MACHAKOS & MAKUENI RANCHERS ASSOCIATION

MEMORANDUM

To

NATIONAL LAND POLICY SECRETARIAT

Friday January 26th 2007: 0900am

We have circulated the Draft National Land Policy [hereafter the Draft] among our members and our consultants and have also sought views on it from many interested parties. While recognizing the work that the Land Policy Secretariat has put in so far, we reject this Draft as it stands. We see it as flawed and only a first step towards improving existing land policy and law. This rejection notwithstanding, our Association offers all possible cooperation in moving forward with the Secretariat towards a more widely acceptable policy with greater participation from other parties. Some of our concerns are as follows: -

1. **EXISTING LAND LAW**

The Draft does not identify defects or deficiencies in the current land policy and it is written as though no land laws exist. Most recommendations for change arise where existing policy and law have been abused, or not enforced. There is an illogical assumption that new laws will be obeyed where old laws were not. (see Annex I)

2. **FLAWED HISTORICAL PREMISE**

The Draft does not reflect an accurate grasp of the history of land tenure in Kenya. It proceeds on selective and flawed suppositions. Whilst it is fair to say that historical injustices have occurred and people have suffered, restitution will not be helped by an exaggerated, tortuous and easily challenged version of Kenya's land history as described in the Draft. A case for restitution made in this way is not persuasive.

Draft para. 48 says: -
"*Where the public purpose or interest justifying the compulsory acquisition fails or ceases, the revised law shall confer pre-emptive rights on the original owners or their successor in title"*. This rather menacing paragraph on its own reveals the bias of the Draft. It could trigger adverse reaction in the banking and mortgage sectors and lead to capital flight. (see Annex II)

3. **ASSAULT ON EXISTING LAND TITLES**

The Draft proposes to disrupt an already working land tenure system and the free and unencumbered transferability of title. Tampering with the duration of land tenure will have a predictable impact on the country's economy - land and property will be unacceptable as security for loans and mortgages. Such radical disturbance to an already working land market will make investment stagnate. If implemented, the Draft proposals will exacerbate and perpetuate poverty both urban and rural. The proposed strictures on land titles clash directly with all accredited land market systems. (see Annex III)

4. **INSUFFICIENT PUBLICITY ABOUT THE DRAFTING PROCESS**

Even though the Secretariat has gone to some lengths to publicize the Policy Formulation Process, its efforts have been inadequate. There is a surprising unawareness of the Draft among people at all levels of society, especially agricultural and pastoral land owners, both small and large scale. Additionally, specialized agricultural production groups, flower growers associations, tea growers, the banking, mortgage and legal sectors, the conveyancing committee of the Kenya Law Society are, by and large, unaware of the existence of the Draft or the plans to speedily convert it to law. (see Annex IV)

5. **MINORITY INTERESTS AND CIVIL SOCIETY CONFLICT WITH EXISTING LAW AND CONSTITUTION**

While minority interests should indeed be attended to, this Draft does not indicate which of them or their grievances are not already addressed in current law. For example, nothing in the written law disbars women or children from owning land, **[Draft para 31g & 42e]**. Legitimate grievances are best addressed through the judiciary with backing from supporters in Civil Society and not aired in a Land Policy.

Throughout the Draft runs a thread pointing to the powerful influence of Civil Society in the policy process. It is known that DFID's Land Reform Support Programme (LRSP) has reintroduced the rejected Land Chapter from the rejected Draft Constitution. This back door tactic has not gone unnoticed. People are becoming aware that certain foreign civil society

groups that neither own land, nor pay taxes are able to facilitate the Drafting process, thereby achieving political power in an undemocratic way, vide: -

DNLP Annex 1 – "*Proposed Organizational Structure (New Institutions). "Civil Society also to be represented in ALL statutory bodies including physical planning liaison bodies"*.
Foreign-backed Civil Society groups are neither elected nor appointed to represent the majority interests. This is unacceptable. (see Annex V)

6. <u>THE FRIGHTENING POWER OF THE PROPOSED NATIONAL LAND COMMISSION (NLC).</u>

Draft para 209 to 215 The Draft arrogates wide powers to the Minister for Lands and the proposed NLC, which are currently held by other Ministries and arms of Government. This lays a base for enormous administrative confusion among both the public and Government alike. Further, the proposals cut across and contradict some 17 pieces of major extant legislation including all the customary and religious marriage acts. Indeed, the Draft produces no evidence that the bureaucratic implications of such a far reaching reorganization of the established systems as transferring powers from other Ministries to Lands has been properly evaluated.
(see Annex VI)

7. <u>OWNERSHIP OF LAND CANNOT BE A BIRTHRIGHT</u>

Draft paras 93, 94, 95 and 96 seem to assure all Kenyans "access to land" without defining what this means. It seems to perpetuate the concept that everyone in Kenya has a right to land therefore "I am poor, give me land-it is my right". The <u>opportunity</u> to own land should be the right, but because land is a resource limited in extent and, given the size of the population, not everyone will be able to do so. That is reality. The political sweet talk proposed under Land Reform Issues **[Draft para 51]** focuses exclusively on the poor and landless by suggesting that land will be redistributed, restituted and resettled. No land policies, regardless of whether tenure is communal or private, can resolve the issue of human increase. For as long as people won't regulate their numbers, the attendant problems will simply escalate As elsewhere in the world, resolving this issue lies in urbanization and industrialization both of which are already more advanced in Kenya than in most of Africa.

<u>CONCLUSION</u>

1. Throughout Kenya land is steadily becoming privately owned due to the irresistible desire of people to possess their land under freehold tenure. The evidence is that productivity and wealth on adjudicated land has increased many times and the prosperity of ordinary folk on the land is steadily improving over situations where land is communally owned. Poverty reduction will not be helped by attacking these wealth producers and introducing alarm and uncertainty by even hinting at a policy to "rationalize" (i.e. reduce in value) freehold and leasehold tenure titles. The Draft argues for accelerating adjudication and land consolidation, which are moves towards tenure under private title, and for the sanctity of title. Yet it also argues for the recognition of customary land rights, that is retention of the systems that adjudication replaces. This is a fundamental contradiction.

2. Much of what the Draft seeks to reform is already provided for in existing statutes- e.g. in allocation of land, planning, re-possession of undeveloped land, land grabbing, communal protection and the regulatory powers available under the Agriculture Act - Land Use Rules.

3. The establishment of a National Land Commission with enormous powers superimposed on the existing arms of Government is frightening. The proposed Kshs.9.6 billion for the land "reform programme" expenses will raise public resentment to rival the outcry heard after it was revealed how much had been spent on the long drawn out and failed Constitution review.

4. What is required is not a revolutionary, seismic reversal of fundamental land law, but that the fundamental disregard of the current law should be addressed and reinforced.

5. The Draft is very long-winded, convoluted and in places contradictory. It is difficult enough for intellectuals to follow, but there is no hope that the form and language can be understood by most citizens.

ANNEXES

ANNEX I Existing Land Law

Draft para 46 acknowledges that "established procedures" have not been adhered to.
"The established procedures for compulsory acquisition are either abused or not adhered to leading to irregular acquisitions"

Draft para 67 records widespread abuse of trust relative to the Trust Land Act.
"In addition, there has been widespread abuse of trust in the context of both the Trust Land Act and the Land (Group Representatives) Act."
In both cases no evidence is presented to show how defaults and abuse arose from any deficiency in law. Thus, no case is made for creating new law or policy. All that is required is the enforcement of existing law, which is quite adequate

ANNEX II Flawed Historical Premise

Draft paras 25, 26 & 27 are factually wrong.

The reality is that at independence the policy, facilitated by the funds provided by the departing Colonial power, was to make the former 'White Highlands' available for African settlement. While it is true that some of these funds were misappropriated to allow some of the new leaders to simply take over what had been white farms without alteration, the greater part of the funds was used legitimately and the land bought was broken into small-holdings taken up by peasant farmers. Only by this process and the granting and acceptance of secure property right protection did small-holders rapidly become the driving force behind agricultural production – a fact acknowledged in the last sentence of **para 26.** *"Within a few years into the independence period, small holders in Kenya had become the main driving force behind agricultural production."*

Draft paras 190 & 191 a) are impractical and flawed.

The Draft advocates using **1895** as an arbitrary reference point to divide a past beyond redress from a past that should be redressed. It chose this point because it opines that 1895 marked the onset of the colonial era after which injustices are recent enough to repair. Factually that is

wrong, though of no great consequence, for British rule started under the Imperial British East Africa Company (IBEAC) nearly a decade earlier. Yet, even if 1895 is taken as the seminal point after which changes in land tenure should be reversed, then presumably what is now Kenya west of the Kedong stream (i.e. the entire Rift Valley to Lake Turkana and all of Western Kenya) should be ceded back to Uganda of which it was part until 1902. Similarly, all of Somalia west of the Juba River should revert to Kenya of which it was part until c.1925. The colonial era happened. Regardless of its manifest injustices, harping on the fact is not progressive.

On a macro scale, the partition of Africa was unfair, but that is how Kenya came to be. Splitting ethnic African entities into different nationalities – which most African borders do – was profoundly unfair. Yet, with the arrival of independence and the creation of the Organization of African Unity, Africans themselves accepted the historical reality that for all their unfairness, the borders could not now be changed. The egg had been broken. They could not go back to a pre-colonial situation in which Africa was largely nationless in the modern sense. If borders were to be changed, it would involve new processes.

The same principles and processes apply within countries. That Kenya was created and ruled by Britain is irreversible. How individuals regard the issues of alleged injustice today is variable and very different to how their grand-parents and great-grand-parents regarded them. The Masai situation makes the point. The first "injustice" inflicted on them was the splitting of their lands between British and German East Africa. The second is now said to derive from the Anglo-Masai Treaties of 1904 and 1911. If there is a case for reversing those Treaties, it will be a *casus belli* for the second and third generation Kikuyu who were born on and now own some of the land in question. And, if that case stands, will the division of the Masai between Kenya and Tanzania be a *casus belli* between the two countries?

ANNEX III Land Tenure

The Draft, vide **[paras. 75 a, b, c; para 77 e; para 137 a]** in aiming to change the existing land law pertaining to the power of the primary rights holder and the principle of sanctity of first registration, shakes the very foundation of agricultural and commercial wealth, business investment and development,

FIRST: by giving powers to the NLC to 'rationalize' i.e. reduce, or cut back on some private leasehold tenure, and restrict all new leaseholds to a maximum of 99 year tenure; and

SECOND: in proposing to modify tenure held under the Registered Land Act (CAP 300) by allowing entitlements from other parties it will impede the free and unencumbered transfer of property rights (of any sort); and

THIRD: by allowing the Government the power, without definition "to restore environmental integrity" and "natural resource management" as a pretext "for extinction of land rights", will create precedents for confiscation. The Draft does not define what is meant by "adequate compensation" and does not assure protection for people who may be targeted and injuriously victimized by this enormous power.

These measures if adopted, will at a single stroke remove the economic incentives for agricultural development and wealth accumulation. They could start capital flight and disinvestment, and could spread poverty in both rural and urban areas.

The economic impact of converting unencumbered freehold tenure to encumbered, fixed term leasehold is immeasurable. Long term mortgages, which provide for investment in property and land, will not be available once the lease has less than 60 years to run, while at 35-40 years no mortgage at all will be available. More ominously, land and property will not be regarded as a safe security for short-term loans, because transfer rights will no longer be unencumbered. Indeed, the

Draft is already creating repercussions. The tender of agricultural land titles as security for loans is being refused by some banks citing uncertainty over the future value of the assets.

ANNEX IV Inadequate Publicity

On an issue of such fundamental importance to Kenya all possible steps must be taken by the Ministry to correct the current public ignorance of the drafting process. It is clearly not enough to consult a lawyer, or a banker. Professional opinions should be sought through their representative associations. If the public knew of the Policy and did not comment on it, then it cannot complain if it does not agree with the results. However, if many are still unaware of it, as is the case - then whatever the publicity so far given, it was plainly inadequate. On an issue as inflammatory as land, it is unwise for Government to say it has done enough and public ignorance is not its responsibility. The Land Policy Secretariat's duty is to make sure that the public is aware, taking whatever steps are necessary. Further, it is not unreasonable to expect that on an issue as important as land, the timetable should be open-ended and arrived at with the public's agreement.

ANNEX V Minorities and the Constitution

Whilst there is undoubtedly much good in the Draft particularly with regard to marginalized people the DNLP is fundamentally flawed, ab initio, in that it has been drafted by what appears to be a specific interest group. Without doubt the process has been resourced by non-Kenyans. The continual reference to minority rights, community, gender rights and so on, almost exclusively at the expense of the majority of landowners' rights, the constant use of development jargon, pejorative and emotive language and the underlying clamour for land redistribution - with complete disregard to sanctity of title and first registration suggest that the policy, if not driven, was drafted by minority lands rights groups**.**

Where unwritten customary law may discriminate against women and the disadvantaged, the appropriate action is to identify that custom and, against the opposition that may exist, specifically outlaw the custom via Parliament.

Draft paras 34 to 43 make an improper attack on the Constitution. The formulators seem intent on using what should be strictly land policy issues to campaign for the re-introduction of the Land Chapter from the rejected Constitution. Instead of identifying deficiencies in law and application of law, they persist in campaigning for a new Constitution. A Draft Land Policy is not the place to promote the reform of a country's Constitution. As it stands, much of the good that the Draft aims at addressing will be negated by most Kenyans who are neither minorities, nor have an interest in communal land. They will, together with their parliamentarians, reject what will be perceived as an assault by a partisan group in Civil Society on their constitutional rights to private landownership.

ANNEX VI Powers of proposed National Land Commission

In one move the Draft seeks to undo the work, thought, research and practice of many pieces of legislation that our democracy, through our parliamentarians, has produced in the forty years since independence. Aside from statutes directly related to land, the proposed policy seeks to negate or fundamentally amend numerous Acts and seeks to confer to the NLC powers already existing under the following Acts:-

(i) National Environmental Management and Co-ordination Act
(ii) Forestry Act
(iii) Wildlife (Conservation & Management) Act
(iv) Water Act
(v) Fisheries Act

(vi) Agriculture Act
(vii) Physical Planning Act
(viii) Trust Act
(ix) Law of Succession
(x) All Marriage Acts (customary & religious)
(xi) The Mining Act
(xii) The Children's Act
(xiii) The Local Government Act
(xiv) Some aspects of The Finance Act and State Corporations Act

It will make the administration of these Acts and the Ministries that administer them subordinate to an all-powerful National Land Commission. Evidently not enough thought has been given to the huge logistical problem so radical a take-over would involve, or whether it is even possible. In addition, numerous legal principles that have arisen over millennia of jurisprudence seem to have been dismissed including areas relating to squatters rights, land title, tenure, compulsory acquisition etc.

Draft para 79 seeks to legitimize the illegal with regard to the existing law of adverse possession/ squatters rights by moving towards a regime where confiscation of land becomes legitimate.
"To deal with the 'squatters' and informal settlements, the Government shall:
a) Create a regime of secondary land rights as a means of improving security in informal/ spontaneous settlements;
b) Recognize and protect the rights of informal land occupiers and guarantee their security of tenure; and
c) Establish a legal framework and put in place procedures for transferring unutilized land and land belonging to absentee landlords to 'squatters' and landless people."

Draft para 210 proposes NLC will have extraordinarily centralized powers and be staffed by political appointees. The chief executive and staff will be in-house appointments.
In contradiction to the Constitution, NLC will be given the powers of a court outside the control of the country's formal judiciary.

Draft para.212 (e) says***: - "****Set up a Land Titles Tribunal, which will sort out the bona fide ownership of land that was previously public or trust land"*

Draft para.213 *says: - "The NLC on establishment shall within two years create legal and administrative mechanisms to investigate, document and recommend measures to be taken in respect of historic injustices including restitution or compensation over a time period specified by legislation. A window for compensation will be established within the Trust Fund to address claims of deserving aggrieved parties of past injustices. The compensation will be funded from contributions by the Exchequer, donations and penalties imposed on perpetrators of historical injustices."*

The NLC is thus charged with ensuring "redress" for all land injustices both present and historical. The NLC becomes a court in its own right. Furthermore,

Draft para. 211 and 212 empowers the NLC to assess tax on land and premiums on property. This will allow the NLC to supersede the role of the Kenya Revenue Authority and the Local Councils. Taxation law is a strict preserve of Parliament and the Ministry of Finance and to give the NLC autonomous, unsupervised powers to devise, impose, collect and administer a whole range of land

taxes radically conflicts with precedent and the democratic principle of no taxation without representation.

Draft para 35 criticizes the current Constitution and the State for centralizing land matters, yet it proposes in great depth that a National Land Commission be established to do precisely that. The direction of most evolving democracies is to de-centralize power and not re-centralize power.
Creating an all powerful, centralized National Land Commission runs contrary to the Government's aim of de-centralizing power, whereas the correct solution lies not in new laws, but enforcement of those already existing. Many, if not most, inadequacies in the current situation derive, not from inappropriate policy or laws, but from not enforcing them. The Draft does not distinguish between failure to implement existing policy and law from inappropriate policy and law.