is rooted in the more general inability of Afghan regimes to establish a dominant central state. Communities of various sorts have resisted the centralized model. The current court-administered system of transaction deeds has proved to be of little interest to landholders.

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<sup>17</sup> The shura in the Takhar test site has consistently regulated rangeland use. By verbal decree, it has forbidden any conversion of grazing land to agricultural use, and community groups strictly observe this decree. While this practice may not be widespread, it does show the potential influence of community decisions about rangeland use.

In light of the state's inability to provide a land administration service that is valued by the population, it may be time to build instead on the governance capabilities of local communities, which they have developed as a matter of survival.

[I]n the name of creating national unity, the state under its various long- and short-lived regimes, systematically undermined the identity and local autonomy of distinct ethnic and sectarian communities. In response, the local communities saw the state as the main source of their oppression and they devised complex social mechanisms to insulate themselves from direct contact with government agents and agencies. . . . Local communities isolated themselves from corrupt government officials by creating community-based parallel power structures (that is, a strong Sharia-governed civil society) to resolve internal problems locally through their own trusted leaders, both religious and secular. It was indeed, these trusted local figures who emerged during the anti-Soviet jihad as the leaders and commanders of many local resistant units across the country (Shahrani 1998, 230).

The brief experiences of the RLAP showed that, at least in some local communities, there is a great commitment to and capacity for administering land records locally, as one aspect of a vibrant community-based governance system. This experience is an example of community self-governing capacities which, in small ways accumulated across the country, can form the basis for the rebuilding of Afghanistan.

Alden Wily argues that "democratisation of [land administration and management] should be an objective of all countries" (Alden Wily 2003a, 1). This principle is particularly relevant to Afghanistan as its citizens work to create a democratic political economy. A corollary is that the nearer the administration of property records is to landholders, "the more accessible, useable and used, cheaper, speedier and generally more efficient the system will be" (Alden Wily 2003a, 2). Of course, this approach cannot be carried to the extreme of every hamlet operating its own land registry, or else the system would be inordinately expensive. But particularly in Afghanistan, where state institutions are weak and not well connected to the population, reestablishing the confidence of the people in governing institutions, including land governing institutions, by making them transparent and observable at the local level, is of fundamental importance.

### **Improving state-community links**

The state's potential contributions to community-based property records administration have not been extensively tested in practice. A key unresolved issue is the role of the judiciary. At present, judges prepare deeds, when asked, for rural property transactions after asking the Amlak to certify property ownership. It is conceivable that judges could consult with communities for such certification in the future. It is unknown whether such a consultation would encourage more rural people to ask judges to prepare title deeds. Any links between judges and community property records archives must be carefully worked out.

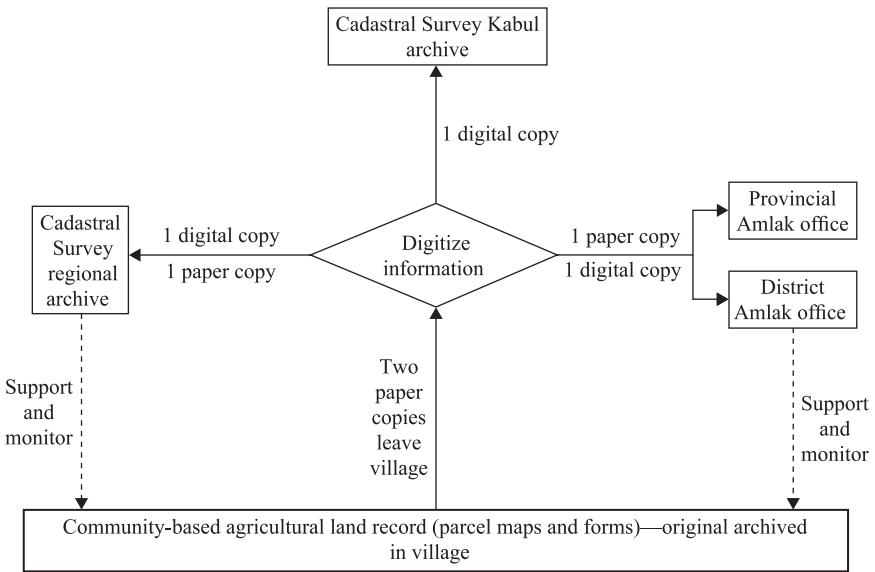


A second link between the community and the state could be the latter’s offering of an archival service to safeguard copies of community-prepared property rights documentation. If this archiving is kept up to date, it would also facilitate judicial consultation of community records when preparing title deeds.

Figure 3 shows the information flows proposed by RLAP for the production and archiving of private land parcel specification forms and maps, in which communities keep the initiative but government agencies carry out monitoring, capacity building, supervision, and archiving. The capacities of government agencies for carrying out these functions have to be strengthened.

As a third link, state agencies could offer technical assistance to communities as they document ownership and use right claims—to help assure the validity of the information collected and its presentation in a more-or-less standard format.

A fourth potential link is the assembly by the Amlak of information about land use and approximate land values. On the parcel form, there is a place to specify the type of land. This item has two purposes: (1) to enable a statistical tabulation of data on types of agricultural land to support planning by the Ministry of Agriculture, Irrigation and Livestock; and (2) to help estimate the value of a land parcel based on its productive potential. This information can also be used by village shuras, which ask family heads for contributions (based on the size of their landholdings) to help pay for land record management, as many already do for payment to arbabs for their work.



**Figure 3. Information flows for parcel forms and maps relating to private land**

Source: Diagram designed by Rural Land Administration Project staff.

Note: One paper copy of the land record is kept in village archive, one goes to the Cadastral Survey regional office, and one goes to the provincial Amlak office.

## **Further testing**

The RLAP's experiences in regard to both communal pasturelands and privately held agricultural lands showed that the generation of written property records at the community level is feasible and that elders and landholders, at least in some villages, are willing to do much of the work of creating the records themselves. Part of villagers' enthusiasm for the process appears to derive from the awareness that they would retain and update the records themselves.

Government agencies can support this process by helping to build communities' capacity to administer property records, monitoring their work, providing backup digital archiving, providing plotted satellite images, and assisting with the formulation of rangeland improvement plans.

Despite the positive results of the RLAP experiment and its implications for how community-state relations can be strengthened, village by village, any extension of the approach will require additional testing. The ADAMAP methodology starts with asking community leaders whether they want to participate in the program. All communities contacted by the RLAP teams responded positively, although some required extensive explanation. This may not always be the case.

Further testing is also needed of methodologies for verifying ownership of croplands—for example, refining the role of village recording secretaries, designated by the community council to manage and archive maps and parcel forms, and establishing the training they need in procedures for maintaining and updating ownership records. Testing is needed to establish how much review the field teams' work needs and how to control unauthorized changing of parcel records. More work needs to be done to ensure the involvement of nomadic rangeland users and any state agency claiming ownership along with the local users of the land and village elders.

## **Other issues**

Despite RLAP's success to date, many governance issues need consideration before a large community-based land administration program is rolled out. Many government officials in Kabul remain suspicious of community-oriented programs, despite the relative success of the community-oriented National Solidarity Program. The means for incorporating Kuchi input into the rangeland agreements have to be refined. Ways need to be found to ensure that community consultations incorporate all community segments, and not just the heads of large landowning families. The capacity to perform new functions supporting community land administration needs to be strengthened for staff in the Amlak and Cadastral Survey, as well as those in the Ministry of Agriculture, Irrigation and Livestock's Land Resources Department who are responsible for improving rangeland management, and the woluswali (district heads). There is a fundamental need for a more supportive legal and administrative framework with people committed to building new state-community relations. The RLAP has shown that a

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development program that operates in alignment with sharia law and custom is quite acceptable legally and culturally among provincial judges and rural community leaders.

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