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LAND ISSUES IN NYAE NYAE:
A COMMUNAL AREAS EXAMPLE IN NAMIBIA

Draft 5

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1. Introduction: Nyae Nyae and Other Communal Areas in Namibia

- 1.1 The problem of communal land rights is one of the most pressing ones which engages Namibia now. This problem can only be approached by acknowledging in detail the ways in which the subsistence of a majority of Namibians -- including the Ju/'hoansi¹ in Nyae Nyae,² once known as Eastern Bushmanland -- is inextricably linked to communal land tenure. As one Ju/'hoan person recently said, "Where you live is how you live".

The real challenge is to balance Namibia's new democratic ideology with ethno-economic realities. Communal land rights must be protected because communal tenure has previously enabled large numbers of people to survive under genuinely harsh conditions; in the absence of other economic options, it is necessary that communal tenure continue.

- 1.2 Prior to Independence, land in Namibia's communal areas was held under several forms of communal tenure administered by government-appointed or recognised chiefs, or by ethnically-based "second-tier" authorities. In the case of Bushmanland, communal land was administered by a government department (Governmental Affairs or Owerheidsake) established to oversee the affairs of a people then deemed incapable of direction by any sort of chief, their own or an appointed one.
- 1.3 At the time of the 1981 census, 70% of Namibia's population lived in the communal areas, and this proportion has probably not changed significantly in the intervening ten years. New policies of communal land tenure have yet to be defined for this majority; the related functions of regional and local government bodies also remain to be defined, as well as policies relating to resettlement. All three of these considerations will have an impact on the land rights and economic situation of a very large number of Namibian citizens.
- 1.4 While economic and social conditions differ greatly from area to area, the principle that communal land rights must be protected as fully as

freehold rights/...

freehold rights is crucial for all the communal areas. Secure land tenure on communal lands is important to Namibia for a number of reasons.

Firstly, for the foreseeable future, most Namibians will continue to support themselves by means of a "mixed economy" which combines subsistence farming and wage work. If either the subsistence leg or the wage work leg is removed, survival is threatened. This is likely to remain the case for years to come, as even a rapidly expanding economy cannot provide enough jobs for all, or high enough wages to make subsistence farming unnecessary as a supplement.

Secondly, in the past the communal lands were ignored and marginalized by the national economy. However, communal land areas have tremendous potential, and the sale of surplus food produced on communal lands can enliven the national economy and provide opportunities for successful rural development. Encouraging local production and commerce in communal areas will enable more people to afford goods and services, thereby stimulating national markets and raising the standard of living in rural areas.

Thirdly, secure tenure on communal lands is essential for social stability. Dispossession is an injustice that belongs only to the colonial past. In stable communities health services and education can be adequately provided and long-range planning can take place. Stability of tenure will also facilitate proper land management.

There will be a number of pressures on state-owned communal lands. Commercial farming interests will push for larger tracts of land for livestock and high-income crops, and the tourist industry will lobby for increased areas for game farms and nature reserves. Pressure to use communal lands for commercial development will also come from banks and foreign investors. The government's own need for revenue to fund services such as health care, education, and water supply may also be a factor favouring land use that produces the highest returns on capital investment. Residents from one communal area may be tempted to

encroach upon/...

encroach upon another, given the problem of overcrowding in so many of the communal areas.

Against this background, it will be vital to implement clear forms of legal entitlement to protect the right to occupy and to use communal land.

- 1.5 Land issues in Nyae Nyae provide some constructive examples of issues which are also found in other communal areas.

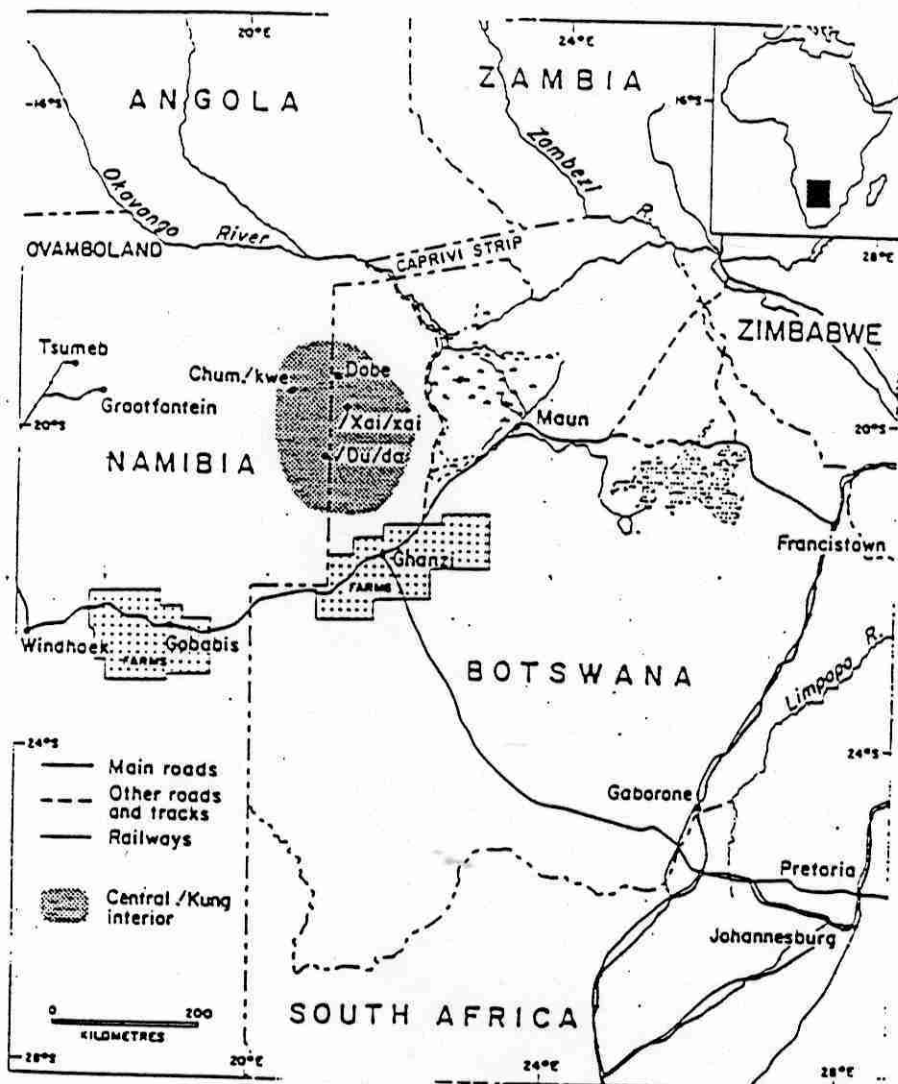
These issues fall under two large headings:

- (1) traditional vs emergent leadership as related to traditional vs emergent patterns of land use; and
- (2) the transition from previous policies implemented under an apartheid system to "free and democratic" land distribution policies which will be in line with the Namibian Constitution.

This briefing paper examines these areas of concern as they apply to Nyae Nyae. It goes on to look at the legal history of land allocation there and the traditional concepts of land tenure among the Ju/'hoansi. It sets forth a few suggestions which could be incorporated into any new policy on land tenure in the communal areas, and ends with conclusions and recommendations on the land question in Nyae Nyae from social, economic, legal, and environmental points of view.

ANNEXURE 1

THE NYAE NYAE REGION (SHADED)



- 2.4 In recent times, Chief Moremi of the BaTawana in Ngamiland expropriated part of the Nyae Nyae Region in what is now Botswana and granted the land to several members of his court. The grants enabled Herero refugees from the German/Herero war of 1904 to settle at several permanent waterholes in the Nyae Nyae Region along the present international border. The Herero in that part of Botswana today affirm that the Ju/'hoansi are the "real owners" of the land, in spite of the fact that they have impressed the Ju/'hoansi into serf labour on their cattle posts. When the administrative post at Tjum!kui was formally opened on Christmas Day, 1959, the only non-Ju/'hoansi living in the Nyae Nyae area were a Tawana/Herero family at /Gam, in what was recently Eastern Hereroland, and three Kavango families who had been situated at camps on the WNLA mines road in what was recently Kavango.
- 2.5 During the 1950's, about 1200 Ju/'hoan people in the Nyae Nyae Region in "South West Africa" and Botswana (see map, Annexure 1.) were the only people still supporting themselves solely by hunting and gathering in Southern Africa. Hunting-gathering in this area requires approximately 37 square kilometres per person to support a stable population. It also requires that people live in small, widely scattered groups in order not to rapidly exhaust local resources of bushfoods. Hunting supplied about 20% and gathering about 80% of the diet. The Ju/'hoan groups in Eastern Bushmanland were among the fortunate few hunter-gatherers in Southern Africa who retained the option to continue their way of life into the middle of the twentieth century.
- 2.6 From the 1950's to the 1970's, however, Ju/'hoansi came to live at the administrative centre, Tjum!kui (Tsumkwe) as a result of promised wage labour, agricultural training, and medical care. Over 900 people migrated to Tjum!kui, where they were given a school, a clinic, a church, a jail and a few jobs. The result was catastrophic for Ju/'hoan life as decimation of local food resources, social disintegration, dependency, alcoholism and crime set in. Worse, as the Ju/'hoansi were no longer occupying their land, it became the target of attempts by the Directorate of Nature Conservation to set it aside as a game reserve from which

human habitation/...

human habitation -- except for a few tourist guides in skins -- would be excluded.

2.7 In 1970, following the work of the Odendaal Commission, Ju/'hoansi lost 70% of their previous foraging territory in Namibia and all but one of their permanent waters. Over 30 000 sq km of Southern Nyae Nyae, where only Ju/'hoansi and the one Tawana/Herero family lived, were expropriated by the SWA Administration and given to the Herero as Hereroland East. Over 13 000 sq km of Northern Nyae Nyae, where only Ju/'hoansi and the three Kavango families lived, were incorporated into Kavango. About 4 000 sq km were later proclaimed the Kaudum (!Aodom) Game Reserve. Ju/'hoansi were left with about 6 000 square kilometres of land, enough to support only about 170 residents by hunting and gathering.

2.8 By the late 1970's, Ju/'hoan groups in Tjum!kui were realising

- 1) that they would have to go back to their land if they hoped to hold on to it, and
- 2) that they would have to develop some more intensive form of economy than hunting-gathering in order to survive on a reduced land area.

This time marked the transition between traditional and emergent new patterns of leadership to match the transition between traditional and new approaches to economy and land use. Ad hoc leadership of n!ore groups became somewhat more formalised as people threw their hearts behind individuals they thought could lead them out of the "place of death" as Tjum!kui came to be called. One such leader, =Oma /Kaece of /Aotcha, had said of him in praise after the group had resettled and begun a mixed subsistence of cattle and gardening to supplement hunting and gathering, that "he stopped our feet" (from wandering).

2.9 The period 1980 to 1986 in Nyae Nyae paralleled the "Outstation Movement" in Australia. It saw the departure of the first three n!ore

groups (/Aotcha./...

groups (/Aotcha, N=anemh, and N=aqmtjoha) for their traditional areas and a life with a hope of a self-sufficient future. Over the next six years some 500 Ju/'hoansi left Tjum!kui to reestablish n!ores in Nyae Nyae, setting up in extended family groups with the help of a Namibian NGO, the Ju/wa (Ju/'hoan) Bushman Development Foundation. This NGO has been able to provide key inputs in terms of cattle, boreholes, training, and advice on establishing broadly-based rural communities, but the entire labour input has come from the people themselves. Their role has been far from easy. They have struggled with lions that kill their cattle, with elephants that trample their gardens and pull out water pumps, and against hostile officials who have believed them incapable of development. They have also struggled within themselves, adapting the cultural rules and values that underwrote the old foraging way of life to the very different one of agriculture.

2.10 The setting up of a grassroots movement in 1986 called the Ju/wa (Ju/'hoan) Farmers Union, later re-named the Nyae Nyae Farmers Cooperative, marked the decisive moment of change in emergent leadership in Nyae Nyae. Recognising that the land available had been made much smaller in 1970 with the work of the Odendaal Commission and that many of the old n!ores were closed off to the previous kxaosi (stewards) in what was now Kavango and Hereroland East, several leaders at the new communities proposed a new incarnation of the n!ore system. This organisation was to represent the communities which had gone back to hold on to their land, and to enable dispossessed groups to settle on available land along the old n!ore lines of settlement and resource use.

2.11 The organisational structure of the JFU (now the NNFC) is outlined in a document of Statutes written in Ju/'hoan and English. Basically, each of the twenty-three settlements in Nyae Nyae elects two representatives to the Council of the NNFC; these representatives act as voices for their communities on matters of n!ore allocation, n!ore group viability, cattle allocation and the organisation of farming labour. The Council is headed by an Executive Committee composed of one representative from each quarter of Nyae Nyae, and a Chairperson, all of whom are

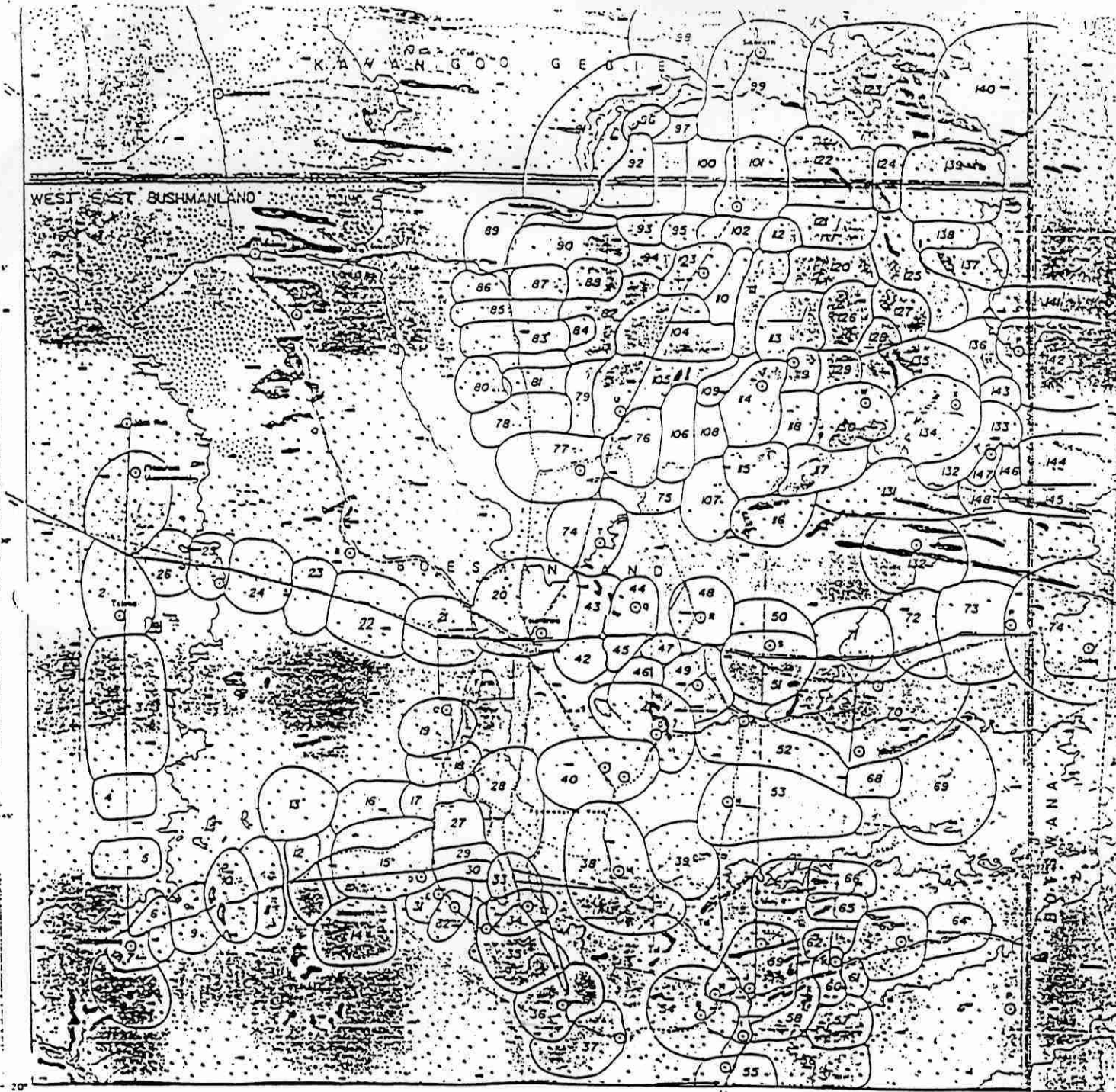
elected by/...

elected by the Council. Annexure 2. to this paper is a map setting out the 23 already reestablished and presently occupied n!ores in Nyae Nyae. Annexure 3 is a map of all traditional n!ores surveyed in Nyae Nyae to date.

The NNFC as a whole deliberates upon regional matters like the applications of new groups, such as those from the ex-Army posts and from the Gobabis area who were "blackbirded" to work on white farms there in the 1950's, for n!ore waterpoints and materials to build infrastructure. The Council meets for at least three days at least once every six months, and usually more often to meet ad hoc situations arising. It acts generally as an information-disseminating body and has provided a forum for discussion of many issues relevant to land and life in Nyae Nyae.

- 2.12 The operational mode of the NNFC between meetings is generally informational trips through all the farming communities conducted by the Chairperson and his/her Secretary, accompanied by the Council representatives appropriate to the issue or area quarter in question. A pre-Independence example of such a trip was the carrying of the news of the coming of Resolution 435 to farflung communities which, without radio or newspaper, might only have heard about it much later. The Chairman at that time, Tsamkxao =Oma, spent hours at each place, explaining about the United Nations, the meaning of the war in Northern Namibia and Angola, the long exile of SWAPO then ending, free elections, and the challenge of becoming citizens of the new Namibia.
- 2.13 The emergence of the Nyae Nyae Farmers Cooperative has been a major step forward in grassroots development for the Ju/'hoansi. Experience in participatory development and its necessary decision-making processes has been vital for a people without formal governing structures larger than extended-family bands. Political awareness and organisational experience have grown hand in hand, as the people's awareness of their own situation and needs has increased enormously. At present the NNFC functions on its own, after some years of organisational support from the NGO, JBDF, and has fashioned itself

into an/...



ANNEXURE 3

1:250,000

into an effective, flexible body for both internal communication and external representation.

Established in 1986, the NNFC spent its first years exploring concepts of representation in the context of a dispersed, non-hierarchical society. Members of the council learned how to participate in an orderly meeting, how to use an agenda, and how to vote on issues, as well as how to adapt parliamentary procedure to their own very tolerant, inclusively social ideas of discussion. They learned to adapt the very time-consuming consensus process to the exigencies of getting decisions made under pressing circumstances.

In March, 1989, shortly before the implementation of Resolution 435, the NNFC received a delegation from the SWAPO leadership, who stayed for three days attending an NNFC meeting and then conducting an informational exchange. This was an historic moment for people who had only been exposed, before, to DTA politics, and it was the beginning of a major eye-opening. It was followed by further visits of SWAPO representatives to NNFC functions, through it was made clear that the NNFC was non-partisan.

The election process was assisted in Nyae Nyae by the organisational legwork previously done by members of the NNFC in the course of establishing contact with all the scattered communities in the area. In the absence of a representative authority for the area, UNTAG and government authorities relied more and more on the NNFC for practical methods of spreading news and information. Increasingly, outsiders to the area, be they Ministerial representatives, officials, or potential development donors, have contacted the NNFC rather than the moribund colonial council to pass and request information.

Women's participation in the NNFC leadership has been actively encouraged, and the support of the men in the very egalitarian Ju/'hoan society has resulted in the election of several women Council members and two regional chairwomen for the Executive Committee. In February, 1991, the first, very capable Chairman of the whole NNFC.

Tsamixao = Oma./...

Tsamkxao =Oma, stepped down in favour of a newly elected Chairman, /'Angn//ao "Kiewiet". The council is currently made up of 46 members, two from each of 23 communities which have joined the NNFC. All of what was called Bushmanland, East and West, contains only 30 communities, and further communities and groups have contacted the NNFC about membership.

- 2.14 True to the ideas of the society from which it springs, the NNFC conceives of resource control as having greater priority than ownership of land per se. Yet it feels that control of resources implies control of land in a deep sense. Transcripts from meetings both before and after Independence reveal a long-standing concern with the health of the land and an awareness that control of resources implies responsible stewardship of them. Along with this concern has come the knowledge that land dispossession is a very real threat to economic livelihood, one which has deprived other Bushman peoples of almost all of their options.

So the question of land distribution and resource allocation has come to be uppermost in the minds of the Council members, and it is the issue on which most of their time has been expended in the last few years. They ask questions like: how will the new Government manage to protect the communal rights of a people attempting to make wise use of the last fragment of their original communal territory? How will the Ju/'hoansi be able to continue feeding themselves if they do not have even that fragment of land, managed by something like their old n!ore system, to do it on? Will Ju/'hoansi be able to continue to hunt on their land? How can the n!ore system be modified to meet changing circumstances and gain recognition as a valid land use option?

The threat of competing land use patterns which might be brought into Nyae Nyae is very present in NNFC awareness. Though their constitutional document makes explicit recognition of the right of any Namibian to settle anywhere in Namibia, it makes recommendations that the health of the land can best be served by agreed community limitation of livestock numbers and responsible resource management. It sees something like a cooperative local body as the logical way to administer such a programme, hopefully in conjunction with informed

scientific opinion./...

scientific opinion. In fact, the NNFC has recently (January, 1991) taken part in a ten-day resource planning exercise for the area, and such community representation and input to planning will be vital to the success of the recommendations. The report from this planning exercise will be available by the time of the Land Reform Conference.

In general, democratic principles of land allocation based on long-term habitation and land use patterns, and local peoples' rights to speak for themselves about the use of their environment and its products, characterise the deeply held goals of the Nyae Nyae Farmers Cooperative. It is clear, too, that the NNFC's evolving structure, with its competent, literate Secretary/Treasurer Kxao "Moses" =Oma, can provide a trusted channel for equitable distribution of the benefits of trophy-hunting, photo-safaris, etc to the Nyae Nyae communities. Lastly, the principle that people work best if they are working for themselves and their land is one of the most strongly held ideas of the NNFC.

- 2.15 Since Independence, several situations involving land and resource control have arisen in Nyae Nyae which the writers would like to bring to attention. First is the arrival in the area of settlers from another area (Eastern Hereroland) prior to finalisation of policy from the Ministry of Lands. This Ministry has pledged to see to the removal of these settlers until a workable policy can be arrived at. The terms of such a policy were announced at a public meeting in Tjum!kui to be collaborative consultation between the Ministry and the NNFC. Unfortunately these settlers have not been removed, and it is unclear what if any course of action will be pursued regarding them.

Secondly, there has already some months before this writing (April, 1991) been some land allocation in Western Bushmanland in the communities on the border between west and east, where 5 ha plots were allocated to male heads of household. When contacted in January 1991, residents of Aasvoelnes, a former Army community most of whose original n!ores were in the !Aodom and other parts of Kavango, were not aware that these lands allocated were anything more than garden

plots. /...

plots. They did not know that this was their final allocation. The writers feel that such an allocation policy cannot work in this environment, except possibly in such fertile arable areas as the riversides to the north. Furthermore such a small area cannot produce a subsistence for a family given the difficulties of agriculture in the area. Also, the traditional social organisation of sharing among Ju/'hoan extended family groups will not mesh well with a subsistence organised by households. Lastly, the health of the land will not be served by an imposed land use pattern which does not take into account the variability of resource distribution and the highest and best use of the land. In the last analysis, the idea of a mixed subsistence is upheld, with each individual and family contributing what it best can to the survival of the whole community, as the logical next step for a people still dependent upon hunting and gathering for a significant proportion of their livelihood.

3. The legal background

- 3.1 In legal terms, the area which has been called "Bushmanland" was "set apart and reserved for the sole use and occupation of Natives" by the Administrator of South West Africa in 1969. ³ "Bushmanland" was specifically defined in 1970 by a Government Notice which created a magisterial district of Bushmanland. ⁴ In 1976, it was set aside for the exclusive use and occupation of members of the "Bushman Nation" by the State President of South Africa. ⁵

The "population group" called "Bushman" was used by the colonial administration as a sort of dumping ground; many people with no traditional relationship to either "Bushmanland" or its residents were classified as "Bushmen". Today there are over 30 000 persons who were classified as "Bushmen" by the SWA Government, including several distinct cultural and linguistic groups of Bushman peoples, as well as a number of poor and dispossessed people who did not readily fit into any of the other "population groups". Approximately 7 - 8 000 of the people classified as "Bushmen" are Ju/'hoan, members of the cultural and linguistic group which originally inhabited the Nyae Nyae Region.

Like the/...

Like the setting aside of other such "reserves" in Namibia, the reservation of Bushmanland for the sole use of "Natives" and its subsequent reservation for the "Bushman Nation" is probably unconstitutional in terms of the Namibian Constitution, which states that "all persons shall have the right to reside and settle in any part of Namibia" (Article 21(1)(h)).

- 3.2 In those areas of Namibia which had ethnically-based "second-tier" representative authorities, the legislative authorities of the different population groups were given jurisdiction over the occupation and possession of communal land and the power to establish and empower tribal, community and regional authorities in respect of "tribes or other communities" on communal land.⁶ However, this did not affect Bushmanland, as no representative authority was ever established there.
- 3.3 There are two pieces of legislation relating to the administration of lands set aside as native reserves and both these laws are still in force. They are the Native Administration Proclamation, 1922 (Proc. 11/1922); and the Native Administration Proclamation, 1928 (Proc. 15/1928).

Proclamation 11/1922 is the authority for the Native Reserve Regulations (G.N. 68 of 1924) which are also still in force.⁷ Under these Regulations, the Magistrate has "general control" of all native reserves established within his district.⁸ The Superintendent of the district is given "the duty of making allotments of land, collecting taxes, supervising sanitation, branding native stock and generally controlling the reserve."⁹ According to the regulations, no new

homesteads or buildings can be erected without the prior consent of the Superintendent. The Superintendent is also given control over the introduction of livestock into the reserve and the collection of grazing fees.¹⁰ The Magistrate has the power to perform all the duties which are assigned to the Superintendent of a Reserve, and all Superintendents and other officers appointed in connection with the

Reserves must carry out the instructions of the Magistrate in regard to the administration of the Reserves. ¹¹

Proclamation 15/1928 gives the "Administrator of South West Africa" (and thus now the President of Namibia ¹²) the power to appoint Superintendents to assist in the control and supervision of native reserves, as well as the power to recognise or appoint chiefs of headmen and to delineate their powers. ¹³ Regulations promulgated in terms of this Proclamation conferred a responsibility on chiefs and headmen to allot arable land and residential sites in a just and equitable manner without favour or prejudice, to the extent allowed by law. ¹⁴ However, no chiefs or headmen were ever recognised or appointed in Bushmanland, as these particular leadership positions were not part of the traditional social structure of the Ju/'hoan people.

3.4 The laws in force have had little to do with the actual administration of Bushmanland in past years. In fact, land occupation and use has been administered by a series of Commissioners acting under the direction of the Department of Governmental Affairs Superintendent, Mr J M Swanepoel, who was based in Windhoek. Mr Swanepoel and the Commissioner set up a "council" of Bushmen in Tjum!kui which had no authority whatsoever and was rarely consulted on matters of consequence (such as the proposed Game Reserve). The most recent "Acting" Commissioner (a junior clerk under the direct control of the Superintendent) departed in December 1989.

4. Traditional concepts of land tenure in Nyae Nyae

4.1 It is an established legal principle that customary law can give rise to valid rights in land, even where that land is covered by a statutory scheme, so long as there is not a direct overlap between the principle of customary law and the statutory authority. ¹⁵ In Nyae Nyae, there are strong traditional concepts of land use and rights of residence which are still fully operational today.

4.2 There are/...

4.2 There are two key concepts of land tenure and land use in the Ju/'hoan tradition:

4.2.1 N!ore rights

A n!ore is a named place containing various natural resources. Some n!oresi (this is the plural of n!ore) are residential while others are used only for hunting and gathering. The right to reside permanently in a n!ore is inherited by individuals from their parents. Siblings share this right equally. This right cannot be sold, given away or willed to anyone. A person who has inherited the right to reside permanently in a n!ore is called the n!ore steward. A person or a group may travel through another person's n!ore, but no one may settle in a n!ore without the permission of the n!ore steward.

Under the traditional system of land tenure, Ju/'hoansi inherited rights of residence in specific areas from their parents. Individuals also established subsidiary rights in other n!ores through marriage, with bride service in the form of hunting for the wife's parents an important determinant of residence for at least part of the husband's lifespan. Richard Lee writes of the contiguous Botswana Ju/'hoansi: "A camp is built up gradually through time by the addition of inmarrying spouses of the core siblings. These spouses may in turn bring in their siblings and their spouses, so that the basic genealogical structure of the camp assumes the form of a chain of spouses and siblings radiating from the core..." (The !Kung San: Men, Women and Work in a Foraging Society, Cambridge University Press, Cambridge, England, p. 61).

The name relationship as an added dimension of kin-relatedness provides subsidiary ties to further possible n!ores. It reflects the need to have several options open during lifetimes which may be characterised by shifting n!ore residence in response to environmental pressures such as scattered rainfall and variable local resources, or social pressure such as group incompatibility. This flexibility is

subsumed within/...

subsumed within a pattern which, to all accounts, has high social agreement and low conflict.

The rights of n!ore owners are understood to include the right of permanent, exclusive possession; the right to raise livestock on the n!ore and to develop any necessary infrastructure; the right to cultivate the n!ore; the right to gather all bushfoods in the n!ore (except for major bushfoods such as tsi beans and mangetti nuts which are traditionally shared); and the exclusive right to trap game in the n!ore.

The n!ore right is subject to the underlying right of the kxa/ho (which is explained below). However, the n!ore right is stronger than the right of the kxa/ho.

Most of the individual n!oresi in Eastern Bushmanland have been surveyed by the JBDF and a map of the results is available to guide the development of an appropriate land tenure policy for the area (see Annexure 3). This map and accompanying information has been submitted to the Ministry of Lands by the NNFC.

4.2.2 Right of the Kxa/ho

The kxa/ho is all of the land traditionally inhabited by the Ju/'hoansi and all of its water, bushfoods, grazing, game, wood, minerals and other natural resources. (In other words, the kxa/ho includes all the individual n!oresi.) The Ju/'hoansi say "our land and all the things God has placed in it" to express the meaning of kxa/ho. The right of the kxa/ho is a communal land right acquired by individuals by descent.

The right of the kxa/ho is usually exercised in the following ways:

- (a) the right to drink the waters of the land, particularly in times of drought;

(b) the right/...

- (b) the right to travel freely through the land, and to drink water, hunt and gather while on the journey;
- (c) the right to shoot and follow wounded game anywhere in the land; and
- (d) the right to gather key bushfoods, such as dshin beans and mangetti nuts.

Today, so many Ju/'hoansi possess the right of the kxa/ho that anyone who speaks Ju/'hoan and refers to him- or herself as Ju/'hoan is assumed to possess the right of the kxa/ho.

- 4.3 According to the Nyae Nyae Farmers Cooperative statutes, the n!ore right and the right of the kxa/ho "have kept the peace among us and served us well". There is not a single known instance of death as the result of a dispute over territory in Nyae Nyae in over 100 years.

Many Ju/'hoansi have already lost their n!oresi through the progressive dispossession imposed on them by the SWA administration. Any land policy implemented in the future in Nyae Nyae must respect the traditional Ju/'hoan concepts of land rights if it is to be successful.

- 4.4 Article 66 of the Namibian Constitution provides that existing customary law and common law shall both remain in force after independence, to the extent that they do not conflict with the Constitution or with any statutory law. However, Parliament is also given the power to repeal or modify customary law, or to confine its application to particular parts of Namibia or to particular periods. This means that Parliament has the power to change existing systems of land allocation in the communal areas, either suddenly or gradually over time, and either all at once or area by area.

Nevertheless, if land in Nyae Nyae is allocated in accordance with the traditional concepts of ownership, conflicts can be avoided for the most

part, and where disputes do arise, they can be resolved according to rules and principles which the people understand and accept.

- 4.5 The traditional concepts of land tenure in Nyae Nyae are conducive to good land management and environmental stewardship. One reason that the n!ore system has worked so well is precisely that it is not based on an atomised aggregate of land-using groups, but rather an interlocking, interco-operating entity, socially and environmentally. Some n!oresi have bushfoods or animal resources not found in others, and reciprocal access by kin and other sorts of extended land use rights has been necessary to ensure a well-rounded and adequate food supply.

As the concept of environmental health through interco-operating n!ores becomes extended to include stockfarming and other sorts of agriculture, it is easy to see that not every parcel of land will be suitable for gardening or cattle raising. For instance, where soils are saline, it may make more sense to rely on the production of indigenous game animals rather than cattle, either as a meat source or as the basis for photographic tourism. Thus, a mosaic, regional view of the resources of an entire natural area -- such as that already encompassed in the existing concept of the n!ore system -- will make sense environmentally and provide social benefits by giving different groups of people access to the varied products of a mixed economy.

One example of such regional environmental sensitivity already in operation can be found in the NNFC Statutes, which give the Council elected by the various farming communities in Eastern Bushmanland the authority to conserve bushfoods and grazing throughout the area, the authority to limit or prohibit the hunting of certain species of game in Nyae Nyae, and the authority to limit the number of cattle and other livestock in the area so long as the limitations are fairly and equally imposed (Article 20, NNFC Statutes). These voluntarily-imposed restraints show an existing consciousness of the need to incorporate conservation of the environment within the concept of land tenure for the benefit of all.

- 4.6 The problems of settling non-agricultural people, as we have seen in Botswana, are very different from those of settling people whose land needs can be more uniformly expressed. Yet this is the challenge, both for resettlement and for land distribution in general, where several of Namibia's communal areas are concerned. Even where various groups are in the process of making a transition from hunting and gathering, or from simple subsistence farming, to a mixed economy, important decisions about the "highest and best use" of land remain to be made. In semi-arid Namibia, these decisions are particularly crucial, as across-the-board economic decisions can and will have detrimental environmental effects.

The key seems to be attention to land use patterns of the past which have substantial time-depth in specific areas, augmented where possible with the development of additional options to create a mixed economy. Clearly, local knowledge is a vital input to these kinds of decisions, and local input a logical part of any truly democratic strategy.

5. Possibilities for a future approach to land tenure

- 5.1 Nyae Nyae is a special case which is not protected by the Namibian Constitution in the same way as other areas because of its unique history and social structure. Article 102(5) of the Namibian Constitution requires the establishment of a Council of Traditional Leaders which shall advise the President on "the control and utilisation of communal land". However, the Ju/'hoansi have historically functioned without "traditional" leaders and, as discussed above, new concepts of democratic leadership are emerging. Therefore, some other form of representation for the Ju/'hoansi of Eastern Bushmanland must be substituted for the "traditional leaders" contemplated by this Constitutional provision, to ensure that the particular needs of the Ju/'hoansi are not overlooked.
- 5.2 The key principles used to guide the allocation of land in Nyae Nyae should be:

a) the allocation/...

- a) the allocation of arable communal land to extended family groups for permanent residence and farming on the basis of the n!ore system of land rights, taking into account the traditional principles of land tenure recognised by the Ju/'hoansi (inheritance, marriage and name relationship, as outlined above); and
- b) the preservation of uncultivated communal land for hunting, gathering and other collective activities by all members of the community. ¹⁶ N!ores as currently constituted in fact contain provisions for these activities in a way that is clearly understood by all.

5.3 Of course, the concept of the n!oresi must also be flexible enough to accommodate those Ju/'hoansi who have been dispossessed of their n!oresi and have little hope of regaining their land; as another NEPRU briefing paper notes, the resettlement of displaced San is likely to be one of the top priorities in a resettlement programme ("Institutions for Land Reform", p. 11).

The present statutes of the NNFC are illustrative of the kind of flexibility which could be employed in the allocation of n!oresi. With regard to enrolment in the NNFC, first priority is given to Ju/'hoansi and others who are permanent residents of Nyae Nyae and to their offspring; second priority to relatives of Ju/'hoan residents; third priority to Ju/'hoansi dispossessed from Hereroland East, Kavango and the Kaudom Game Reserve; fourth priority to all other Ju/'hoansi; and fifth priority to other Namibians (NNFC Statutes, Article 15). Such a concept of priority, rather than one of exclusion, could be similarly incorporated into a land tenure scheme for Nyae Nyae.

It may also be necessary to adjust the boundaries of some of the n!oresi in order to make them suitable for various economic activities. However, the traditional idea of the n!ore right must be the starting point and guideline for any land tenure scheme in Nyae Nyae.

- 5.4 Any land tenure policy which allocates communal land to "heads of households" or "breadwinners" would not make sense in Ju/'hoansi communities, where there is a traditional social organisation based on sharing among the various extended family groups to ensure the survival of the entire community. Similarly, the common concepts of "family" do not include all those persons who have a right to residence in a particular n!ore according to Ju/'hoan tradition.

As a result, to avoid discrimination against the residents of Nyae Nyae, any national land tenure policy or statute must include a mechanism for the allocation of land which is broad enough to encompass the existing Ju/'hoan social structure.

- 5.5 There are several legal techniques which could be used separately or in combination to achieve the aim of providing sufficient flexibility to be appropriate for conditions in the different communal areas of Namibia. What follows are some brief suggestions for further consideration and discussion.

5.6 Land tenure by cooperatives.

One mechanism which could be used to meet the needs of Nyae Nyae would be to allow for the allocation of n!oresi to small cooperatives. The members of each cooperative would not have to be listed by name, but merely defined as a class (e.g., all of those persons with a right to reside in a particular n!ore, according to principles derived from inheritance, marriage and name relationships which would be set forth in detail in the constitution of the cooperative).

The constitution of each such cooperative could also set forth how decisions will be made, to take care of the possibility of disagreement among the members on the utilisation of the land. The Ministry of Lands, or a Land Board established by the Ministry, could provide model constitutions for such cooperative ventures, or it could reserve the right to approve the constitutions of any such cooperatives before they qualify for land tenure. The Land Boards, or the relevant regional

or local government authority, could also establish a mediating body to resolve disputes within such cooperatives.

There is support in the Namibian Constitution for the idea of cooperative action. Article 16 states that all persons shall have the right to acquire, own and dispose of property in any part of Namibia individually or in association with others. Article 98(2) states that the Namibian economy shall be based on the following forms of ownership: public, private, joint public-private, co-operative, co-ownership and small-scale family ownership. Even though these provisions refer to ownership rather than tenure of communal land, the idea of economic activity by a cooperative is clearly endorsed at a national level.¹⁷

The cooperative concept could also be used in other parts of Namibia, in any situation where there was no convenient legal definition of the appropriate group which should be allocated land in a given area -- or in situations where individuals or families wished to combine their landholdings to create more economic agricultural units. (Some of the economic advantages of cooperative land tenure are discussed in other NEPRU briefing papers; see, for example, "Alternative Approaches to the Use and Settlement of Land" and "Institutions for Land Reform".) The cooperative concept could be one of a range of options for identifying persons and groups which are eligible for the allocation of communal land.

Small cooperatives in communal areas could be linked to each other within a larger land use area concept, such as that which is currently being explored and defined by the Delimitation Commission. Thus, the environmental health of the larger land use area could be taken into account in decision-making. (One example of an area where such a larger view is crucial is the wetlands area of Bushmanland, which can be adequately protected only from a regional perspective.)

5.7 A national structure with regional flexibility.

Another conceptual approach to the allocation of communal land would be to implement a national structure with room for regional variation.

For example, a nation-wide Land Act could set forth general guidelines for the allocation and control of communal lands (which could include the option of cooperative land tenure discussed above), while specific allocations to appropriate individuals and groups could be left to regional divisions of a Land Board, or to the democratically-elected regional governments, which would be obligated to implement the national policy with reference to traditional forms of land tenure within the region. This could be done in consultation with the Council of Traditional Leaders -- which, as noted above, must be structured in such a way as to include representation from the Ju/'hoan community, despite the absence of recognised "chiefs" or "headmen" in the Ju/'hoan social system.

In order to ensure fair treatment nation-wide, the law could require that all regional recommendations be ratified by the Ministry of Lands, or a national Land Board established under the auspices of this Ministry; this sort of national supervision could help to guard against the possibility of regional flexibility becoming a disguise for discrimination.

A structure which allowed for a degree of regional variation would be far more fair than a rigid concept of "head of household" or "breadwinner" or even "extended family" in a country with such diverse and complex social structures as Namibia. It would also ensure that decisions, or at least recommendations, regarding land allocation are made at a level of government which is as accessible as possible to the people who are directly affected. Furthermore, a regional perspective on appropriate local land use would promote a sensible allocation of resources which would encourage respect for the ecology of the region.

However, a workable regionally-based system would depend upon a regional delimitation which corresponds to traditional land use areas.

For example./...

For example, one proposal which was submitted to the Delimitation Commission suggested the inclusion of the Tjum!kui area with the Otjinene area; such a delimitation would combine areas with completely different land use patterns and economic pursuits into a single district where the Ju/'hoansi would be numerically swamped. Similarly, any allocation policy which tried to lump together Nyae Nyae and Western Bushmanland would be totally inappropriate, given the vastly different physical characteristics of the two areas, as well as their different histories. Regional variations within the framework of a national land policy must be based on a definition of regions which respects social and ecological integrity.

5.8 Affirmative action.

Another NEPRU briefing paper observes that "the Constitutional right to settle in any part of Namibia, and its relationship to traditional land rights, needs to be clarified. Implications of these respective rights for the more vulnerable groups in Namibia will need careful consideration by Government. It may be that Article 23(2) of the Constitution, concerning "Affirmative Action", will provide a way of approaching the problem" ("Land-related Issues in Communal Areas", p. 17).

Article 23(2) makes it clear that the Constitutional requirement of equality and freedom from discrimination shall not prohibit Parliament "from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices...."

The administration of land use in Eastern Bushmanland under the previous government clearly created social and economic disadvantages for the Ju/'hoansi which deserve to be redressed, as did the land policies which were previously applied to other parts of Namibia. Thus, the concept of affirmative action should be incorporated into any future

approach to/...

approach to land tenure in the communal lands, as an overarching principle which helps to shape policy formulation.

6. Conclusions and Recommendations

In this paper the writers have to the best of their endeavours acknowledged both past and present realities. They have referred to the fact that the Bushmen generally can be considered the original inhabitants of the land and the Ju/'hoansi represent a privileged portion of Namibia's Bushman population in that they have not been entirely dispossessed.

It is the writers' respectful opinion that the process of dispossession of the Bushmen of Namibia should not be allowed to proceed any further. As has been pointed out in one of the NEPRU briefing papers, it makes no sense to dispossess people to satisfy the needs of expansionist commercial farmers, and thereafter have to resettle those dispossessed persons on new land acquired with public funds. Surely, too, the Namibian nation does not want to stand accused that it has alienated the last vestige of land traditionally used by Bushmen, for whatever reason.

The writers have also stressed that the institutions of Chief and Headman, as they are known amongst pastoralists in Namibia, are not found amongst the Ju/'hoansi. However they have pointed out that by means of an organic process leadership structures have emerged.

From the paper it has become clear that the reasoning of the former colonial administrators that the Bushman are not capable of managing their own affairs is incorrect. In another of the NEPRU briefing papers, it is pointed out that the success of developmental projects in communal land areas is dependent on the existence of established local institutions. In many of the other communal areas where second tier authorities did exist, there are no institutions such as the Nyae Nyae Farmers Cooperative. A reference to their statutes clearly reveals the extent to which they, in the absence of an imposed second tier authority, have assumed a governing role themselves. The writers believe that this process should be encouraged rather than stifled. The writers also believe that should the Ministry of Lands, Resettlement and Rehabilitation elect to establish Land

Boards for/...

Boards for the various areas in Namibia, they should recognize the role that the Nyae Nyae Farmers Cooperative has played to date, and ensure that members of the cooperative are represented on the Land Board. In this way the Land Board would gain legitimacy amongst the peoples inhabiting the area and would be in a position to make effective and informed decisions which would benefit both the peoples and the area itself.

A problem with thinking relating to the communal land issue is of trying to use Western concepts to describe the reality that exists on the ground. The most in famous concept in this regard is of course ownership. The writers do not believe it appropriate to attempt to equate N!ore rights or the Rights of the Kxa/ho with ownership as is understood in Western terms. We suggest rather that any land act make provision for local concepts which are variance with Western concepts. In this way a person's interest in the land (which is more dependent on personal relationships with other users of the land than directly with the land itself) would be recognized.

Although it has been argued in this paper that the traditional attitudes towards land use by the Ju/'hoansi have changed, they have not changed to the extent that families or n!ore groups can be limited to further restricted and exactly defined areas. The communal lands, beyond the n!ore areas in Nyae Nyae, form an integral part of their relationship to their land. These are quite clearly, according to resource availability, defined as hunting areas and/or gathering areas, and the rights of stewards of particular n!ores to use them are respected by all. Without access thereto the survival will be severely jeopardized.

Nyae Nyae is fortunate in that it has not suffered the environmental degradation that many of the other communal land areas in Namibia have experienced as a result of overcrowding. The pristine beauty of Nyae Nyae, with its rich veld and natural resources, should be maintained. The inhabitants of Nyae Nyae should receive our accolades for having maintained the area as they have, and should not be dispossessed. Though in many particulars Nyae Nyae may differ from other communal areas in Namibia, including Western Bushmanland, many of its land issues can be seen as relevant to those of other areas. Wherever people's subsistence depends on their access to communal land, protection of communal rights through thoughtful attention to long term land use patterns will be the best key to a truly democratic land reform.

FOOTNOTES

1. The term Ju/'hoan (plural Ju/'hoansi) shall be used to refer to Namibian persons who speak "Ju/'hoansi" whether they reside in Nyae Nyae or not. The generic term Bushmen is used in preference to the term San, despite the latter's general academic acceptance. San has a pejorative meaning in Nama, a major language of Namibia. Though Bushmen has also come to have pejorative meaning, there is not another generic term, covering all the language groups, in current use.
2. This paper only addresses the land issue in what was once known as Eastern Bushmanland, as defined by legislation. Reference to the Nyae Nyae Region is reference to the original lands occupied by the Ju/'hoansi before the process of dispossession started. Nyae Nyae, the area of the Niloaq'ae pans, is the term currently applied by the Ju/'hoansi to what was known as Eastern Bushmanland. The Nyae Nyae Region (see Annexure 1.), in contrast, covered large areas of adjoining Botswana as well as what were briefly known as Kavango and Hereroland East.

Western Bushmanland's name remains unchanged for purposes of this paper. This area is understood to consist of all that part of what was once "Bushmanland" west of a surveyed line 5 km west of the Aasvoeines - Niloqma road.

This paper does not except in passing cover Western Bushmanland, which has completely different needs dictated by the characteristics of its land. For example, Western Bushmanland is covered in deep sand; the water table lies between 150 and 1 000 meters below the surface, meaning that boreholes are extremely expensive and that pumping engines which are costly to maintain are required. Gifblaar, which is poisonous to cattle, is widespread. Bushfoods and game are scarce, so that it is impossible to supplement subsistence farming with foraging as in Nyae Nyae. It must also be kept in mind that most of the approximately 2 000 people currently residing in communities in Western Bushmanland belong to different cultural and linguistic groups from the Ju/'hoansi, and have different backgrounds. Most of the present residents of Western Bushmanland were dependent on income from the SADF prior to independence and are now in desperate straits. However, the vast differences between Nyae Nyae and Western Bushmanland necessitate different policies and different kinds of income-generating projects. Also, because these differences have real practical consequences for the use of the land, it is as well to review them here:

Western Bushmanland

Eastern Bushmanland

Northern !Hun languages	Ju/'hoan language
Fragmented families	Cohesive extended families
Live on unknown lands	Live on well-known lands
Unfamiliar with local resources	Know local resources well
Long dependence on armies	Self-help ethic strong
Deep water table; easy drilling	Shallow water table; hard drilling
Little game or bush foods	Abundant game and bush foods
Potential for forestry	Potential for tourism
Aid programs new since 1989	Integrated aid program since 1981
Work teams organizable due to army experience	Lack of organizing experience but real leaders emerging

It is to be hoped that 1991 may see a new initiative in bringing together information and resource planning efforts from the two areas. Study and consultation should be undertaken with a view to arriving at an integrated set of solutions and land use proposals which would make sense for both areas and for the region as a whole.

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3 Proclamation 84/1969, Schedule, Unsurveyed State Land (Districts of Gobabis and Grootfontein). The Authority for the Proclamation is derived from section 1 of the Reservation of State Land for Natives Ordinance, 1967 (Ord. 35/1967), which states:

The Administrator may from time to time by proclamation in the Official Gazette set apart and reserve for the sole use and occupation of Natives any state land set out in the schedule to this ordinance or any portion of such land as may be specified in any such proclamation.

(The "Unsurveyed State Land" which includes that referred to in Proclamation 84/1969 was added to the Schedule of Ordinance 35/1967 by Ordinance 5/1969.)

4 Government Notice No. 1196, dated 31 July 1970 (Schedule C), issued pursuant to the Magistrates' Courts Ordinance, 1963 (Ord. 29/1963).

5 SA Proclamation R.208 of 8 October 1976, section 2, the authority for this Proclamation was derived from section 2(g) of the Development of Self-Government for Native Nations in South West Africa Act, No. 54 of 1968, which was repealed in most parts of Namibia by section 52 of the Representative Authorities Proclamation, 1980 (AG. 8/1980). AG. 8/1980 specified that the repeal of the Act would be effective in Hereroland, Kaokoland, the Eastern Caprivi and Owambo when representative authorities for those areas came into operation and "in any other part of the territory, on a date to be determined by the Administrator-General by Proclamation in the Official Gazette: Provided that different proclamations and different dates may be issued or determined under this paragraph in respect of different parts of the territory" (section 52(2)(e)). However, as there was never any representative authority for Bushmanland, and as the South African Act was never repealed in respect of Bushmanland by Proclamation, it technically remains in force there.

6 Representative Authorities Proclamation (AG. 8/1980), Schedule, Items 1 and 8.

7 These regulations have been amended by G.N. 238/1930, G.N. 49/1934, G.N. 169/1935, G.N. 179/1935, G.N. 124/1937, G.N. 20/1938, G.N. 129/1938, G.N. 107/1939, G.N. 118/1940, G.N. 29/1941, G.N. 62/1941, G.N. 252/1948, G.N. 267/1949, G.N. 216/1951, G.N. 395/1951, G.N. 121/1952, G.N. 175/1954, SA G.N. 1564/1957, SA G.N. 799/1962, AG. 5/1975, G.N. 1/1985 (Hereros only) and G.N. 2/1988 (Hereros only).

According to Regulation 1 and Regulation 35, the Regulations apply to all Reserves established pursuant to section 16 of Proclamation 11/1922. Section 16 of Proclamation 11/1922 reads in part as follows:

The Administrator may whenever he deems it desirable set aside areas as native reserves for the sole occupation of natives generally or of any race or tribe of natives in particular and the inhabitants thereof shall be subject to such restrictions and to such regulations as he may prescribe.

There is some question as to whether the Regulations are applicable to Bushmanland, since none of the laws setting aside Bushmanland as an area for "Natives" or for the members of the "Bushman Nation" refer to section 16 of Proclamation 11/1922.

However, in a case concerning the Herero reserves, BETHUNE, J., stated obiter dictum that the Native Reserve Regulations in G.N. 68/1924 "are applicable in all the reserves and not only in the Herero reserves." "Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others 1984 (4) SA 295 (SWA) at 308F. In another case concerning the Herero reserves, LEVY, J., stated obiter dictum that the Native Reserve Regulations in G.N. 68/1924 "established a system of Government and Administration of the native reserves" and that these Regulations "applied to all native reserves within the Territory of the Mandate." Ndisiro v Mbanderu Community Authority and Others 1985 (2) SA 532 (SWA) at 537B and 538H.

8 Regulation 1.

9 Regulation 3. See also Regulations 11, 14 and 15.

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- 10 Regulations 20, 22, 23.
- 11 Regulation 1. The Regulations also give every resident of a Reserve "the right to appeal to the Magistrate against any act, omission or order of the Superintendent or any Headman and after due inquiry the Magistrate may make such order as he may deem fit." Regulation 33.
According to the Regulations, headmen do not have the power to allocate sites or to allow anyone to reside in the reserve without the Superintendent's consent. Regulation 9(c) and (f).
- 12 See Article 140 of the Namibian Constitution.
- 13 Sections 1 and 4. Section 2 directs that the Administrator's exercise of powers under the Proclamation shall not be subject to any court law, and section 6 provides that no individual member or members of a tribe may bring any "legal proceeding in regard to the ownership, occupation or acquisition of land by a native tribe" against the chief of the tribe or against the tribe itself without the written approval of the Administrator.
- 14 Regulations Prescribing the Duties, Powers and Privileges of Chiefs and Headmen, G.N. 60/1930, regulation 9 (promulgated in terms of section 1(a) of Proclamation 15/1928).
- 15 See, for example, Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others 1984 (4) SA 295 (SWA) at 318C - E, 319D. In this case, the applicants were found to have committed a criminal offence by moving their residence within the Herero Reserve from one place to another without the consent of the superintendent of the reserve as required by Regulation 11 of G.N. 68/1924. However, because the applicants were the first persons to farm the site, they were found to have superior grazing rights to the area under Herero customary law; Herero custom required that other residents who wished to farm there had to acquire the permission of the applicants before moving cattle into the area. The court relied on these customary law rights in issuing an order for the removal of a fence that interfered with the applicants' ability to graze and water their cattle.
- 16 This is a concept which is also relevant in other areas of Namibia. For example, in the Caprivi, "each adult member of the Ma'we and Masubiya is entitled under traditional law to a residential plot, an arable allotment, and access to communal land for grazing, wood and thatch collecting". Adams and Werner, The land issue in Namibia: An Inquiry, (University of Namibia, 1990), 131.
- 17 The existing legislation relating to cooperatives, the Cooperative Societies Ordinance, Ord. 15/1946, is under review at the time of writing; therefore, new legislation regarding the formation of cooperatives could be conveniently coordinated with a policy which allowed for the allocation of communal land to cooperatives.
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